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THE

ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS.

VOLUME XXXVI.

THE
ENGLISH AND EMPIRE
DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXXVI.

NEGLIGENCE.
NOTARIES.
NUISANCE.
OPEN SPACES AND RECREATION GROUNDS.
PARLIAMENT.
PARTITION.
PARTNERSHIP.
PATENTS AND INVENTIONS.

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PAVING EXPENSES.

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A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.*, [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R. ..	Ontario Appeals	Can.
Act. ..	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current) ...	Scot.
Add. ...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra ...	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649 ...	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R	Alberta Law Reports	Can.
Amb. ..	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And. ..	Anderson's Reports, Common Pleas, fol., 2 parts in one vol	
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R. ...	Architects' Law Reports, 4 vols., 1904—1909 ..	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848 ...	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839 ...	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830-	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (*e.g.*, [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R. ...	British Columbia Reports ...	Can.
B. Dig. ...	Bose's Digest	Ind.
B. L. R. ...	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
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B. W. C. C. ...	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr. ...	Bacon's Abridgment	Eng.
Bail Ct. Cas. ...	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben.	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
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Bom. O. C.	Bombay Reports, Original Civil Jurisdiction	Ind.
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Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800 ...	Eng.
Bro. Supp. to Mor. ...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Brown. & Lush. ...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.

Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	**S. Af.**
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	**S. Af.**
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	**Scot.**
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	**Eng.**
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	**Eng.**
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	**Eng.**
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	**Eng.**
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772	**Eng.**
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	**Eng.**
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	**Eng.**
C. A.	Court of Appeal Reports, 3 vols., 1867—1877	**N.Z.**
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	**Eng.**
C. B.	Common Bench Reports, 18 vols., 1845—1856	**Eng.**
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865	**Eng.**
C. B. R.	Canadian Bankruptcy Reports Annotated, 1920—(current)	**Can.**
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—1913	**Eng.**
C. L. Ch.	Common Law Chambers	**Can.**
C. L. J.	Cape Law Journal	**S. Af.**
C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	**Can.**
C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	**Can.**
C. L. R.	Common Law Reports, 3 vols., 1853—1855	**Eng.**
C. L. R.	Commonwealth Law Reports	**Aus.**
C. L. R.	Calcutta Law Reporter	**Ind.**
C. L. T.	Canadian Law Times	**Can.**
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	**Can.**
C. P.	Upper Canada Common Pleas	**Can.**
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880	**Eng.**
C. P. D.	Cape Provincial Division Reports	**S. Af.**
C. R. [date] A. C.	Canadian Reports, Appeal Cases	**Can.**
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope	**S. Af.**
C. W. N.	Calcutta Weekly Notes	**Ind.**
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	**Eng.**
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	**Eng.**
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	**Eng.**
Cam. Cas.	Cameron's Supreme Court Cases	**Can.**
Cam. Prac.	Cameron's Supreme Court Practice	**Can.**
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	**Eng.**
Can. Com. Cas.	Commercial Law Reports of Canada, 4 vols., 1901—1905	**Can.**
Can. Crim. Cas.	Canadian Criminal Cases, Annotated, 1898—(current)	**Can.**
Can. Gaz.	Canadian Gazette	**Can.**
Can. Ry. Cas.	Canadian Railway Cases	**Can.**
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	**Eng.**
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	**Eng.**
Car. C. L.	Carrington's Treatise on Criminal Law	**Can.**
Card. Doc. Ann.	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	**Eng.**
Carl.	New Brunswick Reports (Carleton)	**Can.**
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842	**Eng.**
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	**Eng.**
Cart.	Cases on British North America Act (Cartwright)	**Can.**
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	**Eng.**
Cary	Cary's Reports, Chancery, 1 vol.	**Eng.**
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697	**Eng.**
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	**Eng.**
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727	**Eng.**
Cas. *temp.* Finch	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680	**Eng.**
Cas. *temp.* King	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733	**Eng.**
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737	**Eng.**
Cass. Dig.	Cassells' Digest	**Can.**
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)	**Eng.**
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875	**Eng.**
Ch. Cas. in Ch.	Choyce Cases in Chancery, 1557—1606	**Eng.**
Ch. Ch.	Upper Canada Chancery Chambers Reports	**Can.**
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890	**Eng.**
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	**Eng.**
Char. Cham. Cas.	Charley's Chamber Cases, 2 vols., 1875—1876	**Eng.**
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876	**Eng.**
Chip.	New Brunswick Reports (Chipman)	**Can.**

Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas. ...	Clark and Scully's Drainage Cases	Can.
Clay.	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent.	Coke's Entries	Eng.
Co. Inst.	Coke's Institutes	Eng.
Co. L. J.	Colonial Law Journal	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	Eng.
Coch.	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe ...	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	Eng.
Com. Dig.	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig.	Congdon's Digest	Can.
Const	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg. ...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. *temp.* Brough. ...	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. *temp.* Cott. ...	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor.	Coryton's Reports	Ind.
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud. ...	Correspondances Judiciaires	Can.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout.	Coutlees' Unreported Cases	Can.
Cout. Dig.	Coutlees' Digest	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol.,1843—1846	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C. ...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas. ...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas. ...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
D.	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A.	Dorion's Queen's Bench Reports	Can.
D. L. R.	Dominion Law Reports	Can.

Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574 ...	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	Scot.
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	Eng.
Dav. Ir.	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	Ir.
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816	Eng.
Day	Day's Election Cases, 1 vol., 1892—1893	Eng.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	Eng.
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B.	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. C. C.	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856	Eng.
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G.	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	Eng.
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	Eng.
De G. J. & Sm. ...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	Eng.
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	Eng.
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798	Eng.
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	Scot.
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822	Eng.
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837	Eng.
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776	Eng.
Doug. K. B.	Douglas' Reports, King's Bench, 4 vols., 1778—1785	Eng.
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818	Eng.
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	Eng.
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	Eng.
Dow. & Ry. K. B. ...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	Eng.
Dow. & Ry. M. C. ...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	Eng.
Dow. & Ry. N. P. ...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	Eng.
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841	Eng.
Dowl. N. S.	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	Eng.
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	Ir.
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843	Ir
Dra.	Draper's King's Bench Reports	Can.
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859	Eng.
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury *temp.* Nap. ...	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859	Ir.
Drury *temp.* Sug. ...	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844	Ir.
Dugd. Orig.	Dugdale's Origines Juridiciales	Eng.
Dunl. (Ct. of Sess.) ...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	Scot.
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	Scot.
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581	Eng.
E. & A.	Upper Canada Error and Appeal	Can.
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	Eng.
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	Eng.
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	Eng.
E. D. C.	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L.	South African Law Reports, Eastern Districts Local Division	S. Af.
E. L. R.	Eastern Law Reporter	Can.
E. R. (or Eng. Rep.) ...	English Reports	Eng.
E. R.	Ontario Election Reports	Can.
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	Eng.

East	East's Reports, King's Bench, 16 vols., 1800—1812	Eng.
East, P. C.	East's Pleas of the Crown	Eng.
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng.
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	Scot.
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng.
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	Scot.
Emden's B. C.	Emden's Building Contracts, Building Leases and Building Statutes	Eng.
Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ...	Eng.
Eq. Rep.	Equity Reports, 3 vols., 1853—1855	Eng.
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880 ...	Eng.
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	Eng.
Exch. C. R.	Exchequer Court Reports	Can.
F. (Ct. of Sess.) ...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F.	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	S. Af.
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D.	Finnemore's Notes and Digest of Natal Cases, 1863—1867 ...	S. Af.
Fac. Coll.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 37 vols., 1752—1841	Scot.
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot.
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng.
Fenton	Fenton, Important Judgments	N.Z.
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev. ...	Fitzherbert's Natura Brevium	Eng.
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	Ir.
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ...	Eng.
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
For[1]	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fort. De Laud. ...	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Fost.	Foster's Crown Cases, 1 vol., 1708—1760	Eng.
Fount.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	Scot.
Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
Fox & S. Reg.	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	Eng.
Fras.	Fraser (Simon), Election Cases, 2 vols., 1793	Eng.
Freem. Ch.	Freeman's Reports, Chancery, 1 vol., 1660—1706	Eng.
Freem. K. B.	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	Eng.
G.	Gregorowski's Reports of the High Court of the Orange Free State from 1883	S. Af.
G. & R.	Nova Scotia Reports (Geldert & Russell)	Can.
G. I. Dig.	General Index Digest	Can.
G. W. D.	South African Law Reports, Griqualand West Local Division	S. Af.
G. W. L.	South African Law Reports, Griqualand West Local Division	S. Af.
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gale	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports	N.Z.
Geld. Dig.	Geldert's Digest	Can.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff.	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
Gilb.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714 ...	Eng.
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilb. Ch.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	Eng.
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	Scot.
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv.	Glanville, De Legibus et Consuetudinibus Regni Angliæ ...	Eng.
Glanv. El. Cas.	Glanville's Election Cases, 1 vol., 1623—1624	Eng.
Glascock	Glascock's Reports (Ireland), 1 vol., 1831—1832	Ir.

Godb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb.	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr.	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases ...	Griffin's Patent Cases, 1884—1887	Eng.
Gwill.	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H.	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C.	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N.	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw.	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850 ...	Eng.
H. & W.	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date)	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (*e.g.*, [1915] H. B. R.)	Eng.
H. C.	Reports of the High Court of Griqualand West	S. Af.
H. E. C.	Hodgin's Election Reports	Can.
H. L. Cas.	Clark's Reports, House of Lords, 11 vols., 1847—1866 ...	Eng.
Hag. Adm.	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con.	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc.	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833 ...	Eng.
Hailes	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L.	Hale's Common Law	Eng.
Hale, P. C.	Hale's Pleas of the Crown, 2 vols.	Eng.
Han.	New Brunswick Reports (Hannay)	Can.
Har. & Ruth.	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W.	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard.	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C.	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay	Hay's Reports	Ind.
Hay & Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ...	Eng.
Hayes	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832 ...	Ir.
Hayes & Jo.	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M.	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het.	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631 ...	Eng.
Hob.	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625 ...	Eng.
Hodg.	Hodges' Reports, Common Pleas, 3 vols., 1835—1837 ...	Eng.
Hog.	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834 ...	Ir.
Holt, Adm.	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
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Holt, K. B.	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P.	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess. ...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R. ...	Hong Kong Reports	Hong Kong
Hop. & Colt.	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph.	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H.	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp.	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C.	Howard's Chancery Practice	Ir.
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Hud. & B.	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C.	Hudson on Building Contracts, 2 vols.	Eng.
Hume	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut.	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638 ...	Eng.
Hy. Bl.	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde	Hyde's Reports	Ind.
I. C. L. R.	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
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I. L. R. (Vol.) Pat. ...	Indian Law Reports, Patna	Ind.
I. L. R. (Vol.) Ran. ...	Indian Law Reports, Rangoon	Ind.
I. L. T.	Irish Law Times, 1867—(current)	Ir.
I. L. T. Jo.	Irish Law Times Journal, 1867—(current)	Ir.
I. R. (preceded by date)	Irish Reports, since 1893 (*e.g.*, [1894] 1 I. R.)	Ir.
I. R. (Vol.) C. L. ...	Irish Reports, Common Law, 11 vols., 1866—1877	Ir.
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Ir. Cir. Rep.	Reports of Irish Circuit Cases, 1 vol., 1841—1843	Ir.
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J. Bridg.	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	Eng.
J. D. R.	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	S. Af.
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Jac.	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821 ...	Eng.
James	Nova Scotia Reports (James)	Can.
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Kames, Dict. Dec. ...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec. ...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
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Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835 ...	Eng.
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Konst. & W. Rat. App.	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
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L. J. P. M. & A. ...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
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Legge	Legge's Reports	Aus.
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Macph. (Ct. of Sess.) ...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	Scot.
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My. & K.	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835 ...	Eng.
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O. F. S.	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	Ontario Law Reports	Can.
O'M. & H.	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
O. P. D.	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R.	Ontario Reports	Can.
O. R.	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. C.	Reports of the High Court of the Orange River Colony	S. Af.
O. S.	Upper Canada Queen's Bench, Old Series	Can.
O. W. N.	Ontario Weekly Notes	Can.
O. W. R.	Ontario Weekly Reporter	Can.
Old.	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig.	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date)	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (*e.g.*, [1891] P.)	Eng.
P. & B.	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas.	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	Prince Edward Island Reports	Can.
P. R.	Ontario Practice	Can.
P. Wms.	Peere Williams' Reports, Chancery and King's Bench, 3 vols.,	Eng.
Palm.	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Park.	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App.	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App.	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas.	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
Peck.	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	Pelham (S. A.) Reports	Aus.
Per. & Dav.	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S.	Perrault's Counseil Superieur	Can.
Per. P.	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph.	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	Philipps' Election Cases, 1 vol., 1780	Eng.
Phillim.	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R.	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc.	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd.	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll.	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph.	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D.	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

Pratt	Pratt's Supplement to Bott's Poor Laws, 1833	Eng.
Prec. Ch.	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	Price's Mining Commissioners' Cases	Can.
Pug.	New Brunswick Reports (Pugsley)	Can.
Py. R.	Pykes' Lower Canada Reports	Can.
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 (*e.g.*, [1891] 1 Q. B.)	Eng.
Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ...	Eng.
Q. J. P.	Queensland Justice of Peace Reports	Aus.
Q. L. J.	Queensland Law Journal and Reports, 11 vols., 1879—1901 ...	Aus.
Q. L. R.	Quebec Law Reports	Can.
Q. L. R. (Beor) ...	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R.	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaries de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. C. ...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
Q. S. C. R.	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
Q. S. R.	Queensland State Reports, 6 vols., 1902—1906	Aus.
Q. W. N.	Weekly Notes, Queensland	Aus.
R.	The Reports, 15 vols., 1893—1895	Eng.
R.	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.)	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. A. C.	Ramsay, Appeal Cases	Can.
R. & C.	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J.	Revue de Jurisprudence	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q.	Quebec Revised Reports	Can.
R. L. N. S.	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S.	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
R. P. C.	Reports of Patent Cases, 1884—(current)	Eng.
R. R.	Revised Reports	Eng.
Rast.	Rastell's Entries	Eng.
Rayn.	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Real Prop. Cas. ...	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch.	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Rep. in C. of A.	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud. ...	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas.	Reserved Cases	Ir.
Rick. & M.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Rick. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Ridg. Parl. Rep. ...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	Ir.
Ridg. *temp.* H.	Ridgeway's Reports *temp.* Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep. ...	Ritchie's Equity Reports	Can.
Rob. Eccl.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ...	Eng.
Rob. L. & W.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
Robert. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Robin. App.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr.	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ...	Eng.
Rom.	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ...	Eng.
Roscoe's B. C.	Roscoe, Digest of Building Cases	Eng.
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Ross, L. C.	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rowe	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ...	Eng.
Rul. Cas.	Campbell's Ruling Cases, 25 vols.	Eng.
Russ.	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
Russ. & M.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ...	Eng.

Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports...	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (*e.g.*, [1921] S. A. S. R.)	Aus.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (*e.g.*, [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (*e.g.*, [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (*e.g.*, [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	South-West Africa Law Reports	S.-W. Af.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—1924	Scot.
Sc. R. R.	Scots Revised Reports	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm.	Seanle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P.	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B. ...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.) ...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & Macl.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas. ...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699... ...	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas. ...	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (*e.g.*, [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S. ...	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton...	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw.	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports *temp.* Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tru.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S. ...	Canada Law Journal, New Series, 1865—(current)	Can.

U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	Victorian Reports (Equity)	Aus.
V. R. (Law)	Victorian Reports (Law)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court	S. Af.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) (*e.g.*, [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R.	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A'B.	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis by Lyne	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	Ir.
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1602—1855	Eng.
Welsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex.	Wentworth's Office and Duty of Executors	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West *temp.* Hard.	West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
West. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	Scot.
White & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	Eng.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y. A. D.	Young's Vice-Admiralty Reports	Can.

Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—	Eng.
Y. & C. Ex. ...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830...	Eng.
Y. B.	...	Year Books	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series)	Eng.
Y B. (Sel. Soc.)...	...	Year Books (Selden Society)	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
You.	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

ABBREVIATIONS
USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xix—xxxv, *ante*.)

A.-G.	for	Attorney-General.
Act.	„	Actiengesellschaft.
Admlty.	„	Admiralty
Affd.	„	Affirmed
Affg.		Affirming.
Akt.		Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Alta.		Alberta.
Anon.		Anonymous.
Apld.		Applied.
Appct.		Applicant.
Appln.		Application.
Appln.		Application to Register a Trade Mark.
Appit.		Appellant.
Apprvd.		Approved.
Arbn.		Arbitration.
Archbp.		Archbishop.
Art.		Article.
Ass. Tax Case		Assessed Tax Case.
Assce.		Assurance.
Assocn.		Association.
B. C.		Borough Council.
B. C.		British Columbia.
Bkpcy.		Bankruptcy.
Bkpt.	„	Bankrupt.
Bldg. Soc.		Building Society.
Bp.		Bishop.
C. A.		Court of Appeal.
C. & S. L. Ry. Co.		City & South London Railway Co.
C. C. A.		Court of Criminal Appeal.
C. C. R.		County Court Rules.
C. C. R.		Court of Crown Cases Reserved.
C. L. P. Act.		Common Law Procedure Act.
C. L. Ry. Co.		Central London Railway Co.
C. O. R.		Crown Office Rules.
C. S. U. C.		Consolidated Statutes of Upper Canada.
Ca. sa.		*Capias ad satisfaciandum.*
Cale. Ry. Co.		Caledonian Railway Co.
Ch.		Chancery.
Ch. Div.		Chancery Division.
Co.		Company.
Co-op. Assocn		Co-operative Supply Association.
Comrs.		Commissioners.
Consd.		Considered.
Corpn.		Corporation.
Ct.		Court.
Ct. of Ch.		Court of Chancery.
Ct. of Eq.		Court of Equity.
Ct. of R.		Court of Review.
D. C.	„	Divisional Court.
Dbtd.	„	Doubted.

Deft.	for Defendant.
Distd.	„ Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
Ex p.	„ *Ex parte.*
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Extd.	„ Extended.
Extrix.	„ Executrix.
Fi. fa.	„ *Fieri facias.*
Folld.	„ Followed.
G. & S. W. Ry. Co.	Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insce.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L.J.	„ Lord Justice.
L.JJ.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	Merchant Shipping Act.
M. S. & L. Ry. Co.	Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	Magistrates.
Man.	Manitoba.
Mentd.	Mentioned.
Met. Dist. Ry. Co.	Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B.	„ New Brunswick.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.

N. S.	for Nova Scotia.
N. W. P.	,, North-West Provinces.
. W. T.	,, North-West Territories.
Ont.	,, Ontario.
Ord.	,, Order.
Overd.	,, Overruled.
P. C.	,, Privy Council.
P. E. I.	,, Prince Edward Island.
Petn.	,, Petition or Election Petition.
Pltf.	,, Plaintiff.
Q. B. Div.	,, Queen's Bench Division.
Qu.	,, *Quære.*
Que.	,, Quebec.
R. C.	,, Rural Council.
R. D. C.	Rural District Council.
R. S. A.	,, Rural Sanitary Authority.
R. S. C.	Revised Statutes of Canada.
R. S. C.	Rules of the Supreme Court, 1883.
Refd.	Referred.
Regn. of Trade Mk.	Registration of Trade Mark.
Regr. of Trade Mks.	,, Registrar of Trade Marks.
Resp.	,, Respondent.
Restg.	,, Restoring.
Revsd.	,, Reversed.
Revsg.	,, Reversing.
Ry. Co.	,, Rail. Co. or Railway Co.
S. C.	,, Same Case.
S. C. (name of colony following)	,, Supreme Court of a Colony.
S. E.	,, Settled Estates.
S. E. & C. Ry. Co.	,, South Eastern & Chatham Railway Co.
S. E. Ry. Co.	,, South Eastern Railway Co.
S. P.	,, Same Point.
S.S.	Steamship.
Sask.	Saskatchewan.
Sched.	Schedule.
Sci. fa.	,, *Scire facias.*
Sect.	Section.
Set. Land Act	,, Settled Land Act.
Settlmt.	,, Settlement.
Soc.	Society.
Soc. Anon.	Société Anonyme, etc.
Solr.	Solicitor.
Trade Mk.	,, Trade Mark.
Tram. Co.	,, Tramways Company.
U. C.	,, Urban Council.
U. D. C.	,, Urban District Council.
U. S. A.	,, United States of America.
Union Assmt. Com.	,, Union Assessment Committee.
Urban S. A.	,, Urban Sanitary Authority.
V.-C.	,, Vice-Chancellor.
Workmen's Comp. Act	,, Workmen's Compensation Act.
Y. T.	,, Yukon Territory.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

"APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

"APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

"CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

"DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

"DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

"EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

"EXTENDED" (Extd.).—Compare "APPLIED," *supra*.

"FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

"NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.

"OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

"REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

"MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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Part I.—General Principles.

SECT. 1.—DEFINITIONS, NATURE AND CHARACTERISTICS.

SUB-SECT. 1.—NEGLIGENCE.

1. Definition—Omission to do something that reasonable person would—Doing something that reasonable person would not.]—(1) A water co. having observed the directions of the Act of Parliament in laying down their pipes, is not responsible for an escape of water from them not caused by their own negligence.

(2) The fact, that their precautions proved insufficient against the effects of a winter of extreme coldness, such as no man could have foreseen, is not sufficient to render them liable for negligence.

It would be monstrous to hold defts. responsible because they did not foresee & prevent an accident the cause of which was so obscure, that it was not discovered until many months after the accident had happened (BRAMWELL, B.).

(3) Fire-plugs properly constructed having been inserted as safety-valves in these pipes, in pursuance of their Act, *semble*: the co. are not liable for not removing accumulations of ice in the streets over such plugs.

(4) Negligence consists in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; in either case causing, unintentionally, mischief to a third party (ALDERSON, B.).—BLYTH *v.* BIRMINGHAM WATERWORKS CO. (1856), 11 Exch. 781; 25 L. J. Ex. 212; 26 L. T. O. S. 261; 20 J. P. 247; 2 Jur. N. S. 333; 4 W. R. 294; 156 E. R 1047.

Annotations:—*As to* (2) **Reld.** Smith *v.* L. & S. W. Ry. (1870), L. R. 6 C. P. 14. *As to* (3) **Distd.** Steggles *v.* New River Co. (1863), 1 New Rep. 236. **Reld.** Madras Ry. *v.* Zemindar of Carvetinagarum (1874), 30 L. T. 770. *As to* (4) **Consd.** Baker *v.* James, [1921] 2 K. B. 674. **Reld.** Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539. *Generally*, **Reld.** Stretton's Derby Brewery Co. *v.* Derby Corpn., [1894] 1 Ch. 431; Bull *v.* Shoreditch Borough (1902), 1 L. G. R. 81; Weld-Blundell *v.* Stephens, [1920] A. C. 956; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560; Montreal City *v.* Watt & Scott, [1922] 2 A. C. 555.

2. —— —— ——.]—C. used to receive empty casks from B., sent by railway, which he filled with ketchup & returned. One day the railway co. delivered, by mistake, empty turpentine casks instead of B.'s casks, which being filled with ketchup spoiled the contents:—*Held*: C. could not sue the railway co., as neither a breach of any specific duty nor a misrepresentation was alleged.

Now, I myself am prepared to say that, wherever the circumstances disclosed are such that, if the person charged with negligence thought of what he was about to do, or to omit to do, he must see that, unless he used reasonable care, there must be at least a great probability of injury to the person charging negligence against him, either as to his person, or property, then there is a duty shown to use reasonable care (BRETT, M.R.).—CUNNINGTON *v.* GREAT NORTHERN RY. CO. (1883), 49 L. T. 392; 48 J. P. 134, C. A.

Annotation:—**Consd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533.

PART I. SECT. 1, SUB-SECT. 1.

1 i. *Definition — Omission to do something that reasonable person would —Doing something that reasonable person would not.*]—Negligence consists in doing that which a person ought not to do, or omitting that which he ought to do, in disregard of the rights of others.—FERGUSSON *v.* UNION S.S. CO. OF NEW ZEALAND, LTD. (1884), 10 V. L. R. 279.—**AUS.**

3. —— —— ——.]—By negligence was meant substantially the doing by a person of some act which a reasonable & prudent man would not have done under the circumstances of the case in question, or the omission to do everything that could be fairly & reasonably expected of such a man under such circumstances (HUDDLESTON, B.). —SNOOK *v.* GRAND JUNCTION WATERWORKS CO., LTD. (1886), 2 T. L. R. 308.

4. —— —— ——.] — (1) [Negligence] may be defined as the doing of something which a person of ordinary care & skill under the circumstances would not do, or omitting to do something which such a person under the circumstances would do (BRETT, M.R.).

(2) What is the gist of an action of this kind? In the first place, there must be negligence on the part of defts.' servants for which defts. are responsible: they must have committed some breach of duty, either by omitting to do what they ought to have done, or doing something which they ought not to have done; secondly, injury must have been occasioned to someone by that negligence; & thirdly, it is a principle long established in English law that in order to maintain the action the alleged negligence must have directly caused the injury without any contributory negligence on the part of pltf. (BOWEN, L.J.).—WAKELIN *v.* LONDON & SOUTH WESTERN RY. CO. (1884), [1896] 1 Q. B. 189, n.; 65 L. J. Q. B. 224, n.; 73 L. T. 615, n., C. A.; *on appeal* (1886), 12 App. Cas. 41, H. L.

Annotations:—As to (2) **Refd.** Bettany *v.* Waine (1885), 1 T. L. R. 588; Brown *v.* G. W. Ry. (1885), 52 L. T. 622; Murgatroyd *v.* Blackburn & Over Darwen Tram Co. (1886), 3 T. L. R. 180; Evans *v.* Rhymney L. B. (1887), 4 T. L. R. 72; Smith *v.* Baker (1889), 5 T. L. R. 518; Smith *v.* S. E. Ry., [1896] 1 Q. B. 178; Pomfret *v.* L. & Y. Ry., [1903] 2 K. B. 718. *Generally*, **Refd.** Griffiths *v.* East & West India Dock Co. (1888), 5 T. L. R. 43; Barker *v.* L. & S. W. Ry. (1891), 8 T. L. R. 31; Moore *v.* Ramsome's Dock Committee (1898), 14 T. L. R. 539; McDonald *v.* S.S. Banana, [1908] 2 K. B. 926; Lewis *v.* Ronald (1909), 101 L. T. 534; Low (or Jackson) *v.* General Steam Fishing Co., [1909] A. C. 523; Marshall *v.* S.S. Wild Rose, [1910] A. C. 486; Evans *v.* Astley, [1911] A. C. 674; McKenzie *v.* Chilliwack Corpn., [1912] A. C. 888; Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Papworth *v.* Battersea B. C. (1914), 79 J. P. 105; Kerr (or Lendrum) *v.* Ayr Steam Shipping Co., [1915] A. C. 217; Cole *v.* De Trafford, [1918] 2 K. B. 523; Craig *v.* Glasgow Corpn. (1919), 35 T. L. R. 214; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253; Sharpe *v.* Southern Ry., [1925] 2 K. B. 311. **Mentd.** Bender *v.* S.S. Zent (1909), 100 L. T. 639; Walker *v.* Murrays (1911), 4 B. W. C. C. 409; Marshall *v.* Prince, [1914] 3 K. B. 1047; Jefferson *v.* Paskell (1915), 85 L. J. K. B. 398; Davidson *v.* M'Robb or Officer, [1918] A. C. 304; Janvier *v.* Sweeney, [1919] 2 K. B. 316; Smith *v.* G. W. Ry., [1921] 2 K. B. 237.

5. —— ——.] — (1) It is not necessary to show that the precaution, if resorted to, would necessarily have had the effect of preventing the accident. All that is necessary, I think, to establish negligence is this, that there was a precaution which it was reasonable to resort to, & which, if resorted to, might by its ordinary effect have been the means of preventing the accident, & there was an omission to resort to such precaution (WILLES, J.).

(2) The train was coming at its ordinary speed & the morning was dark, & it was the time when the workmen would be crossing to go to their work. Surely, therefore, it was not an unreasonable thing to make known the approach of the engine by whistling; & I think, therefore, that there was evidence of negligence for the jury, &, consequently, this rule should be discharged (MONTAGUE SMITH, J.).—JAMES *v.* GREAT WESTERN RY. CO. (1867), L. R. 2 C. P. 634, n.; 36 L. J. C. P. 255, n.

Annotations:—As to (2) **Distd.** Skelton *v.* L. & N. W. Ry. (1867), L. R. 2 C. P. 631; Siner *v.* G. W. Ry. (1869), 38 L. J. Ex. 67. *Generally*, **Refd.** Smith *v.* S. E. Ry. (1895), 65 L. J. Q. B. 219.

6. —— Choice of doubtful course of action—Where alternative course clearly safe.]—It is negligence where there are two ways of doing a thing, & one is clearly right, & the other is doubtful, to do it in the doubtful way.

An attorney, on the part of his client, an execution creditor, had effected an arrangement with a third party to release him, on such party undertaking that the debtor should give certain bills, & execute a warrant of attorney to secure their payment; the undertaking to be void if the bills, etc., were not sent to the guarantor by a certain time; the attorney sent notes instead of bills; & guarantor sent them to the debtor, & the debtor signed them, but declined to execute the warrant of attorney; the creditor suing on the guarantee having averred in his declaration the giving of the notes as performance; & the declaration having been deemed bad on demurrer; in an action by the creditor against the attorney for negligence in not sending bills; whereby the guarantor was discharged, the debt lost, & the costs of the former action thrown away:—*Held:* the suing on the guarantee was not *per se* evidence of negligence; but the sending notes instead of bills was negligence, for which the attorney was answerable; because though there might be no substantial difference between bills & notes in such a case, it raised a doubt, & involved his client in difficulty, which might have been avoided. —LEVY *v.* SPYERS (1856), 1 F. & F. 3, N. P.

7. —— Absence of care or skill—According to circumstances.]—The definition of negligence is the absence of care, according to the circumstances (WILLES, J.).—VAUGHAN *v.* TAFF VALE RY. CO. (1860), 5 H. & N. 679; 29 L. J. Ex. 247; 2 L. T. 394; 24 J. P. 453; 6 Jur. N. S. 899; 8 W. R. 549; 157 E. R. 1351, Ex. Ch.; *revsg.* (1858), 3 H. & N. 743.

Annotations:—**Apprvd.** H.M.S. Bellerophon (1875), 33 L. T. 412. **Refd.** Cale. Ry. *v.* Lockhart (1860), 3 L. T. 65; Freemantle *v.* L. & N. W. Ry., Bliss *v.* L. & N. W. Ry. (1861), 10 C. B. N. S. 89; Longman *v.* Grand Junction Canal Co. (1863), 3 F. & F. 736; Scott *v.* London Docks Co. (1864), 11 L. T. 383; Fletcher *v.* Rylands (1865), 34 L. J. Ex. 177; Hammersmith, etc. Ry. *v.* Brand (1869), L. R. 4 H. L. 171; Smith *v.* L. & S. W. Ry. (1870), L. R. 6 C. P. 14; Dunn *v.* Birmingham Canal Co. (1872), L. R. 8 Q. B. 42; Madras Ry. *v.* Zemindar of Carvetinagarum (1874), 30 L. T. 770; Cattle *v.* Stockton Waterworks Co. (1875), 44 L. J. Q. B. 139; Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418; Evans *v.* M. S. & L. Ry. (1887), 36 Ch. D. 626; Dulieu *v.* White, [1901] 2 K. B. 669; Canadian Pacific Ry. *v.* Roy, [1902] A. C. 220; G. C. Ry. *v.* Howlett, [1916] 2 A. C. 511; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539. **Mentd.** Kearns *v.* Cordwainers' Co., Cordwainers' Co. *v.* Kearns (1859), 6 C. B. N. S. 388; Jones *v.* Festiniog Ry. (1868), L. R. 3 Q. B. 733; Dungey *v.* London Corpn. (1869), 38 L. J. C. P. 298; Buccleuch *v.* Metropolitan Board of Works (1870), L. R. 5 Exch. 221; Hill *v.* Metropolitan Asylum, Managers (1879), 4 Q. B. D. 433; Powell *v.* Fall (1880), 5 Q. B. D. 597; R. *v.* Sheward (1882), 9 Q. B. D.

5 i. —— ——.]—DRAKE *v.* PAULSON (N. W. P.) (1907), 5 W. L. R. 433. —**CAN.**

5 ii. —— ——.] — Negligence is not the omission to take such precaution as will avoid an accident in all events; it is simply the failure to exercise the care that a reasonable prudent man would exercise under the circumstances in question.—CARNAT *v.* MATTHEWS, [1921] 2 W. W. R. 218; 16 Alta. L. R. 275; 59 D. L. R. 505. —**CAN.**

5 iii. —— ——.]—A horse which had been sent to be grazed for hire upon a farm was killed by falling into a hole in the field in which it had been placed, which was situated over old mineral workings. The hole was proved to have been noticed for some time before the accident by several persons resident in the neighbourhood:—*Held:* the farmer was liable in damages for the loss, as he had failed to take that reasonable care of property placed in his custody which a prudent man would have taken of his own.—M'LEAN *v.* WARNOCK (1883), 10 R. (Ct. of Sess.) 1052; 20 Sc. L. R. 712.—**SCOT.**

Sect. 1.—*Definitions, nature and characteristics: Subsect.* 1.]

741 ; Gas Light & Coke Co. *v.* St. Mary Abbots, Kensington, Vestry (1884), Cab. & El. 368 ; Lea Conservancy Board *v.* Hertford Corpn. (1884), Cab. & El. 299 ; L. & B. Ry. *v.* Truman (1885), 11 App. Cas. 45 ; Cowper-Essex *v.* Acton L. B. (1889), 14 App. Cas. 153 ; National Telephone Co. *v.* Baker (1893), 62 L. J. Ch. 699 ; A.-G. *v.* Met. Ry., [1894] 1 Q. B. 384 ; Emsley *v.* N. E. Ry., [1896] 1 Ch. 418 ; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1898] 2 Ch. 614 ; Southwark & Vauxhall Water Co. *v.* Wandsworth Board of Works, [1898] 2 Ch. 603 ; Long Eaton Recreation Grounds Co. *v.* Mid. Ry. (1901), 71 L. J. K. B. 74 ; Jackson *v.* Mumford (1902), 8 Com. Cas. 61 ; West *v.* Bristol Tram Co., [1908] 2 K. B. 14 ; Quebec Ry. Light, Heat & Power Co. *v.* Vandry, [1920] A. C. 662.

8. —— —— Which defendant bound to exercise.]—Gross negligence is a relative term & means the absence of the care that was requisite under the circumstances.

Gross negligence is ordinary negligence with a vituperative epithet. . . . Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of deft. to use (WILLES, J.).

The use of the term gross negligence is only one way of stating that less care is required in some cases than in others (MONTAGUE SMITH, J.).—GRILL *v.* GENERAL IRON SCREW COLLIER CO. (1866), L. R. 1 C. P. 600 ; Har. & Ruth. 654 ; 35 L. J. C. P. 321 ; 14 L. T. 711 ; 12 Jur. N. S. 727 ; 14 W. R. 893 ; 2 Mar. L. C. 362 ; *affd.* (1868), L. R. 3 C. P. 476, Ex. Ch.

Annotations :—**Consd.** Giblin *v.* McMullen (1868), L. R. 2 P. C. 317 ; Oppenheim *v.* White Lion Hotel Co. (1871), L. R. 6 C. P. 515 ; Newman *v.* Bourne & Hollingsworth (1915), 31 T. L. R. 209 ; *Re* City Equitable Fire Insce., [1925] Ch. 407. **Refd.** Notara *v.* Henderson (1872), L. R. 7 Q. B. 225. **Mentd.** Leuw *v.* Dudgeon (1867), 17 L. T. 145 ; The Chasca (1875), L. R. 4 A. & E. 446 ; Scaramanga *v.* Stamp (1880), 28 W. R. 691 ; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1882), 10 Q. B. D. 521 ; Wilson *v.* Xantho (Owners of Cargo) (1887), 12 App. Cas. 503 ; Steinman *v.* Angier Line, [1891] 1 Q. B. 619 ; The Glendarroch, [1894] P. 226 ; Trinder, Anderson *v.* Thames & Mersey Marine Insce., Trinder, Anderson *v.* North Queensland Insce., Trinder, Anderson *v.* Weston, Crocker, [1898] 2 Q. B. 114 ; Fenton *v.* Thorley, [1903] A. C. 443 ; Price *v.* Union Lighterage Co., [1904] 1 K. B. 412 ; *Re* Etherington & Lancashire & Yorkshire Accident Insce., [1909] 1 K. B. 591 ; Leyland Shipping Co. *v.* Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873 ; Becker, Gray *v.* London Assce. Corpn., [1918] A. C. 101.

9. —— —— —— Injury to plaintiff without contributory negligence.]—Deft. supplied & erected a staging round a ship under a contract with the shipowner. Pltf. was a workman in the employ of a ship painter who had contracted with the shipowner to paint the outside of the ship, & in order to do the painting pltf. went on & used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by deft., broke, & by reason thereof pltf. fell into the dock & was injured :—*Held :* pltf., being engaged on work on the vessel in the performance of which deft., as dock owner, was interested, deft. was under an obligation to him to take reasonable care that at the time he supplied the staging & ropes they were in a fit state to be used, & for the neglect of such duty deft. was liable to pltf. for the injury he had sustained ; whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care & skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care & skill to avoid such danger.

There was in a sense, an invitation of pltf. by deft. to use the stage. . . . Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom deft. owes the duty of observing ordinary care & skill by which neglect, pltf. without contributory negligence on his part has suffered injury to his person or property (BRETT, M.R.).

I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who, without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act (COTTON, L.J.).—HEAVEN *v.* PENDER (1883), 11 Q. B. D. 503 ; 52 L. J. Q. B. 702 ; 49 L. T. 357 ; 47 J. P. 709 ; 27 Sol. Jo. 667, C. A.

Annotations :—**Consd.** Cann *v.* Willson (1888), 39 Ch. D. 39 ; Thrussell *v.* Handyside (1888), 20 Q. B. D. 359 ; Le Lievre *v.* Gould, [1893] 1 Q. B. 491 ; Hopkins *v.* G. E. Ry. (1895), 60 J. P. 86 ; Hawkins *v.* Smith (1896), 12 T. L. R. 532 ; Cale. Ry. *v.* Mulholland, [1898] A. C. 216 ; Earl *v.* Lubbock, [1905] 1 K. B. 253 ; Bates *v.* Batey, [1913] 3 K. B. 351. **Refd.** Elliott *v.* Hall (1885), 15 Q. B. D. 315 ; Tolhausen *v.* Davies (1888), 57 L. J. Q. B. 392 ; O'Neil *v.* Everest (1892), 61 L. J. Q. B. 453 ; Scholfield *v.* Londesborough (1894), 10 T. L. R. 518 ; Lane *v.* Cox (1896), 66 L. J. Q. B. 193 ; Marney *v.* Scott, [1899] 1 Q. B. 986 ; Milburn *v.* Jamaica Fruit Importing & Trading Co. of London, [1900] 2 Q. B. 540 ; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305 ; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533 ; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398 ; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272. **Mentd.** Witted *v.* Galbraith (1893), 9 T. L. R. 300 ; Mowbray *v.* Merryweather, [1895] 2 Q. B. 640 ; Cavalier *v.* Pope, [1905] 2 K. B. 757 ; Jackson *v.* Watson (1909), 78 L. J. K. B. 587 ; Baker *v.* James, [1921] 2 K. B. 674.

10. —— —— ——.]—Pltf. was employed in a cooling room in deft.'s brewery. In the room were a boiling vat, & a cooling vat, & between them ran a passage which was in part only three feet wide. The cooling vat had a rim raised sixteen inches above the level of the passage, but it was not fenced or railed in. Pltf. went along this passage to pull a board from under the boiling vat. This board stuck fast & then came away suddenly so that he fell back into the cooling vat & was scalded. In an action under Employers' Liability Act, 1880 (c. 42) :—*Held :* the defence arising from the maxim *volenti non fit injuria* had not been affected by Employers' Liability Act, 1880 (c. 42), & applied to the present case, & there was therefore no evidence of negligence arising from a breach of duty on the part of deft. towards pltf., & pltf. was not entitled to recover.

The ideas of negligence & duty are strictly correlative & there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody. . . . There may be a perception of the existence of the danger without comprehension of the risk : as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature & extent. . . . Deft. in such circumstances does not discharge his legal obligation by merely affecting pltf. with knowledge of a danger which but for a breach of duty on his own part would not exist at all. But where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible & the risk appreciated, & where the injured person knowing & appreciating both risk & danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all.

Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete. . . . It [contributory negligence] rests upon the view that though deft. has in fact been negligent, yet pltf. has by his own carelessness severed the causal connection between deft.'s negligence & the accident which has occurred; & that deft.'s negligence accordingly is not the true proximate cause of the injury (BOWEN, L.J.).—THOMAS *v.* QUARTERMAINE (1887), 18 Q. B. D. 685; 56 L. J. Q. B. 340; 57 L. T. 537; 51 J. P. 516; 35 W. R. 555; 3 T. L. R. 495, C. A.

Annotations :—**Expld.** Yarmouth *v.* France (1887), 19 Q. B. D. 647. **Consd.** Baddeley *v.* Granville (1887), 19 Q. B. D. 423; Evans *v.* M. S. & L. Ry. (1887), 36 Ch. D. 626; Smith *v.* Baker, [1891] A. C. 325; Letang *v.* Ottawa Elec. Ry., [1926] A. C. 725. **Refd.** Church *v.* Appleby (1888), 60 L. T. 542; Osborne *v.* L. & N. W. Ry. (1888), 21 Q. B. D. 220; Thrussell *v.* Handyside (1888), 20 Q. B. D. 359; Walsh *v.* Whiteley (1888), 21 Q. B. D. 371; Membery *v.* G. W. Ry. (1889), 14 App. Cas. 179; Amos *v.* Duffy (1890), 6 T. L. R. 339; Sanders *v.* Barker (1890), 6 T. L. R. 324; Young *v.* Hoffmann Manufacturing Co., [1907] 2 K. B. 646; Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871; Brackley *v.* Mid. Ry. (1916), 85 L. J. K. B. 1596; Davies *v.* Owen, [1919] 2 K. B. 39; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. **Mentd.** Brannigan *v.* Robinson (1892), 66 L. T. 647.

Culpable negligence.]—AUSTIN *v.* MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO., No. 28, *post.*

12. —— Wilful negligence.]—An act, or an omission to do an act, is wilful where the person who acts, or omits to act, knows what he is doing & intends to do what he is doing, but if that act or omission amounts to a breach of that person's duty, & therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing, & intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty.—*Re* CITY EQUITABLE FIRE INSURANCE CO., LTD., [1925] 1 Ch. 407; 94 L. J. Ch. 445; 133 L. T. 520; 40 T. L. R. 853; [1925] B. & C. R. 109, C. A.

Annotation :—**Distd.** *Re* City of London Insce. (1925), 41 T. L. R. 521.

13. May be unintentional.]—Neglect or default may be wilful, though it may have been unintentional & have arisen from forgetfulness.—ELLIOTT *v.* TURNER (1843), 13 Sim. 477; 60 E. R. 185.

Annotations :—**Consd.** *Re* London Corpn. & Tubbs' Contract, [1894] 2 Ch. 524. **Refd.** *Re* City Equitable Fire Insce., [1925] Ch. 407.

14. ——.]—BLYTH *v.* BIRMINGHAM WATERWORKS CO., No. 1, *ante.*

15. Dependant on circumstances—Always relative.]—(1) The rule of law, that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, applies to the case of a person who is injured whilst voluntarily assisting the servants in their work.

Where the servants of defts., a railway co., were turning a truck on a turntable, & a person not in the employment of defts. volunteered to assist them, & whilst so engaged, other servants of defts. negligently propelled a steam engine & thereby caused the death of the person who so volunteered: & the servants were persons of competent skill & defts. did not authorise the negligence :—*Held :* defts. were not liable to an action by the personal representative of deceased.

(2) If a man commits a trespass to land, the occupier is not justified in shooting him, & probably if the occupier were sporting or firing at a mark on his land, & saw a trespasser, & fired carelessly & hurt him, an action would be (BRAMWELL, B.).

(3) There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place or person (BRAMWELL, B.).—DEGG *v.* MIDLAND RY. CO. (1857), 1 H. & N. 773; 26 L. J. Ex. 171; 28 L. T. O. S. 357; 3 Jur. N. S. 395; 5 W. R. 364; 156 E. R. 1413.

Annotations :—*As to* (1) **Distd.** Abraham *v.* Reynolds (1860), 5 H. & N. 143. **Apprvd.** Potter *v.* Faulkner (1861), 1 B. & S. 800. **Distd.** Wright *v.* L. & N. W. Ry. (1876), 1 Q. B. D. 252; Bass *v.* Hendon U. D. C. (1911), 76 J. P. 13. **Consd.** Houghton *v.* Pilkington, [1912] 3 K. B. 308. **Expld. & Distd.** Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899. **Apld.** Heasmer *v.* Pickfords (1920), 36 T. L. R. 818. **Refd.** Tarrant *v.* Webb (1856), 18 C. B. 797; Bartonshill Coal Co. *v.* M'Guire (1858), 31 L. T. O. S. 258; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341. *As to* (3) **Apld.** Ruck *v.* Williams (1858), 3 H. & N. 308.

16. ——.]—VAUGHAN *v.* TAFF VALE RY. CO., No. 7, *ante.*

17. ——.]—In an action against a railway co. for an injury alleged to have been caused by the negligence of their servants: —*Held :* a railway co. is bound to use the best precautions in known practical use to secure the safety of their passengers, but not every possible precaution which the highest scientific skill, according to speculative evidence, might have suggested; & if there are several grounds of negligence suggested, the jury must be satisfied that some one or other of them existed, & caused damage to the party injured, though they need not be able to ascribe the whole injury to either.

Negligence is not to be defined, because it involves some inquiry as to the degree of care required, & that is the degree which the jury think is reasonably to be required from the parties, considering all the circumstances. The railway co. is bound to take reasonable care; to use the best precautions in known practical use, for securing the safety & convenience of their passengers (ERLE, C.J.).—FORD *v.* LONDON & SOUTH WESTERN RY. CO. (1862), 2 F. & F. 730, N. P.

Annotation :—**Consd.** Readhead *v.* Mid. Ry. (1869), L. R. 4 Q. B. 379.

18. ——.]—It is a matter of fact in each case what constitutes negligence of this kind. One reported case is of little value on the facts in another (CHITTY, J.).—BROWN *v.* STEDMAN (1896), 44 W. R. 458; 40 Sol. Jo. 457.

19. Distinguished from accident.]—If, in the prosecution of a lawful act, an accident, purely accidental, arise, no action can be supported for an injury, arising from such accident.—DAVIS *v.* SAUNDERS (1770), 2 Chit. 639.

Accident as defence.]—*See* Part X., Sect. 6, *post.*

20. Distinguished from mala fides.]—In an action by the indorsee of a bill who has given value, if his title be disputed on the ground that his indorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, whether the indorsee acted with good faith in taking the bill. The question whether or not he was guilty of gross negligence is improper. Gross negligence may be evidence of *mala fides*, but is not equivalent to it.—GOODMAN *v.* HARVEY (1836),

11 l. —— *Culpable negligence.*]—Culpable negligence means actionable negligence.—MCPHERSON *v.* ST. JOHN CORPN. (1894), 32 N. B. R. 423.—**CAN.**

Sect. 1.—*Definitions, nature and characteristics: Subsects.* 1 & 2.]

4 Ad. & El. 870; 6 Nev. & M. K. B. 372; 6 L. J. K. B. 63, 260; 111 E. R. 1011.

Annotations:—**Consd.** Uther *v.* Rich (1839), 10 Ad. & El. 784; *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615. **Refd.** Jones *v.* Smith (1841), 1 Hare, 43. **Mentd.** Arbouin *v.* Anderson (1841), 1 Q. B. 498; *Re* Lowenthal, *Ex p.* Lowenthal (No. 2) (1874), 9 Ch. App. 591.

21. ——.]—Negligence may be evidence of, but it is not in law the same thing as, *mala fides*.—JONES *v.* SMITH (1841), 1 Hare, 43; 11 L. J. Ch. 83; 6 Jur. 8; 66 E. R. 943; *on appeal* (1843), 1 Ph. 244, L. C.

Annotations:—**Consd.** West *v.* Reid (1843), 2 Hare, 249; Welchman *v.* Coventry Union Bank (1860), 8 W. R. 729. **Refd.** Montefiore *v.* Browne (1858), 7 H. L. Cas. 241; Agra Bank *v.* Barry (1874), L. R. 7 H. L. 135; Lee *v.* Clutton (1875), 45 L. J. Ch. 43; Lloyds Banking Co. *v.* Jones (1885), 29 Ch. D. 221; *Re* Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622; Oliver *v.* Hinton, [1899] 2 Ch. 264; Davis *v.* Hutchings, [1907] 1 Ch. 356; *Re* De Leeuw, Jakens *v.* Central Advance & Discount Corpn., [1922] 2 Ch. 540. **Mentd.** Steadman *v.* Poole (1847), 16 L. J. Ch. 348; Barnhart *v.* Greenshields (1853), 9 Moo. P. C. C. 18; Bird *v.* Fox (1853), 11 Hare, 40; Ware *v.* Egmont (1853), 23 L. J. Ch. 499; Clack *v.* Holland (1854), 19 Beav. 262; *Re* Bright's Trusts (1856), 21 Beav. 430; Rooke *v.* Kensington (1856), 2 K. & J. 753; Dawson *v.* Prince (1857), 2 De G. & J. 41; Jones *v.* Williams (1857), 24 Beav. 47; Knight *v.* Bowyer (1858), 27 L. J. Ch. 520; Cox *v.* Coventon (1862), 31 Beav. 378; Wilson *v.* Hart (1865), 2 Hem. & M. 551; *Re* Hop & Malt Exchange & Warehouse Co., *Ex p.* Briggs (1866), 35 L. J. Ch. 320; Lees *v.* Whiteley (1866), L. R. 2 Eq. 143; Brown *v.* Tanner (1868), 3 Ch. App. 597; Turton *v.* Meacham (1868), 19 L. T. 760; Macbryde *v.* Eykyn (1871), 24 L. T. 461; Shaw *v.* Foster (1872), L. R. 5 H. L. 321; Carroll *v.* Keays, Keays *v.* Carroll (1873), 22 W. R. 243; The Emilien Marie (1875), 44 L. J. Adm. 9; A.-G. *v.* Biphosphated Guano Co. (1878), 38 L. T. 941; Patman *v.* Harland (1881), 17 Ch. D. 353; Williams *v.* Williams (1881), 17 Ch. D. 437; English & Scottish Mercantile Investment Trust *v.* Brunton, [1892] 2 Q. B. 700; Bailey *v.* Barnes, [1894] 1 Ch. 25; Black *v.* Williams (1894), 2 Mans. 86; *Re* Alms Corn Charity, Charity Comrs. *v.* Bode, [1901] 2 Ch. 750; Hooper *v.* Bromet (1903), 89 L. T. 37; *Re* Valletort Sanitary Steam Laundry Co., Ward *v.* Valletort Sanitary Steam Laundry Co., [1903] 2 Ch. 654; *Re* Standard Rotary Machine Co. (1906), 95 L. T. 829; Reeves *v.* Pope, [1914] 2 K. B. 284; *Re* Chafer & Randall's Contract, [1916] 2 Ch. 8; Underwood *v.* Bank of Liverpool, Same *v.* Barclays Bank, [1924] 1 K. B. 775.

22. Whether distinguished from misconduct.]—The mistake as a matter of carelessness, is so gross as to amount, though not in a moral point of view, in the judicial sense of that word to misconduct on the part of the arbitrator. "*Negligentia*," both by the civil law & our own, approximates to & cannot be distinguished from "*dolus malus*," or misconduct (TINDAL, C.J.).—*Re* HALL & HINDS (1841), 2 Man. & G. 847; Drinkwater, 214; 3 Scott, N. R. 250; 10 L. J. C. P. 210; 133 E. R. 987.

Annotations:—**Refd.** Phillips *v.* Evans (1843), 12 M. & W. 309; *Re* Stroud (1849), 8 C. B. 502; Winn *v.* Nicholson (1849), 7 C. B. 819; Saunders *v.* Damer (1850), 16 L. T. O. S. 153; Flynn *v.* Robertson (1869), L. R. 4 C. P. 324. **Mentd.** Hagger *v.* Baker (1845), 2 Dow. & L. 856; Hutchinson *v.* Shepperton (1849), 13 Q. B. 955; Hodgkinson *v.* Fernie (1857), 3 C. B. N. S. 189; Hogge *v.* Burgess (1858), 3 H. & N. 293; Sadler *v.* Smith (1869), L. R. 4 Q. B. 214; Imperial Royal Chartered Azienda Assicuratrice of Trieste *v.* Funder (1872), 27 L. T. 438.

23. —— **Wilful misconduct.**]—A railway co. undertook to carry certain goods at a reduced rate upon terms that they should be excused from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, etc., arose from wilful misconduct on the part of the co.'s servants. In an action brought by a trader to recover damages for injury to goods:—*Held:* upon the facts, there had been no wilful misconduct; wilful misconduct in such a special condition meant misconduct to which the will is party as contra-distinguished from accidents, & is far beyond any negligence, even gross or culpable negligence, & involves that a person wilfully misconducts himself who knows & appreciates that it is wrong conduct on his part in the existing circumstances to do or fail or omit to do, as the case may be, a particular thing, & yet intentionally does, or fails, or omits to do it, or persists in the act, failure, or omission regardless of consequences.—FORDER *v.* GREAT WESTERN RY. CO., [1905] 2 K. B. 532; 74 L. J. K. B. 871; 93 L. T. 344; 53 W. R. 574; 21 T. L. R. 625; 49 Sol. Jo. 597.

Annotations:—**Consd.** Norris *v.* G. C. Ry. (1915), 85 L. J. K. B. 285, n. **Apld.** Buckton *v.* L. & N. W. Ry. (1916), 87 L. J. K. B. 234. **Consd.** Metropolitan Water Board *v.* L. & N. E. Ry. (1924), 131 L. T. 123. **Apprvd.** *Re* City Equitable Fire Insce., [1925] Ch. 407. **Refd.** Sheppard *v.* Mid. Ry. (1915), 85 L. J. K. B. 283; Smith *v.* Mid. Ry. (1919), 88 L. J. K. B. 868.

24. Distinguished from imprudence.]—Where a man, during a procession held in his honour, imprudently, but lawfully & without any intention on his part so to do, acts in such a way as to incite others to commit damage, he is not liable for that damage.

I am unable to say that when a gentleman is canvassing, & accompanied by townspeople who are not his agents, & he does an act only of imprudence, on account of which they commit damage, that he should be responsible in any action of trespass. He has done nothing either directly or indirectly. All that the county ct. judge charges him with is imprudence. There is nothing for us to make him responsible for (COCKBURN, C.J.).—PEACOCK *v.* YOUNG (1869), 21 L. T. 527; 34 J. P. 213; 18 W. R. 134.

25. Distinguished from fraud.]—What a man does through negligence he does not do from a fraudulent motive. Fraud imports design & purpose; negligence imports that you are acting carelessly & without that design. But what is meant is this; that conduct which might be negligent, or which might be attributable to negligence, is really attributable to a design not to know any more, & is, therefore, an indication that you knew that of which you desired to avoid the evidence (FRY, J.).—KETTLEWELL *v.* WATSON (1882), 21 Ch. D. 685; 51 L. J. Ch. 281; 46 L. T. 83; 30 W. R. 402; *on appeal* (1884), 26 Ch. D. 501, C. A.

Annotations:—**Refd.** National Provincial Bank of England *v.* Jackson (1886), 33 Ch. D. 1; Farrand *v.* Yorkshire Banking Co. (1888), 40 Ch. D. 182. **Mentd.** *Re* Payne, Young *v.* Payne, [1904] 2 Ch. 608; Berwick *v.* Price, [1905] 1 Ch. 632; Manks *v.* Whiteley, [1912] 1 Ch. 735; Barker *v.* Stickney, [1919] 1 K. B. 121.

26. Distinguished from carelessness.]—Mtgees. of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mtgees., & there was no contractual relation between him & them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part:—*Held:* (1) the surveyor owed no duty to the mtgees. to exercise care in giving his certificates, & they could not maintain an action against him by reason of negligence.

The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. . . .

If a man is driving on Salisbury Plain, & no other person is near him, he is at liberty to drive as fast & as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood (LORD ESHER, M.R.).

(2) The law of England does not consider that what a man writes on paper is like a gun or other dangerous instrument, & unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly (BOWEN, L.J.).—LE LIEVRE *v.* GOULD, [1893] 1 Q. B. 491; 62 L. J. Q. B. 353; 68 L. T. 626; 57 J. P. 484; 41 W. R. 468; 37 Sol. Jo. 267; 4 R. 274; *sub nom.* DENNES *v.* GOULD, 9 T. L. R. 243, C. A.

Annotations:—*As to* (1) **Consd.** Earl *v.* Lubbock (1904), 74 L. J. K. B. 121. **Apld.** Australian Steam Shipping Co. *v.* Devitt (1917), 33 T. L. R. 178. **Consd.** Everett *v.* Griffiths, [1920] 3 K. B. 163. **Refd.** Lane *v.* Cox (1896), 66 L. J. Q. B. 193; Pritty *v.* Child (1902), 71 L. J. K. B. 512; Cavalier *v.* Pope, [1905] 2 K. B. 757; Empress Assce. Corpn. *v.* Bowring (1905), 11 Com. Cas. 107; Love *v.* Mack (1905), 92 L. T. 345; Compania Naviera Vasconzada *v.* Churchill & Sim, Same *v.* Burton, [1906] 1 K. B. 237; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272; Baker *v.* James, [1921] 2 K. B. 674. *As to* (2) **Refd.** Weld-Blundell *v.* Stephens, [1920] A. C. 956.

Distinguished from gross negligence.]—*See* Sub-sect. 2, *post.*

SUB-SECT. 2.—GROSS NEGLIGENCE.

27. Whether distinguishable from "negligence."]—I said I could see no difference between negligence & gross negligence, that it was the same thing, with the addition of a vituperative epithet (ROLFE, B.).—WILSON *v.* BRETT (1843), as reported in 11 M. & W. 113; 152 E. R. 737.

Annotations:—**Apld.** Grill *v.* General Iron Screw Collier Co. (1866), L. R. 1 C. P. 600. **Refd.** Phillips *v.* Clark (1859), 5 Jur. N. S. 1081; Giblin *v.* McMullen (1869), L. R. 2 P. C. 317. **Mentd.** Lygo *v.* Newbolt (1854), 22 L. T. O. S. 226.

28. ——.]—The terms "gross negligence" & "culpable negligence" cannot alter the nature of the thing omitted, nor can they exaggerate such omisson into an act of misfeasance or renunciation of the character in which they received the horses to be carried. . . . Those words . . . must apply . . . to all risks of whatever kind, & however arising, to be encountered in the course of the journey, one of which is undoubtedly the risk of a wheel taking fire, owing to neglect to grease it. Whether that is called "negligence" merely, or "gross negligence," or "culpable negligence," or whatever other epithet may be applied to it, it is within the exemption from responsibility provided by the contract (CRESWELL, J.).—AUSTIN *v.* MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. (1852), 7 Ry. & Can. Cas. 300; 10 C. B. 454; 21 L. J. C. P. 179; 19 L. T. O. S. 256; 16 Jur. 763; 138 E. R. 181; *previous proceedings* (1851), 16 Q. B. 600.

Annotations:—**Folld.** Phillips *v.* Clark (1859), 5 Jur. N. S. 1081. **Mentd.** Carr *v.* L. & Y. Ry. (1852), 7 Exch. 707; Morville *v.* G. N. Ry. (1852), 16 Jur. 528; York, Newcastle & Berwick Ry. *v.* Crisp (1854), 14 C. B. 527; MacAndrew *v.* Electric Telegraph Co. (1855), 17 C. B. 3; M'Manus *v.* L. & Y. Ry. (1859), 4 H. & N. 327; Harrison *v.* L. & B. Ry. (1862), 2 B. & S. 152; Peek *v.* North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Shaw *v.* G. W. Ry., [1894] 1 Q. B. 373; Travers *v.* Cooper, [1915] 1 K. B. 73; G. N. Ry. *v.* L. E. P. Transport & Depository, [1922] 2 K. B. 742.

29. ——.]—GRILL *v.* GENERAL IRON SCREW COLLIER CO., No 8, *ante.*

30. Applicability to mortgagee—Leaving title deeds with mortgagor.]—It is difficult to define gross negligence, but it may be taken as *primâ facie* correct that a mtgee., who, knowing that his mtgor. has title deeds, omits to call for or inquire about them, is guilty of such negligence as to make him responsible for the frauds which he has thus enabled his mtgor. to commit.—COLYER *v.* FINCH (1856), 5 H. L. Cas. 905; 26 L. J. Ch. 65; 28 L. T. O. S. 27; 3 Jur. N. S. 25; 10 E. R. 1159, H. L.; *affg.* S. C. *sub nom.* FINCH *v.* SHAW, COLYER *v.* FINCH (1854), 19 Beav. 500.

Annotations:—**Refd.** Carter *v.* Carter (1857), 3 K. & J. 617. **Mentd.** Thompson *v.* Finch (1856), 8 De G. M. & G. 560; Perry-Herrick *v.* Attwood (1857), 2 De G. & J. 21; Hipkins *v.* Amery (1860), 2 Giff. 292; Hunt *v.* Elmes (1860), 3 L. T. 796; Phillips *v.* Phillips (1862), 4 De G. F. & J. 208; Hooper *v.* Gumm, McLellan *v.* Gumm (1865), 13 L. T. 187; Wilkinson *v.* Castle (1868), 37 L. J. Ch. 467; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292; Dixon *v.* Muckleston (1872), 8 Ch. App. 155; Heath *v.* Crealock (1873), L. R. 18 Eq. 215; R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420; Corser *v.* Cartwright (1875), L. R. 7 H. L. 731; Heath *v.* Pugh (1881), 6 Q. B. D. 345; *Re* Hawthorne, Graham *v.* Massey (1883), 23 Ch. D. 743; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482; Manners *v.* Mew (1885), 29 Ch. D. 725; Taylor *v.* Russell, [1891] 1 Ch. 8; *Re* Rebbeck, Bennett *v.* Rebbeck (1894), 63 L. J. Ch. 596; *Re* Venn & Furze's Contract, [1894] 2 Ch. 101; *Re* Henson, Chester *v.* Henson, [1908] 2 Ch. 356.

Distinguished from mala fides.] *See* No. 20, *ante.*

31. Applicability to bailees.]—"Gross negligence" is a term properly used to describe the sort of negligence for which a gratuitous bailee is responsible: it cannot properly be said of an unskilled person who does not use skill: it is only applicable where a skilled person does not use the skill he has.—PHILLIPS *v.* CLARK (1859), 5 Jur. N. S. 1081; *previous proceedings* (1857), 2 C. B. N. S. 156.

32. ——.]—(1) The term "gross negligence" is not intended as a definition, but is useful as expressing the practical difference between the degrees of negligence for which different classes of bailees are responsible.

In an action for damages against a bank as bailees for the negligent keeping of certain railway debentures placed in their care by a customer, in the ordinary way of their business as bankers, it appeared that the box containing such securities, of which the customer kept the key, was kept in a strong room in the bank, with the boxes of other customers, & specie & other securities belonging to the bank. Access to this room was only obtained by passing through a compartment where a cashier sat by day, & a messenger slept at night. The strong room had two iron doors, which were opened by separate keys, which during the day were kept by the cashier who occupied the compartment. One of the keys was kept at night by the cashier of the bank, & the other key by another officer of the bank. Beyond this strong room there was two other rooms; in the outer of the two, uncoined gold, & in the inner, bullion & unsigned notes were kept. The manager of the bank kept the key of the outer of these rooms, & one of the directors of the bank that of the inner. The owner of the box had free access to the room where his box was deposited during banking-hours, in the presence of one of the bank clerks, when he had occasion to take out coupons from his debentures, for collection. While in such custody the cashier of the bank abstracted the debentures from the box, & made away with them:—*Held:* (2) the bank, as gratuitous bailees, were not bound to exercise more than ordinary care of the deposits entrusted to them, & the negligence for

Sect. 1.—*Definitions, nature and characteristics: Sub-sect.* 2. *Sect.* 2: *Sub-sect.* 1.]

which alone they would be made liable would have been the want of that ordinary diligence, which a reasonably prudent man takes of his own property of the like description.

At the close of pltf.'s case, deft. applied for a nonsuit, on the ground that the bank, being gratuitous bailees, there was no evidence given of such negligence as to render them liable. The judge refused to stop the case, but reserved leave to move for a nonsuit. The jury found for pltf. Deft. obtained a rule to set aside the verdict, & to enter a verdict for deft., or for a judgment of nonsuit, & the ct. made the rule absolute for a nonsuit:—*Held:* (3) such course was regular, as it was the duty of the ct. to do what the judge ought to have done at the trial, when at the close of pltf.'s case there was no evidence upon which the jury could reasonably & properly find a verdict, as the judge ought to have directed a nonsuit, &, as in every case before evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally any evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.—GIBLIN *v.* MCMULLEN (1869), L. R. 2 P. C. 317; 5 Moo. P. C. C. N. S. 434; 38 L. J. P. C. 25; 21 L. T. 214; 17 W. R. 445; 16 E. R. 578, P. C.

Annotations:—*As to* (1) **Refd.** Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; *Re* National Bank of Wales, [1899] 2 Ch. 629. *As to* (2) **Distd.** *Re* United Service Co., Johnston's Claim (1871), 6 Ch. App. 212. **Refd.** Leese *v.* Martin (1873), L. R. 17 Eq. 224; Bullen *v.* Swan Electric Engraving Co. (1906), 22 T. L. R. 275; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409.

SECT. 2.—DUTY TO TAKE CARE.

SUB-SECT. 1.—NECESSITY FOR.

33. No negligence without duty.] — In an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, etc., charging negligence, whereby consignor lost his goods, it is not sufficient to prove that they never reached their destination or were accounted for. The office-keeper's duty is to deliver to a carrier; & some evidence must be given, showing specifically a breach of that duty. A tradesman, having made up goods by order, delivered them at a booking-office, with the customer's address, & booked them, to be forwarded to him, not specifying any particular conveyance, & no particular mode of transmission having been pointed out by the customer. *Qu.:* whether the consignor could maintain an action against the office-keeper

PART I. SECT. 2, SUB-SECT. 1.

33 i. *No negligence without duty.*]—There can be no negligence where there is no duty to take care.—MCMILLAN *v.* MCMILLAN (1891), 17 V. L. R. 33.—**AUS.**

33 ii. ——.]—MUNICIPAL TRAMWAYS TRUST *v.* WALLMAN, [1920] S. A. L. R. 325.—**AUS.**

33 iii. ——.]—HALL *v.* MOSS (1866), 25 U. C. R. 263.—**CAN.**

33 iv. ——.]—The omission of a common law duty is actionable negligence equally with the omission of a statutory duty.—WALLMAN *v.* CANADIAN PACIFIC RY. CO. (1906), 16 Man. L. R. 82.—**CAN.**

33 v. ——.]—BECK *v.* CANADIAN NORTHERN RY. CO. (Alta.) (1910), 47 S. C. R. 397; 23 W. L. R. 576.—**CAN.**

33 vi. ——.]—Negligence must be founded upon a breach of duty to some one.—ROBERTS *v.* BELL TELEPHONE CO. & WESTERN COUNTIES ELECTRIC CO. (1913), 24 O. W. R. 428; 4 O. W. N. 1099; 10 D. L. R. 459.—**CAN.**

33 vii. ——.]—*Held:* there was a legal duty resting upon the co. to have secured their electric wires to a cross-arm at a sufficient distance on each side of the pole to have afforded a reasonably safe space for the telegraph co.'s employees using the pole to pass through ascending & descending the pole, & a breach of this duty entailing injury to any employee of the telegraph co. would be actionable negligence.—YOUNG *v.* BRANDON & BRANDON ELECTRIC LIGHT CO. (1915), 32 W. L. R. 231; 9 W. W. R. 62.—**CAN.**

33 viii. ——.]—CHRISTIE *v.* LONDON ELECTRIC CO. (1915), 7 O. W. N. 703; 8 O. W. N. 124; 33 O. L. R. 395; 23 D. L. R. 476.—**CAN.**

33 ix. ——.]—*Held:* defts.' failure to perform their duty was the cause of the man's death, & they were liable in an action under Fatal Accidents Act. In the circumstances, there was a duty upon defts. towards every one there as the man was, employed in removing gravel for defts., to take reasonable care that the frozen surface was so removed that it should not be a needless danger to them when so employed.—DURANT *v.* ONTARIO & MINNESOTA POWER CO. (1918), 41 O. L. R. 130; 13 O. W. N. 195.—**CAN.**

33 x. ——.]—H., who had invited certain parties to his house, was riding in their automobile in the front seat with the driver to show them the way. While approaching a crossing he & the driver were looking at a part of the machine & did not notice deft.'s street car which approached without sounding its gong in time & collided with them killing H.:—*Held:* there was no duty on H. to warn the driver that he was approaching a street car line.—HUNTER *v.* SASKATOON CORPN. (Sask.), [1919] 2 W. W. R. 872; 48 D. L. R. 68.—**CAN.**

33 xi. ——.]—Pltf. & his brother were driving two loads of hay along a road in daylight, pltf. driving the second load which was drawn by a team of which one was a mare, which had her colt running beside her. Just as a motor car, driven by deft. in the opposite direction, came opposite the colt it jumped in front of the car:—*Held:* deft. was not liable for injury to colt, as there was no duty on him to anticipate the possibility of a colt being there.—STEVENS *v.* SASKATCHEWAN TAXICAB CO., LTD. (Sask.), [1919] 1 W. W. R. 958.—**CAN.**

33 xii. ——.]—DAWSON *v.* PARADISE MINE & CANADIAN PACIFIC RY. CO. (B. C.), [1919] 1 W. W. R. 499.—**CAN.**

33 xiii. ——.]—An act is negligent when the doer might, had he thought, have reasonably anticipated that some injury would result from it to some person towards whom he has a duty to be careful.—RAILWAY PASSENGER INSURANCE CO. *v.* BRODEUR & MASSE (Man.), [1920] 2 W. W. R. 924.—**CAN.**

33 xiv. ——.]—A charge of negligence is substantiated by proving the breach of a statutory duty, where the failure to observe such duty was set up, even although there was no allegation that the duty was a statutory obligation.—SEIBEL *v.* GRAND TRUNK PACIFIC RY. CO., [1920] 2 W. W R. 318; 13 Sask. L. R. 234.—**CAN.**

33 xv. ——.]—The driving of a motor car in Vancouver during a thick fog is not in itself negligence.—PEARSON *v.* READ, [1925] 1 D. L. R. 893; [1925] 1 W. W. R. 487; 34 B. C. R. 524.—**CAN.**

33 xvi. ——.]—To sustain an action for negligence, there must be an obligation on the part of deft. to use care, & a breach of that obligation to pltf.'s injury is an act contrary to law.—SVAMI NAYUDU *v.* SUBRAMANIA MUDALI (1864), 2 Mad. 158.—**IND.**

33 xvii. ——.]—A party taking down a house adjoining that of another, is bound to take down the old house with reasonable & ordinary care; if he do it negligently or carelessly, he is responsible.—O'NEIL *v.* GRIER (1846, Bl. D. & Osb. 72.—**IR.**

33 xviii. ——.]—In an action for personal injuries arising from negligence alleged to have occurred on the premises of defts., the plaint must aver that the party injured was lawfully on the premises at the time, so as to show that some duty was owing to him by defts.—MCCABE *v.* GUINNESS (1876), I. R. 10 C. L. 21.—**IR.**

33 xix. ——.]—A proprietor held liable for the result of blasting operations performed in his own grounds without sufficient care to prevent injury to persons in adjoining grounds.—PATERSON *v.* LINDSAY (1885), 23 Sc. L. R. 180.—**SCOT.**

33 xx. ——.]—GAVIN *v.* ARROLL & CO. (1889), 16 R. (Ct. of Sess.) 509; 26 Sc. L. R. 370.—**SCOT.**

33 xxi. ——.]—*Held:* a stevedore was not liable for injuries sustained by one of his servants in consequence of defects in the ship upon which the stevedore was employed, there being no particular circumstances to lay the duty of inspection upon him.—SIMPSON *v.* BURRELL & SON & PATON (1896), 23 R. (Ct. of Sess.) 590.—**SCOT.**

33 xxii. ——.]—Negligence *per se* is not a ground of liability & can only infer liability where it has caused a breach of duty.—CLELLAND *v.* ROBB, [1911] S. C. 253.—**SCOT.**

33 xxiii. ——.]—M'LEOD *v.* ST. ANDREWS' MAGISTRATES, [1924] S. C. 960.—**SCOT.**

33 xxiv. ——.]—Where in conse-

for a negligent loss of the goods while under his charge.—GILBART *v.* DALE (1836), 5 Ad. & El. 543; 2 Har. & W. 383; 1 Nev. & P. K. B. 22; 6 L. J. K. B. 3; 111 E. R. 1270.

Annotation:—**Apld.** Mid. Ry. *v.* Bromley (1856), 17 C. B. 372.

34. ——.]—In case for an injury to pltf.'s reversionary interest by deft.'s obstruction of a watercourse on his land & thereby sending water upon & under the house & land in the occupation of pltf.'s tenant, deft. pleaded, that the obstruction was caused by the neglect of the pltf.'s tenant to repair a wall on the demised land, that in consequence it fell into the watercourse, & caused the damage, & that within a reasonable time after deft. had notice he removed it:—*Held:* to be a bad plea, it not showing any obligation on the tenant to repair the wall merely as terre-tenant. *Qu.:* whether it would have been good if it had.—BELL *v.* TWENTYMAN (1841), 1 Q. B. 766; 1 Gal. & Dav. 223; 10 L. J. Q. B. 278; 6 Jur. 366; 113 E. R. 1324.

Annotations:—**Distd.** Taylor *v.* Stendall (1845), 5 L. T. O. S. 214. **Refd.** Carstairs *v.* Taylor (1871), L. R. 6 Exch. 217; Humphries *v.* Cousins (1877), 2 C. P. D. 239; Goodhart *v.* Hyett (1883), 25 Ch. D. 182.

35. ——.]—A declaration in case stated, by way of inducement, that pltf. was possessed of a dwelling-house as tenant to deft., & that deft., at the request of pltf., promised to fit up a cellar for a wine cellar, with brick & stone binns; & then charged that it became the duty of deft. to use due care in fitting up the same, but that he did not, & that the slabs gave way, & broke pltf.'s wine bottles. It was proved that deft. did fit up a wine cellar with brick & stone binns; but that pltf. afterwards required more binns to be made, & deft. consented to have the partitions carried up to the roof of the cellar. The workmen, however, by pltf.'s directions, erected the new partitions upon the centre of the slabs which covered the binns first made, & the slabs then gave way. It was proved that those slabs would have been strong enough to bear the weight of empty bottles; but some of the witnesses thought not that of full bottles:—*Held:* under these circumstances no breach of duty was shown, deft. having only undertaken to fit up a wine cellar with brick & stone binns, & not one of any particular character.—RICHARDSON *v.* BERKELEY (1847), 10 L. T. O. S. 203.

36. ——.]—The declaration stated that defts. were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river, covered by ordinary tides, that the anchor had become removed into, & remained in, another part of the river covered by ordinary tides, not indicated, whereof defts. had notice, & although they had the means & power of refixing & securing the anchor, & indicating it, they neglected so to do, whereby pltfs.' vessel, whilst sailing in a part of the river ordinarily used by ships, ran foul of & struck against the anchor, & was thereby damaged, etc.:—*Held:* bad, for not showing that defts. were privy to the removal of the anchor, or that it was their duty to refix it & to indicate it.—HANCOCK *v.* YORK, NEWCASTLE & BERWICK RY. Co. (1850), 10 C. B. 348; 14 L. T. O. S. 467; 138 E. R. 140.

37. ——.]—Negligence creates no cause of action unless it expresses a breach of a duty (ERLE, C.J.).—DUTTON *v.* POWLES (1862), 2 B. & S. 191; 31 L. J. Q. B. 191; 6 L. T. 224; 8 Jur. N. S. 970; 10 W. R. 408; 1 Mar. L. C. 209; 121 E. R. 1043, Ex. Ch.

38. ——.]—Pltf., a carman, being sent by his employer to defts. for some goods, was directed by a servant of defts. to go to the counting house. In proceeding along a dark passage of defts. in the direction pointed out, pltf. fell down a staircase, & was injured:—*Held:* defts. were not guilty of any negligence; for if the passage was so dark that pltf. could not see his way, he ought not to have proceeded; & if, on the other hand, there was sufficient light, he ought to have avoided the danger.—WILKINSON *v.* FAIRRIE (1862), 1 H. & C. 633; 32 L. J. Ex. 73; 7 L. T. 599; 9 Jur. N. S. 280; 158 E. R. 1038.

Annotations:—**Apld.** Lewis *v.* Ronald (1909), 101 L. T. 534. **Refd.** Nicholson *v.* L. & Y. Ry. (1865), 34 L. J. Ex. 84: Indermaur *v.* Dames (1866), L. R. 1 C. P. 274; Paddock *v.* N.-E. Ry. (1886), 18 L. T. 60; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398.

39. ——.]—SKELTON *v.* LONDON & NORTH WESTERN RY. Co., No. 91, *post.*

40. ——.]—Pltfs., merchants at Valparaiso, received through defts. a telegram purporting to come from London & addressed to them, ordering a large shipment of barley. No such message was ever in fact sent to pltfs. The misdelivery of the message was caused by the negligence of defts., & occasioned heavy loss, to pltfs., in consequence of a fall in the market price of barley. In an action to recover the amount of this loss:—*Held:* there was no duty owing by defts. to pltfs. in the matter, either by contract or law, & therefore no action would lie.—DICKSON *v.* REUTER'S TELEGRAM CO. (1877), 3 C. P. D. 1; 37 L. T. 370; 42 J. P. 308; 26 W. R. 23; *sub nom.* DIXON *v.* REUTER'S TELEGRAPH CO., LTD., 47 L. J. Q. B. 1, C. A.

Annotations:—**Consd.** Cunnington *v.* G. N. Ry. (1883), 49 L. T. 392. **Dbtd.** Brown *v.* Low (1895), 72 L. T. 779. **Consd.** Starkey *v.* Bank of England, [1903] A. C. 114. **Refd.** Coventry, Sheppard *v.* G. E. Ry. (1883), 49 L. T. 641; Firbank's Exors. *v.* Humphreys (1886), 18 Q. B. D. 54; Edwards *v.* Porter, McNeall *v.* Hawes, [1923] 2 K. B. 538.

41. ——.]—In point of law no negligence can justify a thief or forger; it may be taken into consideration in punishing him, but it is impossible to say that any negligence can be a justification or excuse. If so, there can be no reason why pltf.'s should not take advantage of the fact that the cheque was stolen & forged, & recover. There is another ground upon which the plea is bad: there can be no negligence without neglect of some duty; there was no duty here, no relation between pltfs. & deft. which could cause any duty to exist from pltfs. to deft. (BRETT, L.J.).—PATENT SAFETY GUN COTTON CO. *v.* WILSON (1880), 49 L. J. Q. B. 713, C. A.

Annotation:—**Refd.** Morison *v.* London County & Westminster Bank (1913), 108 L. T. 379.

42. ——.]—It is undoubtedly correct to say that actionable negligence consists in the breach of some duty & that if a duty is not shown to exist there can be no negligence (WILLIAMS, J.).—GRAY *v.* NORTH EASTERN RY. Co. & WASHINGTON COLLIERY CO., TUCKER & CO. *v.* SAME (1883), 48 L. T. 904, D. C.

43. ——.]—HEAVEN *v.* PENDER, No. 9, *ante.*

44. ——.]—Pltf. in 1865 purchased certain Turkish bonds, which were drawn for payment in 1874. Not knowing that they had been so drawn, pltf. presented the coupons attached to his bonds at the office of defts., the contractors for the loan, regularly down to 1876, & they were duly cashed. The Turkish Govt. failed to furnish

quence of some positive act a duty is created to do some other act or exercise some special care so as to avoid injury to others, the person concerned is liable for damage caused to those to whom he owes such duty by an omission to discharge it.—HALLIWELL *v.* JOHANNESBURG MUNICIPAL COUNCIL, [1912] App. D. 659.—**S. AF.**

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defts. with any funds from 1876 for the payment of either the coupons or the bonds drawn for payment. Pltf., having subsequently discovered that his bonds ought to have been paid off in 1874, brought this action against defts., on the ground that they had been furnished with the money due to him from the Turkish Govt., & that they had negligently omitted to give him due notice of this fact. Defts. admitted that they had in 1874 had funds to pay off all bonds then drawn off, but it appeared that on a settlement of accounts between themselves & the Turkish Govt., made previously to the commencement of this action, they had repaid to the latter all moneys then in their hands, & which had been received by them for the service of the loan:—*Held:* pltf. was not entitled to recover, as defts. had been under no obligation to give him notice of the fact of his bonds having been drawn, & had only been bound to pay off any drawn bonds brought to them while they still held moneys for the service of the loan.—NORGROVE *v.* IMPERIAL OTTOMAN BANK (1885), 1 T. L. R. 381, D. C.

45. ——.]—THOMAS *v.* QUARTERMAINE, No. 10, *ante.*

46. ——.]—WAKELIN *v.* LONDON & SOUTH WESTERN RY. CO., No. 4, *ante.*

47. ——.]—Deft.'s horse, by the negligence of deft.'s servant, ran away with a cart, & turned from a highway into the yard of deft.'s house, which opened on to the highway. Pltf.'s wife, who happened to be paying a visit at deft.'s house, ran out into the yard to see what was the matter, when she was met & knocked down by the horse & cart, receiving serious injuries:—*Held:* as deft.'s servant was not bound to anticipate that pltf.'s wife would be in the yard, there was no duty on the part of deft. towards pltf.'s wife, & the action, therefore, was not maintainable.—TOLHAUSEN *v.* DAVIES (1888), 58 L. J. Q. B. 98; 5 T. L. R. 18, C. A.

Annotations:—**Consd.** Gayler & Pope *v.* Davies, [1924] 2 K. B. 75. **Refd.** Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272.

48. ——.]—Defts. owed no duty to pltf., by statute or by contract, but there was evidence of a course of conduct on the part of defts., which pltf. knew. Defts. interrupted that course of conduct, & pltf. in consequence met with an accident. There was no evidence that pltf. on the faith of the expectation that defts. would continue their course of conduct was misled by their discontinuance:—*Held:* defts. were not liable.

Qu.: if there had been evidence that pltf. had been so misled, defts. would have been liable.—LOADER *v.* LONDON & INDIA DOCKS JOINT COMMITTEE (1891), 56 J. P. 165; 8 T. L. R. 5, C. A.

49. ——.]—THOMPSON *v.* SCHMIDT, No. 128, *post.*

50. ——.]—Deft., who was a master lighterman, was employed to carry a cargo from a wharf to a ship for loading, for which purpose he supplied a barge. He sub-contracted with a third person to take his barge from the wharf to the ship & return it when unloaded.

Pltf., who was a stevedore's man, was employed by a master stevedore in unloading the barge. Stepping back to get clear of the crane which was hoisting the cargo, he fell backwards through the hatchway, which was uncovered, into the cabin of the barge. The accident occurred after dark. Deft. had not furnished the barge with a cover for the hatchway. Pltf. brought an action against deft. for compensation for the personal injury which he had sustained:—*Held:* the accident to pltf. did not directly result from any breach of duty on the part of deft., it being no part of his duty to see that the hatchway was kept covered; therefore the action failed.—O'NEIL *v.* EVEREST (1892), 61 L. J. Q. B. 453; 66 L. T. 396; 56 J. P. 612; 8 T. L. R. 426; 7 Asp. M. L. C. 163, C. A.

51. ——.]—LE LIEVRE *v.* GOULD, No. 26, *ante.*

52. ——.]—Pltf. suffered considerable losses through the negligence of deft., his agent & manager. The jury found that pltf. also was guilty of negligence which partly contributed to the loss:—*Held:* this was no answer to pltf.'s claim, as pltf. owed no duty to deft.—BECKER *v.* MEDD (1897), 13 T. L. R. 313, C. A.

53. ——.]—Wagons belonging to the Caledonian Ry. co. were filled with coal from pits on that ry. co.'s system, & delivered to the Glasgow & South Western Ry. co. at Dumfries Station, who had an agreement with the Gas Comrs. of Dumfries to haul the coal from the station to the gasworks. The station & the gasworks were connected by the Gas Comrs.' tramway line running along a public street. The Glasgow & South Western supplied the men & horses to haul the wagons, & once the wagons left the Caledonian co.'s system they were not under their control. In conducting the wagons into the gasworks, two wagons at a time were taken along the tramway; but owing to a descent & ascent, one of the wagons was as usual uncoupled at the top of the descent, & the other taken on at a sharp trot to rush the ascent. While this was being done an obstruction got in the way, & the first wagon had to be pulled up; but the brake of the second wagon refused to act, & the husband of resp., who was in the employ of the Glasgow & South Western Ry. co., was caught between the two wagons & killed. Resp. raised this action against both ry. cos., & the question was whether there was a relevant case made against the Caledonian Ry. co. There was no averment as to the state of the wagons before they left the Caledonian Ry. co.'s system:—*Held:* resp.'s averments did not show that there was any duty cast on the Caledonian Ry. co. in respect to any one using the wagons on behalf of the Glasgow & South Western Ry. co. to take care that the wagons were in proper order after the coal had been delivered at Dumfries Station & therefore the Caledonian Ry. co. must be dismissed from the action.—CALEDONIAN RY. CO. *v.* MULHOLLAND, [1898] A. C. 216; 67 L. J. P. C. 1; 46 W. R. 236; 14 T. L. R. 41; *sub nom.* CALEDONIAN RY. CO. *v.* WARWICK, 77 L. T. 570, H. L.

Annotations:—**Refd.** Marney *v.* Scott, [1899] 1 Q. B. 986; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533.

54. ——.]—Where there is a reckless statement of fact, intended to be acted on, made to another by a person who owed a duty to that other to take reasonable care, it is actionable if it causes damage (LORD ALVERSTONE, C.J.).—PRITTY *v.* CHILD (1902), 71 L. J. K. B. 512; 18 T. L. R. 460, D. C.

55. ——.]—Defts., who were the owners of premises, let them to a person, who sublet part to a co. Pltf.'s husband was the manager of the co., & he & his wife resided in part of the premises let to the co. They had the use of a lavatory in which there was a flush cistern affixed to the wall some feet from the floor. Pltf. & her husband complained that the cistern was unsafe & in a dangerous condition owing to the vibration caused by certain engines belonging to defts., which were upon

adjoining premises. Defts. thereupon sent their workmen, who fixed a bracket under the cistern to support it. Some months afterwards the bracket gave way & fell upon pltf., who was in the lavatory, & injured her. In an action to recover damages, the jury found that the bracket fell by reason of the working of the engines, which caused vibration amounting to a nuisance, that the bracket was negligently put up & was left in a dangerous condition:—*Held:* defts. owed no duty to her, & therefore she could not recover on the ground of negligence.—MALONE *v.* LASKEY, [1907] 2 K. B. 141; 76 L. J. K. B. 1134; 97 L. T. 324; 23 T. L. R. 399; 51 Sol. Jo. 356, C. A.

Annotations:—**Reld.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; White *v.* Steadman (1913), 109 L. T. 249.

56. ——.]—CARLISLE & CUMBERLAND BANKING CO. *v.* BRAGG, No. 181, *post.*

57. ——.]—Pltfs. made a contract with a firm of shipbuilders that the firm was to build for pltfs. a steamship in conformity with Lloyd's Rules & in accordance with a specification providing that it was to be 100 A1 with widely spaced hold pillars. The management committee of Lloyd's Register approved of the plans & supervised the building & gave a certificate that the vessel was of the 100 A1 class with widely spaced hold pillars. On her first voyage the foundations of some of the hold pillars gave way & the vessel was thereby injured. In an action by pltfs. against the chairman, deputy-chairman, & trustees of Lloyd's Register for damages for alleged breach of duty or negligence in passing the vessel as being in accordance with Lloyd's Rules when she was not:—*Held:* pltfs. had no contract with the defts., & defts. owed no duty to pltfs., & therefore pltfs. were not entitled to recover.

It was idle to talk of negligence unless the party charged with it was under some duty (SANKEY, J.).—AUSTRALIAN STEAM SHIPPING CO., LTD. *v.* DEVITT (1917), 33 T. L. R. 178.

58. ——.]—In an action for negligence & breach of duty, not for fraud, Statute of Frauds Amendment Act, 1828 (c. 14), does not apply, & an action may be maintained on a parol representation as to the credit of another person, if made negligently & in breach of a duty owing to pltf.

Applt., who was a customer of resp. bank, when on a visit to Canada, was given by the general manager of the bank a letter of introduction to the branch managers asking them, if he applied to them for assistance & advice, to place themselves at his disposal. He called upon G., who was the branch manager of the bank at V., & discussed the question of investments with him, & acting as he alleged, on the advice of G., he invested a large sum of money in an investment which turned out badly, & the money was lost. It was admitted that G.'s advice was given honestly. Applt. brought an action against the bank to recover the loss, & the jury found that G. had authority to advise him to make the investment, & the advice was negligently & unskilfully given, & judgment was entered for pltf. The Ct. of Appeal ordered judgment to be entered for the bank:—*Held:* although the point was not taken at the trial that there was no evidence that G. had authority to bind the bank, or that the bank owed any duty to pltf., it was open to defts. to raise the points in the Ct. of Appeal under R. S. C., Ord. 58, rr. 1, 4, & there was in fact no evidence of such authority or breach of duty.—BANBURY *v.* BANK OF MONTREAL, [1918] A. C. 626; 87 L. J. K. B. 1158; 119 L. T. 446; 34 T. L. R. 518; 62 Sol. Jo. 665, H. L.

Annotations:—**Reld.** Hearn *v.* Southern Ry. (1925), 41 T. L. R. 305. **Mentd.** Calmenson *v.* Merchants' Warehousing Co. (1920), 125 L. T. 129; Dey *v.* Mayo, [1920] 2 K. B. 346; Everett *v.* Griffiths, [1921] 1 A. C. 631.

59. ——.]—Defts. owned two floating docks called the East & West Floats. A boilermaker, who was working for a contractor on a ship lying in the East Float, left the ship at 4.45 on a December afternoon to go to the latrine & was never seen alive again. There was a dense fog at the time. His way from the ship to the latrine lay southward across a piece of ground bounded on the east & west by the two floats & on the south by the waterway connecting them & then over a bridge crossing the waterway, the latrine being at the south end of the bridge. A line of posts & chains was placed round the three sides of the land which were surrounded by water. The chains were taken down from time to time to afford access to the quay, but the dock officials had instructions to see that they were kept in position so far as practicable. The man's body was found in the West Float opposite to a point where there was a gap in the line of chains, the chain having been taken down for the convenience of some men working on the quay & having been left down for several days. The quay side of the West Float was nearly fifty yards out of the man's proper course. In an action by his widow under Fatal Accidents Act, 1846 (c. 93), against defts. for damages for the death of her husband:—*Held:* in the circumstances, the failure of defts. to keep the chain in position was not a breach of any duty owed by them to the deceased, & the action failed.

Semble: also, on the principle of *Wakelin* v. *London & South Western Ry. Co.*, No. 4, *ante*, assuming negligence, the trial judge was entitled to find that pltf. had not proved that the negligence was the cause of the death.

It is not disputed that deceased man came within the class [of invitees]. He came upon the dock property & passed to & from the vessel where he was engaged upon business which concerned both the dock co. & himself; & he was entitled, subject to using reasonable care on his part, to expect that the dock co. should use reasonable care to protect him from any unusual danger known to the co. & not known to or reasonably to be expected by him. It is important, to bear in mind the exact nature of the applt.'s duty to deceased. It was not to give him absolute protection in whatever part of the applt.'s premises he might be found, but only to use reasonable care for his safety while he was upon their land & acting in compliance with their invitation & this duty must be limited . . . to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so (LORD CAVE, C.).—MERSEY DOCKS & HARBOUR BOARD *v.* PROCTER, [1923] A. C. 253; 92 L. J. K. B. 479; 129 L. T. 34; 39 T. L. R. 275; 67 Sol. Jo. 400; 16 Asp. M. L. C. 123, H. L.

60. Applicable to recreation as well as to work—Accident at game of golf.]—Pltf., while she was carrying deft.'s golf clubs on a golf course, was struck with a golf club by deft. when she, deft., was demonstrating a stroke to pltf.'s brother, with whom deft. was playing. In an action for damages for personal injuries caused by negligence the jury found that deft. was guilty of negligence which brought about the accident, & that pltf. was not guilty of negligence & did not take the risk of such an accident by going on the course as a spectator, & they awarded pltf. damages:—

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Held: there was no reason why deft. should be excused merely because the accident took place in the course of recreation rather than of work, & as pltf. had not agreed, by going on the course as she did, to take the risk of being injured by negligence, pltf. was entitled to judgment.—CLEGHORN *v.* OLDHAM (1927), 43 T. L. R. 465.

Injuria absque damno.]—*See* ACTION, Vol. I., p. 29, Nos. 231, 232.

Damnum absque injuria.]—*See* ACTION, Vol. I., pp. 29–35, Nos. 233–274.

SUB-SECT. 2.—HOW ARISING.

61. Contract.]—Wherever there is a contract, & something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract.

In case, the declaration alleged that A. employed B. as a broker, to sell & deliver oil, on the terms contained in such contracts of sale as should be made with persons who should become purchasers thereof, for reasonable commission to B.: That B. accepted the employment, & sold oil to C. on the terms of payment on delivery: That it thereupon became the duty of B. not to deliver the oil without payment: That B. delivered the oil to C., but did not obtain payment, whereby pltf. was damnified:—*Held:* this declaration set forth a good cause of action: the duty of B. arose out of the contract.—BROWN *v.* BOORMAN (1844), 11 Cl. & Fin. 1; 8 E. R. 1003, H. L.; *affg.* S. C. *sub nom.* BOORMAN *v.* BROWN (1842), 3 Q. B. 511, Ex. Ch.

Annotations:—**Consd.** Courtenay *v.* Earle (1850), 10 C. B. 73. **Refd.** Howard *v.* Shepherd (1850), 9 C. B. 297; Marfell *v.* South Wales Ry. (1860), 8 C. B. N. S. 525; Dutton *v.* Powles (1861), 2 B. & S. 174; Baylis *v.* Lintott (1873), L. R. 8 C. P. 345; Hyman *v.* Nye (1881), 6 Q. B. D. 685; Steljes *v.* Ingram (1903), 19 T. L. R. 534. **Mentd.** Mid. Ry. *v.* Withington District L. B. (1883), 49 L. T. 489.

62. —— Breach may not amount to negligence.]—The case of *Brown* v. *Boorman*, No. 61, *ante*, does not decide that the neglect to perform a contract is in every case, a breach of duty for which an action of tort will lie.—COURTENAY *v.* EARLE (1850), 10 C. B. 73; 1 L. M. & P. 764; 20 L. J. C. P. 7; 15 Jur. 15; 138 E. R. 30.

Annotation:—**Apld.** Woods *v.* Finnis (1852), 7 Exch. 363.

63. —— ——.]—An action on the case will not lie for every neglect to perform a contract.—WOODS *v.* FINNIS (1852), 7 Exch. 363; 21 L. J. Ex. 138; 18 L. T. O. S. 331; 16 Jur. 936; 155 E. R. 988.

Annotations:—**Mentd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443; Hemming *v.* Hale (1859), 7 C. B. N. S. 487.

64. ——.]—A declaration stated that pltf., at deft.'s request, delivered to deft., then being a livery stable keeper, a horse of pltf., to be by him taken due & proper care of, & to be kept in a separate stall in deft.'s stable, for reward to deft. to be paid by pltf. in that behalf. Deft. accepted the care & custody of the said horse upon the terms aforesaid; yet he would not take due & proper, or any, care thereof, or keep it in a separate stall, & by means of the premises the horse was so kicked by other horses that it became of no value to pltf. Deft. pleaded "not guilty"; & at the trial a verdict was found for pltf., with £7 damages:—*Held:* the cause of action was founded on contract, not on tort.—LEGGE *v.* TUCKER (1856), 1 H. & N. 500; 26 L. J. Ex. 71; 28 L. T. O. S. 145; 2 Jur. N. S. 1235; 5 W. R. 78; 56 E. R. 1235.

Annotations:—**Refd.** Morgan *v.* Ravey (1861), 30 L. J. Ex. 131; Baylis *v.* Lintott (1873), L. R. 8 C. P. 345; Bryant *v.* Herbert (1878), 3 C. P. D. 189. **Mentd.** Turner *v.* Stallibrass (1897), 67 L. J. Q. B. 52.

65. ——.]—A declaration alleged that deft. at the time of the promise & negligence therein alleged, was the owner of a hackney cab at the time of the promise conducted by his servant; that pltf. at his request hired it of him, & deft. promised to convey pltf.'s luggage safely, but not regarding his duty or promise negligently lost the same:—*Held:* the action was founded on contract.—BAYLIS *v.* LINTOTT (1873), L. R. 8 C. P. 345; 42 L. J. C. P. 119; 28 L. T. 666.

Annotation:—**Refd.** Bryant *v.* Herbert (1878), 3 C. P. D. 189.

66. —— Implied promise.]—An innkeeper, though guilty of no negligence but even diligent, is liable for the loss or injury of the goods of his guest not arising from the negligence of the guest, the act of God, or the Queen's enemies.

Wherever a relation exists between two parties, which involves the performance of certain duties by one of them & the payment of reward to him by the other, the law will imply, or a jury may infer, a promise by each party to do what is to be done by him. Therefore an action may be maintained against the exors. of an innkeeper on his implied promise to keep safely & without diminution the goods of his guest. The exors. are also liable in "tort," the loss of the goods being a wrong committed within Civil Procedure Act, 1833 (c. 42), s. 2.—MORGAN *v.* RAVEY (1861), 6 H. & N. 265; 30 L. J. Ex. 131; 3 L. T. 784; 25 J. P. 376; 9 W. R. 376; 158 E. R. 109.

Annotations:—**Refd.** Baylis *v.* Lintott (1873), L. R. 8 C. P. 345; Herbert *v.* Markwell (1881), 45 L. T. 649; Medawar *v.* Grand Hotel Co., [1891] 2 Q. B. 11. **Mentd.** Batthyany *v.* Walford (1887), 36 Ch. D. 269; Robb *v.* Green, 2 Q. B. 1; Jackson *v.* Watson, [1909] 2 K. B. 193.

—— Must be privity of contract.]—*See* BUILDING CONTRACTS, Vol. VII., p. 449, Nos. 476–478; CONTRACT, Vol. XII., pp. 49, 50, Nos. 269–276.

67. Knowledge of risk.]—In an action for negligence in galvanising wire sent by pltf. to be galvanised by deft., it is no misdirection on the part of the judge if he tell the jury that if, when the wire was sent by pltf. to deft., it was in such a state that he could not galvanise it without spoiling it, it would be negligence on the part of deft. to galvanise it.—COMBE *v.* SIMMONDS (1853), 1 W. R. 289; *sub nom.* COOMB *v.* SYMONS, 1 C. L. R. 31.

Degree of care required.]—*See* Sub-sect. 3, *post.*

Sale of goods.]—*See* SALE OF GOODS.

Special relationships.]—*See* Part VI., *post.*

Statutory duties.]—*See* Part V., *post.*

Ownership, possession or control of property.] *See* Part II., *post.*

Proximity to property.]—*See* Part II., *post.*

Highways & vehicles.]—*See* Part III., *post.*

SUB-SECT. 3.—DEGREE OF CARE REQUIRED.

A. General Rules.

68. Ordinary care required.]—It is not expected that a man should use all possible diligence; if

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PART I. SECT. 2, SUB-SECT. 2.

61 i. *Contract.*]—HENCE *v.* STANDARD CHEMICAL CO. (1907), 2 E. L. R. 553.—**CAN.**

61 ii. ——.]—EARL *v.* REID (1911), 18 O. W. R. 562; 2 O. W. N. 873; 23 O. L. R. 453.—**CAN.**

PART I. SECT. 2, SUB-SECT. 3.—A.

68 i. *Ordinary care required.*]—A person sending goods to be warehoused has a right to expect that the

he used due fair diligence it is sufficient (LORD KENYON).—RIDLEY *v.* BLACKETT (1795), Peake, Add. Cas. 62 ; 170 E. R. 195, N. P.

69. ——.]—If negligence be an ingredient in such a case, the question for the jury is not whether, by using other trucks or keeping better watch, the loss might possibly have been prevented, but whether that ordinary & reasonable amount of care, prudence, & caution has been used which was usually resorted to in such cases by defts. & others similarly situated. Where negligence is sought to be imported into such a case it is allowable to defts. to show that they & other carriers have been accustomed to deal with such goods in the same manner & without loss for a great number of years. Negligence is not simply made out by proof that a loss has occurred which might by possibility & with extraordinary foresight & prudence have been avoided.—ROTHSCHILD *v.* ROYAL MAIL STEAM PACKET CO. (1851), 18 L. T. O. S. 334.

70. ——.]—STOOMVAART MAATSCHAPPY NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., No. 77, *post.*

71. ——.]—HEAVEN *v.* PENDER, No. 9, *ante.*

72. ——.]—SNOOK *v.* GRAND JUNCTION WATERWORKS CO., LTD., No. 3, *ante.*

73. Depends on circumstances.]—The principle as to negligence is, that a man must bring skill & precaution proportionate to the danger to the public in the employment he is engaged upon, & this is to be measured by all the circumstances, as, for instance, in the case of driving, with reference to the size & character of the horse, the nature of the vehicle, the place where, & the time when, he is driven.—HALL *v.* DAYRELL (1847), 8 L. T. O. S. 338.

74. ——.] — FORD *v.* LONDON & SOUTH WESTERN RY. CO., No. 17, *ante.*

75. What may be taken into consideration—General usage.]—It is not enough that they do what is usual if the course ordinarily pursued is imprudent & careless ; for no one can claim to be excused for want of care because others are as careless as himself ; on the other hand, in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business (COCKBURN, C.J.).—BLENKIRON *v.* GREAT CENTRAL GAS CONSUMERS CO. (1860), 2 F. & F. 437 ; *subsequent proceedings, sub nom.* BLENKIRON *v.* GREAT CENTRAL GAS CONSUMERS CO., STURGEON *v.* SAME, 3 L. T. 317.

76. —— ——.]—BRYANT *v.* NORTH METROPOLITAN TRAMWAYS CO. (1890), 6 T. L. R. 396, D. C.

Annotations :—**Mentd.** Clarke *v.* West Ham Corpn., [1914] 2 K. B. 448 ; Skeate *v.* Slaters, [1914] 2 K. B. 429.

B. Unusual Risks.

Dangerous goods or matter.]—*See* Part II., Sect. 5, *post.*

Dangerous employment.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 194 *et seq.*

Special relationship.]—*See* Part VI., *post.*

C. Imminence of Risk.

77. General rule.]—A man may not do the right thing, nay may even do the wrong thing, & yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care & use reasonable skill ; & I agree that when a man is suddenly & without warning thrown into a critical position, due allowance should be made for this, but not too much (LORD BLACKBURN).—STOOMVAART MAATSCHAPPY NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO. (1880), 5 App. Cas. 876 ; 43 L. T. 610 ; 29 W. R. 173 ; 4 Asp. M. L. C. 360, H. L.

Annotations :—**Consd.** The Benares (1883), 9 P. D. 16. **Refd.** Scicluna *v.* Stevenson, The Rhondda (1883), 8 App. Cas. 549 ; Woodley *v.* Michell (1883), 11 Q. B. D. 47 ; The Beryl (1884), 9 P. D. 137 ; Cayzer *v.* Carron Co. (1884), 9 App. Cas. 873 ; The Harton (1884), 50 L. T. 370 ; The Boynton (1898), 14 T. L. R. 173 ; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129. **Mentd.** The Main (1886), 11 P. D. 132 ; The Vallejo (1887), 4 T. L. R. 169 ; The Memnon (1888), 4 T. L. R. 501 ; S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670 ; The City of Berlin (1907), 98 L. T. 298.

78. Act involving risk to others—Self defence.]—Trespass & assault will lie for originally throwing a squib, which after having been thrown about in self-defence by other persons, at last put out the pltf.'s eye.

I look upon all that was done subsequent to the original throwing as a continuation of the first force & first act, which will continue till the squib was spent by bursting, & I think that any innocent person removing the danger from himself to another is justifiable. . . . I do not consider [them] as free agents in the present case, but acting under a compulsive necessity for their own safety & self-preservation (DE GREY, C.J.).—SCOTT *v.* SHEPHERD (1773), 2 Wm. Bl. 892 ; 3 Wils. 403 ; 96 E. R. 525.

Annotations :—**Consd.** Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131. **Refd.** Leame *v.* Bray (1803), 3 East, 593 ; Langridge *v.* Levy (1837), 6 L. J. Ex. 137 ; M'Laughlin *v.* Pryor (1842), 4 Scott, N. R. 655 ; Rich *v.* Basterfield (1846), 2 Car. & Kir. 257 ; Sharrod *v.* L. & N. W. Ry. (1849), 4 Exch. 580 ; The George & Richard (1871), L. R. 3 A. & E. 466 ; Sneesby *v.* L. & Y. Ry. (1874), L. R. 9 Q. B. 263 ; Holmes *v.* Mather (1875), 44 L. J. Ex. 176 ; Clark *v.* Chambers (1878), 3 Q. B. D. 327 ; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398 ; H.M.S. London, [1914] P. 72 ; Weld-Blundell *v.* Stephens, [1920] A. C. 956 ; Singleton Abbey (Owners) *v.* Paludina (Owners), The Paludina (1926), 95 L. J. P. 135. **Mentd.** Clifford *v.* Brooke (1806), 13 Ves. 131 ; Fitzsimons *v.* Inglis (1814), 5 Taunt. 534 ; Gilbertson *v.* Richardson (1848), 5 C. B. 502 ; Coward *v.* Baddeley (1859), 33 L. T. O. S. 125 ; Seymour *v.* Greenwood (1861), 6 H. & N. 259 ; Clark *v.* Hoskins (1868), 37 L. J. Ch. 561 ; R. *v.* Ashwell (1885), 16 Q. B. D. 190 ; Ruoff *v.* Long, [1916] 1 K. B. 148 ; Bradley *v.* Newsom, [1919] A. C. 16 ; Britannia Hygienic Laundry Co. *v.* Thornycroft (1926), 135 L. T. 83.

79. Act involving risk to doer — Choosing alternative danger.]—If through the default of a coach proprietor, in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned.

building in which they are placed shall be reasonably fit for the purpose, but he has no right to expect more than ordinary & average care in that respect, & it is only in the absence of such care on the warehouseman's part that he will be liable.—WILMOT *v.* JARVIS (1855), 12 U. C. R. 641.—**CAN.**

68 ii. ——.]—TORPY *v.* GRAND TRUNK RY. CO. (1861), 20 U. C. R. 446.—**CAN.**

73 i. *Depends on circumstances.*]—The motorman of an electric car is not necessarily guilty of negligence because he does not at once stop the car at the first notice that a horse is being frightened either at the car or at something else. All that can be expected is that the motorman shall proceed carefully, & it is in each case a question whether that has been done.—ROBINSON *v.* TORONTO RY. CO. (1901), 21 C. L. T. 370 ; 2 O. L. R. 18.—**CAN.**

73 ii. ——.]—ROSE *v.* CLARK (1911), 21 Man. L. R. 635.—**CAN.**

73 iii. ——.]—What are reasonable precautions depends upon the circumstances of each case.—STEVENS *v.* ABBOTSFORD LUMBER CO. (B. C.), [1923] 3 W. W. R. 349.—**CAN.**

PART I. SECT. 2, SUB-SECT. 3.—C.

77 i. *General rule.*]—It is not an act of negligence for a person not to risk his life in the presence of imminent danger.—PARKER *v.* NO. 1 TIN SYNDICATE, LTD., [1906] T. S. 576.—**S. AF.**

Sect. 2.—Duty to take care: Sub-sect. 3, C., D. (a) (b), & E. (a).]

It is for your [the jury's] consideration whether pltf.'s act was the measure of an unreasonably alarmed mind, or such as a reasonable & prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences (LORD ELLENBOROUGH).—JONES *v.* BOYCE (1816), 1 Stark. 493, N. P.

Annotations:—**Apld.** Wilson *v.* Newport Dock Co. (1866), L. R. 1 Exch. 177. **Consd.** Adams *v.* L. & Y. Ry. (1869), L. R. 4 C. P. 739; Murphy *v.* Palgreave (1869), 21 L. T. 209; The George & Richard (1871), L. R. 3 A. & E. 466 Robson *v.* N. E. Ry. (1875), L. R. 10 Q. B. 271. **Apprvd.** The City of Lincoln (1889), 15 P. D. 15. **Consd.** Dulieu *v.* White, [1901] 2 K. B. 669. **Apld.** Maclenan *v.* Segar, [1917] 2 K. B. 325; Brandon *v.* Osborne, Garrett, [1924] 1 K. B. 548. **Refd.** Wilkinson *v.* Downton, [1897] 2 Q. B. 57; Janvier *v.* Sweeney, [1919] 2 K. B. 316; Weld-Blundell *v.* Stephens, [1920] A. C. 956; Wilson *v.* United Counties Bank, [1920] A. C. 102; Singleton Abbey (Owners) *v.* Paludina (Owners), The Paludina (1926), 95 L. J. P. 135.

Whether amounting to contributory negligence.]—*See* Part XI., Sect. 4, *post.*

D. Knowledge or Notice of Risk.

(a) In General.

80. Creates a duty to take care.]—HEAVEN *v.* PENDER, No. 9, *ante.*

81. —— Extent of duty—Inquiry as to extent of risk.]—Reasonable care is not shown when after notice of danger at a particular spot, no inquiry is made as to its existence & extent, & no warning is given.—R. *v.* WILLIAMS (1884), 9 App. Cas. 418; 53 L. J. P. C. 64; 51 L. T. 546, P. C.

Annotations:—**Refd.** Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310; Scrutton *v.* A.-G. for Trinidad (1920), 90 L. J. P. C. 30.

82. —— —— Duty to give warning.]—R. *v.* WILLIAMS, No. 81, *ante.*

83. —— —— ——.]—If a person creates a dangerous condition of things in the nature of a concealed trap, whether in a public highway, or on private premises, either his own or those of another person, & sees some other person, who to his knowledge is unaware of the existence of the danger, lawfully exposing himself or about to expose himself to the danger which he has created,

PART I. SECT. 2, SUB-SECT. 3.—D. (a).

80 i. *Creates a duty to take care.]*—KINNEY *v.* MORLEY (1852), 2 C. P. 226.—**CAN.**

80 ii. ——.]—VAN WART *v.* NEW BRUNSWICK RY. CO. (1888), 27 N. B. R. 59.—**CAN.**

80 iii. ——.]—MCKENZIE *v.* LEWIS (1898), 31 N. S. R. 408.—**CAN.**

80 iv. ——.]—The construction of a roof with projecting eaves, which caused an accumulation of ice & snow thereon, is not *per se* evidence of negligence on the part of the owner, although it may impose upon him a greater degree of watchfulness & care in order to prevent accidents.—DUGAL *v.* PEOPLE'S BANK OF HALIFAX (1899), 34 N. B. R. 581.—**CAN.**

80 v. ——.]—SMITH *v.* NIAGARA & ST. CATHARINES RY. CO. (1905), 25 C. L. T. 34; 9 O. L. R. 158; 4 O. W. R. 526.—**CAN.**

80 vi. ——.]—CROUCH *v.* PERE MARQUETTE RY. CO. (1910), 22 O. W. R. 333; 13 Can. Ry. Cas. 247.—**CAN.**

80 vii. ——.]—TORONTO RY. CO. *v.* FLEMING (1913), 47 S. C. R. 612.—**CAN.**

80 viii. ——.]—STURGEON *v.* CANADA IRON CORPN., LTD. (1913), 24 O. W. R. 684; 4 O. W. N. 1386; 12 D. L. R. 500.—**CAN.**

80 ix. ——.]—OSKEY *v.* KINGSTON (1914), 32 O. L. R. 190; 20 D. L. R. 959; 7 O. W. N. 251.—**CAN.**

80 x. ——.]—The owner or occupant of a building, the roof of which is so constructed that from natural causes the snow or ice which falls or collects upon it will naturally & probably slide from the roof, is bound, apart from any obligation imposed upon him by a municipal bye-law, to take all reasonable means to prevent the snow or ice from falling upon adjoining property or an adjoining highway, & causing damage to person or property. — MEREDITH *v.* PEER (1917), 39 O. L. R. 271; 12 O. W. N. 97; 35 D. L. R. 592.—**CAN.**

80 xi. ——.]—Every person must be taken to know that horses are likely to consume grain to excess, if the opportunity to do so is afforded them; therefore, if it be left in such an unguarded condition as to permit of horses being attracted by it & eating it to their injury, the owner of the grain will be liable for the resulting damage, even though the horses are trespassers.—FULTON *v.* RANDALL, GEE & MITCHELL, LTD. (Alta.), [1918] 3 W. W. R. 331.—**CAN.**

80 xii. ——.]—BARR *v.* TORONTO RY. CO. & CITY OF TORONTO (1919), 46 O. L. R. 64; 46 D. L. R. 722; 16 O. W. N. 324.—**CAN.**

80 xiii. ——.]—In putting an awning on pltf.'s store front deft. with his arm knocked an iron rod off its fastening in the awning frame & broke a window:—*Held:* deft., knowing of the rod & its fastening & the probable result of its displacement, was bound to use due care not to displace it, & in hitting it with his arm he did not exercise the care which a reasonably prudent man would have exercised under the circumstances & was therefore negligent & liable in damages.—SPANOS *v.* WALTON (Sask.), [1920] 2 W. W. R. 99.—**CAN.**

80 xiv. ——.]—WHITTEN *v.* BURTWELL (1920), 47 O. L. R. 210; 18 O. W. N. 51.—**CAN.**

80 xv. ——.]—Where the driver of a motor car perceives a person crossing the path of the car, recognises that such person is in a meditative mood, & perceives that he looks neither to the right nor to the left, such driver must be more than ordinarily careful.—PERESZLUKI *v.* HOME BREWERIES, LTD. (Man.), [1923] 3 D. L. R. 1021; [1923] 2 W. W. R. 385.—**CAN.**

80 xvi. ——.]—Although perfectly competent persons employed in hazardous occupations frequently become so inured to the danger of their occupations as to neglect to take precautions which are reasonable & prudent, & are themselves prepared to & do run the risk so incurred, this is none the less negligence for which they will be liable if it results in damage to others.—MCKENNA *v.* CRAIG (1899), 18 N. Z. L. R. 529.—**N.Z.**

80 xvii. ——.]—KING *v.* POLLOCK (1874), 2 R. (Ct. of Sess.) 42; 12 Sc. L. R. 17.—**SCOT.**

80 xviii. ——.]—WATSON *v.* WORDIE & Co. (1906), 8 F. (Ct. of Sess.) 876; 43 Sc. L. R. 644; 14 S. L. T. 98.—**SCOT.**

80 xix. ——.]—While it is a duty of vehicles approaching a main road from a side road to give way to vehicles on the main road, this rule does not absolve vehicles on the main road from the duty of approaching the entrance to the side road with caution.—ROBERTSON *v.* WILSON, [1912] S. C. 1276.—**SCOT.**

80 xx. ——.]—BUCHANAN *v.* GLASGOW CORPN., [1919] S. C. 515.—**SCOT.**

80 xxi. ——.]—A driver on a main road is not absolved from the duty of taking care to avoid collision with a vehicle entering a main road from a side road.—HUTCHISON *v.* LESLIE, [1927] S. C. 95.—**SCOT.**

82 i. —— *Extent of duty—Duty to give warning.]*—LEFEBVRE *v.* TRETHEWEY SILVER COBALT MINE (1912), 22 O. W. R. 694; 3 O. W. N. 1535; 5 D. L. R. 195.—**CAN.**

82 ii. —— —— ——.]—A child employed by defts. in their factory had become accustomed to the movement of a press at which she worked, & her own movement had become mechanical. She was then put to work at a press moving at a different rate of speed, without instruction or warning, & not appreciating the need to alter her movement, was injured at the commencement of her new work:—*Held:* defts. were liable. — PICKARD *v.* DEUTCHER-CANADIER CO. (1912), 22 W. L. R. 817; 3 W. W. R. 579; 8 D. L. R. 888; 5 Alta. L. R. 395.—**CAN.**

82 iii. —— —— ——.]—
driver of a rapidly moving vehicle on a public highway is bound at common law to take reasonable precautions in time of darkness or fog to warn others, the natural & ordinary mode being by a light attached to the vehicle.—SANDERS *v.* CROLL (1921), 30 B. C. R. 284.—**CAN.**

82 iv. —— —— ——.]—WYLLIE *v.* CALEDONIAN RY. CO. (1871), 9 Macph. (Ct. of Sess.) 463; 43 Sc. Jur. 220.—**SCOT.**

82 v. —— —— ——.]—In an action of damages for running down an old woman in crossing a street:—*Held:* it is not enough for a driver of a vehicle to keep his own side & call out to a foot passenger who happens to be in the way. He must see that his warning is attended to & pull up if necessary in time.—CLERK *v.* PETRIE (1879), 6 R. (Ct. of Sess.) 1076; 16 Sc. L. R. 626.—**SCOT.**

82 vi. —— —— ——.]—A firm of ship repairers, employed to cut away a ventilator on a ship, used an oxy-acetylene burner which sent out quantities of sparks & particles of molten metal. The ventilator, which had not been plugged, communicated with a hold where inflammable cargo was stowed. The cargo caught fire, & damage was also done to the ship:—*Held:* it was the duty of the repairers, who alone understood the risk attending the use of their machine, to take precautions against fire, or to warn the shipowners of the danger.—NAUTILUS S.S. CO. *v.* HENDERSON, [1919] S. C. 605.—**SCOT.**

he is under a duty to give such person a warning, & that duty arises quite independently of the occupation of the premises, or of any invitation or licence.—KIMBER *v.* GAS LIGHT & COKE CO., [1918] 1 K. B. 439 ; 87 L. J. K. B. 651 ; 118 L. T. 562 ; 82 J. P. 125 ; 34 T. L. R. 260 ; 62 Sol. Jo. 329 ; 16 L. G. R. 280, C. A.

84. —— Warning of danger given — Previous mishap from same cause.]—A tradesman had in his house, between the shop & the back door, a dangerous opening. Whilst A. was in his shop as a customer the shop was closed for the night, & he directed her to go out by the back door ; in doing so she fell down the hole. Another person had before fallen down, & deft. had, just before the accident, been cautioned as to the danger :—*Held :* he was liable for the injury to A.—CLAPSON *v.* ALLEN (1853), 20 L. T. O. S. 212.

85. —— Culpable neglect to obtain knowledge.]—If knowledge of the existence of a cause of mischief makes persons responsible for the injury it occasions, they will be equally responsible when, by their culpable negligence, its existence is not known to them.—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW (1866), L. R. 1 H. L. 93 ; 11 H. L. Cas. 35 L. J. Ex. 225 ; 14 L. T. 677 ; 30 J. P. 467 ; 12 Jur. N. S. 571 ; 14 W. R. 872 ; 2 Mar. L. C. 353 ; 11 E. R. 1500, H. L. ; *affg.* S. C. *sub nom.* GIBBS *v.* LIVERPOOL DOCKS TRUSTEES (1858), 3 H. & N. 164, Ex. Ch. & S. C. *sub nom.* MERSEY DOCKS & HARBOUR BOARD *v.* PENHALLOW (1861), 7 H. & N. 329, Ex. Ch.

Annotations :—**Consd.** Forbes *v.* Lee Conservancy Board (1879), 4 Ex. D. 116. **Apld.** Fleming *v.* Manchester Corpn. (1881), 44 L. T. 517 ; Dormont *v.* Furness Ry. (1883), 11 Q. B. D. 496 ; R. *v.* Williams (1884), 9 App. Cas. 418. **Distd.** The Moorcock (1889), 14 P. D. 64. **Consd.** Gibraltar Sanitary Comrs. *v.* Orfila (1890), 15 App. Cas. 400. **Apld.** The Bearn, [1906] P. 48 ; Queens of the River S.S. Co. *v.* Easton, Gibb & River Thames Conservators (1907), 96 L. T. 901. **Refd.** Ruck *v.* Williams (1858), 3 H. & N. 308 ; Southampton & Itchin Bridge & Co. *v.* Southampton L. B. (1858), 8 E. & B. 801 ; Walker *v.* Goe (1859), 4 H. & N. 350 ; Metcalfe *v.* Hetherington (1860), 5 H. & N. 719 ; Holiday *v.* St. Leonard Shoreditch, Vestry (1861), 11 C. B. N. S. 192 ; Brownlow *v.* Metropolitan Board of Works (1862), 13 C. B. N. S. 768 ; Thompson *v.* N. E. Ry. (1862), 2 B. & S. 119 ; Waller *v.* S. E. Ry. (1863), 32 L. J. Ex. 205 ; Stiles *v.* Cardiff Steam Navigation Co. (1864), 33 L. J. Q. B. 310 ; Coe *v.* Wise (1866), L. R. 1 Q. B. 711 ; A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146 ; Foreman *v.* Canterbury Corpn. (1871), L. R. 6 Q. B. 214 ; Winch *v.* Thames Conservators (1874), L. R. 9 C. P. 378 ; White *v.* Hindley L. B. (1875), L. R. 10 Q. B. 219 ; Harris *v.* G. W. Ry. (1876), 1 Q. B. D. 515 ; Lowther *v.* Curwen (1887), 58 L. T. 168 ; Tucker *v.* Axbridge Highway Board (1888), 53 J. P. 87 ; Crossfield *v.* Manchester Ship Canal Co. (1903), 19 T. L. R. 398 ; Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310 ; Tozeland *v.* West Ham Union, [1907] 1 K. B. 920 ; McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118 ; Papworth *v.* Battersea B. C., (1914), 79 J. P. 105 ; Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788 ; The Ella, [1915] P. 111 ; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899 ; Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Walter Nelson, [1918] 2 K. B. 381 ; Baker *v.* James, [1921] 2 K. B. 674 ; Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213 ; The Devon (1923), 130 L. T. 448 ; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746 ; British Petroleum Co. *v.* A.-G. for Ceylon, [1926] A. C. 147. **Mentd.** Whitehouse *v.* Fellowes (1861), 10 C. B. N. S. 765 ; Ohrby *v.* Ryde Comrs. (1864), 5 B. & S. 743 ; Worral Waterworks Co. *v.* Lloyd (1866), L. R. 1 C. P. 719 ; Birch *v.* Marylebone Vestry (1869), 17 W. R. 1014 ; Clowes *v.* Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 125 ; A.-G. & Dommes *v.* Basingstoke Corpn. (1876), 24 W. R. 817 ; Goslin *v.* Agricultural Hall Co. (1876), 1 C. P. D. 482 ; Holborn Union Grdns. *v.* St. Leonard Shoreditch, Vestry, (1876), 2 Q. B. D. 145 ; Weir *v.* Barnett (1877), 3 Ex. D. 32 ; Hill *v.* Metropolitan Asylum District Managers (1879), 4 Q. B. D. 433 ; Jersey *v.* Uxbridge R. S. A., [1891] 3 Ch. 183 ; R. *v.* Selby Dam Drainage Comrs., [1892] 1 Q. B. 348 ; Taff Vale Ry. *v.* Amalgamated Soc. of Railway Servants, [1901] A. C. 426 ; Hackney Corpn. *v.* Lee Conservancy Board, [1904] 2 K. B. 541 ; Hillyer *v.* St. Bartholomew's Hospital Governors, [1909] 2 K. B. 820.

86. —— ——.]—Pltfs.' steamer, while navigating the river Thames near Kew Bridge, was damaged by a baulk of timber which had been at one time apparently used as a pile, & which was afterwards found to have its blunt end stuck in the bed of the river & its pointed end slanting upwards & only a few inches below the surface of the water :—*Held :* upon the facts, assuming that a duty lay upon the Thames Conservators to keep the river Thames free from obstructions to navigation, there was no evidence that the conservators had been guilty of any neglect of such duty causing the damage to pltfs.' steamer. —QUEENS OF THE RIVER S.S. CO., LTD. *v.* EASTON GIBB & CO. & RIVER THAMES CONSERVATORS (1907), 96 L. T. 901 ; 23 T. L. R. 478 ; 10 Asp. M. L. C. 542 ; 12 Com. Cas. 278, C. A.

(b) Particular Instances.

Animals.]—*See* ANIMALS, Vol. II., pp. 224, 236–247, 297, Nos. 161, 238–306, 672.

Carriers.]—*See* CARRIERS, Vol. VIII., pp. 88–91, 135–137, Nos. 604–617, 894–900.

Level crossings.]—*See* RAILWAYS.

—— Shipping cases.]—*See* SHIPPING.

Defective machinery.]—*See* Part II., Sect. 5, sub-sect. 3, B., C., *post.*

Sale of goods—Dangerous or defective goods.]—*See* Part II., Sect. 5, *post ;* SALE OF GOODS.

Defective vehicles.]—*See* Part III., Sect. 9, sub-sect. 2, *post ;* BAILMENT, Vol. III., pp. 86–88, Nos. 203–212 ; CARRIERS, Vol. VIII., pp. 75–77, Nos. 514–526.

Lessee of part of premises—Floor of premises overloaded.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 354, No. 4968.

Dangerous premises abutting on highway.]—*See* HIGHWAYS, Vol. XXVI., p. 433, Nos. 1517–1519.

Works of gas companies.]—*See* GAS, Vol. XXV., pp. 482, 483, Nos. 74, 79.

Lessee of ferry.]—*See* FERRIES, Vol. XXIV., p. 977, No. 101.

E. Profession of Special Skill.

(a) In General.

87. Duty to exercise skill.]—The public profession of an art is a representation & undertaking to all the world that the professor possesses the requisite skill & ability. When a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.—HARMER

PART I. SECT. 2, SUB-SECT. 3.—E. (a).

87 i. *Duty to exercise skill.*]—Pltf. contracted with defts. to do certain work for them in connection with the erection of a mill. In the performance of the work contracted for pltf. failed to properly fasten down the pent stock, & ordered the mill to start without this being done, as the result of which the floor lifted & the pinion & crown wheel cogs came out of gear & the arms of the crown wheel were broken :—*Held :* under the circumstances the pltf. was liable in damages for injuries resulting from his negligent & unskilful workmanship.—BRUHM *v.* FORD (1900), 33 N. S. R. 323.—**CAN.**

87 ii. ——.]—*Held :* defts. were liable for actionable negligence, as they had failed to exercise the high degree of skill, care & foresight required of persons engaging in operations of a dangerous nature.—ROYAL ELECTRIC CO. *v.* HÉVÉ (1902), 32 S. C. R. 462 ; 22 C. L. T. 358.—**CAN.**

87 iii. ——.]—Goods were sent to a finisher to be finished by a process admittedly delicate, & attended with some amount of risk. They were returned injured :—*Held :* the finisher, by accepting the employment, undertook to perform the work without injury to the goods, & he could only exonerate himself by proving that the injury was due to some defect in the goods, or incapacity to undergo the process.—HINSHAW & CO. *v.* ADAM & (1870), 8 Macph. (Ct. of Sess.) 933. —**SCOT.**

Sect. 2.—Duty to take care: Sub-sect. 3, E. (a) & F. & G. Sect. 3: Sub-sect. 1.]

v. CORNELIUS (1858), 5 C. B. N. S. 236; 28 L. J. C. P. 85; 32 L. T. O. S. 62; 22 J. P. 724; 4 Jur. N. S. 1110; 6 W. R. 749; 141 E. R. 94.

Annotations:—**Refd.** Cuckson *v.* Stones (1859), 1 E. & E. 248. **Mentd.** Andrews *v.* Garstin (1861), 10 C. B. N. S. 444.

88. —— With reasonable care & diligence.]—Professional men possessed of a reasonable portion of information & skill, according to the duties they undertake to perform, & exercising what they so possess with reasonable care & diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion. Every case, ought to depend upon its own peculiar circumstances, & when an injury has been sustained which could not have arisen except from the want of such reasonable skill & diligence, or the absence of either, the law holds the attorney liable (*per* CUR.).—HART *v.* FRAME (1839), 6 Cl. & Fin. 193; Macl. & Rob. 595; 3 Jur. 547; 9 E. R. 218, H. L.

Annotations:—**Distd.** Fletcher *v.* Jubb, Booth & Helliwell, [1920] 1 K. B. 275. **Refd.** Purves *v.* Landell (1845), 12 Cl. & Fin. 91.

(b) Particular Instances.

89. Barber—Use of insanitary appliances.]—Pltf. in an action of negligence alleged that he had contracted an infectious disease through the negligence of deft., a barber, in using razors & other appliances in a dirty & insanitary condition. In support of his case he tendered the evidence of two witnesses who deposed that they had contracted a similar disease in deft.'s shop:—*Held:* as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by deft., the evidence of these witnesses was admissible.—HALES *v.* KERR, [1908] 2 K. B. 601; 77 L. J. K. B. 870; 99 L. T. 364; 24 T. L. R. 779.

90. Trade protection society.]—Persons forming themselves into a society for the protection of trade, & issuing prospectuses in which they represented that they instituted inquiries for subscribers with reference to the respectability of proposed customers:—*Held:* liable to subscribers for neglect to take due & reasonable care to make such inquiries.—WOOD *v.* WOODS (1862), 3 F. & F. 244, N. P.

Accountants.]—*See* AGENCY, Vol. I., p. 433, No. 1243.

Agents.]—*See* AGENCY, Vol. I., pp. 429–437, 524–526; Nos. 1214–1274, 1841–1853.

—— **House agents.]**—*See* AGENCY, Vol. I., pp. 425, 429, 430–435, Nos. 1186, 1214, 1262, 1263.

—— **Insurance agents.]**—*See* INSURANCE, Vol. XXIX., pp. 78–82, Nos. 374–412.

—— **Parliamentary agents.]**—*See* PARLIAMENT, p. 277, No. 254, *post.*

—— **Patent agents.]**—*See* PATENTS.

Architects & engineers.]—*See* BUILDING CONTRACTS, Vol. VII., pp. 435–439, 440, 443, Nos. 413–425, 428, 439, 440.

Arbitrators.]—*See* ARBITRATION, Vol. II., p. 429, Nos. 791–796.

Artificers & workmen.]—*See* WORK & LABOUR.

[illegible] AUCTIONEERS,

Auditors.]—*See* AGENCY, Vol. I., pp. 433, 434, Nos. 1250, 1251.

Bailees.]—*See* BAILMENT, Vol. III., pp. 72 *et seq.*

Barristers.]—*See* BARRISTERS, Vol. III., pp. 337, 338, Nos. 268–273.

Brokers.]—*See* AGENCY, Vol. I., pp. 392, 434, 435, Nos. 956, 1252–1259.

—— **Insurance brokers.]**—*See* INSURANCE, Vol. XXIX., pp. 78–82.

—— **Stockbrokers.]**—*See* STOCK EXCHANGE.

Carriers.]—*See* CARRIERS, Vol. VIII., pp. 71–97.

Chemists.]—*See* MEDICINE & PHARMACY, Vol. XXXIV., p. 560, No. 198.

Directors of companies.]—*See* COMPANIES, Vol. IX., pp. 468–470, Nos. 3056–3074.

Education authorities.]—*See* EDUCATION, Vol. XIX., pp. 556, 557, Nos. 17–24.

Medical practitioners.]—*See* MEDICINE & PHARMACY, Vol. XXXIV., pp. 548, 549, Nos. 67–73.

—— **Certification of lunatics.]**—*See* LUNATICS, Vol. XXXIII., pp. 265–267, Nos. 1850–1856.

Public authorities.]—*See* PUBLIC AUTHORITIES; PUBLIC HEALTH.

Schoolmasters.]—*See* EDUCATION, Vol. XIX., pp. 606, 607, Nos. 314–317.

Shipping.]—*See* SHIPPING.

Solicitors.]—*See* SOLICITORS.

Telegraph companies.]—*See* TELEGRAPHS & TELEPHONES.

Valuers.]—*See* VALUERS & APPRAISERS.

F. Gratuitous Services.

91. General rule.]—Defts. were owners of a railway, crossed by a footpath on a level; there were gates on the footpath on each side of the line, which were fastened by rings attached to the posts. The rings were connected with a lever fixed in an adjoining signal box, & by means of the lever the rings could be raised so as to enable foot passengers to open the gates, or let down so as to keep the gates securely closed. Defts. gave instructions to the pointsmen in the signal box to let down the rings when a train was passing & to raise them at other times. These instructions had been generally, not invariably, followed, for two years. A., who was well acquainted with the spot, had occasion to cross the line by the footpath in question. On his arriving at the gate the ring was up, but a goods train was standing on the line immediately in front of the gate. A. waited till the goods train had passed & then crossed the line, & in so doing was killed on the further line by a down train. From the centre of the line A. could have seen three hundred yards up the line, but he crossed without looking up or down the line. In an action brought under Fatal Accidents Act, 1846 (c. 93), to recover compensation for the death of A.:—*Held:* (1) there was no evidence of negligence on the part of defts., or, at all events, there was such evidence of contributory negligence on the part of A. as to justify a non-suit; (2) the rings by which the gates were secured were used by defts. as a precaution & not as a signal, & no action is maintainable for the omission to perform a voluntary duty altogether, although, if such duty is performed, an action may lie for gross negligence in the performance of it.

If a person undertakes to perform a voluntary Act, he is liable if he performs it improperly but not if he neglects to perform it (WILLES, J.).—SKELTON *v.* LONDON & NORTH WESTERN RY. CO. (1867), L. R. 2 C. P. 631; 36 L. J. C. P. 249; 16 L. T. 563; 15 W. R. 925.

Annotation:—*Generally*, **Consd.** Dublin, Wicklow, & Wexford Ry. *v.* Slattery (1878), 3 App. Cas. 1155.

92. ——.]—A person who provides anything for the use of another is bound to provide a thing reasonably safe for the purpose for which it is intended, even though the person using it, uses it only by the permission or consent of the person providing it & has no legal claim to the use of it.—SHRIMPTON *v.* HERTFORDSHIRE COUNTY COUNCIL

(1911), 104 L. T. 145 ; 75 J. P. 201 ; 27 T. L. R. 251 ; 55 Sol. Jo. 270 ; 9 L. G. R. 397, H. L.
Annotation :—**Consd.** Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775.

Agents.]—*See* AGENCY, Vol. I., pp. 436, 437, 600, Nos. 1269–1274, 2317, 2318.

Bailees.]—*See* BAILMENT, Vol. III., pp. 59–70.

93. Carriers.]—LYGO *v.* NEWBOLD, No. 307, *post.*

94. ——.]—KARAVIAS *v.* CALLINICOS, [1917] W. N. 323, C. A.

——.]—*See, also,* CARRIERS, Vol. VIII., pp. 10, 11, 94, 95, Nos. 40–44, 637, 638, & Nos. 398, 399, *post.*

Solicitors.]—*See* SOLICITORS.

Steward of horse race.]—*See* GAMING & WAGERING, Vol. XXV., p. 462, No. 494.

Trustees.]—*See* TRUSTS & TRUSTEES.

G. Other Cases.

95. Building hay stack—Probability of ignition.]—Case lies against a man for negligently & improperly keeping a stack of hay put together in such a state as to be likely to ignite, & which eventually does ignite & his neighbour's premises are injured.

At the trial the judge told the jury that the question for them to consider, was, not whether deft. had acted according to the best of his skill & judgment in the adoption of measures calculated to avert the threatened danger, but whether he had acted with such a reasonable degree of caution as a prudent & careful man might have been expected to exercise ; & that, if they thought deft. had not acted with reasonable care & prudence, but had been guilty of gross negligence, pltf. was entitled to a verdict :—*Held :* this direction was substantially correct.—VAUGHAN *v.* MENLOVE (1837), 3 Bing. N. C. 468 ; 3 Hodg. 51 ; 4 Scott, 244 ; 6 L. J. C. P. 92 ; 1 Jur. 215 ; 132 E. R. 490.
Annotations :—**Consd.** Canterbury *v.* R. (1843), 1 Ph. 306. **Distd.** Smith *v.* Konrick (1849), 7 C. B. 515. **Refd.** Filliter *v.* Phippard (1847), 11 Q. B. 347 ; Blyth *v.* Birmingham Waterworks Co. (1856), 11 Exch. 781 ; Musgrove *v.* Pandelis, [1919] 2 K. B. 43.

96. Defective fire plug on water main.]—BLYTH *v.* BIRMINGHAM WATERWORKS CO., No. 1, *ante.*

97. Water escape from main.]—BLYTH *v.* BIRMINGHAM WATERWORKS CO., No. 1, *ante.*

98. Sewer—Escape of sewer gas.]—The duty of defts. is to take all ordinary precautions. No sewage authority is ever shown to have had reason to apprehend danger from the cause [escape of sewer gas] which occurred in this case, or to have ever used the precautions suggested. I am of opinion there is no evidence of negligence (CAVE, J.).—DIGBY *v.* EAST HAM URBAN DISTRICT COUNCIL (1896), 13 T. L. R. 11.

99. —— Construction causing subsidence.]—Defts. having contracted with the London County Council to construct a sewer along Rockingham Street, Walworth, in the county of Surrey, opened up a long trench for that purpose in close proximity to pltfs.' buildings. A serious subsidence of pltfs.' land having taken place, & the walls & buildings belonging to pltfs. being greatly injured, in an action brought against defts. for negligence : —*Held :* the damage to pltfs.' premises had been caused by defts.' works, defts. had not exercised reasonable care & skill in the execution of the works, & the injury was occasioned to pltfs.' premises by the negligence of defts. in carrying out the works.—LONDON GENERAL OMNIBUS CO., LTD., *v.* TILBURY CONTRACTING & DREDGING CO. (1906), LTD. (1907), 71 J. P. 534.

100. Building abutting on highway—Passer by injured by falling implement—Liability as between contractor & sub-contractor.]—Defts. were builders & contractors who after the outside of a house was finished had removed the outer hoarding & had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor in walking, shook a plank which caused a tool to fall out of a window of the house, & the tool in falling injured pltf. who was passing along the highway. The jury found that the hoarding had been properly removed, but that the injury was caused by the negligence of defts. in not providing some other protection for the public :—*Held :* (1) defts. were entitled to judgment, for there was no evidence that the falling of the tool was a probable accident which might reasonably have been foreseen, so as to make it the duty of defts. to provide against it ; (2) if it was the duty of any one to supply protection against the consequences of the falling of the tool, it was the duty of the sub-contractor & not of defts.—PEARSON *v.* COX (1877), 2 C. P. D. 369 ; 36 L. T. 495 ; 42 J. P. 117, C. A.
Annotation :—**Refd.** Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817.

101. Dangerous obstruction in street—Malicious act of third party.]—Where the proximate cause of the raising of an iron plate, lid, or covering of a water apparatus in a street of the Metropolis, above the level of the pavement so as to be a dangerous obstruction by sticking up, is the malicious act of a third person against which precautions would have been inoperative, the Metropolitan Water Board is not liable to any one thrown down by it & hurt, in the absence of a finding that the occurrence could or ought to have been foreseen & provided against. Although bound to exercise all reasonable care the Board is not, in the absence of such a finding, responsible for damage caused by the malicious acts of third persons. — SIMPSON *v.* METROPOLITAN WATER BOARD (1917), 15 L. G. R. 629.

As between particular classes of persons.]—*See* Part VI., *post.*

Fences & party walls.]—*See* Part II., Sects. 6, 7.

Shipping.]—*See* SHIPPING.

Wharves & docks.]—*See* SHIPPING ; WATERS & WATERCOURSES.

SECT. 3.—MALFEASANCE, MISFEASANCE, AND NONFEASANCE.

SUB-SECT. 1.—MALFEASANCE.

102. Distinction between malfeasance & non feasance—Misconduct of solicitor—Jurisdiction of court.]—The ct. will not, in the exercise of its summary jurisdiction over solrs., call upon a solr. to account for moneys received by him, where they were received by him not in the character of solr. to the person making the application, but of solr. to another person.

PART I. SECT. 2, SUB-SECT. 3.—G.

a. *Machinery on road—Frightening horses.*]—LAWSON *v.* ALLISTON VILLAGE (1890), 19 O. R. 655.—**CAN.**

b. *Storing perishable goods.*]—CHARREST *v.* MANITOBA COLD STORAGE CO. (1908), 6 W. L. R. 762 ; 8 W. L. R. 110 ; 17 Man. L. R. 539.—**CAN.**

c. *Cutting channel through ice.*]—PENNOCK *v.* MITCHELL (1908), 12 O. W. R. 767 ; 17 O. L. R. 286.—**CAN.**

d. *Firearms.*]—Sportsmen carrying firearms must use a high degree of care, especially near populous centres, in order to avoid liability for negligence.—WHALEN *v.* BOWERS, [1925] 3 D. L. R. 442 ; [1925] 1 W. W. R. 686 ; 35 B. C. R. 128.—**CAN.**

e. *Education authority—Supervision over blind children.*]—GOW *v.* GLASGOW EDUCATION AUTHORITY, [1922] S. C. 260.—**SCOT.**

Sect. 3.—*Malfeasance, misfeasance, and nonfeasance: Sub-sects.* 1 & 2, *A.* & *B.* (*a*) & (*b*) *i.*]

D. was solr. to pltf. in a cause, & also to the receiver, & the receiver was in the habit of remitting the rents to him:—*Held:* D. must be considered to have received the rents as solr. as agent of the receiver, & pltf. could not call upon him to account for them under the summary jurisdiction.

The ct. has jurisdiction to charge solrs. with losses sustained by their clients from their misconduct in the prosecution of suits. . . . The ct. has constantly exercised this jurisdiction in cases of malfeasance. . . . Whether this jurisdiction, which undoubtedly exists in cases of malfeasance, extends to cases of mere neglect, I think it is unnecessary for us in this case to decide, but I am not satisfied that in principle any sound distinction can be drawn between cases of malfeasance & cases of nonfeasance (TURNER, L.J.).—DIXON *v.* WILKINSON (1859), 4 De G. & J. 508; 33 L. T. O. S. 321; 5 Jur. N. S. 1063; 7 W. R. 624; 45 E. R. 198, L. JJ.

Annotations:—**Consd.** *Re* Dangar's Trusts (1889), 41 Ch. D. 178. **Refd.** British Mutual Investment Co. *v.* Cobbold (1875), L. R. 19 Eq. 627.

103. Liability for original malfeasance—Injury through intervention of third party — Erecting barrier across road.]—Deft., who was in the occupation of certain premises abutting on a private road consisting of a carriage & footway, which premises he used for the purposes of athletic sports, had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises & overlooking the sports. In the middle of this barrier was a gap which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that deft. had no legal right to erect this barrier. Some person, without deft.'s authority, removed a part of the barrier armed with spikes, commonly called *chevaux de frise*, from the carriage way where deft. had placed it, & put it in an upright position across the footpath. Pltf., on a dark night, was lawfully passing along the road on his way from one of the houses to which it led. He felt his way through the opening in the middle of the barrier & getting on to the footpath was proceeding along it when his eye came in contact with one of the spikes of the *chevaux de frise* & was injured. It was not suggested that pltf. was guilty of any negligence contributing to the accident & the jury found that the use of the *chevaux de frise* in the road was dangerous to the safety of the persons using it:—*Held:* deft. having unlawfully placed a dangerous instrument in the road was liable in respect of injuries occasioned by it to pltf., who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriage way, where deft. had placed it, to the footpath.—CLARK *v.* CHAMBERS (1878), 3 Q. B. D. 327; 47 L. J. Q. B. 427; 38 L. T. 454; 42 J. P. 438; 26 W. R. 613.

Annotations:—**Consd.** Ruoff *v.* Long, [1916] 1 K. B. 148; Glasgow City Corpn. *v.* Taylor, [1922] 1 A. C. 44. **Refd.** Tolhausen *v.* Davies (1888), 59 L. T. 436; A.-G. *v.* Tod-Heatly & Brownrigg (1897), 76 L. T. 174; Bull *v.* Shoreditch Corpn. (1902), 67 J. P. 37; McDowall *v.* G. W. Ry. [1902] 1 K. B. 618; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Weld-Blundell *v.* Stephens, [1920] A. C. 956. **Mentd.** The Bernina (2) (1887), 12 P. D. 58; Coldrick *v.* Partridge, Jones (1909), 78 L. J. K. B. 452; Cory *v.* Franco, Fenwick, [1911] 1 K. B. 114; The San Onofre, [1922] P. 243.

SUB-SECT. 2.—MISFEASANCE AND NONFEASANCE.

A. Definition.

104. Misfeasance—Improper mode of performing legal act.]—Deft. contracted with a local board of health to dig wells for them, according to a specification prepared by the surveyor: the works to be done to the satisfaction of such surveyor; & the digging to be done entirely under his direction: the surveyor to have power, if he considered the materials or works improper, of making the contractor remove them, or of removing them at the contractor's expense; & of ordering the dismissal of workmen with whom he should be dissatisfied, or of dismissing them himself: the board to have the power of making alterations & additions. Deft. was sued for having left a hole, excavated in working one of the wells in a highway, without light by night; whereby pltf., who was driving a carriage along the way, fell into the hole, & was bruised, & his carriage injured.

The action is brought for an improper mode of performing the work. How can that be called a nonfeasance? It is doing unlawfully what might be done lawfully. . . . The action here is for doing what was positively wrong (LORD CAMPBELL, C.J.).—NEWTON *v.* ELLIS (1855), 5 E. & B. 115; 3 C. L. R. 1253; 24 L. J. Q. B. 337; 25 L. T. O. S. 140; 19 J. P. 805; 1 Jur. N. S. 850; 3 W. R. 476; 119 E. R. 424.

Annotations:—**Consd.** Poulsum *v.* Thirst (1867), L. R. 2 C. P. 449. **Refd.** Jolliffe *v.* Wallasey L. B. (1873), L. R. 9 C. P. 62. **Mentd.** Arthy *v.* Coleman (1857), 30 L. T. O. S. 101; Ward *v.* Lee (1857), 3 Jur. N. S. 557; Williams *v.* Golding (1865), L. R. 1 C. P. 69.

105. —— Includes nonfeasance — If equivalent to negligence amounting to breach of trust.]—Misfeasance includes such nonfeasance as is negligence amounting to a breach of trust.—*Re* LIVERPOOL HOUSEHOLD STORES ASSOCN., LTD. (1890), 59 L. J. Ch. 616; 62 L. T. 873; 2 Meg. 217.

Annotations:—**Refd.** *Re* North Australian Territory Co., Archer's Case, [1892] 1 Ch. 322. **Mentd.** Finch *v.* Oake (1896), 60 J. P. 309.

106. —— Negligent performance of statutory duty—By public body.]—Defts., a local authority, affixed to a wall in a street which was not repairable by the inhabitants at large a plate intended to indicate the position of a fire plug in the water main & marked "F.P. 22 ft. 3 in."; in fact, a line drawn straight from the plate across the street for the required distance crossed the water main at a spot 6 feet 10 inches away from the place where the fire plug was inserted in the main. A fire broke out on pltfs.' premises, which were a short distance from the plug; the fire brigade were quickly in attendance, but there was considerable delay owing to their inability to find the exact position of the fire plug, as a result of which delay the fire assumed greater dimensions & caused more damage than it would otherwise have done:—*Held:* in putting up an indication plate which was in fact misleading, defts. were guilty of an act of misfeasance, & not of nonfeasance only, & they were therefore liable to pltfs. for the extra loss caused by the fire as damages for breach of their statutory duty.—DAWSON & Co. *v.* BINGLEY URBAN COUNCIL, [1911] 2 K. B. 149; 80 L. J. K. B. 842; 104 L. T. 659; 75 J. P. 289; 27 T. L. R. 308; 55 Sol. Jo. 346; 9 L. G. R. 502, C. A.

Annotations:—**Consd.** McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118. **Mentd.** Fraser *v.* Fear (1912), 107 L. T. 423; Ryall *v.* Kidwell, [1913] 3 K. B. 123; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 2 K. B. 832.

107. Nonfeasance — Non-performance of duty — Created by contract.]—That there is a large class of

cases in which the formation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently like *assumpsit* or case upon tort, is not disputed. . . . In many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance. . . . The contract creates a duty & the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort (TINDAL, C.J.).—BOORMAN *v.* BROWN (1842), 3 Q. B. 511; 2 Gal. & Dav. 793; 11 L. J. Ex. 437; 114 E. R. 603, Ex. Ch.; *affd. sub nom.* BROWN *v.* BOORMAN (1844), 11 Cl. & Fin. 1, H. L.

Annotations:—**Refd.** Courtenay *v.* Earle (1850), 10 C. B. 73; Howard *v.* Shepherd (1850), 9 C. B. 297; Dutton *v.* Powles (1861), 2 B. & S. 174; Hyman *v.* Nye (1881), 6 Q. B. D. 685. **Mentd.** Marfell *v.* South Wales Ry. (1860), 8 C. B. N. S. 525; Baylis *v.* Lintott (1873), L. R. 8 C. P. 345; Mid. Ry. *v.* Withington District L. B. (1883), 49 L. T. 489; Steljes *v.* Ingram (1903), 19 T. L. R. 534.

108. —— May be equivalent to misfeasance.]—SHOREDITCH CORPN. *v.* BULL, No. 202, *post.*

B. Distinction between.

(*a*) *In General.*

109. Whether material—Where remedy for injury alternative—Action for breach of contract or for tort.]—BROWN *v.* BOORMAN, No. 61, *ante.*

110. Distinction difficult.]—BOORMAN *v.* BROWN, No. 107, *ante.*

111. Acts of directors of company.]—If directors of a co. do acts in a matter in which they have no authority, those acts are null & void; but if they neglect the acts which are within their authority, & which they ought to perform, neither a ct. of law nor of equity will allow them afterwards to take advantage of their own neglect.—BARGATE *v.* SHORTRIDGE (1855), 5 H. L. Cas. 297; 3 Eq. Rep. 605; 24 L. J. Ch. 457; 25 L. T. O. S. 204; 3 W. R. 423; 10 E. R. 914, H. L.; *affg.* S. C. *sub nom.* SHORTRIDGE *v.* BOSANQUET (1852), 16 Beav. 84.

Annotations:—**Refd.** Eastern Counties Ry. *v.* Hawkes (1855), 5 H. L. Cas. 331; *Re* Royal British Bank, *Ex p.* Walton & Hue (1857), 5 W. R. 637; Prince of Wales Assce. *v.* Harding (1858), E. B. & E. 183; Fountaine *v.* Carmarthen Ry. (1868), L. R. 5 Eq. 316; *Re* Land Credit Co. of Ireland, *Ex p.* Overend, Gurney (1869), 4 Ch. App. 460; Murray *v.* Bush (1873), L. R. 6 H. L. 37. **Mentd.** Burmester *v.* Norris, (1851), 21 L. J. Ex. 43; *Re* Newcastle-upon-Tyne Marine Insce. (1), *Ex p.* Brown (1854), 19 Beav. 97; Newcastle-upon-Tyne Marine Insce. Co. (2), *Ex p.* Henderson (1854), 19 Beav. 107; Horn *v.* Kilkenny & G. S. & W. Ry. (1855), 3 Eq. Rep. 812; Green *v.* Nixon (1857), 23 Beav. 530; Prince of Wales Assce. Soc. *v.* Athenæum Assce. Soc. (1858), 3 C. B. N. S. 756, n.; *Re* Mitre Assce., Eyre's Case (1862), 31 Beav. 177; *Re* British Provident, etc. Assce. Soc., Grady's Case (1863), 1 De G. J. & Sm. 488; *Re* British Provident, etc., Assce. Soc., Lane's Case (1863), 3 New Rep. 50; Woodhams *v.* Anglo-Australian, etc. Co. (1864), 2 De G. J. & Sm. 162; *Re* Barned's Banking Co., *Ex p.* Contract Corpn. (1867), 36 L. J. Ch. 732; *Re* Smith, Knight, Weston's Case (1868), 4 Ch. App. 20; Spackman *v.* Evans (1868), L. R. 3 H. L. 171; Escott *v.* Gray (1878), 47 L. J. Q. B. 606; Moffatt *v.* Farquhar (1878), 7 Ch. D. 591.

(*b*) *Application of Distinction.*

i. *Gratuitous Services.*

112. Liability for nonfeasance.]—If H. undertake to do a thing without hire, no action lies for the nonfeasance: but if he enters upon the doing it, action lies for a misfeasance, if through his own neglect or mismanagement, because it is a deceit; but not if by mere accident.—COGGS *v.* BERNARD (1703), 1 Salk. 26; 1 Com. 133; Holt, K. B. 13; 2 Ld. Raym. 909; 3 Salk. 11; 91 E. R. 25.

Annotations:—**Apld.** Elsee *v.* Gatward (1793), 5 Term Rep. 143; Gibson *v.* Inglis (1814), 4 Camp. 72. **Consd.** Blakemore *v.* Bristol & Exeter Ry. (1858), 8 E. & B. 1035; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317; Nugent *v.* Smith (1875), 1 C. P. D. 19. **Apld.** Foulkes *v.* Met. Dist. Ry. (1880), 28 W. R. 526. **Consd.** Banbury *v.* Bank of Montreal, [1918] A. C. 626. **Refd.** Shelton *v.* Osborn (1729), 1 Barn. K. B. 260; Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Pippin *v.* Sheppard (1822), 11 Price, 400; Whitehead *v.* Greetham (1825), 2 Bing. 464; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; Boorman *v.* Brown (1842), 3 Q. B. 511; Ross *v.* Hill (1846), 2 C. B. 877; G. N. Ry. *v.* Shepherd (1852), 8 Exch. 30; Balfe *v.* West, [1853] 13 C. B. 466; Dansey *v.* Richardson (1854), 3 E. & B. 144; MacCarthy *v.* Young (1861), 6 H. & N. 329; Peninsular & Oriental Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272; R. *v.* Mid. Ry. (1867), 31 J. P. 661; Skelton *v.* L. & N. W. Ry. (1867), L. R. 2 C. P. 631; Readhead *v.* Mid. Ry. (1869), L. R. 4 Q. B. 379; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Hoare *v.* G. W. Ry. (1877), De Colyar's County Court Cases 192; Bergheim *v.* G. E. Ry. (1878), 3 C. P. D. 221; Cutler *v.* North London Ry. (1887), 56 L. T. 639; The Moorcock (1889), 14 P. D. 64; Shaw *v.* G. W. Ry., [1894] 1 Q. B. 373; The Winkfield, [1902] P. 42; Harris *v.* Perry, [1903] 2 K. B. 219; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; The Empress (1923), 92 L. J. P. 42; Pratt *v.* Patrick, [1924] 1 K. B. 488; **Mentd.** Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes. Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Kettle *v.* Bromsall (1738), Willes, 118; Hartop *v.* Hoare (1743), 3 Atk. 44; Ryall *v.* Rolle (1749), 1 Atk. 165; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Corbett *v.* Packington (1827), 6 B. & C. 268; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; *Ex p.* Cording (1832), 4 B. & Ad. 198; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Crouch *v.* L. & N. W. Ry. (1854), 14 C. B. 255; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338; Harris *v.* G. W. Ry. (1876), 1 Q. B. D. 515; Cheshire *v.* Bailey, [1905] 1 K. B. 237; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858; Attenborough *v.* Solomon, [1913] A. C. 76; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 765; Coldman *v.* Hill, [1919] 1 K. B. 443; Ellis' Trustee *v.* Dixon-Johnson, [1924] 2 Ch. 451.

113. ——.]—(1) A count in a declaration stating that pltf. retained deft., who was a carpenter, to repair a house before a given day, that deft. accepted the retainer, but did not perform the work within the time, *per quod* the walls of pltf.'s house were damaged, cannot be supported.

No consideration results from his situation as a carpenter, nor from the undertaking: . . . deft. has merely told a falsehood, & has not performed his promise; but for his non-performance of it no action can be supported. This is warranted by LORD HOLT'S opinion in *Coggs* v. *Bernard*, No. 112, *ante* (LORD KENYON, C.J.).

(2) A count stating that pltf., being possessed of some old materials, retained deft. to perform the carpenters' work on certain buildings of pltf., & to use those old materials, but that deft., instead of using those, made use of new ones, thereby increasing the expense, may.

The second count may be supported . . . having entered upon the contract, he was bound to perform it; & not having performed it in the manner proposed, an action lies against him (LORD KENYON, C.J.).—ELSEE *v.* GATWARD (1793), 5 Term Rep. 143; 101 E. R. 82.

Annotations:—*As to* (1) **Refd.** Bourne *v.* Diggles (1814), 2 Chit. 311. *Generally*, **Refd.** Balfe *v.* West (1853), 13 C. B. 466. **Mentd.** Bates *v.* Cort (1823), 3 Dow. & Ry. K. B. 676.

114. ——.]—A person gratuitously undertaking the duties of steward of a horse race is not liable for negligent nonfeasance in not appointing a judge, unless it appears that he commenced to perform the duties of the office.—BALFE *v.* WEST (1853), 13 C. B. 466; 1 C. L. R. 225; 22 L. J. C. P. 175; 21 L. T. O. S. 90; 1 W. R. 335; 138 E. R. 1281.

Annotation:—**Refd.** Cooper *v.* Shuttleworth (1856), 25 L. J. Ex. 114.

Sect. 3.—*Malfeasance, misfeasance, and nonfeasance: Sub-sect.* 2, *B.* (*b*) *i. & ii. Sect.* 4: *Sub-sects.*

115. Liability for misfeasance.]—COGGS *v.* BERNARD, No. 112, *ante*.

116. ——.]—ELSEE *v.* GATWARD, No. 113, *ante*.

117. ——.]—BALFE *v.* WEST, No. 114, *ante*.

Gratuitous bailment.]—*See* BAILMENT, Vol. III., pp. 59 *et seq.*

Public authorities.]—*See* PUBLIC AUTHORITIES.

ii. *Failure to Exercise Statutory Powers or to Perform Statutory Duties.*

See HIGHWAYS, Vol. XXVI., pp. 398 *et seq.*; PUBLIC AUTHORITIES; STATUTES; & Titles *passim*.

SECT. 4.—EFFECTIVE CAUSE.

SUB-SECT. 1.—IN GENERAL.

118. Question for jury.]—Deft. negligently left his horse & cart unattended in the street. Pltf., a child seven years old, got upon the cart in play; another child incautiously led the horse on; & pltf. was thereby thrown down & hurt:—*Held:* (1) deft. was liable in an action on the case, though pltf. was a trespasser, & contributed to the mischief by his own act; (2) it was properly left to the jury, whether deft.'s conduct was negligent, & the negligence caused the injury; (3) the cooperation of third parties in the injury was not a ground of defence, if the means of injury were negligently left when it was extremely probable that they would be set in motion.

(4) The legal proposition, that one who has by his own negligence contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications. Indeed LORD ELLENBOROUGH'S doctrine in *Butterfield* v. *Forrester*, No. 745, *post*, which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim for redress: ordinary care must mean that degree of care which may reasonably be expected from a person in pltf.'s situation: & this would evidently be very small indeed in so young a child. . . . But the question remains, can pltf. then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart & deserted horse, then we think that deft. cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real & only cause of the mischief. He has been deficient in ordinary care: the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of deft. which produced it (LORD DENMAN, C.J.).—LYNCH *v.* NURDIN (1841), 1 Q. B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L. J. Q. B. 73; 5 J. P. 319; 5 Jur. 797; 113 E. R. 1041.

Annotations:—*As to* (1) **Distd.** Lygo *v.* Newbold (1854), 9 Exch. 302; Caswell *v.* Worth (1856), 5 E. & B. 849; Hughes *v.* Macfie, Abbott *v.* Same (1863), 3 New Rep. 394. **Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327. **Distd. & Dbtd.** Mann *v.* Ward (1892), 8 T. L. R. 699. **Distd.** Ponting *v.* Noakes, [1894] 2 Q. B. 281. **Consd.** Cooke *v.* Midland, Great Western Ry. of Ireland, [1909] A. C. 229. **Distd.** Lowery *v.* Walker (1909), 79 L. J. K. B. 297; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Hardy *v.* C. L. Ry., [1920] 3 K. B. 459. **Refd.** Barnes *v.* Ward (1850), 9 C. B. 392; Alsop *v.* Yates (1858), 27 L. J. Ex. 156; Singleton *v.* Eastern Counties Ry. (1859), 7 C. B. N. S. 287; Waite *v.* N. E. Ry. (1859), E. B. & E. 728; Mangan *v.* Atterton (1866), 4 H. & C. 388; Francis *v.* Cockerell (1870), 10 B. & S. 950; Ruoff *v.* Long (1915), 114 L. T. 186. *As to* (2) **Refd.** Engelhart *v.* Farrant, [1897] 1 Q. B. 240. *As to* (3) **Consd.** McDowall *v.* G. W. Ry., [1902] 1 K. B. 618. **Distd.** Rickards *v.* Lothian, [1913] A. C. 263. **Refd.** Crane *v.* South Suburban Gas Co., [1916] 1 K. B. 33. *As to* (4) **Apprvd.** Harrold *v.* Watney, [1898] 2 Q. B. 320. **Apld.** Glasgow City Corpn. *v.* Taylor, [1922] 1 A. C. 44. *Generally*, **Refd.** Davis *v.* Mann (1842), 7 J. P. 53; Degg *v.* Mid. Ry. (1857), 1 H. & N. 773; Barker *v.* Herbert, [1911] 2 K. B. 633; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

119. ——.]—In an action for negligence, it appeared that pltf. was a passenger on an omnibus which was racing with deft.'s omnibus, &, in trying to avoid a cart, a wheel of deft.'s omnibus came in contact with the step of the omnibus on which pltf. was riding, which caused the latter to swing towards the kerbstone, & the speed rendering it impossible to pull up, the seat on which pltf. sat struck against a lamppost, & he was thrown off:—*Held:* the jury were properly directed, that pltf. was not disentitled to recover merely because the omnibus on which he sat was driving at a furious rate; &, if the jury thought that the collision took place from the negligence of deft.'s omnibus, so that the other omnibus was not in fault in not endeavouring to avoid the accident deft. was liable.

Every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct; & I think that, in the situation of these parties, any distinction which I might be disposed to draw in an extreme case, does not arise in the one which is now before the ct. (POLLOCK, C.B.).—RIGBY *v.* HEWITT (1850), 5 Exch. 240; 19 L. J. Ex. 291; 155 E. R. 103; *sub nom.* RIGLEY *v.* HEWITT, 15 L. T. O. S. 185.

Annotations:—**Consd.** Greenland *v.* Chaplin (1850), 5 Exch. 243; Cory *v.* France, Fenwick, [1911] 1 K. B. 114. **Refd.** Hoey *v.* Felton (1861), 11 C. B. N. S. 142; The Bernina (2) (1887), 12 P. D. 58; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560. **Mentd.** Lynch *v.* Knight (1861), 5 L. T. 291.

120. ——.]—Pltf. having been engaged by wharfingers to land bags of guano, at so much a ton, & carry them into a warehouse, where they were piled by their day labourers, & pltf. having been injured by the fall of some of the bags through bad piling:—*Held:* it was for the jury, in an action by him against the wharfingers, whether the piling was done by their men under a separate & distinct employment, & if so, whether the fall of the bags

PART I. SECT. 4, SUB-SECT. 1.

118 i. *Question for jury.*]—*Held:* to run a train, part of which was admittedly not under control, in the way stated over a public crossing, was negligence, or at all events was clearly a question for the jury, & they having decided it to be negligence, there was no reason for interfering with their verdict.—MCLEOD *v.* WINDSOR & ANNAPOLIS RY. CO. (1890), 23 N. S. R. 69.—**CAN.**

118 ii. ——.]—MISENER *v.* WABASH RY. CO. (1906), 12 O. L. R. 71; 7 O. W. R. 651.—**CAN.**

118 iii. ——.]—JACOB *v.* TORONTO RY. CO. (1912), 22 O. W. R. 180; 3 O. W. N. 1255; 3 D. L. R. 818.—**CAN.**

118 iv. ——.]—ELLIS *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1914), 28 W. L. R. 901; 20 D. L. R. 82.—**CAN.**

118 v. ——.]—CAMMACK *v.* NEW BRUNSWICK POWER CO. (N. B.) (1922), 70 D. L. R. 697.—**CAN.**

118 vi. ——.]—The question arising out of a collision of vehicles at an intersection, namely, whose negligence caused the collision, is a question of fact rather than of law.—HANLEY *v.* HAYES, [1925] 3 D. L. R. 782; 55 O. L. R. 361.—**CAN.**

118 vii. ——.]—BARRY *v.* RUBENSTEIN (N. B.), [1926] 1 D. L. R. 445.—**CAN.**

was caused by their negligence, or that of their men & pltf. combined, & in the former case the verdict should be for pltf.; in the latter case, for defts.—FLETCHER *v.* PETO (1862), 3 F. & F. 368, N. P.

121. ——.]—There is no rule of law to prevent a master being liable for negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damage complained of. Whether the original negligence was an effective cause of the damage is a question of fact in each case.

If a stranger interferes it does not follow that deft. is liable; but equally it does not follow that because a stranger interferes deft. is not liable if the negligence of a servant of his is an effective cause of the accident (LORD ESHER, M.R.).—ENGELHART *v.* FARRANT & CO., [1897] 1 Q. B. 240; 66 L. J. Q. B. 122; 75 L. T. 617; 45 W. R. 179; 13 T. L. R. 81, C. A.

Annotations:—**Apld.** McDowall *v.* G. W. Ry., [1903] 2 K. B. 331; Harris *v.* Fiat Motors (1906), 22 T. L. R. 556; Ricketts *v.* Tilling, [1915] 1 K. B. 644. **Refd.** Latham *v.* Johnson, & Nephew, [1913] 1 K. B. 398; Norman *v.* G. W. Ry., [1914] 2 K. B. 153; Jefferies & Atkey *v.* Derbyshire Farmers (1920), 36 T. L. R. 825; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

122. Act of two or more parties — Measure of liability.]—RIGBY *v.* HEWITT, No. 119, *ante*.

123. —— ——.]—A person who is guilty of negligence, & thereby produces injury to another, cannot set up as a defence, that part of the mischief would not have arisen if the person injured had not himself been guilty of some negligence.

Therefore, where pltf., a passenger on board a steamboat, was injured by the falling of an anchor, caused by the deft.'s steamboat striking the other steamboat:—*Held:* it was improper to direct the jury, that, if they thought the collision was owing to the bad navigation of deft.'s steamboat they should find for pltf., unless there was negligence, either in the stowage of the anchor or in pltf. putting himself in the place where he was, so as to lead or contribute to the mischief; in which case pltf. could not recover.

I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought to be set up as an answer to the action (POLLOCK, C.B.).—GREENLAND *v.* CHAPLIN (1850), 5 Exch. 243; 19 L. J. Ex. 293; 15 L. T. O. S. 185; 155 E. R. 104.

Annotations:—**Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327; The Bernina (2) (1887), 12 P. D. 58; Cory *v.* France, Fenwick, [1911] 1 K. B. 114. **Refd.** *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560.

124. —— ——.]—Defts., a gas co., contracted to supply pltf. with a proper service pipe to convey gas from the main outside, to a meter inside, his premises. Gas escaped, from the pipe laid down under the contract, into pltf.'s shop. The servant of a gasfitter employed by pltf. happened to be at work in another room at the time of the escape, & went into the shop upon hearing of it, with a view of finding out its cause. He was carrying a lighted candle in his hand, & immediately on entering the shop an explosion took place, doing damage to pltf.'s premises & stock. On the trial of an action against defts. to recover for the injury sustained, the jury found, (*a*) that the escape of gas was occasioned by a defect in the pipe, & that that defect existed in the pipe when supplied, &, (*b*) that there was negligence on the part of the gasfitter's servant in carrying a lighted candle. Upon these findings:—*Held:* pltf. was entitled to recover, & defts. were not relieved from responsibility by the negligent act of the gasfitter's servant.

If a man sustain an injury from the separate negligence of two persons employed on his premises to do two separate things . . . he can, in my opinion, maintain an action against both or either of the wrongdoers (KELLY, C.B.).—BURROWS *v.* MARCH GAS CO. (1870), L. R. 5 Exch. 67; 39 L. J. Ex. 33; 22 L. T. 24; 18 W. R. 348; *affd.* (1872), L. R. 7 Exch. 96, Ex. Ch.

Annotations:—**Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327. **Distd.** Sayer *v.* Hatton (1885), Cab. & El. 492. **Refd.** Lilley *v.* Doubleday (1881), 7 Q. B. D. 510; Henderson *v.* Newcastle & Gateshead Gas Co. (No. 1) (1893), 37 Sol. Jo. 403; Mowbray *v.* Merryweather, [1895] 2 Q. B. 640; Weld-Blundell *v.* Stephens, [1920] A. C. 956; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560.

—— **Collision of ships.**]—*See* SHIPPING.

SUB-SECT. 2.—INJURY MUST BE RESULT OF NEGLIGENCE.

A. In General.

See, generally, DAMAGES, Vol. XVII., pp. 93 *et seq.*

125. General rule.]—Where a work of a public character, as a canal, has been constructed under the authority of an Act of Parliament, a right of action for an injury not occasioned wilfully, nor by an act necessarily causing it, but arising from the user of the work, as, for instance, through the overflow of the water in the canal, must be founded on negligence; & negligence is of the essence of the action; & although the jury have given a general verdict for pltf., & it has been proved that the proximate cause of the injury was an act of defts.' servants, as raising a flood-gate; yet, if it is doubtful whether that act necessarily must have caused the injury, & the jury also find that there was no negligence, the verdict will be entered for defts.—WHITEHOUSE *v.* BIRMINGHAM CANAL CO. (1857), 27 L. J. Ex. 25.

Annotations:—**Refd.** Hipkins *v.* Birmingham & Staffordshire Gaslight Co. (1860), 1 L. T. 303; Hammond *v.* St. Pancras Vestry (1874), L. R. 9 C. P. 316; Stretton's Derby Brewery Co. *v.* Derby Corpn., [1894] 1 Ch. 431.

126. ——.]—WAKELIN *v.* LONDON & SOUTH WESTERN RY. CO., No. 4, *ante*.

127. ——.]—With reference to the question of negligence on the part of defts., there might have

PART I. SECT. 4, SUB-SECT. 2.—A.

125 i. *General rule.*]—IRVINE *v.* CANADIAN BANK OF COMMERCE (1874), 23 C. P. 509.—**CAN.**

125 ii. ——.]—KEITH *v.* INTERCOLONIAL COAL MINING CO. (1885), 6 R. & G. 226; 6 C. L. T. 446.—**CAN.**

125 iii. ——.]—In an action by the Crown for damages arising out of an accident alleged to be due to the negligence of a contractor in the performance of his contract for the construction of a public work, before a contractor can be held liable the evidence must show beyond reasonable doubt that the accident was the result of his negligence.—R. *v.* POUPORE (1897), 6 Exch. C. R. 4.—**CAN.**

125 iv. ——.]—It is not negligence *per se* for the engine driver or conductor of a train to exceed the rate of speed prescribed by the time-table of the railway.—COLPITTS *v.* R. (1899), 6 Exch. C. R. 254.—**CAN.**

125 v. ——.]—CANADIAN PACIFIC RY. CO. *v.* SMITH (1901), 31 S. C. R. 367.—**CAN.**

125 vi. ——.]—JEWISON *v.* HASSARD (1916), 34 W. L. R. 904; 10 W. W. R.

125 vii. ——.]—HONESS *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1917), 34 B. C. R. 90; 36 D. L. R. 301.—**CAN.**

125 viii. ——.]—EVANS *v.* SOUTH VANCOUVER DISTRICT & RICHMOND TOWNSHIP (B. C.), [1918] 3 W. W. R. 487.—**CAN.**

125 ix. ——.]—MCCAFFRY *v.* CANADIAN PACIFIC RY. CO., [1924] 2 D. L. R. 213; [1924] 1 W. W. R. 1083; 30 Can. Ry. Cas. 65.—**CAN.**

125 x. ——.]—RETALLICK *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1925), 35 B. C. R. 165; [1925] 1 W. W. R. 885.—**CAN.**

125 xi. ——.]—PALMER *v.* BATEMAN, [1908] 2 I. R. 393.—**IR.**

125 xii. ——.]—HOLLOWAY *v.* LAMB, [1924] N. Z. L. R. 913.—**N.Z.**

Sect. 4.—Effective cause: Sub-sect. 2, A.]

been great negligence on their part, but such negligence was not the efficient cause of the loss. In order to make defts. liable the negligence must have caused the loss (LORD COLERIDGE, C.J.).—CRAPP *v.* EAST STONEHOUSE LOCAL BOARD (1889), 5 T. L. R. 501, C. A.

128. ——.] — The effect of Lunacy Act, 1890 (c. 5), s. 20, is to vest an absolute discretion in the constable, relieving officer, or overseer with regard to the duty imposed upon him by that sect. Deft. was a medical man, & had attended the pltf.'s family for many years as medical man. In 1888, pltf. had an illness which seemed to have affected his brain. In the summer of 1889, pltf. was confined in a lunatic asylum for eleven weeks. In the autumn of 1890 pltf.'s conduct again became peculiar, & on Nov. 1 his wife applied to the relieving officer for his intervention under Lunacy Act, 1890 (c. 5), s. 20. The relieving officer declined to interfere without a note from a doctor as to pltf.'s state of mind. The wife thereupon applied to deft., & from what she told him & from his previous knowledge of the history of the case, he wrote the following: "I hereby certify that Mr. Thompson, *i.e.*, pltf., is a person of unsound mind, & is dangerous to those about him." The relieving officer then took pltf. to an infirmary where he was confined for two days, & then brought before a magistrate & discharged as being sane. Pltf. brought this action against deft. for negligence in giving the above certificate:—*Held:* deft. was not liable.

To establish his case pltf. must prove negligence in deft., & that the negligence was the cause of his being taken to the infirmary. . . . A man cannot be sued for negligence unless there is a duty imposed upon him to take care. In this case, the wife, & daughter, & son of pltf. were frightened about pltf.'s conduct. The wife went to the relieving officer. The relieving officer desired to have the opinion of the medical man, & the wife went to deft. & obtained what was called a certificate. It was in reality merely the written opinion of deft. The wife did not go to deft. to get advice & treatment for pltf. She only went to get his opinion for the relieving officer. Therefore, there was no duty imposed upon deft. towards pltf. as a patient to exercise ordinary care & skill, & there was no other duty imposed upon him beyond that imposed upon any other person. There was therefore, no negligence. By sect. 20 the sole responsibility was upon the relieving officer, & he had to act upon his own responsibility. So the opinion of deft. was not the cause of pltf.'s being taken to the infirmary. The confinement was not the direct result of deft.'s act, but it was the direct result & the sole result of the act of the relieving officer; therefore judgment ought to have been entered for deft. (LORD ESHER, M.R.).—THOMPSON *v.* SCHMIDT (1891), 56 J. P. 212; 8 T. L. R. 120, C. A.

Annotations:—**Consd.** Harnett *v.* Fisher (1926), 135 L. T. 724. **Refd.** Everett *v.* Griffiths, [1921] 1 A. C. 631.

129. ——.]—BOON *v.* EDDISON (1900), 64 J. P. 58.

130. ——.] — BOOME *v.* BROMLEY RURAL DISTRICT COUNCIL (1905), 69 J. P. Jo. 533.

131. ——.] — (1) An act or omission can constitute a cause of action under the head of negligence only where it is proved that the act or omission caused the injury complained of. You must be able to trace the injury as an effect of the act or the omission which is alleged to be negligent (KENNEDY, L.J.).

(2) The guiding principle is that a person is liable only for the natural & probable consequences occasioned by or resulting from trespass or negligence, & injury suffered must be brought within this degree to give rise to a cause of action (SWINFEN EADY, L.J.).—BRADLEY *v.* WALLACES, LTD., [1913] 3 K. B. 629; 82 L. J. K. B. 1074; 109 L. T. 281; 29 T. L. R. 705; 6 B. W. C. C. 706, C. A.

Annotation:—**Refd.** Heath's Garage *v.* Hodges, [1916] 2 K. B. 370.

132. Direct & natural cause of injury.]—WALWORTH *v.* BARTON (1860), 8 W. R. 190.

133. ——.] — In an action against a railway co. for an injury sustained through falling down some stairs at their station:—*Held:* it was not enough to show that the stairs were of improper condition or construction unless the fall was caused thereby.—DAVIS *v.* LONDON & BRIGHTON RY. CO. (1861), 2 F. & F. 588, N. P.

134. ——.] — (1) In cases of negligence it is for the judge to decide whether negligence can legitimately be inferred from the facts proved, & for the jury to decide whether negligence ought in fact to be inferred.

(2) In such cases it is not sufficient to prove some act of negligence on the part of deft., unless it be proved that such negligence was the direct cause of the injury complained of.—METROPOLITAN RY. CO. *v.* JACKSON (1877), 3 App. Cas. 193; 47 L. J. Q. B. 303; 37 L. T. 679; 42 J. P. 420; 26 W. R. 175, H. L.

Annotations:—*As to* (1) **Consd.** Maddox *v.* L. C. & D. Ry. (1878), 38 L. T. 458. **Apld.** Brearley *v.* L. & N. W. Ry. (1899), 15 T. L. R. 237; Leaver *v.* Pontypridd U. D. C. (1910), 75 J. P. 25. **Consd.** Banbury *v.* Bank of Montreal, [1918] A. C. 626. **Refd.** Finegan *v.* L. & N. W. Ry. (1889), 53 J. P. 663; Everett *v.* Griffiths, [1921] 1 A. C. 631. *As to* (2) **Consd.** Wright *v.* Mid. Ry. (1884), 51 L. T. 539. **Distd.** Jones *v.* G. W. Ry. (1885), 1 T. L. R. 333; Murgatroyd *v.* Blackburn & Over Darwen Tram. Co. (1886), 3 T. L. R. 180. **Consd.** Cobb *v.* G. W. Ry., [1893] 1 Q. B. 459. **Apld.** Bradley *v.* Wallaces & Thompson, McKay, [1913] 3 K. B. 629. **Consd.** Craig *v.* Glasgow Corpn. (1919), 35 T. L. R. 214. **Refd.** Davey *v.* L. & S. W. Ry. (1883), 11 Q. B. D. 213; Catherall *v.* Mersey Ry. (1887), 3 T. L. R. 508; Toronto Ry. *v.* King, [1908] A. C. 260; Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871. *Generally*, **Consd.** Bullner *v.* L. C. & D. Ry. (1885), 1 T. L. R. 534. **Refd.** Dublin, Wicklow & Wexford Ry. *v.* Slattery (1878), 3 App. Cas. 1155; Pounder *v.* N. E. Ry., [1892] 1 Q. B. 385; Benson *v.* Furness Ry. (1903), 88 L. T. 268; Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Papworth *v.* Battersea B. C. (1914), 79 J. P. 105. **Mentd.** Esdaile *v.* Payne (1889), 40 Ch. D. 520.

135. ——.]—A passenger claimed to recover as damages from a railway co. a sum of money, of which he had been robbed, in consequence, as he alleged, of the co.'s negligence in allowing their carriage to be overcrowded:—*Held:* the damage claimed for was too remote.

The law is that the damages must be the direct

132 i. *Direct & natural cause of injury.*]—GRAHAM *v.* GRAND TRUNK RY. CO. (1912), 20 O. W. R. 965; 3 O. W. N. 123; 1 D. L. R. 554.—**CAN.**

132 ii. ——.]—SLINGSBY *v.* TORONTO RY. CO. (1912), 21 O. W. R. 980; 3 O. W. N. 1161; 3 D. L. R. 453.—**CAN.**

132 iii. ——.]—COLUMBIA BITHULITHIC, LTD. *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (B. C.), [1917] 2 W. W. R. 664; 37 D. L. R. 64.—**CAN.**

132 iv. ——.]—HAY *v.* CANADIAN PACIFIC RY. CO., [1918] 2 W. W. R. 233; 40 D. L. R. 292; 11 Sask. L. R. 127.—**CAN.**

132 v. ——.]—FORSTER *v.* TORONTO RY. CO. (1921), 67 D. L. R. 441; 51 O. L. R. 136.—**CAN.**

132 vi. ——.]—MCQUILLAN *v.* RYAN (1921), 64 D. L. R. 482; 50 O. L. R. 337.—**CAN.**

132 vii. ——.]—GERRARD *v.* ADAM & EVANS (1923), 32 B. C. R. 114.—**CAN.**

132 viii. ——.]—WELSH *v.* MOIR (1885), 12 R. (Ct. of Sess.) 590; 22 Sc. L. R. 381.—**SCOT.**

& natural consequence of the breach of obligation complained of (BOWEN, L.J.).—COBB *v.* GREAT WESTERN RY. Co., [1893] 1 Q. B. 459; 62 L. J. Q. B. 335; 68 L. T. 483; 57 J. P. 437; 41 W. R. 275; 9 T. L. R. 253; 37 Sol. Jo. 248; 4 R. 283, C. A.; *affd.*, [1894] A. C. 419.

Annotations:—**Distd.** Abraham *v.* Bullock (1902), 86 L. T. 796. **Consd.** Weld-Blundell *v.* Stephens, [1920] A. C. 956. **Refd.** No. 7 Steam Sand Pump Dredger *v.* S.S. Greta Holme, The Greta Holme, [1897] A. C. 596.

136. ——.]—In an action for damages by the widow & children of a man who was burnt to death in a lock-up from a fire which arose from an unascertained cause:—*Held:* the burden of proof of negligence in defts. lay upon pltfs., & had not been discharged in the absence of proof that the death of deceased was in any way attributable to, or materially contributed to by, any negligent act or omission on the part of defts.—MCKENZIE *v.* CHILLIWACK CORPN., [1912] A. C. 888; 82 L. J. P. C. 22; 107 L. T. 570; 29 T. L. R. 40, P. C.

137. Natural & probable cause of injury.]—BRADLEY *v.* WALLACES, LTD., No. 131, *ante*.

138. Proximate cause.]—Pltf., travelling by night with a horse & carriage along a highway, crossed by a railway at a level crossing, found no one in charge of the gates, & after waiting a reasonable time, & using all reasonable means to procure the attendance of some person on behalf of the co., he opened the gates & crossed the railway; but in so doing, without any negligence on his part, he was injured by one of the gates falling to. He brought this action against the co. for negligence.

Pltf. is not entitled to succeed, on the ground that the injury he has sustained was not a natural result of deft.'s breach of duty, but of his own act; . . . the injury must be traced directly to his own act, & cannot be ascribed to deft.'s neglect, as its proximate cause (SHEE, J.).—WYATT *v.* GREAT WESTERN RY. Co. (1865), 6 B. & S. 709; 6 New Rep. 259; 34 L. J. Q. B. 204; 12 L. T. 568; 29 J. P. 630; 11 Jur. N. S. 825; 13 W. R. 837; 122 E. R. 1356.

Annotations:—**Distd.** Lax *v.* Darlington Corpn. (1879), 5 Ex. D. 28. **Consd.** R. *v.* Strange (1889), 16 Cox, C. C. 552. **Refd.** Skelton *v.* L. & N. W. Ry. (1867), L. R. 2 C. P. 631; Dublin, Wicklow & Wexford Ry. *v.* Slattery (1878), 3 App. Cas. 1155.

139. ——.]—Deft.'s servant, in breach of Metropolitan Police Act, 1839 (c. 47), s. 54, washed a van in a public street, & allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, & the water flowed over a portion of the cause way, which was ill paved & uneven, & there froze. There was no evidence that deft. knew of the grating being obstructed. Pltf.'s horse, while being led past the spot, slipped upon the ice & broke its leg:—*Held:* this was a consequence too remote to be attributed to the wrongful act of deft.

The act of deft. was not the ordinary or proximate cause of the damage to pltf.'s horse, or within the ordinary consequences which deft. may be presumed to have contemplated, as for which he is responsible (GROVE, J.).—SHARP *v.* POWELL (1872), L. R. 7 C. P. 253; 41 L. J. C. P. 95; 26 L. T. 436; 20 W. R. 584.

Annotations:—**Distd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335. **Consd.** Clinton *v.* Lyons, [1912] 3 K. B. 198. **Distd.** Weld-Blundell *v.* Stephens, [1920] A. C. 956. **Refd.** Cory *v.* France, Fenwick, [1911] 1 K. B. 114; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560.

140. ——.]—Cattle belonging to pltf. were driven at night along an occupation road, which crossed a branch line of defts.' railway on a level. As they were passing over the crossing they became frightened owing to a number of trucks being shunted by defts. in a negligent manner, & part of them escaped from the control of their drivers. These were on the following morning found dead or dying on the main line of defts.' railway, which they reached owing to defects in the fence of an orchard & garden adjoining the railway:—*Held:* there was sufficient evidence that the death of the cattle was the natural result of defts.' negligence.—SNEESBY *v.* LANCASHIRE & YORKSHIRE RY. Co. (1875), 1 Q. B. D. 42; 45 L. J. Q. B. 1; 33 L. T. 372; 40 J. P. 36; 24 W. R. 99, C. A.

Annotations:—**Refd.** Victorian Rys. Comrs. *v.* Coultas (1888), 13 App. Cas. 222; Bull *v.* Shoreditch Corpn. (1902), 67 J. P. 37.

141. ——.]—Deft. gave H. his blank acceptance on a stamped paper, & authorised H. to fill in his name as drawer. H. returned the blank acceptance to deft. in the same state in which he received it. Deft. put it into a drawer of his writing table at his chambers, which was unlocked, & it was lost or stolen. C. afterwards filled in his own

137 i. *Natural & probable cause of injury.*]—CONNELLY *v.* FERN (Alta.) (1922), 70 D. L. R. 767.—**CAN.**

137 ii. ——.]—BYRNE *v.* WILSON (1862), 15 I. C. L. R. 332.—**IR.**

137 iii. ——.]—BOWIE *v.* RANKIN & Co. (1886), 13 R. (Ct. of Sess.) 981; 23 Sc. L. R. 706.—**SCOT.**

138 i. *Proximate cause.*]—DORSETT *v.* ADELAIDE CORPN., [1915] S. A. L. R. 71.—**AUS.**

138 ii. ——.]—GRAHAM *v.* GREAT WESTERN RY. Co. (1877), 41 U. C. R. 324.—**CAN.**

138 iii. ——.]—A person driving on a public highway who sustains injury to his person & property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away & that their violent, uncontrollable speed was the proximate cause of the accident.—BELL TELEPHONE CO. *v.* CHATHAM CORPN. (1900), 31 S. C. R. 61.—**CAN.**

138 iv. ——.]—BIRD *v.* CANADIAN PACIFIC RY. Co. (1908), 7 W. L. R. 868.—**CAN.**

138 v. ——.]—SMITH *v.* BERWICK (1913), 26 W. L. R. 155; 5 W. W. R. 661; 15 D. L. R. 91; 6 Sask. L. R. 1279.—**CAN.**

138 vi. ——.]—A judgment for damages for negligence on the ground that the failure of deft.'s motorman to avoid a collision with pltf.'s automobile when he might have done so was the decisive negligence, sustained.—BANBURY *v.* REGINA CORPN., [1917] 3 W. W. R. 159; 35 D. L. R. 502; 10 Sask. L. R. 297.—**CAN.**

138 vii. ——.]—GEALL *v.* DOMINION CREOSOTING CO., SALTER *v.* DOMINION CREOSOTING CO. (B. C.), [1918] 1 W. W. R. 280; 39 D. L. R. 242; 55 S. C. R. 587.—**CAN.**

138 viii. ——.]—HANSEN *v.* CANADIAN PACIFIC RY. Co., C. R., [1907] A. C. 573.—**CAN.**

138 ix. ——.]—MAGILL *v.* TOWNSHIP OF MOORE (1919), 43 O. L. R. 372; 44 D. L. R. 489.—**CAN.**

138 x. ——.]—LYMAN *v.* EMERY (1919), 47 N. B. R. 119; 50 D. L. R. 317.—**CAN.**

138 xi. ——.]—The driver of a motor car held to be liable for personal injuries caused a passenger in another car with which the former car collided, although the emergency which resulted in the collision was created by the excessive speed of the car in which the pltf. was a passenger & the injuries were incurred not at the moment of collision but when the car came into contact with the street curb.—TAYLOR *v.* TURNER, [1925] 3 D. L. R. 574; [1925] 2 W. W. R. 490.—**CAN.**

138 xii. ——.]—MADRAS & SOUTHERN MAHRATTA RY. Co. *v.* JAYAMMAL (1924), I. L. R. 48 Mad. 417.—**IND.**

138 xiii. ——.]—HALLENSTEIN BROTHERS, LTD. *v.* DWYER (1908), 28 N. Z. L. R. 19.—**N.Z.**

138 xiv. ——.]—M'INTYRE *v.* GALLAGHER (1883), 11 R. (Ct. of Sess.) 64.—**SCOT.**

138 xv. ——.]—M'DERMAID *v.* EDINBURGH STREET TRAMWAYS CO., LTD. (1884), 12 R. (Ct. of Sess.) 15; 22 Sc. L. R. 13.—**SCOT.**

138 xvi. ——.]—ROBINSON *v.* REID'S TRUSTEES (1900), 2 F. (Ct. of Sess.) 928; 37 Sc. L. R. 718; 8 S. L. T. 47.—**SCOT.**

138 xvii. ——.]—MACFARLANE *v.* COLAM, [1908] S. C. 56; 45 Sc. L. R. 47; 15 S. L. T. 451.—**SCOT.**

138 xviii. ——.]—GRIEVE *v.* BROWN, [1926] S. C. 787.—**SCOT.**

Sect. 4.—Effective cause: Sub-sect. 2, A. & B.]

name without deft.'s authority, & an action was brought on it by pltf. as indorsee for value:—*Held:* deft. was not liable on the bill.

It is said that he has done so through negligence. I confess that I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud (BRAMWELL, L.J.).—BAXENDALE *v.* BENNETT (1878), 3 Q. B. D. 525; 47 L. J. Q. B. 624; 40 L. T. 23; 43 J. P. 204; 26 W. R. 899, C. A.

Annotations:—**Apld.** *Re* Cooper, Cooper *v.* Vesey (1882), 20 Ch. D. 611. **Distd.** De la Bere *v.* Pearson, [1907] 1 K. B. 483. **Refd.** Patent Safety Gun Cotton Co. *v.* Wilson (1880), 49 L. J. Q. B. 713; Scholfield *v.* Londesborough, [1896] A. C. 514; Lewis *v.* Clay (1897), 77 L. T. 653; Lloyd's Bank *v.* Cooke, [1907] 1 K. B. 794; Smith *v.* Prosser, [1907] 2 K. B. 735; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777. **Mentd.** London & South Western Bank *v.* Wentworth (1880), 5 Ex. D. 96; Marcussen *v.* Birkbeck Bank (1889), 5 T. L. R. 179; Brocklesby *v.* Temperance Permanent Bldg. Soc. (1893), 42 W. R. 68; Nash *v.* De Freville, [1900] 2 Q. B. 72; Watkin *v.* Lamb (1901), 85 L. T. 483; Herdman *v.* Wheeler, [1902] 1 K. B. 361.

142. ——.]—In actions for damages in respect of an accident against applt. gas co. it appeared that applts. were not occupiers of the premises on which the accident had occurred & had no contractual relations with pltfs., but that they had installed a machine on the said premises, & the jury found that the accident was caused by an explosion resulting from gas emitted, owing to applts.' negligence, through its safety valve direct into the closed premises instead of into the open air:—*Held:* the initial negligence having been found against applts. in respect of an easy & reasonable precaution which they were bound to have taken, they were liable unless they could show that the true cause of the accident was the act of a subsequent conscious volition, *e.g.*, the tampering with the machine by third parties.

On the other hand, if the proximate cause of the accident is not the negligence of deft., but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail (LORD).—DOMINION NATURAL GAS CO., LTD. *v.* COLLINS & PERKINS, [1909] A. C. 640; 79 L. J. P. C. 13; 101 L. T. 359; 25 T. L. R. 831, P. C.

Annotations:—**Consd.** Ruoff *v.* Long, [1916] 1 K. B. 148; **Refd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; White *v.* Steadman, [1913] 3 K. B. 340; Jefferson *v.* Derbyshire Farmers, [1921] 2 K. B. 281; Montreal City *v.* Watt & Scott, [1922] 2 A. C. 555.

143. ——.]—To sustain an action for negligence it must be shown that the negligence found by the jury is the proximate cause of the damage. Where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, deft. is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen & provided against it.

In an action for damages to property located on the second floor of a building leased to deft., through a continuous overflow of water from a lavatory basin on the top floor caused by the water tap having been turned on full & the waste-pipe plugged, the jury found that "this was the malicious act of some person":—*Held:* (1) deft. was not responsible unless either he instigated the act or the jury had found that he ought reasonably to have prevented it; (2) his having on his premises a proper & reasonable supply of water was an ordinary & proper user of his house, & although he was bound to exercise all reasonable care he was not responsible for damage not due to his own default, whether caused by inevitable accident or the wrongful acts of third persons.—RICKARDS *v.* LOTHIAN, [1913] A. C. 263; 82 L. J. P. C. 42; 108 L. T. 225; 29 T. L. R. 281; 57 Sol. Jo. 281, P. C.

Annotations:—*As to* (1) **Consd.** Ruoff *v.* Long, [1916] 1 K. B. 148. **Refd.** Charing Cross, West End & City Electricity Supply Co. *v.* London Hydraulic Power Co., [1913] 3 K. B. 442; Edwards *v.* Birmingham Navigations Co. of Proprietors, [1924] 1 K. B. 341; Noble *v.* Harrison, [1926] 2 K. B. 332; Smith *v.* G. W. Ry. (1926), 135 L. T. 112. *Generally*, **Refd.** Hanley *v.* Edinburgh Corpn. (1913), 77 J. P. 233.

144. —— **Unskilfulness of plaintiff.**]—If the proximate cause of damage be pltf.'s unskilfulness, although the primary cause be the misfeasance of deft., he cannot recover. At least if the mischief be in part occasioned by the misfeasance of a third person not sued.

A. placed lime rubbish in a highway, the dust blown from it frightened the horse of B., & nearly carried him into contact with a passing waggon, in avoiding which he unskilfully drove over other rubbish placed in the road by C., & was overthrown & hurt:—*Held:* upon a count stating these facts B. could not recover against A.—FLOWER *v.* ADAM (1810), 2 Taunt. 314; 127 E. R. 1098.

Annotation:—**Distd.** Trower *v.* Chadwick (1836), 3 Scott, 699.

145. —— **Plaintiff wanting in sense & judgment.**]—FAULKNER *v.* BRINE (1858), 1 F. & F. 254. N. P.

146. —— **Loss through culpable neglect.**]—To entitle pltf. to recover from deft., on the ground of estoppel, a loss occasioned through culpable neglect on the part of deft., pltf. must prove that the negligence complained of occurred in the particular transaction in which his loss arose, & also that such negligence was the proximate, direct, or real cause of the loss.—LONGMAN *v.* BATH ELECTRIC TRAMWAYS, LTD., [1905] 1 Ch. 646; 74 L. J. Ch. 424; 92 L. T. 743; 53 W. R. 480; 21 T. L. R. 373; 12 Mans. 147, C. A.

Annotation:—**Mentd.** Rainford *v.* Keith & Blackman Co. (1905), 74 L. J. Ch. 531.

147. —— **Plaintiff relying on breach of statutory duty.**]—In an action for damages for personal injuries pltf. relying on the breach of a statutory duty must prove not only the breach but also that the breach caused the injuries.—GRAND TRUNK RY. CO. *v.* MCALPINE, [1913] A. C. 838; 83 L. J. P. C. 44; 109 L. T. 693; 29 T. L. R. 679, P. C.

Annotation:—**Refd.** Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871.

—— **Contributory negligence.**]—*See* Part XI., Sect. 1, sub-sect. 1, *post.*

—— **Act or intervention of third party.**]—*See* Sub-sect. 3, *post.*

148. Negligence & loss must be in same transaction—Loss through culpable neglect.]—LONGMAN *v.* BATH ELECTRIC TRAMWAYS, LTD., No. 146, *ante.*

149. Injury not capable of being foreseen or anticipated.]—BLYTH *v.* BIRMINGHAM WATERWORKS CO., No. 1, *ante.*

149 i. *Injury not capable of being foreseen or anticipated.*]—Deft. who was engaged in placing steam fitting in the basement of a school which, to his knowledge, was used by the children to play in, left a detached section of a steam heater on the floor. The section being in the way of the children the caretaker of the school removed it & placed it in an almost perpendicular position against the wall. The section fell upon a child who was injured:—*Held:* deft. was not negligent since he could not have been expected to take precautions to prevent an accident

150. —— Liability only where negligence established.]—Workmen employed by defts., a railway co., after cutting the grass & trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge & the line, & allowed them to remain there fourteen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge & the rails, & burnt some of the heaps of trimmings & the hedge, & spread to a stubble field beyond, & was thence carried by a high wind across the stubble field & over a road, & burnt pltf.'s cottage, which was situated about two hundred yards from the place where the fire broke out. There was evidence that an engine belonging to defts. had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings & not on the parched ground around them:—*Held:* (1) it being a matter of common knowledge that engines do emit sparks, there was evidence for the jury that the fire originated in sparks from the engine that had just passed; (2) there was evidence for the jury that defts. were negligent, in leaving the dry trimmings, & the trimmings either originated or increased the fire, & caused it to spread to the stubble field; (3) if defts. were negligent they were responsible for the injury that resulted from their conduct to pltf., although they could not have reasonably anticipated that such injury would be caused by it.

Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, & this is what was meant by BRAMWELL, B., in his judgment in *Blyth* v. *Birmingham Waterworks Co.*, No. 1. *ante*, . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not (CHANNELL, B.).—SMITH *v.* LONDON & SOUTH WESTERN RY. CO. (1870), L. R. 6 C. P. 14; 40 L. J. C. P. 21; 23 L. T. 678; 19 W. R. 230, Ex. Ch.

Annotations:—*As to* (3) **Consd.** Bull *v.* Shoreditch Corpn. (1902), 67 J. P. 37; H.M.S. London, [1914] P. 72. **Apld.** *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560. **Refd.** Canadian Pacific Ry. *v.* Roy, [1902] A. C. 220; Clinton *v.* Lyons, [1912] 3 K. B. 198; Weld-Blundell *v.* Stephens, [1920] A. C. 956. *Generally*, **Refd.** McDowall *v.* G. W. Ry. (1902), 71 L. J. K. B. 330.

151. —— ——.]—Given the breach of duty which constitutes the negligence, & given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant (BANKES, L.J.).—*Re* POLEMIS & FURNESS, WITHY & CO., [1921] 3 K. B. 560; *sub nom.* POLEMIS *v.* FURNESS, WITHY & CO., 90 L. J. K. B. 1353; 126 L. T. 154; 37 T. L. R. 940; 15 Asp. M. L. C. 398; 27 Com. Cas. 25, C. A.

Annotations:—**Consd.** Hambrook *v.* Stokes, [1925] 1 K. B. 141. **Refd.** Adelaide S.S. Co. *v.* R., [1923] 1 K. B. 59; Harnett *v.* Bond, [1924] 2 K. B. 517; Britannia Hygienic Laundry Co. *v.* Thornycroft (1925), 94 L. J. K. B. 858; Fagan *v.* Green & Edwards, [1926] 1 K. B. 102.

Act or intervention of third party.]—*See* Nos. 183–187, *post.*

B. Where Act Not Proximate in Time.

152. Want of proximity immaterial—If injury in fact caused by act.]—SCOTT *v.* SHEPHERD, No. 78, *ante.*

153. —— ——.]—Where deft. is the proximate cause of damage it is no answer to say, that the falling of certain timber, which was the immediate cause of the damage, was not occasioned by any act or neglect of deft., or by the breach of any duty cast upon him by law.—TROWER *v.* CHADWICK (1836), 3 Bing. N. C. 334; 2 Hodg. 267; 3 Scott, 699; 6 L. J. C. P. 47; 132 E. R. 439; *revsd.* on other grounds, *sub nom.* CHADWICK *v.* TROWER (1839), 6 Bing. N. C., Ex. Ch.

Annotations:—**Refd.** Bibbey *v.* Carter (1859), 7 W. R. 193; Dalton *v.* Angus (1881), 6 App. Cas. 740; Fairbrother *v.* Bury R. S. A. (1889), 37 W. R. 544; Southwark & Vauxhall Water Co. *v.* Wandsworth Board of Works, [1898] 2 Ch. 603. **Mentd.** Bradbee *v.* Christ's Hospital (1842), 2 Dowl. N. S. 164; Humphries *v.* Brogden (1850), 12 Q. B. 739; Metcalfe *v.* Hetherington (1855), 11 Exch. 257; Bonomi *v.* Backhouse (1858), E. B. & E. 622; Sub-Marine Telegraph Co. *v.* Dickson (1864), 15 C. B. N. S. 759; Fletcher *v.* Rylands (1866), L. R. 1 Exch. 265; Ilford U. D. C. *v.* Beal & Judd, [1925] 1 K. B. 671.

154. —— ——.]—WANSTALL *v.* POOLEY (1841), 6 Cl. & Fin. 911, n.; 7 E. R. 940.

155. —— ——.]—A.'s carriage was driven against the wheel of B.'s chaise: the collision threw a person who was in the chaise upon the dashing-board; the dashing-board fell on the back of the horse, & caused him to kick, & thereby the chaise was injured:—*Held:* B. was entitled to recover in trespass against A. damages commensurate with the whole of the injury sustained.—GILBERTSON *v.* RICHARDSON (1848), 5 C. B. 502; 17 L. J. C. P. 112; 10 L. T. O. S. 375; 12 Jur. 292; 136 E. R. 974.

156. —— ——.]—An incorporated water co. created a nuisance in a public highway by leaving unfenced a stream of water which they had caused to spout up in it. The horses of pltf. were frightened, & swerving from it fell into an unfenced excavation in the highway made by contractors who were constructing a sewer, & were thereby injured:—*Held:* the water co. & not the contractors were the parties liable.—HILL *v.* NEW RIVER CO. (1868), 9 B. & S. 303; 18 L. T. 355.

Annotations:—**Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327. **Refd.** Child *v.* Hearn (1874), L. R. 9 Exch. 176; Weld-Blundell *v.* Stephens, [1920] A. C. 956; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560.

157. —— ——.]—SMITH *v.* LONDON & SOUTH WESTERN RY. CO., No. 150, *ante.*

158. —— ——.]—(1) A brig, by the negligence of those on board her, came into collision with a barque on Jan. 15, about 5 a.m. off the Lizard. In the collision the main rigging of the barque was carried away, & shortly afterwards her fore & main masts went by the board. Towards evening the wind increased in violence, & about 2 a.m. the next morning the barque was driven on shore, & some of the crew were drowned:—*Held:* the loss of life was occasioned by the collision.

(2) In a suit for limitation of liability, instituted on behalf of the owners of the brig, an appearance was entered on behalf of a child of one of the drowned men *en ventre sa mère.* The ct. reserved leave to the child, *en ventre*, if born within due time, to prefer its claim for damages sustained by the death of its father.—THE GEORGE &

which could not reasonably have been foreseen by him.—VICK *v.* MORIN & THOMPSON (1915), 30 W. L. R. 412; 7 W. W. R. 1053.—**CAN.**

149 ii. ——.]—LEVASSEUR *v.* R. (1921), 62 D. L. R. 349; 20 Exch. C. R. 462.—**CAN.**

149 iii. ——.]—To establish a case of actionable negligence it is not sufficient that the act was the direct cause of the injury complained of: it must further appear that the consequence of the act was one that a prudent man might reasonably have foreseen.—LAURIE *v.* GODFREY, [1920] N. Z. L. R. 231.—**N.Z.**

Sect. 4.—Effective cause: Sub-sect. 2, B., C. & D.; sub-sect. 3, A. & B.]

RICHARD (1871), L. R. 3 A. & E. 466; 24 L. T. 717; 20 W. R. 245; 1 Asp. M. L. C. 50.

Annotations:—*As to* (1) **Refd.** Robson v. N. E. Ry. (1875), 32 L. T. 551; H.M.S. London, [1914] P. 72. *As to* (2) **Refd.** Williams v. Ocean Coal Co., [1907] 2 K. B. 422. *Generally*, **Mentd.** The Theta (1894), 71 L. T. 25.

159. —— ——.]—Defts.' vessel, owing to the negligence of their servants, struck on a sandbank, & becoming from that cause unmanageable, was driven by wind & tide upon a sea wall of pltfs.', which it damaged. Having regard to the state of the weather & tide it was impossible to prevent this, the ship having once struck:—*Held:* defts. were liable for the damage caused to the wall.—ROMNEY MARSH (LORDS BAILIFF-JURATS) *v.* TRINITY HOUSE CORPN. (1872), L. R. 7 Exch. 247; 41 L. J. Ex. 106; 20 W. R. 952, Ex. Ch.; *affg.* (1870), L. R. 5 Exch. 204.

Annotations:—**Consd.** The George & Richard (1871), L. R. 3 A. & E. 466. **Mentd.** Gilbert v. Trinity House Corpn. (1886), 17 Q. B. D. 795.

160. —— ——.]—A house-van attached to a steam plough was left for the night on the grassy side of a highway by deft. The van & plough were four or five feet from the metalled part of the way. During the evening pltfs.' testator drove his mare in a cart along the metalled road. The mare was a kicker, but he was unaware of her vice. Passing the van she shied at it, kicked, & galloped kicking for one hundred & forty yards, then got her leg over the shaft, fell, & kicked her driver as he rolled out of the cart. He afterwards died from the kick so received. In an action under Fatal Accidents Act, 1846 (c. 93), by his exors. for wrongful & negligent obstruction of the highway, the jury found that the van was left where it stood unreasonably, & negligently, & caused some appreciable danger to vehicles passing along the metalled parts of the road; that the death was occasioned by the van standing where it did, & by the inherent vice of the mare combined, & that there was no contributory negligence:—*Held:* on these findings the verdict & judgment must be for pltfs.; for the unauthorised, unreasonable, & dangerous user of the highway by deft. was the proximate cause of the injury.—HARRIS *v.* MOBBS (1878), 3 Ex. D. 268; 39 L. T. 164; 42 J. P. 759; 27 W. R. 154.

Annotations:—**Apld.** Ellis v. Banyard (1911), 106 L. T. 51. **Refd.** Wilkins v. Day (1883), 12 Q. B. D. 110; Dulieu v. White, [1901] 2 K. B. 669; Hadwell v. Righton, [1907] 2 K. B. 345; Heath's Garage v. Hodges, [1916] 2 K. B. 370. **Mentd.** Wilkinson v. Downton, [1897] 2 Q. B. 57.

—— ——.]—A warehouseman whose predecessor in the business & the occupation of the warehouse had issued warrants in respect of goods, & who represented to the broker of the original depositor that the goods were still in the warehouse, whereupon the broker bought the warrants:—*Held:* estopped from asserting that the goods were no longer in the warehouse through a misdelivery by his servant, the representation being culpably negligent & the proximate & real cause of the broker buying the warrants.—SETON *v.* LAFONE (1887), 19 Q. B. D. 68; 56 L. J. Q. B. 415; 57 L. T. 547; 35 W. R. 749; 3 T. L. R. 624, C. A.

Annotations:—**Consd.** Sarat Chunder Dey v. Chunder Lala (1892), 56 J. P. 741; L. & Y. Ry., L. & N. W. Ry. & Graeser v. MacNicoll (1918), 88 L. J. K. B. 601. **Mentd.** Flatau v. Sawyer (1892), 8 T. L. R. 656.

162. —— ——.]—A collision took place between a steamer & a barque, the steamer being alone to blame. The steering compass, charts, log & log glass of the barque were lost through the collision. The captain of the barque made for a port of safety, navigating his ship by a compass which he found on board. The barque while on her way, without any negligence on the part of the captain or crew, & owing to the loss of the requisites for navigation above-mentioned, grounded, & was necessarily abandoned:—*Held:* the grounding of the barque was a natural & reasonable consequence of the collision, & the owners of the steamer were liable for the damages caused thereby.—THE CITY OF LINCOLN (1889), 15 P. D. 15; 59 L. J. P. 1; 62 L. T. 49; 38 W. R. 345; 6 Asp. M. L. C. 475, C. A.

Annotations:—**Distd.** The San Onofre, [1922] P. 243. **Consd.** Singleton Abbey (Owners) v. Paludina (Owners), The Paludina (1926), 95 L. J. P. 135. **Refd.** Dulieu v. White (1901), 85 L. T. 126; H.M.S. London, [1914] P. 72.

163. —— ——.]—A steamship whilst getting up her anchors in a gale of wind to proceed to a safer anchorage, negligently failed to obtain the assistance of a tug so as to enable her to perform the manœuvre safely. She was in consequence driven against a pier, where she again negligently abstained for a considerable time from taking the assistance of a tug, which was offered to her. Having ultimately taken such assistance, she was towed in the only direction then possible, when, coming into a heavy seaway & the full force of a strong gale, the towing hawser parted, & she was driven ashore, doing damage to pltfs.' property. There was no negligence on the part of the ship after she took the assistance of the tug. The Trinity Masters having advised the ct. that the breaking of the tow rope was a thing that would very probably" happen, considering the direction in which it was necessary to tow the ship after she had collided with the pier, & considering the wind & weather she would meet whilst being towed:—*Held:* the damage following upon such breaking of the tow rope was a natural consequence of defts.' original negligence, & the owners of the ship were liable for such damage.—THE GERTOR (1894), 70 L. T. 703; 7 Asp. M. L. C. 472.

164. —— ——.]—SHOREDITCH CORPN. *v.* BULL, No. 202, *post.*

C. Contributory Negligence.

See Part XI., Sect. 1, sub-sect. 1, *post.*

D. Particular Instances.

Bankers — Forged or altered cheques.]—*See* BANKERS, Vol. III., pp. 232–233, Nos. 640–644.

—— **Custody of securities & valuables.**]—*See* BANKERS, Vol. III., p. 256, No. 763.

Carriers.]—*See* CARRIERS, Vol. VIII., pp. 71–97, 143, Nos. 479–650, 943.

Corporations—Fraudulent use of corporate seal.]—*See* CORPORATIONS, Vol. XIII., pp. 286–287, Nos. 179–180a.

Criminal negligence—Homicide.]—*See* CRIMINAL LAW, Vol. XV., pp. 772–773, Nos. 8273–8277.

Railway companies.]—*See* RAILWAYS.

Canal companies.]—*See* RAILWAYS.

Shipping.]—*See* SHIPPING.

SUB-SECT. 3.—ACT OR INTERVENTION OF THIRD PARTY.

A. In General.

165. Whether defendant necessarily liable.]—ENGELHART *v.* FARRANT & CO., No. 121, *ante.*

PART I. SECT. 4, SUB-SECT. 3.—A.

165 i. *Whether defendant necessarily liable.*]—Where a competent person engaged to carry out a certain duty employs another, unfitted by reason of strength or otherwise, to perform such duty, & an accident occurs, through the default of such latter person, there is proper to be submitted to a

166. ——.]—Defts.' servants shunted some trucks & a brake van, all coupled together, on to a siding which was on an incline running down to a level crossing over a highway. The siding had a catch point to prevent vehicles, if set loose, from running down the incline; but, for the convenience of their shunting operations, defts.' servants did not place the trucks & van beyond the catch point, but screwed down their brakes, & left them in a position in which they would not have caused any damage if not interfered with. Some boys, trespassing on the siding, uncoupled the van from the trucks & released its brake, so that it ran down the incline & injured pltf., who was lawfully passing along the highway over the level crossing. Defts. were aware that boys were in the habit of trespassing on the siding & meddling with vehicles placed upon it.

At the trial of an action by pltf., the jury found that the van was in a safe position as & where left by defts., unless interfered with afterwards; that the accident would not have happened if the van had not been interfered with; that the interference was the act of trespassers, who acted negligently; that the danger of interference causing injury was known to & could have been guarded against by the exercise of reasonable care on the part of defts.; & that the negligence of defts. in not placing the van beyond the catch point was the effective cause of the accident:—*Held:* the evidence did not support the findings of negligence on the part of defts.; &, therefore applying the rule in *Engelhart* v. *Farrant*, No. 121, *ante*, as negligence on their part was not the effective cause of the accident, they were not rendered liable through the interference of trespassers.—MCDOWALL *v.* GREAT WESTERN RY. CO., [1903] 2 K. B. 331; 72 L. J. K. B. 652; 88 L. T. 825; 19 T. L. R. 552; 47 Sol. Jo. 603, C. A.

Annotations:—**Consd.** Clinton *v.* Lyons, [1912] 3 K. B. 198. **Apld.** Wheeler *v.* Morris (1915), 84 L. J. K. B. 1435. **Refd.** Cooke *v.* Mid. G. W. Ry. of Ireland, [1909] A. C. 229; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Rueff *v.* Long, [1916] 1 K. B. 148; Everett *v.* Griffiths, [1920] 3 K. B. 163; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

167. Malicious act of third party.]—SIMPSON *v.* METROPOLITAN WATER BOARD, No. 101, *ante*.

168. Act or intervention instigated by defendant.]—RICKARDS *v.* LOTHIAN, No. 143, *ante*.

169. Act of third party probable.]—LYNCH *v.* NURDIN, No. 118, *ante*.

170. Opportunity for act of third party given by agent.]—ENGELHART *v.* FARRANT & CO., No. 121, *ante*.

Liability of master for negligence of servant—On intervention of third party.]—*See* MASTER & SERVANT, Vol. XXIV., pp. 138, 142, 143, Nos. 1082, 1115–1119.

B. Act or Intervention Real Cause of Injury.

171. Defendant not liable.]—If any artificer, or person employed to do any work in a highway, street, common staircase, etc., makes, or procures to be made, an opening for the convenience of his operations, & then goes away for a time, his work being unfinished, & he intending to return at a future period & complete it, & in the mean time the opening is used by other workmen or persons, it is the duty of these latter persons to secure the opening at night; & the person who so originally made the opening, or procured it to be made, & goes away as above stated, is not liable in damages for any accident that may happen from their negligence.

Where a plasterer, employed about a new building, of which the floors were not laid, or where an opening was left for the staircase which was not then begun, for the convenience of his operations opened, or caused or advised to be opened, a passage or communication from the common staircase of an adjoining house, & afterwards went away for a time before his work was finished, with the intention of returning at a future period to complete it, & both while he was there, & during the time he was absent, other workmen employed about the premises—masons, carpenters, & others—made use of the passage or communication, & during the time he was so absent, the passage not having been secured at night, a man fell through, broke both his legs, & was in other respects severely wounded & bruised:—*Held:* the plasterer was not the person liable in damages for this misfortune.—MILNE *v.* SMITH (1814), 2 Dow, 390; 3 E. R. 905, H. L.

172. ——.]—A tradesman, who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap of it is so placed & secured, as that, under ordinary circumstances, it shall not fall down; but if the tradesman has so placed & secured it, & a wrong doer throws it over, the tradesman will not be liable in damages for any injury occasioned by it.—DANIELS *v.* POTTER & WING, ETC. (1830), 4 C. & P. 262; Mood. & M. 501, N. P.

Annotation:—**Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327.

173. ——.]—By the Act the co. of proprietors of the H. Wet Docks were empowered to appoint

jury of direct personal negligence on the original employer's part.—VALLENDER *v.* VICTORIAN RAILWAYS COMRS. (1896), 22 V. L. R. 141.—**AUS.**

165 ii. ——.]—BLISS *v.* BOECKH (1885), 8 O. R. 451.—**CAN.**

165 iii. ——.]—While pltf. was being conveyed as a passenger on a car of defts., he was injured in consequence of the car being run into from behind by another car on the same track. The motorman & conductor of the other car had, contrary to the express rules of the co., exchanged places:—*Held:* the negligence of the motorman in abandoning his post to the conductor was the effective cause of the accident, & defts. were liable in damages for the injury to pltf.—HILL *v.* WINNIPEG ELECTRIC RY. CO. (1911), 21 Man. L. R. 2; 46 S. C. R. 654.—**CAN.**

165 iv. ——.]—A driver of a motor vehicle which, without negligence on his part, collided with another motor & was forced upon the sidewalk injured pltf., held not liable to the ter.—TURNBILL *v.* GRAHAM, [1918] 3 W. W. R. 1033; 44 D. L. R. 632; 14 Alta. L. R. 125.—**CAN.**

165 v. ——.]—MURPHY *v.* NORTHERN RY. CO., [1897] 2 I. R. 301.—**IR.**

165 vi. ——.]—HOWARD *v.* BERGIN, O'CONNOR & CO., [1925] 2 I. R. 110, 118.—**IR.**

165 vii. ——.]—MURPHY *v.* SMITH (1886), 13 R. (Ct. of Sess.) 985.—**SCOT.**

PART I. SECT. 4, SUB-SECT. 3.—B.

171 i. *Defendant not liable.*]—A railway co. are not liable for an injury caused to a person standing on a station platform by an object carelessly thrown out of a baggage-car on a moving train by a passenger without the knowledge of any of the train crew, unless it is shown that they should have anticipated & could have prevented the act.—GALBRAITH *v.* CANADIAN PACIFIC RY. CO. (1914), 28 W. L. R. 307; 6 W. W. R. 908; 17 D. L. R. 65; 24 Man. L. R. 291.—**CAN.**

171 ii. ——.]—The flowers in pltf.'s flower store were injured by reason of the escape of gas from a pipe of deft. gas co. Unknown to the said co., a pipe had been fractured as a result of the operations of a steam roller belonging to a third party upon the road under which the pipe was laid:—*Held:* deft. co. was not liable since the fracture was caused without its knowledge by a third party, over whom it had no control, & the consequence of whose acts it could not reasonably have anticipated.—TIDY *v.* CUNNINGHAM (1915), 30 W. L. R. 547; 7 W. W. R. 1205.—**CAN.**

171 iii. ——.]—*Held:* the act of the trespasser was "a fresh independent cause," which, in the circumstances, defts. had no reason to anticipate: pltfs. failed in their action to recover damages for the loss they had sustained because the negligence of the defts., found by the jury, was not the proximate cause of the damage; the sole proximate cause was the act of the trespasser.—TORONTO HYDRO-ELECTRIC COMMISSION *v.* TORONTO RY. CO. (1919), 16 O. W. N. 203; 48 D. L. R. 103; 45 O. L. R. 470.—**CAN.**

Sect. 4.—Effective cause: Sub-sect. 3, B. & C.]

such officers as to them should seem meet, & to remove ballast from & out of ships entering the port of H., demanding & taking payment for every ton of ballast so removed; & by the same Act power was given to any person appointed, in pursuance of the Act, to act as dock master, to regulate & direct the placing & mooring of ships in the docks, & a penalty is imposed on all persons refusing or resisting the orders of the dock master: —*Held:* where a Dutch ship was moved by a steam tug, under the directions of the harbour master, & such ship, the ballast having been taken out by order of the harbour master, fell over & sunk the tug, that the owners of the Dutch ship were not responsible for the damage.—THE BROEDER TROW (1852), 17 Jur. 94.

174. ——.]—Assuming it is *primâ facie* evidence of negligence in a railway co. that a train has got off the line, such evidence is entirely rebutted by proof that the accident arose from the wilful & wrongful act of a stranger.—LATCH *v.* RUMNER RY. CO. (1858), 27 L. J. Ex. 155.

175. ——.]—An unskilled practitioner, who ventures to prescribe dangerous medicines, of the use of which he is ignorant, that is culpable rashness, for which he will be responsible. A person who so "takes a leap in the dark" is guilty of gross negligence.

If a man were wounded, & another applied to his wound sulphuric acid, or something which was of a dangerous nature & ought not to be applied, & which led to fatal results, then the person who applied this remedy would be answerable, & not the person who inflicted the wound, because a new cause had supervened. But if the person who dressed the wound applied a proper remedy, then if a fatal result ensued, he who inflicted the wound remained liable (WILLES, J.).—R. *v.* MARKUSS (1864), 4 F. & F. 356.

Annotation:—**Refd.** R. *v.* Bateman (1925), 94 L. J. K. B. 791.

176. ——.]—BARTLETT *v.* BAKER (1864), 3 H. & C. 153; 34 L. J. Ex. 8; 159 E. R. 486.

Annotation:—**Mentd.** Sandford *v.* Clarke (1888), 57 L. J. Q. B. 507.

177. ——.]—MANGAN *v.* ATTERTON, No. 464, *post.*

178. ——.]—Defts., the highway board & local authority for the district, built a retaining wall across a street for the purpose of altering the level of a roadway. This wall did not interfere with the ordinary flow of surface water across the street & alongside pltf.'s premises, but owing to the wrongful act of third parties on land over which defts. had no control, an unusual flow of water ran down this street & did damage to pltf.'s premises:—*Held:* defts. were not liable, as the damage was occasioned by the unexpected flow of water for which they were not responsible, & they were not negligent in not building this retaining wall so as to have prevented the unusual flow of water across the street & alongside pltf.'s premises.—ELY BREWERY CO. *v.* PONTYPRIDD URBAN DISTRICT COUNCIL (1903), 68 J. P. 3; 2 L. G. R. 40, C. A.

179. ——.]—MCDOWALL *v.* GREAT WESTERN RY. CO., No. 166, *ante.*

Co.,

181. ——.]—Deft. signed a document, which purported to be a continuing guarantee by him, up to a certain amount, of the payment by R. of any sum which might at any time thereafter be or become due from R. to pltfs., a banking co., on

them. In fact,
fraud of R. to sign the document,
it, & not knowing that it was a gu
supposing it to be a document of

use of pltfs.
, & not deft.'s supposed negligence.

There can be no material negligence unless there is a duty on deft. towards pltfs. (VAUGHAN WILLIAMS, L.J.).—CARLISLE & CUMBERLAND BANKING CO. *v.* BRAGG, [1911] 1 K. B. 489; 80 L. J. K. B. 472; 104 L. T. 121, C. A.

182. ——.]—The mere fact that a tramway car has been started from an optional stopping place through the bell being pulled by a passenger in the absence of the conductor does not render the tramway owners responsible for injury thereby occasioned, unless it is shown that in the circumstances the non-control of the bell by the conductor amounted to negligence.—WAGNER *v.* WEST HAM CORPN. (1920), 37 T. L. R. 86.

183. —— **Unless act or intervention able to be foreseen or anticipated.**]—(1) Where works are going on over a line of railway, with which works the railway co. has nothing to do, & the execution of such works is entrusted to contractors who are entirely independent of the railway co., it is not the duty of the railway directors to assume that such works will be negligently conducted by those who have contracted for their execution, & to take precautions against possible negligence on the part of persons who are not in their employment nor under their control.

The Corpn. of the City of London was authorised

cuted elsewhere
co. had no control over these works,
executed by contractors engaged by the
Several girders had been safely put in their
by manual labour, but on this occasion, the contractors brought into use for one of the girders a monkey steam-engine which moved the girder with a jerk, & so caused it to overbalance
It fell on a passing train, & injured pltf.:—*Held:* this was not a mischief the occurrence of which the railway co. was bound to anticipate, & against which it was bound to take precautions, & consequently the railway co. was not liable in damages.

The ordinary business of life could not go on if

(2) Where pltf. has closed his evidence,
judge who tries the cause is of opinion that there is no case to go to the jury, he ought
accordingly, giving leave, if necessary, for pltf. move to enter a verdict in his favour.

erroneous under such circumstances to take a formal verdict for pltf., reserving leave to deft. to move to enter a verdict for him should the judges, to whom power is reserved to draw inferences of fact, be of opinion that on the facts the verdict ought to be so entered.—DANIEL *v.* METROPOLITAN RY. CO. (1871), L. R. 5 H. L. 45; 40 L. J. C. P. 121; 24 L. T. 815; 35 J. P. 708; 20 W. R. 37, H. L.

Annotations :—As to (1) **Refd.** The Secret (1872), 26 L. T. 670; Simson *v.* London General Omnibus Co. (1872), 21 W. R. 595; Wright *v.* Mid. Ry. (1873), 42 L. J. Ex. 87; Williams *v.* G. W. Ry. (1874), L. R. 9 Exch. 157; Cohen *v.* Met. Ry. (1890), 6 T. L. R. 146; Pounder *v.* N. E. Ry., [1892] 1 Q. B. 385.

184. —— ——.]—RICKARDS *v.* LOTHIAN, No. 143, *ante*.

185. —— ——.]—Deft., a shopkeeper, suspended outside his premises a canvas sunblind, which overhung the pavement. This blind was extended by means of projecting arms or rods, & in consequence of passers by jumping up & catching hold of these rods a strain was put on the blind as a whole, which drew the screws out of the wood forming the top of the box, & thus caused the blind to fall & the projecting rods to drop, whereby pltf., who was passing thereunder, was injured :—*Held :* all that could be required of deft. was that he should have taken such reasonable precautions as a reasonable man would exercise in order to avoid the result of an accident that might reasonably be foreseen; & it would be extending the authority of *McDowall* v. *Great Western Railway Co.*, No. 166, *ante*, to make deft. liable for the injuries sustained by pltf.—WHEELER *v.* MORRIS (1915), 84 L. J. K. B. 1435; 113 L. T. 644, C. A.

Annotation :—**Consd.** Ruoff *v.* Long, [1916] 1 K. B. 148.

186. —— ——.]—A person lawfully leaving his property unattended in a highway must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway. He is not liable for damage caused by his property through such interference of third persons as he is not bound to anticipate.

Defts.' servants momentarily left stationary but unattended in a highway a steam motor lorry. In order to start the lorry it was necessary to withdraw a hand-pin from the gear lever & then to remove that & two other levers. Two soldiers seeing the lorry mounted it. One tried but failed to set it in motion. The other succeeded in starting it backwards so that it ran into pltf.'s shop front & did damage for which the action was brought :—*Held :* (1) there was in the circumstances no evidence of negligence in leaving the lorry unattended; & (2) assuming that there was negligence, there was no evidence that it caused the damage.—RUOFF *v.* LONG & CO., [1916] 1 K. B. 148; 85 L. J. K. B. 364; 114 L. T. 186; 80 J. P. 158; 32 T. L. R. 82; 60 Sol. Jo. 323, D. C.

Annotations :—As to (1) **Distd.** Martin *v.* Stanborough (1924), 41 T. L. R. 1. **Refd.** Gayler & Pope *v.* Davies, [1924] 2 K. B. 75.

187. —— ——.]—SIMPSON *v.* METROPOLITAN WATER BOARD, No. 101, *ante*.

C. Injury Natural or Direct Outcome of Original Negligence.

188. Whether defendant liable.]—If a horse & cart are left standing in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer by, in striking the horse.—ILLIDGE *v.* GOODWIN (1831), 5 C. & P. 190, N. P.

Annotations :—**Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327. **Refd.** Lynch *v.* Nurdin (1841), 1 Q. B. 29; Dansey *v.* Richardson (1854), 3 E. & B. 144; Englehart *v.* Farrant, [1897] 1 Q. B. 240; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Weld-Blundell *v.* Stephens, [1920] A. C. 956; Gayler & Pope *v.* Davies, [1924] 2 K. B. 75.

189. ——.]—LYNCH *v.* NURDIN, No. 118, *ante*.

190. ——.]—R. *v.* MARKUSS, No. 175, *ante*.

191. ——.]—HILL *v.* NEW RIVER CO., No. 156, *ante*.

192. ——.]—CLARK *v.* CHAMBERS, No. 103, *ante*.

193. ——.]—MANN *v.* WARD (1892), 8 T. L. R. 699, C. A.

Annotation :—**Dbtd.** Englehart *v.* Farrant, [1897] 1 Q. B. 240.

194. ——.]—PATERSON *v.* BLACKBURN CORPN. (1892), 9 T. L. R. 55, C. A.

195. ——.]—Deft., a licensed victualler, was the owner of a dog which he knew to be of a savage nature. He entrusted it to his barman, with instructions to let it out each morning & bring it back & tie it up before the other servants came down. On one occasion the barman brought the dog back while pltf. & another barmaid were at breakfast, took it into the kitchen, & said, "I bet the dog won't bite any one. Go it, Bob"; whereupon the dog bit pltf.

It appears to me to be absolutely immaterial, where a man has chosen to keep a dangerous animal at his own peril in all circumstances, whether the injury arises from the actual negligence of the owner or from the act of a third person. The wrong is in keeping the fierce beast, & the person who chooses to keep it is responsible for the injury arising from his own wrongful act, unless the injury was due to pltf.'s own default or (possibly) to *vis major* or the act of God (FARWELL, L.J.).—BAKER *v.* SNELL, [1908] 2 K. B. 825; 77 L. J. K. B. 1090; 99 L. T. 753; 24 T. L. R. 811; 52 Sol. Jo. 681; 21 Cox, C. C. 716, C. A.

Annotations :—**Apld.** Lowery *v.* Walker (1909), 78 L. J. K. B. 874. **Refd.** Clinton *v.* Lyons, [1912] 3 K. B. 198.

196. ——.]—WAGNER *v.* WEST HAM CORPN., No. 182, *ante*.

197. —— **Fraudulent act of third party.**]—Where one man by his negligence has enabled another to practise a fraud on a third party, which the third party had no means whatever of detecting, the consequence of that must be visited on the individual who enables the other to practise the fraud (POLLOCK, C.B.).—BARKER *v.* STERNE (1854), 9 Exch. 684; 2 C. L. R. 1020; 23 L. J. Ex. 201; 23 L. T. O. S. 95; 2 W. R. 418; 156 E. R. 293.

Annotation :—**Refd.** London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777.

198. —— **Criminal act of third party.**]—Defts., who were newspaper proprietors, advertised in their newspaper that their city editor would answer inquiries from readers of the paper desiring financial advice. Pltf., a reader of the paper,

PART I. SECT. 4, SUB-SECT. 3.—C.

188 i. *Whether defendant liable.*]—Pltfs. were injured by a wire which had been cut & allowed to hang loose by the workmen of deft. co. while straightening a pole. It came in contact with a power wire & thus became a live wire injuring the pltfs. Defts. held liable owing to original negligence of defts.' workmen.—LABOMBARDE *v.* CHATHAM GAS CO. & CHATHAM CORPN. (1905), 5 O. W. R. 534; 10 O. L. R. 446.—**CAN.**

198 i. —— *Criminal act of third party.*]—A railway co. in the course of statutory operations made an opening in a wall surrounding a cellar, which they omitted to fill up again. In consequence of this a man in the employment of the co. who had observed that the opening had not been filled up, entered the cellar by it & stole goods belonging to the proprietor :—*Held :* as theft was one of the ordinary risks against which a co. were bound to protect a proprietor when opening up his premises, they were liable in damages for the loss sustained through their failure to restore the premises to their original condition.—MARSHALL *v.* CALEDONIAN RY. CO. (1899), 36 Sc. L. R. 845.—**SCOT.**

Sect. 4.—*Effective cause: Sub-sect.* 3, *C. Part II. Sect.* 1: *Sub-sects.* 1 & 2, *A.* (*a*).]

wrote to defts.' city editor for a safe investment for £800, & also for the name of a "good stock-broker." The editor recommended a person who, as he well knew, was an "outside broker," that is, a person who transacted Stock Exchange business, but was not a member of the Stock Exchange. The outside broker had for some months been employed by the editor to advise him on matters connected with the financial correspondence in defts.' newspaper, & there was no evidence that the editor had any reason to suspect his honesty. The outside broker was, in fact, an undischarged bkpt., a fact which was unknown to the editor, who might, however, easily have ascertained his financial position if he had made inquiries. Pltf., in reliance on the editor's recommendation, sent sums of £1,300 & £100 for investment to the outside broker, who immediately misappropriated them: —*Held:* there was a contract between pltf. & defts. by which defts. undertook to use reasonable care that the person recommended as a broker should answer the description of a good stock-broker; the defts.' city editor, in recommending the outside broker without making reasonable inquiries about him, had committed a breach of that contract; & pltf.'s loss naturally flowed from defts.' breach of contract, even if the misappropriation of the money by the broker amounted to a criminal offence.—DE LA BERE *v.* PEARSON, LTD., [1908] 1 K. B. 280; 77 L. J. K. B. 380; 98 L. T. 71; 24 T. L. R. 120, C. A.

Annotations:—**Consd.** H.M.S. London, [1914] P. 72. **Expld.** Weld-Blundell *v.* Stephens, [1920] A. C. 956.

199. Duty of defendant to guard against intervention.]—A co., charged with the duty of repairing a drain, was held responsible for the injury arising from the banks of the drain giving way at a period of extraordinary rainfall, which swelled the drain, in consequence of the outlet thereof not being sufficiently widened by other parties, whose duty it was to keep the outlet of a certain width.—HARRISON *v.* GREAT NORTHERN RY. CO. (1864), 3 H. & C. 231; 5 New Rep. 93; 33 L. J. Ex. 266; 10 L. T. 621; 10 Jur. N. S. 992; 12 W. R. 1081; 159 E. R. 518.

Annotations:—**Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327. **Refd.** Fletcher *v.* Rylands (1865), 3 H. & C. 774.

200. ——.]—By a drainage Act, the comrs. were to construct a cut, with proper walls, gates, & sluices, to keep out the waters of a tidal river, & also a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut & to keep the same at all times open. In consequence of the negligent construction of the gates & sluices, the waters of the river flowed into the cut, &, bursting its western bank, flooded the adjoining lands. Pltf. & other owners of lands on the east side of the cut closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, re-opened it, & so let the waters through on pltf.'s land to a much greater extent:—*Held:* the comrs. were responsible for the entire damage thus caused to pltf.'s land.—COLLINS *v.* MIDDLE LEVEL COMRS. (1869), L. R. 4 C. P. 279; 38 L. J. C. P. 236; 20 L. T. 442; 17 W. R. 929.

Annotations:—**Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327. **Dbtd.** Singleton Abbey (Owners) *v.* Paludina (Owners), The Paludina (1926), 95 L. J. P. 135. **Refd.** Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213.

201 ——.]—BURROWS *v.* MARCH GAS CO., No. 124, *ante.*

202. ——.]—Defts., who were both the highway & sanitary authority, dug a trench along a road under their control for the purpose of laying a sewer. When the sewer was laid they filled in the trench & opened the road for traffic. About a week after the road was thrown open pltf. was driven along it in a cab. The cab driver found that the part of the road where the trench had been filled in was soft; he crossed to the off side to avoid that danger, & ran into a heap of rubbish which had been deposited by a wrongdoer upon that side of the road, with the result that the cab was overturned & pltf. suffered injuries. Defts. knew that the heap of rubbish had been deposited upon the road. The jury found that at the time of the accident that part of the road where the trench had been filled in was dangerous for traffic: —*Held:* defts. were liable on the ground that they were guilty of misfeasance in throwing open the road when it was not fit for traffic, & that misfeasance was the cause of the accident.

In some cases non-feasance might be equivalent to misfeasance. . . . The persons who disturbed the street in the first instance as sewer authority are also as highway authority responsible for maintenance. Those who first interfered are throughout responsible for a misfeasance (LORD HALSBURY, C.).—SHOREDITCH CORPN. *v.* BULL (1904), 90 L. T. 210; 68 J. P. 415; 20 T. L. R. 254; 2 L. G. R. 756, H. L.; *affg.* S. C. *sub nom.* BULL *v.* SHOREDITCH CORPN. (1902), 67 J. P. 37, C. A.

Annotations:—**Distd.** Holloway *v.* Birmingham Corpn. (1905), 69 J. P. 358. **Consd.** Maguire *v.* Liverpool Corpn., [1905] 1 K. B. 767; Gould *v.* Birkenhead Corpn. (1909), 74 J. P. 105. **Apld.** Dawson *v.* Bingley U. D. C., [1911] 2 K. B. 149; Baldwin *v.* Halifax Corpn. (1916), 85 L. J. K. B. 1769. **Refd.** Short *v.* Hammersmith Corpn. (1910), 104 L. T. 70; Barker *v.* Herbert (1911), 75 J. P. 355; McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118; Thompson *v.* Bradford Corpn. & Tinsley (1915), 79 J. P. 364.

203. ——.]—RICKARDS *v.* LOTHIAN, No. 143, *ante.*

204. ——.]—CRANE *v.* SOUTH SUBURBAN GAS CO., No. 258, *post*

205. ——.]—To leave a motor car unattended on a fairly steep slope in a public highway, with the brakes out of order & with only an easily removable block of wood to keep the car in position, so that the car could easily be started downhill by any mischievous person, constitutes evidence of negligence.—MARTIN *v.* STANBOROUGH (1924), 41 T. L. R. 1; 69 Sol. Jo. 104, C. A.

Annotation:—**Refd.** Gaylor & Pope *v.* Davies, [1924] 2 K. B. 75.

Part II.—Negligence in regard to Property.

SECT. 1.—IN REGARD TO PARTICULAR PERSONS.

SUB-SECT. 1.—LIABILITY OF OWNER.

206. General rule.]—In an action of damages against the corpn. of Edinburgh & against the owners of a tenement in the city, the pursuer averred that while he was proceeding along a street which adjoined the garden wall of the tenement a door in the wall suddenly opened outwards on to the street & struck him on the face, causing him serious injuries; that the door as constructed formed an obstruction to the street; & that it constituted a grave danger to the public, & a danger which was obvious to the defenders. He averred fault against the owners for having on their premises a door of this dangerous construction; & he averred fault against the corpn. in failing to remove this dangerous obstruction to the street, which he alleged they had power to do under Roads & Bridges (Scotland) Act, 1878 (c. 51), ss. 3, 94, 123, & a local Municipal Act:—*Held:* the pursuer had not stated a relevant case against the owners, because having a door opening outwards upon a street did not *per se* infer negligence on their part, nor against the corpn., for the door was not an obstruction to the highway within the local Municipal Act, which the corpn. had power to remove, & the pursuer had failed to aver that the street in question was a street to which the provisions of Roads & Bridges (Scotland) Act, 1878 (c. 51), applied.

If a man has premises so constructed that they may become a danger to passers-by . . . he is liable for the accident that results (LORD BUCKMASTER, C.).—EVANS *v.* EDINBURGH CORPN., [1916] 2 A. C. 45; 85 L. J. P. C. 200; 114 L. T. 911; 32 T. L. R. 396, H. L.

207. Negligence a question for jury.]—Pltf. purchased a ticket & went to a football ground where a match was being played. On the ticket purchased by him there was a note to the effect that it was agreed between him & defts., who were the members of the committee of a Football Union, that defts. should not be liable for any injury caused to him through the overcrowding of the stand, or the conduct of the spectators; & a large number of red posters exhibiting a notice to that effect were placed in conspicuous positions inside the entrances to the ground. While the match was in progress there was a considerable amount of swaying to & fro of the people crowded on the stand, & pltf. was thereby carried over the place where a post forming part of the barrier had been snapped off leaving a hole, & his foot was caught in the hole & his leg injured. In an action claiming damages in respect of that injury, the jury found, (*a*) that pltf. knew that there was printed matter on the ticket purchased by him; (*b*) that pltf. did not know that the printing contained conditions upon which he was allowed to enter the ground; (*c*) that defts. did not do what was reasonably sufficient to give pltf. notice of the conditions; & (*d*) that the accident happened owing to the negligence of defts.:—*Held:* the questions whether defts. had taken reasonable care to give pltf. notice of the conditions of the contract, & whether there had been negligence on the part of defts., were entirely for the jury, & the ct. could not interfere with the verdict.—SKRINE *v.* GOULD (1912), 29 T. L. R. 19, C. A.

Premises in defective condition.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 314–317, 344–349, Nos. 4565–4589, 4867–4906.

—— **Flats, chambers & offices.**]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 98, 99, Nos. 2374–2379.

—— **The common staircase.**]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 99–101, Nos. 2380–2388.

The roof.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 101, 102, Nos. 2389–2393.

—— **Entrance hall & lift.**]—*See* LANDLORD & TENANT, Vol. XXXI., p. 102, Nos. 2395, 2396.

—— **In regard to persons using highway.**]—*See* HIGHWAYS, Vol. XXVI., pp. 433, 434, Nos. 1517–1520; BOUNDARIES, Vol. VII., pp. 283–291, Nos. 135–172.

Duty to invitees.]—*See* Sub-sect. 2, *post.*

SUB-SECT. 2.—DUTY TO INVITEES.

A. Who is an Invitee.

(*a*) *In General.*

208. Persons entering premises of owner or occupier—For purposes of business or common interest—On invitation express or implied.]—Upon the premises of deft., a sugar refiner, was a hole or shoot on a level with the floor, used for raising & lowering sugar to & from the different storeys of the building, & usual, necessary, & proper in the way of deft.'s business. Whilst in use, it was necessary & proper that this hole should be unfenced. When not in use, it was sometimes necessary, for the purpose of ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; & it might at such times, without injury to the business, have been fenced by a rail. Whether or not it was usual to fence similar places when not in actual use, did not appear. Pltf., a journeyman gasfitter in the employ of a patentee who had fixed a patent gas regulator upon deft.'s premises, for which he was to be paid provided it effected a certain amount of saving in the consumption of gas, went upon the premises with his employer's agent for the purpose of examining the several burners, so as to test the new apparatus. Whilst thus engaged upon an upper floor of the building, pltf., under circumstances as to which the evidence was conflicting, but accidentally, &, as the jury found, without any fault or negligence on his part, fell through the hole, & was injured:—*Held:* inasmuch as pltf. was upon the premises on lawful business, in the course of fulfilling a contract in which he, or his employer & deft. both had an interest, & the hole or shoot was from its nature unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, deft.

PART II. SECT. 1, SUB-SECT. 1.

206 i. *General rule.*]—There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, & no liability for accidents caused by its falling.—LAZARUS *v.* TORONTO CITY (1859), 19 U. C. R. 9.—**CAN.**

206 ii. ——.]—The mere fact that a person is the owner of land on which there is a trap does not make him liable for damages suffered by reason of the trap by a bare licencee.—MARTLE *v.* NORTHERN LIFE ASSURANCE Co. (Alta.), [1920] 3 W. W. R. 228.—**CAN.**

206 iii. ——.]—CORYELL *v.* BERTHA CONSOLIDATED GOLD MINING CO., [1924] 1 D. L. R. 236; [1924] 1 W. W. R. 122; 33 B. C. R. 81.—**CAN.**

Sect. 1.—*In regard to particular persons: Sub-sect.* 2, *A.* (*a*).]

was guilty of a breach of duty towards him in suffering the hole to be unfenced.

It was also argued that pltf. was at best in the condition of a bare licencee or guest who, it was urged, is only entitled to use the place as he finds it, & whose complaint may be said to wear the colour of ingratitude, so long as there is no design to injure him. The authorities respecting guests & other bare licencees & those respecting servants & others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority & practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap door left open, unfenced & unlighted. . . . This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. If a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, & as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. If, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go not as mere volunteers, or licencees, or guests, or servants or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, & upon his invitation express or implied (WILLES, J.).—INDERMAUR *v.* DAMES (1866), L. R. 1 C. P. 274; Har. & Ruth. 243; 35 L. J. C. P. 184; 14 L. T. 484; 12 Jur. N. S. 432; 14 W. R. 586; *affd.* (1867), L. R. 2 C. P. 311, Ex. Ch.

Annotations:—**Folld.** Smith *v.* London & St. Katherine Docks Co. (1868), L. R. 3 C. P. 326. **Distd.** Brooks *v.* Courtney (1869), 20 L. T. 440. **Apld.** M. S. & L. Ry. *v.* Woodcock (1871), 25 L. T. 335; Smith *v.* Steele (1875), L. R. 10 Q. B. 125; Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817. **Folld.** White *v.* France (1877), 2 C. P. D. 308. **Apld.** Marney *v.* Scott, [1899] 1 Q. B. 986. **Distd.** Cavalier *v.* Pope, [1906] A. C. 428. **Apld.** Lewis *v.* Ronald (1909), 101 L. T. 534. **Distd.** Lucy *v.* Bawden, [1914] 2 K. B. 318. **Consd.** Norman *v.* G. W. Ry., [1915] 1 K. B. 584. **Distd.** Maclenan *v.* Segar, [1917] 2 K. B. 325. **Apld.** Pritchard *v.* Peto, [1917] 2 K. B. 173; Anchor Line (Henderson) *v.* Dundee Harbour Trustees, Ellerman Lines *v.* Dundee Harbour Trustees, Thomson, Shepherd *v.* Dundee Harbour Trustees (1922), 38 T. L. R. 299; Mercer *v.* S. E. & C. Ry.'s Managing Committee, [1922] 2 K. B. 549. **Consd.** Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. **Folld.** Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746. **Refd.** Gautret *v.* Egerton, Jones *v.* Egerton (1867), L. R. 2 C. P. 371; Paddock *v.* N. E. Ry. (1868), 18 L. T. 60; John *v.* Bacon (1870), L. R. 5 C. P. 437; King *v.* G. W. Ry. (1871), 24 L. T. 583; Woodley *v.* Met. Dist. Ry. (1877), 2 Ex. D. 384; Sandys *v.* Florence (1878), 47 L. J. Q. B. 598; Burchell *v.* Hickisson (1880), 50 L. J. Q. B. 101; Batchelor *v.* Fortescue (1883), 11 Q. B. D. 474; Heaven *v.* Pender (1883), 11 Q. B. D. 503; Elliott *v.* Hall (1885), 15 Q. B. D. 315; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685; O'Neil *v.* Everest (1892), 61 L. J. Q. B. 453; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Clinton *v.* Lyons, [1912] 3 K. B. 198; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Elliott *v.* Roberts (1915), 32 T. L. R. 71; Wilson *v.* Barry Ry. (1916), 116 L. T. 71; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899; Cole *v.* De Trafford, [1918] 2 K. B. 523; Dunster *v.* Hollis, [1918] 2 K. B. 795; Scrutton *v.* A.-G. for Trinidad (1920), 90 L. J. P. C. 30; Cockburn *v.* Smith (1923), 40 T. L. R. 113; Fairman *v.* Perpetual Investment Bldg. Soc., [1923] A. C. 74; Sheehan *v.* Dreamland, Margate (1923), 40 T. L. R. 155; Lotang *v.* Ottawa Elec. Ry., [1926] A. C. 725. **Mentd.** Swainson *v.* N. E. Ry. (1877), 37 L. T. 102; Gridley *v.* Thames Conservators (1886), 2 T. L. R. 469; Cale. Ry. *v.* Mulholland, [1898] A. C. 216; Wright *v.* Lefevor (1902), 51 W. R. 149; Earl *v.* Lubbock (1904), 74 L. J. K. B. 121; Lowery *v.* Walker, [1910] 1 K. B. 173; Bates *v.* Batey, [1913] 3 K. B. 351; R. *v.* Broad, [1915] A. C. 1110; Brackley *v.* Mid. Ry. (1916), 85 L. J. K. B. 1596; Cox *v.* Coulson, [1916] 2 K. B. 177; Hart *v.* Rogers, [1916] 1 K. B. 646; Walker *v.* Crabb (1916), 33 T. L. R. 119.

209. —— —— ——.]—The declaration stated that defts. were possessed of land with a canal & cuttings intersecting the same, & of bridges across the canal & cuttings communicating with & leading to certain docks of defts., which land & bridges were used with the consent & permission of the defts. by persons proceeding to & coming from the docks; that they wrongfully & improperly kept & maintained the land, canal, cuttings, & bridges, & suffered them to be in so improper a state & condition as to render them unsafe for persons lawfully passing along & over the said land & bridges towards the said docks; & that one G. lawfully passing over & using the bridges, through the wrongful, negligent, & improper conduct of defts., fell into one of the cuttings & was drowned: —*Held:* (1) the declaration disclosed no actionable breach of duty on the part of defts.

The consequences of these accidents are sought to be visited upon these defts. because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of defts. (WILLES, J.).

The dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, & omitted to caution the donee. There must be something like fraud on the part of giver (WILLES, J.).—GAUTRET *v.* EGERTON, JONES *v.* EGERTON (1867), L. R. 2 C. P. 371; 36 L. J. C. P. 191; 15 W. R. 638; *sub nom.* GANTRET *v.* EGERTON, JONES *v.* EGERTON, 16 L. T. 17.

Annotations:—*As to* (1) **Apld.** Keeble *v.* East & West India Dock Co. (1889), 5 T. L. R. 312. **Refd.** Shoebottom *v.* Egerton (1868), 18 L. T. 364; Bulman *v.* Furness Ry. (1875), 32 L. T. 430; Cale. Ry. *v.* Mulholland, [1898] A. C. 216; Harris *v.* Perry, [1903] 2 K. B. 219; Salaman *v.* Secretary of State in Council of India, [1906] 1 K. B. 613; French *v.* Hills Plymouth Co. (1908), 24 T. L. R. 644; Coldrick *v.* Partridge, Jones, [1909] 1 K. B. 530; Wilson *v.* Barry Ry. (1916), 86 L. J. K. B. 432; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899; Hardy *v.* C. L. Ry., [1920] 3 K. B. 459; Fairman *v.* Perpetual Investment Bldg. Soc., [1923] A. C. 74. *As to* (2) **Refd.** Heaven *v.* Pender (1883), 11 Q. B. D. 503; Lowery *v.* Walker, [1910] 1 K. B. 173; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746. *Generally*, **Mentd.** King *v.* G. W. Ry. (1871), 24 L. T. 583; Sandys *v.* Florence (1878), 47 L. J. Q. B. 598; West Rand Central Gold Mining Co. *v.* R., [1905] 2 K. B. 391; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; R. *v.* Broad, [1915] A. C. 1110.

210. —— —— ——.]—Defts., called the contractor, entered into a contract with the London County Council to remodel & enlarge a school building for a lump sum in accordance with the specification in the schedule thereto. This sum included certain sums for special work, *e.g.*, a sum for providing & fixing hot water heating apparatus, & the County Council reserved to themselves the right to nominate special tradesmen to execute this work, in which case the fixed sum for

the work was to be deducted from the contract price & to be paid direct by the County Council to the tradesmen executing the work. By a clause in the contract all specialists, merchants, tradesmen, & others executing any work or supplying any goods for the purposes of the contract who might at any time be nominated or approved by the County Council were thereby declared to be sub-contractors employed by the contractor. By a clause in the specification the contractor is to afford facilities to any other tradesmen employed by the Council in the building, & to include the reasonable use of any scaffolding already erected for his own purposes, so that their work may proceed during the progress of his contract. The County Council, under the option reserved to them, contracted with a firm of hot water engineers to provide & fix the hot water heating apparatus in the building. Defts., in order to provide a gangway for their workmen over an opening in an upper floor of the building, laid down two planks side by side across the opening. The planks were not fastened down in any way. Pltf., a workman in the employment of the hot water engineers, in the course of his work was passing over the gangway when, apparently by reason of the boards slipping, he fell down the opening & was injured. In an action against defts. to recover damages for the injuries caused, as alleged, by their negligence :—*Held :* pltf. was in the position of a person invited by defts. to use the gangway for the purposes of his work, & that the duty of defts. to the pltf. was that of invitors & not that of mere licensors.

It is essential to pltf.'s case that he should bring himself into the position of an invitee & he can only do that by satisfying the ct. that by reason of the contract between defts. & the County Council defts. had a common interest with his employers in the completion of the work comprised in the contract & that therefore he, as a workman employed on the work by Messrs. Watkin [sub-contractors] was using the gangway as an invitee of defts. (BANKES, L.J.).—ELLIOTT *v.* ROBERTS (C. P.) & CO., LTD., [1916] 2 K. B. 518 ; 85 L. J. K. B. 1689 ; 115 L. T. 255 ; 81 J. P. 20 ; 32 T. L. R. 478 ; 14 L. G. R. 942, C. A.

Annotations :—**Refd.** Brackley *v.* Mid. Ry. (1916), 114 L. T. 1150 ; Groves *v.* Western Mansions (1916), 33 T. L. R. 76.

211. —— —— ——.]—It is said that the invitation to the quayside amounted practically to an invitation to any part of the premises & to any warehouse on the premises, but I cannot assent to that for one moment. I do not think that if a man is permitted or invited go to a quayside to do business by the ship's rail or in the ship itself that amounts to an invitation to any other part of the dock premises.

I think it is not an invitation to go into a warehouse where in the ordinary course the business of a tallyman is not conducted. He was not at the time of the accident . . . doing anything which was for the common interest of pltfs. & defts. It was no part of deft.'s business to do that tallying, so that this is not a case where the act was done for the common interest of both parties (COZENS-HARDY, M.R.).—WILSON, SONS & CO., LTD. *v.* BARRY RY. CO. (1916), 86 L. J. K. B. 432 ; 116 L. T. 71 ; 10 B. W. C. C. 24, C. A.

212. —— —— ——.]—MERSEY DOCKS & HARBOUR BOARD *v.* PROCTER, No. 59, *ante.*

213. —— —— ——.]—The liability in tort of the owner of premises to those who use them is carefully discussed in the case of *Latham* v. *R. Johnson & Nephew*, No. 223, *post*, & the statement of law there is a concise & accurate expression of well known principles. It is pointed out that the duty varies ; being lowest to the trespasser ; next to a licencee & greatest to a person whose position owing to the deficiencies of the English language is described by lawyers as an invitee, meaning persons invited to the premises by the owner or occupier for purposes of business or of material interest (LORD BUCKMASTER).—FAIRMAN *v.* PERPETUAL INVESTMENT BUILDING SOCIETY, [1923] A. C. 74 ; 92 L. J. K. B. 50 ; 128 L. T. 386 ; 87 J. P. 21 ; 39 T. L. R. 54, H. L.

Annotations :—**Refd.** Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746. **Mentd.** Cockburn *v.* Smith, [1924] 2 K. B. 119.

214. —— —— —— **Distinguished from mere volunteer.**]—INDERMAUR *v.* DAMES, No. 208, *ante.*

215. —— —— —— ——.]—Pltf. after the usual business hours of the docks, but before they were closed, went on board a vessel lying in the docks, pursuant to an invitation from one of the officers on board, & while there took an order for several instruments. While on board the vessel the servants of the dock co. moved the vessel, & in doing so shifted a horse on which the stage communicating with the shore rested. Pltf. had no notice that the stage had been disarranged, & while returning along it it turned over, & he was thrown into the water & injured. This stage was the property of the dock co. & under the control of their servants, & formed the only access between the vessel & the shore, & the dangerous state it was in was known to defts.' servants :—*Held :* (1) as pltf. was there on the business of a ship in defts.' dock, the only access to which was supplied by them, he was there on business, in which they were interested, & therefore that they were liable for injuries he sustained through the negligence of their servants. (2) Pltf. was not a mere volunteer, but he passed along the stage by the tacit invitation of defts., & that as the dangerous state of the stage was in the nature of a trap, & was known to defts., & not communicated by them to pltf., they were liable for the injuries he sustained.—SMITH *v.* LONDON & ST. KATHARINE DOCKS CO. (1868), L. R. 3 C. P. 326 ; 37 L. J. C. P. 217 ; 18 L. T. 403 ; 16 W. R. 728 ; 3 Mar. L. C. 66.

Annotations :—*As to* (1) **Distd.** O'Neil *v.* Everest (1892), 61 L. J. Q. B. 453. **Apld.** Miller *v.* Hancock, [1893] 2 Q. B. 177 ; Lewis *v.* Ronald (1909), 101 L. T. 534. **Refd.** Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817 ; Elliott *v.* Roberts (1915), 32 T. L. R. 71 ; Dunster *v.* Hollis, [1918] 2 K. B. 795 ; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. *As to* (2) **Distd.** O'Neil *v.* Everest (1892), 61 L. J. Q. B. 453. **Refd.** King *v.* G. W. Ry. (1871), 24 L. T. 583 ; Lucy *v.* Bawden, [1914] 2 K. B. 318 ; Brackley *v.* Mid. Ry. (1916), 114 L. T. 1150. *Generally*, **Refd.** Heaven *v.* Pender (1883), 11 Q. B. D. 503 ; Fairman *v.* Perpetual Investment Bldg. Soc., [1923] A. C. 74. **Mentd.** Mowbray *v.* Merryweather, [1895] 1 Q. B. 857 ; Hargroves, Aronson *v.* Hartop (1905), 74 L. J. K. B. 233 ; Huggett *v.* Miers, [1908] 2 K. B. 278.

216. —— —— —— ——.]—Pltf. sent a heifer, which was put into a horse box by defts.' railway to their P. station. On the arrival of the train at the station, there being only two porters available to shunt the horse box to the siding, from which alone the heifer could be delivered to pltf., in order to save delay he assisted in shunting the horse box & while he was so assisting he was run against & injured through a train being negligently allowed by defts.' servants to come out of the siding. There was evidence that the station master knew that pltf. was assisting in the shunting & assented to his doing so :—*Held :* pltf. was not a mere volunteer assisting defts.' servants, but was on defts.' premises with their consent for the purpose of expediting the delivery of his own goods ; & defts. were therefore liable to him for the

Sect. 1.—*In regard to particular persons: Sub-sect.* 2, *A.* (*a*) & (*b*).]

negligence of their servants according to the principle of *Holmes* v. *North Eastern Ry. Co.*, No. 219, *post*.—WRIGHT *v.* LONDON & NORTH WESTERN RY. CO. (1876), 1 Q. B. D. 252; 45 L. J. Q. B. 570; 33 L. T. 830; 40 J. P. 628, C. A.

Annotations:—**Apld.** Williams *v.* Linotype & Machinery (1914), 84 L. J. K. B. 1620. **Followed.** Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899. **Refd.** *Houghton v. Pilkington*, [1912] 3 K. B. 308; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746.

217. —— —— —— ——.] — Defts., M. E., Ltd., were the occupiers of a theatre in which rehearsals were taking place under their control & direction of a dramatic piece or revue, which they intended shortly to produce. Pltf., a professional dancer & actress, between whom & defts. there was no existing contract, was attending the rehearsals by the licence or invitation of defts. with a view to their ascertaining her fitness for engagement in the piece, & to pltf. obtaining an engagement to perform in it when produced. While attending a rehearsal she was told by an employee of defts., whose orders she was not bound to obey, to stand on a staircase forming part of the stage scenery, which by his negligence was insecurely fastened; & on her doing so the staircase collapsed, & she was injured. In an action by pltf. against these defts. for damages for personal injuries:—*Held*: as the rehearsal was not a matter of exclusive interest to defts., but of common interest to pltf. & defts., pltf., by taking part in it, could not be regarded as a volunteer gratuitously assisting the servant of defts. in doing their work so as to entitle defts. to rely upon the defence of common employment, but that pltf. was on the premises of defts. as a licencee having a common interest with them, or as an invitee, to whom defts. accordingly owed a duty of using reasonable care to prevent damage to pltf. from unusual dangers or traps of which they knew or ought to have known, & therefore, defts. having failed in the observance of that duty, pltf. was entitled to recover against them in the action.—HAYWARD *v.* DRURY LANE THEATRE, LTD. & MOSS' EMPIRES, LTD., [1917] 2 K. B. 899; 87 L. J. K. B. 18; 117 L. T. 523; 33 T. L. R. 557; 61 Sol. Jo. 665, C. A.

Annotations:—**Refd.** Kimber *v.* Gas Light & Coke Co. (1918), 87 L. J. K. B. 651; Hardy *v.* C. L. Ry., [1920] 3 K. B. 459; Heasmer *v.* Pickfords (1920), 36 T. L. R. 818; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746.

218. —— —— —— **Distinguished from mere licencee.**]—INDERMAUR *v.* DAMES, No. 208, *ante*.

219. —— —— —— ——.]—At defts.' station at C. it was the habit to unload coal waggons by shunting them & tipping the coal into cells; it was also the practice for the consignees of the coal, or their servants, to assist in the unloading, & for that purpose to go along a flagged path by the side of the waggons. Pltf. was consignee of a coal waggon, which could not be unloaded in the usual way on account of all the cells being occupied. With the permission of the station master he went to his waggon, which was shunted in the usual place, took some coal from the top of the waggon, & descended on to the flagged path. The flag he stepped on gave way, & he fell into one of the cells & was injured:—*Held*: although not getting his coal in the usual mode, pltf. was not a mere licencee, but was engaged, with the consent & invitation of defts., in a transaction of common interest to both parties, & was therefore entitled to require that defts.' premises should be in a reasonably secure condition.

I quite concur in the rule laid down by the cases, that where a person is a mere licencee he has no cause of action on account of dangers existing in the place he is permitted to enter. Now in one sense pltf. was a licencee, but he was not a mere licencee, & the word mere has a very qualifying operation. We must infer from the silence of the station master that he acquiesced in pltf.'s going on to the siding for the purpose of getting coal from his waggon in the way in which he did get it, & we are not to suppose that any additional risk was caused by his mode of descending from the buffer. Pltf., then, went there with the consent of the station master for the purpose of getting his coal, but in what relation did defts. stand to that purpose? In the delivery & receipt of the coal there was a common interest in them & in pltf., since they were bound to deliver it; & this prevents the case from being that of one who is a mere licencee (CHANNELL, B.).—HOLMES *v.* NORTH EASTERN RY. CO. (1869), L. R. 4 Exch. 254; 38 L. J. Ex. 161; 20 L. T. 616; 17 W. R. 800; *affd.* (1871), L. R. 6 Exch. 123, Ex. Ch.

Annotations:—**Apld.** Wright *v.* L. & N. W. Ry. (1876), 1 Q. B. D. 252. **Consd.** Marney *v.* Scott, [1899] 1 Q. B. 986; Wilson *v.* Barry Ry. (1916), 116 L. T. 71. **Followed.** Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899. **Refd.** Batchelor *v.* Fortescue (1883), 11 Q. B. D. 474; Thatcher *v.* G. W. Ry. (1893), 10 T. L. R. 13; Houghton *v.* Pilkington, [1912] 3 K. B. 308; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Brackley *v.* Mid. Ry. (1916), 114 L. T. 1150; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746.

220. —— —— —— ——.]—Pltf., a licenced waterman, having complained to the person in charge that a barge of deft.'s was being navigated unlawfully, was referred to deft.'s foreman. While going along deft.'s premises in order to see the foreman, pltf. was injured by the falling of a bale of goods so placed as to be dangerous, & yet to give no warning of danger:—*Held*: (1) pltf. was not a bare licencee, but was on deft.'s premises by the invitation of deft., & for a purpose in which both pltf. & deft. had a common interest; & (2) the injury was caused by a trap or concealed source of mischief within the meaning of *Bolch* v. *Smith*, No. 293, *post*.—WHITE *v.* FRANCE (1877), 2 C. P. D. 308; 46 L. J. Q. B. 823; 25 W. R. 878.

221. —— —— —— ——.]—LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., No. 223, *post*.

222. —— —— —— **Distinguished from guest.**]—INDERMAUR *v.* DAMES, No. 208, *ante*.

223. —— —— —— ——.] — Defts. were owners of a plot of unfenced waste land from which old houses had been cleared. It did not adjoin any public highway, but was accessible by a path leading from the back of the house in which pltf., a child between two & three years old, lived with her parents. The public were allowed by defts. to traverse the land, & children of all ages were in the habit of playing upon heaps of sand, stone, & other materials which from time to time were deposited there by defts. Pltf. went upon the

PART II. SECT. 1, SUB-SECT. 2.—A. (a).

218 i. *Person entering premises of owner or occupier—For purposes of business or common interest—On invitation express or implied—Distinguished from mere licencee.*]—Pltf. went to call on a friend who occupied a suite of rooms in a building owned by deft. co.; &, in going along a narrow & badly lighted hallway to her friend's suite, fell into a trap-hole in the hallway, sustaining injuries for which damages were claimed in this action:—*Held*: pltf. was not a mere licencee, to whom no duty was owed by deft. co. but that she was entitled as a guest of the tenant to the same protection as the tenant.—WALLICH *v.* GREAT WEST CONSTRUCTION CO. (1914), 29 W. L. R. 41; 6 W. W. R. 1404; 24 Man. L. R. 642; 20 D. L. R. 553.—**CAN.**

land unaccompanied by any older person & was shortly afterwards found upon a heap of paving stones, one of which had fallen upon her hand & injured it. There was no evidence to show how the accident happened. In an action for negligence the jury found that children played upon the land with the knowledge & permission of defts.; that there was no invitation to pltf. to use the land unaccompanied; that defts. ought to have known that there was a likelihood of children being injured by the stones; & that defts. did not take reasonable care to prevent children being injured thereby: —*Held:* (1) there being neither allurement nor trap, nor invitation, nor dangerous object placed upon the land, defts. were not liable.

Now the law as to mere licencees is well settled. The grant of the licence to go on the land creates no right, but merely affords an answer to a charge of trespass. It is a mere permission, & those who take it must take it with all chances of meeting with accidents. There are, however, the following exceptions to the freedom from liability, namely, (*a*) Allurement in the evil sense of alluring with malicious intent to injure. This gives a right of action even to a trespasser, & *a fortiori* therefore to a licencee. (*b*) Concealed trap—that is, something added to the condition of the ground as it was when the licence was given in a way likely to be dangerous & without giving notice to the licencee. (*c*) The last exception is the introduction into the land to which the licence applies of something out of the normal user of the land, known to the owners to be dangerous, without warning the licencee (FARWELL, L.J.).

(2) The latter term [invitee] is reserved for those who are invited into the premises by the owner or occupier for some purpose of business or of material interest. Those who are invited as guests, whether from benevolence or for social reasons, are not in law invitees but licencees (HAMILTON, L.J.).—LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., [1913] 1 K. B. 398; 82 L. J. K. B. 258; 108 L. T. 4; 77 J. P. 137; 29 T. L. R. 124; 57 Sol. Jo. 127, C. A.

Annotations:—*As to* (1) **Refd.** Glasgow Corpn. *v.* Taylor, [1922] 1 A. C. 44. *As to* (2) **Refd.** Wilson *v.* Barry Ry. (1916), 116 L. T. 71; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899; Pritchard *v.* Peto, [1917] 2 K. B. 173; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746. *Generally*, **Consd.** Hardy *v.* C. L. Ry., [1920] 3 K. B. 459. **Refd.** Crane *v.* South Suburban Gas Co., [1916] 1 K. B. 33; Elliott *v.* Roberts, [1916] 2 K. B. 518; Ruoff *v.* Long, [1916] 1 K. B. 148; Fairman *v.* Perpetual Investment Bldg. Soc., [1923] A. C. 74; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. **Mentd.** Norman *v.* G. W. Ry., [1914] 2 K. B. 153; Maclenan *v.* Segar, [1917] 2 K. B. 325; Everett *v.* Griffiths, [1920] 3 K. B. 163; Harnett *v.* Fisher (1926), 135 L. T. 724.

224. —— —— —— Distinguished from servant.]—INDERMAUR *v.* DAMES, No. 208, *ante.*

225. —— —— —— Distinguished from employee with knowledge of probable danger.]—INDERMAUR *v.* DAMES, No. 208, *ante.*

226. —— —— —— Distinguished from trespasser.]—LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., No. 223, *ante.*

227. —— —— —— ——.]—FAIRMAN *v.* PERPETUAL INVESTMENT BUILDING SOCIETY, No. 213, *ante.*

(*b*) *Particular Instances.*

228. Customer in shop.]—INDERMAUR *v.* DAMES, No. 208, *ante.*

229. ——.]—There being a navigable canal here belonging to defts., they invite persons navigating or using the canal with boats & barges to go over this bridge in the same way & sense that a shopkeeper, who keeps open shop, invites passers by & the public to enter his shop; & under those circumstances, defts. were bound & were under the duty, to keep the bridge in a safe condition, & to take care that there was no pitfall, trap, or other dangerous thing in the way (BRAMWELL, B.).—SHOEBOTTOM *v.* EGERTON (1868), 18 L. T. 889.

230. Servant of customer.]—INDERMAUR *v.* DAMES, No. 208, *ante.*

231. Person navigating canal.]—SHOEBOTTOM *v.* EGERTON, No. 229, *ante.*

232. ——.]—WHITE *v.* FRANCE, No. 220, *ante.*

233. Person on railway premises—Expediting delivery of own goods.]—HOLMES *v.* NORTH EASTERN RY. CO., No. 219, *ante.*

234. —— ——.]—WRIGHT *v.* LONDON & NORTH WESTERN RY. CO., No. 216, *ante.*

235. —— Seeing friend off.]—Pltf., who had frequently accompanied passengers in the same way on previous occasions, in company with A., a passenger by deft.'s railway, entered upon the premises of defts.' for the purpose of seeing A. off. In order to get to the departure platform of the defts.' railway, it was necessary to cross a bridge approached by steep steps & turning to the right at the top of the steps. About 6 or 10 feet from the top step a servant of the defts., for the purpose of cleaning a lamp, was standing on a narrow plank placed across the bridge resting on the balustrades about 4 feet 6 inches from the ground. Pltf. walked against the plank & was injured. It was daylight at the time of the accident. In an action against defts. for personal injuries:—*Held:* (1) There was no reasonable evidence of negligence on the part of defts. to go to the jury; (2) pltf. was not a bare licencee, but was on defts.' premises by the invitation of defts. to the same extent as the passenger accompanied, who was there on lawful business in which the passenger & the co. had both an interest.—WATKINS *v.* GREAT WESTERN RY. CO. (1877), 46 L. J. Q. B. 817; 37 L. T. 193; 25 W. R. 905.

Annotation:—**Refd.** Thatcher *v.* G. W. Ry. (1893), 10 T. L. R. 13.

236. —— Crossing line at level crossing—Gates usually locked when train passing.]—At a level crossing on defts.' railway there was a small wicket gate for the use of pedestrians. According to the practice of defts. the gate was kept locked when trains were passing, & was unlocked only when it was safe to cross the line, & that practice was known to pltf. On the occasion in question, owing to the negligence of a servant of defts., the gate was left unlocked when a train was approaching, & pltf. went through it, & proceeded to cross the line when he was knocked down by the train & injured. In an action by pltf. against defts. for damages:—*Held:* defts., by leaving the gate unlocked, gave to pltf. an invitation to cross the

PART II. SECT. 1, SUB-SECT. 2.—A. (b).

235 i. *Person on railway premises—Seeing friend off.*]—The Board of Land & Works is liable, in an action of tort, for injuries to a friend accompanying a passenger upon a railway station, occasioned by the neglect to sufficiently light the station at night.—SWEENY *v.* BOARD OF LAND & WORKS (1878), 4 V. L. R. (L.) 440.—**AUS.**

235 ii. —— ——.]—A small hand truck with some luggage on it was left unattended on a railway platform, close to the train. The train was an excursion train, & the platform was extremely crowded. Pltf., who was seeing some friends off, walked along the platform looking for a carriage, & stumbling against the truck, injured her leg:—*Held:* under the circumstances the truck was a trap or pitfall, & defts. were liable in an action for negligence.—REDPATH *v.* RAILWAY COMRS. (1900), 21 N. S. W. L. R. 234; 17 N. S. W. W. N. 47.—**AUS.**

f. —— *Meeting friend.*] — Railway proprietors owe a duty to friends of a passenger, going to a station to receive him, to protect them from any

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line, in the circumstances pltf., in acting upon that invitation, had not failed to use ordinary & reasonable care, &, therefore, he was entitled to recover.—MERCER *v.* SOUTH EASTERN & CHATHAM RY. CO.'S MANAGING COMMITTEE, [1922] 2 K. B. 549; 92 L. J. K. B. 25; 127 L. T. 723; 38 T. L. R. 431.

237. Tradesman delivering goods.]—Pltf., on going to a shop, the property of deft., to deliver some goods ordered by the tenant there, was told by the latter to go round to a back door. In going so pltf. had to go through a dark passage, in which there were some steps, down which she fell. Deft. as owner of the premises, acknowledged the liability, if any, to pay damages to pltf. for the injuries she had suffered in so falling down the steps:—*Held:* there was sufficient evidence of negligence as to the passage having been insufficiently lighted for the case to go to the jury.—*v.* JENKINSON (1884), 1 T. L. R. 102, D. C.

238. Excise officer on duty — Given key to allow access.]—FLINN *v.* MAGEE (1898), 62 J. P. 489.

239. Police constable on duty — Entering premises after dark—Door left open.]—A police-constable, seeing the door of deft.'s warehouse open after dark, & in order to see that everything was right, & in the execution of his duty, entered the warehouse & injured himself by falling into an unfenced sawpit inside:—*Held:* he had no legal right to enter, being neither an invitee nor a licencee, but even assuming he had, deft. was under no duty to him to make the place safe for him or to warn him of the danger.—GREAT CENTRAL RY. CO. *v.* BATES, [1921] 3 K. B. 578; 90 L. J. K. B. 1269; 126 L. T. 61; 37 T. L. R. 948; 65 Sol. Jo. 768; 19 L. G. R. 649, D. C.

240. Person inspecting house to let — Key obtained from house agent.]—Landlord held liable for injury caused to a stranger through the front doorsteps giving way, who had obtained a key to look over the premises, which were to let, from the house agent.—WRIGHT *v.* LEFEVER (1902), 51 W. R. 149; 47 Sol. Jo. 109, C. A.

241. Servant of sub-contractor — Using contractor's scaffolding — Contract providing for facilities by contractor to sub-contractor.]—ELLIOTT *v.* ROBERTS (C. P.) & CO., LTD.; No. 210, *ante*.

242. Spectator at public exhibition.] — Deft. was the lessee & manager of a theatre. He had arranged for the performance of a play in his theatre with the manager of a touring theatrical co., who was to provide actors & scenery, deft. providing the theatre, the lighting & the playbills; each took an agreed proportion of the receipts. Pltf. took & occupied a seat in the theatre; during the performance an actor fired a pistol, which should have contained only a blank cartridge, but in the barrel of which, by some unexplained mischance, there was also a second cartridge of smaller size, which, when the pistol was fired struck pltf. on the wrist & inflicted a serious wound. The county ct. judge held that it was an implied term of the contract between pltf. & deft. that all persons connected with the performance of the play should exercise reasonable care so that members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care:—*Held:* the implied warranty found by the county ct. judge was too wide, the true relation between pltf. & deft. was that of invitor & invitee, deft. owed pltf. a duty to use reasonable care that she was not exposed to unusual danger, the existence of which deft. either knew or ought to have known, & that there must be a new trial to inquire into the supervision exercised over the firearms & the ammunition for them & into the loading of the pistols.—COX *v.* COULSON, [1916] 2 K. B. 177; 85 L. J. K. B. 1081; 114 L. T. 599; 32 T. L. R. 406; 60 Sol. Jo. 402, C. A.

Annotations:—**Folld.** Sheehan *v.* Dreamland, Margate (1923), 40 T. L. R. 155. **Refd.** Maclenan *v.* Segar, [1917] 2 K. B. 325.

243. ——.]—Defts. were the freeholders of a large space of ground on which various side shows were held & defts. issued advertisements inviting people to visit the place. Pltf. visited the place & paid for a ticket for a side show belonging to a concessionare from defts. & containing a contrivance for throwing a person into the air. The person who was in charge of the contrivance, but who was not a servant of defts., improperly invited pltf. to sit on it in a wrong position, & pltf. was injured through being thrown off the contrivance. In an action for damages for negligence:—*Held:* the position of defts. & pltf. was that of invitors & invitee & as there was no evidence that the performance was intrinsically dangerous & no evidence of any negligence by defts. or by any servant of theirs pltf. could not recover.—SHEEHAN *v.* DREAMLAND, MARGATE, LTD. (1923), 40 T. L. R. 155, C. A.

244. Tradesman calling at house—For payment.]—Pltf., a newsvendor, called at deft.'s house for payment of money due for supplying papers, & while pltf. was standing at the door a piece of projecting cornice on the top of the house fell & injured him. The cornice was defective, but deft. was not aware of the defect; & no evidence was given on behalf of pltf. to show that deft. neglected proper precautions, whereby she failed to notice the condition of the cornice:—*Held:* deft.'s duty was to keep her house in such a state of repair as not to expose pltf., an invitee, to any hidden danger of which she was aware or ought to have been aware, & as she was in fact not aware of such danger, & there was no evidence to show negligence, whereby she failed to be aware of it, pltf.'s claim failed.—PRITCHARD *v.* PETO, [1917] 2 K. B. 173; 86 L. J. K. B. 1292; 117 L. T. 145; 15 L. G. R. 860.

Annotation:—**Apld.** Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523.

245. Actress attending rehearsal—In expectation of engagement.]—HAYWARD *v.* DRURY LANE THEATRE, LTD. & MOSS' EMPIRES, LTD., No. 217, *ante*.

dangerous place, not only in the way provided for access to the station, but also in any other way of access allowed to be commonly used by persons resorting to the station.—LANGTON *v.* BOARD OF LAND & WORKS (1880), 6 V. L. R. (L.) 316.—**AUS.**

g. —— *Unloading car in station yard.*]—THOMPSON *v.* GRAND TRUNK RY. CO. (1912), 22 O. W. R. 524; 3 O. W. N. 1392; 5 D. L. R. 145.—**CAN.**

237 *i. Tradesman delivering goods.*]—While a teamster was delivering a load of coke on the premises of defts., he was struck in the eye & injured by a chip, which one of defts.' workmen, who was cutting off the excrescences on the inside of an iron pipe for the purpose of smoothing it, had chipped off. The accident might have been avoided had there been a screen or guard; or, in the absence of a screen or guard, by the workman stopping work during the delivery of the coke:—*Held:* defts. were liable for the injuries sustained.—FALLIS *v.* GARTSHORE-THOMPSON PIPE FOUNDRY CO. (1902), 22 C. L. T. 283; 4 O. L. R. 176; 1 O. W. R. 348.—**CAN.**

h. Workman on train — Workman servant of contractor for railway.]—

246. Builder's foreman removing firm's advertisement board—After work completed.]—The owners of a flat let it on a lease to a tenant & agreed to contribute to the cost of decorating & repairing it at the commencement of the term. The tenant employed a firm of builders to do the work. The firm's advertisement board was fixed to a balcony with a balustrade projecting from the front wall of the flat. The judge at the trial found that the balcony was not parcel of the demised premises but was part of the exterior of the premises which the lessors were bound to repair. The jury found that the balcony was dangerous & that the lessors knew or ought to have known this. When the work was finished the firm's foreman went on the balcony to remove the advertisement board. The balustrade gave way & the man fell into the street below & was killed.

In an action by his widow under Lord Campbell's Act, 1846 (c. 93), against the lessors of the flat :—*Held :* pltf. was entitled to recover, for that the deceased man was more than a bare licencee of defts. & was at least a licencee with an interest, with the same rights as an invitee, & that there was evidence to support the finding of the jury that defts. ought to have known the balcony was dangerous.—SUTCLIFFE *v.* CLIENTS INVESTMENT CO., [1924] 2 K. B. 746 ; 94 L. J. K. B. 113 ; 132 L. T. 83 ; 40 T. L. R. 765, C. A.

Public using highways.]—*See* Sub-sect. 6, *post.*

B. Nature of Duty.

(a) General Rules.

247. Duty to exercise reasonable care—To prevent damage from unusual danger.]—There is no implied contract between the owners of a ship & a pilot whom they are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants ; & an action will lie by the pilot against the shipowners for injuries, caused to him, whilst acting as pilot on board their vessel, by the negligence of their servants.

This was an action under Lord Campbell's Act, 1846, to recover damages in respect of the death of pltf.'s testator, who was her husband. . . . There is an obligation on the part of the occupier of property, whether fixed or movable, to those who, at his invitation, express or implied, come on that property, to take, by himself & servants, reasonable care that the person so coming shall not be exposed to unusual danger (BLACKBURN, J.).—SMITH *v.* STEELE (1875), L. R. 10 Q. B. 125 ; 44 L. J. Q. B. 60 ; 32 L. T. 195 ; 39 J. P. 326 ; 23 W. R. 388 ; 2 Asp. M. L. C. 487.

Annotations :—**Refd.** Heaven *v.* Pender (1882), 9 Q. B. D. 302. **Mentd.** Tozeland *v.* West Ham Union, [1906] 1 K. B. 538.

248. —— ——.]—Defts. ought to have their premises in such a state that people coming to transact business with them had a right to suppose those premises to be in a reasonably safe condition (MANISTY, J.).—BUTTS *v.* GODDARD (1887), 4 T. L. R. 193.

249. —— —— **Which invitor knew or ought to have known.**]—INDERMAUR *v.* DAMES, No. 208, *ante.*

250. —— —— ——.]—COX *v.* COULSON, No. 242, *ante.*

251. —— —— ——.]—HAYWARD *v.* DRURY LANE THEATRE, LTD. & MOSS' EMPIRES, LTD., No. 217, *ante.*

252. —— —— —— **Danger unknown to invitee.**]—SMITH *v.* LONDON & ST. KATHARINE DOCKS CO., No. 215, *ante.*

253. —— —— —— ——.]—WRIGHT *v.* LEFEVER, No. 240, *ante.*

254. —— —— —— ——.]—Near a station on defts. line of railway, & passing over the line from north to south there was a level crossing, with gates for carriage traffic, which formed part of the highway, but which defts. were bound by statute to maintain. Defts. had voluntarily constructed close to the station & to the level crossing & parallel to the latter a footbridge, with staircases. The bridge stood entirely on deft.'s land, & had been maintained by them, but the footway over it at each end communicated directly with the highway, & only indirectly by means of the highway with defts.' station premises. Defts. had never closed the footway or taken any steps to prevent the public from using it, & the public in fact used it without hinderance. On Jan. 22, 1915, between 1 & 2 p.m., pltf. was crossing over the bridge from north to south with a view to catching a train at the south platform of defts.' station. On the morning of that day there had been a blizzard, & snow had fallen on the footway of the bridge, which in consequence of the traffic had become caked on the steps, rendering them slippery. As pltf. was descending

v. TORONTO, GREY & BRUCE RY. CO. (1874), 34 U. C. R. 451.—**CAN.**

k. *Servant of government contractor.*]—BREBNER *v.* R. (1913), 14 Exch. C. R. 242 ; 14 D. L. R. 397.—**CAN.**

PART II. SECT. 1, SUB-SECT. 2.—B. (a).

247 i. *Duty to exercise reasonable care—To prevent damage from unusual danger.*]—RICHARDSON *v.* SOUTH AUSTRALIAN CO. (1915), 20 C. L. R. 181 ; *affg.*, [1914] S. A. L. R. 316.—**AUS.**

247 ii. —— ——.]—WATSON *v.* MUNICIPAL COUNCIL OF SYDNEY (1926), 26 S. R. N. S. W. 501 ; 43 N. S. W. W. N. 164.—**AUS.**

247 iii. —— ——.]—KINGSTON & BATH ROAD CO. *v.* CAMPBELL (1891), 20 S. C. R. 605.—**CAN.**

247 iv. —— ——.]—FRASER *v.* LONDON STREET RY. CO. (1899), 29 O. R. 411 ; 26 A. R. 383.—**CAN.**

247 v. —— ——.]—FONSECA *v.* LAKE OF THE WOODS MILLING CO. (1905), 15 Man. L. R. 413 ; 1 W. L. R. 553.—**CAN.**

247 vi. —— ——.]—The owner of a building in course of construction owes to those whom he invites into or upon it the duty of using reasonable care & skill in order to have the property & appliances upon it intended for use in the work fit for the purposes they are to be put to.—VALIQUETTE *v.* FRASER (1907), 39 S. C. R. 1.—**CAN.**

247 vii. —— ——.]—LEVINE *v.* DOMINION EXPRESS CO., [1922] 1 W. W. R. 1143 ; 63 D. L. R. 422 ; 15 Sask. L. R. 247.—**CAN.**

247 viii. —— ——.]—BUTLER *v.* M'ALPINE, [1904] 2 I. R. 445.—**IR.**

247 ix. —— ——.]—GREENLEES *v.* ROYAL HOTEL, DUNDEE (1905), 7 F. (Ct. of Sess.) 382.—**SCOT.**

247 x. —— ——.]—Owing to negligence on the part of a Public Works Department in failing to maintain the ceiling of a post office in a proper state of repair, part of such ceiling fell upon & injured pltf., a lessee of a postal letter-box, while he was proceeding through the building after attending his box :—*Held :* the government had been under a duty to persons like pltf., whom it had invited into the post office, to keep the premises in proper repair, &, having failed in its duty, was liable to pltf. for damages.—LIDDELL *v.* TRANSVAAL GOVERNMENT, [1906] T. S. 863.—**S. AF.**

249 i. —— —— *Which invitor knew or ought to have known.*]—LEVERIDGE *v.* SKUTHORPE (1919), 19 N. S. W. L. R. 254 ; 36 N. S. W. W. N. 46 ; 26 C. L. R. 135.—**AUS.**

ii. —— —— ——.]—A man when in a public house which he was in the habit of frequenting intended to go into a lavatory in which he had been once before, but by mistake passed the door of the lavatory, & pushing open the door of a sunk cellar, which was standing ajar, fell into the cellar & was injured. In an action of damages it was proved that two other accidents of a similar nature had happened, & that the publican had ordered the cellar door to be kept locked :—*Held :* the publican was liable in damages.—CAIRNS *v.* BOYD (1879), 6 R. (Ct. of Sess.) 1004.—**SCOT.**

249 iii. —— —— ——.]—PATERSON *v.* KIDD'S TRUSTEES (1896), 24 R. (Ct. of Sess.) 99 ; 34 Sc. L. R. 69 ; 4 S. L. T. 145.—**SCOT.**

Sect. 1.—*In regard to particular persons: Sub-sect.* 2, *B.* (*a*), (*b*), (*c*), (*d*), (*e*) & (*f*), & *C.*]

the stair on the south side she warned her young daughter who accompanied her to be careful, & she herself made use of the handrail. She nevertheless slipped on a mass of frozen snow & fell, & was hurt. Pltf. brought an action against defts. for damages for personal injuries. It was found that there had been no contributory negligence on her part:—*Held:* (1) the facts showed that the footway over the bridge had been dedicated by defts. & accepted by the public as a highway, & defts. were under no duty to persons using the footway to maintain or cleanse it, & therefore were not liable to pltf.; (2) if defts. owed any duty to persons using the footway, it could not be higher than that of an inviter towards an invitee, which arises only in respect of dangers of which the invitee has no knowledge or notice; here the facts showed that pltf. had knowledge of the danger, & therefore, even on that view, defts. were not liable to pltf.—BRACKLEY *v.* MIDLAND RY. CO. (1916), 85 L. J. K. B. 1596; 114 L. T. 1150; 80 J. P. 369; 14 L. G. R. 632, C. A.

255. —— —— —— ——.]—PRITCHARD *v.* PETO, No. 244, *ante*.

256. —— —— **Danger more or less hidden.**]—(1) A duty exists on the part of the person who invites towards a person who acts on the invitation, that duty does not, according to the authorities, amount to a guarantee by inviter that the person invited shall suffer no injury while on the premises to which he has been invited to come, but only to a duty to take reasonable care that he shall not be exposed to dangers which are more or less hidden, & not obvious (VAUGHAN WILLIAMS, L.J.).

(2) The point has apparently escaped notice in this case that the element referred to by COCKBURN, C.J., in his judgment in *Gallagher* v. *Humphery*, No. 292, *post*, which contain the most favourable statement of the law for pltf. that I can find, is absent, namely, the adding by negligence or otherwise of some danger after permission or licence given to pltf. or the public for the use of the way on the part of the owner (KENNEDY, L.J.).—LOWERY *v.* WALKER, [1910] 1 K. B. 173; 79 L. J. K. B. 297; 101 L. T. 873; 26 T. L. R. 108; 54 Sol. Jo. 99, C. A.; *revsd.* on other grounds, [1911] A. C. 10, H. L.

Annotations:—*As to* (1) **Refd.** Norman *v.* G. W. Ry., [1914] 2 K. B. 153; Brackley *v.* Mid. Ry. (1916), 114 L. T. 1150. *Generally*, **Refd.** Grand Trunk Ry. of Canada *v.* Barnett, [1911] A. C. 361; Clinton *v.* Lyons, [1912] 3 K. B. 198; Latham *v.* Johnson & Nephew (1912), 82 L. J. K. B. 258; Wilson *v.* Barry Ry. (1916), 116 L. T. 71; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899; Hardy *v.* C. L. Ry., [1920] 3 K. B. 459; Fairman *v.* Perpetual Investment Bldg. Soc., [1923] A. C. 74. **Mentd.** Mowlem *v.* Dunne, [1912] 2 K. B. 136; Tofts *v.* Pearl Life Assce. (1913), 110 L. T. 190; Pritchard *v.* Torkington (1914), 7 B. W. C. C. 719; Manton *v.* Brocklebank, [1923] 1 K. B. 406.

257. —— **That property & appliances thereon fit for purposes to which put—Effect of owner contracting with competent persons—To perform work.**]—Deft. chartered for a single voyage, a vessel which was at the time at sea & in ballast. The charterparty declared that she was in every way fit for the service, & provided that she should be so maintained by the owners. On the afternoon of Apr. 5, the vessel was put at deft.'s disposal in dock, & two hours afterwards the loading began, deft. having contracted with a stevedore for the purpose, who had engaged pltf. amongst others to carry out the work. Fifteen minutes later pltf., in the course of his work, had to descend a ladder leading into the hold. It came adrift, & pltf. fell, sustaining injuries for which he sued deft.:—*Held:* deft. was liable to pltf., since it was his duty under the circumstances to make some inspection of the vessel before allowing the stevedore & his men to go on board her, & since the slightest inspection would have revealed the defective state of the ladder.

A man who intends that others shall come upon property of which he is the occupier for purposes of work or business in which he is interested, owes a duty to those who do so come to use reasonable care to see that the property & the applicances upon it which it is intended shall be used in the work are fit for the purpose to which they are to be put, & he does not discharge this duty by merely contracting with competent people to do the work for him (BIGHAM, J.).—MARNEY *v.* SCOTT. [1899] 1 Q. B. 986; 68 L. J. Q. B. 736; 47 W. R. 666; 15 T. L. R. 320; 43 Sol. Jo. 417.

Annotations:—**Refd.** Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; Maclenan *v.* Segar, [1917] 2 K. B. 325. **Mentd.** Scott *v.* Foley, Aikman (1899), 16 T. L. R. 55.

258. Duty only in relation to invitees or licencees.]—Workmen employed by defts., a gas co., for the purpose of carrying out repairs to a gas main in a highway placed a fire pail, on which was a ladle containing molten lead, on unenclosed land adjacent to the highway. Pltf., a young child, was playing with other children near the fire when a passer by accidentally knocked over the fire pail, & the molten lead was spilled on pltf., causing her injury. In an action by pltf. to recover damages the county ct. judge found that defts. were guilty of negligence in leaving the fire unattended & unguarded with the knowledge that it was surrounded by children & that it was being used for molten lead:—*Held:* there was evidence on which the county ct. judge could find that defts. were negligent; & defts. were also liable on the ground that what they were doing was a nuisance in that it was dangerous unless precautions were taken to guard persons using the highway from the danger.

The necessity of considering the question of a trap only arises where the person who is said to have created it gave a licence or invitation to others to enter the premises where the alleged trap existed (LUSH, J.).—CRANE *v.* SOUTH SUBURBAN GAS CO., [1916] 1 K. B. 33; 85 L. J. K. B. 172; 114 L. T. 71; 80 J. P. 51; 32 T. L. R. 74; 60 Sol. Jo. 222; 14 L. G. R. 382, D. C.

(*b*) *Customers in Shops, Restaurants, etc.*

259. Reasonable care must be exercised—To prevent damage from unusual danger—Knowledge

PART II. SECT. 1, SUB-SECT. 2.—B. (b).

259 i. *Reasonable care must be exercised—To prevent damage from unusual danger—Knowledge of danger or means of knowledge.*]—A merchant who expressly or impliedly invites customers to come into his store owes a duty to them to use reasonable care to prevent damage from unusual danger of which he knows or ought to know.—MITCHELL *v.* JOHNSTONE WALKER, LTD. (Alta.), [1919] 3 W. W. R. 24; 47 D. L. R. 293.—**CAN.**

259 ii. —— —— ——.]—When a customer, who is properly in a shop for the purpose of trading in it, seeks to reach for a proper purpose what is apparently another part of the premises which the tradesman is bound to provide for him, & which is in constant use for that purpose by his customers, the tradesman is bound to warn him of any concealed dangers that there are on the road to it, & if he fails to do so he cannot shield himself from responsibility for injury to the customer by proving that the way & the trap were under the control of some one else.—MCCALLUM *v.* HEMPHILL TRADE SCHOOLS, LTD. (Alta.), [1920] 1 W. W. R. 114; 50 D. L. R. 311.—**CAN.**

of danger or means of knowledge.]—INDERMAUR *v.* DAMES, No. 208, *ante.*

260. —— —— —— Latent defects.] — The contract between a restaurant keeper & his customer contains an implied warranty by the restaurant keeper that the premises shall be as safe as reasonable care & skill can make them, but he is not liable for defects which could not have been discovered by the exercise of reasonable care & skill on the part of anyone concerned.—BRANNIGEN *v.* HARRINGTON (1921), 37 T. L. R. 349.

261. Liability for dangerous opening in floor.]—A shopkeeper, who invites the public to his shop, is liable for neglect on leaving a trap door open without any protection, by which his customers suffer injury (TINDAL, C.J.).—PARNABY *v.* LANCASTER CANAL CO., LANCASTER CANAL CO. *v.* PARNABY (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L. J. Ex. 338; 113 E. R. 400, Ex. Ch.; *affg.* S. C. *sub nom.* BARNABY *v.* LANCASTER CANAL CO. (1838), 2 J. P. 679.

Annotations:—**Distd.** Ward *v.* London & Blackwall Ry. (1845), 6 L. T. O. S. 125. **Consd.** Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746. **Reld.** Hodgman *v.* West Midland Ry. Co. (1864), 5 B. & S. 173; Indermaur *v.* Dames (1866), L. R. 1 C. P. 274; Winch *v.* Thames Conservators (1874), L. R. 9 C. P. 378; Gallin *v.* L. & N. W. Ry. (1875), L. R. 10 Q. B. 212; Sandys *v.* Florence (1878), 47 L. J. Q. B. 598; Forbes *v.* Lee Conservancy Board (1879), 4 Ex. D. 116; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Norman *v.* G. W. Ry., [1915] 1 K. B. 584; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899. **Mentd.** Brown *v.* Mallett (1848), 5 C. B. 599; Pilbrow *v.* Pilbrow's Atmospheric Ry. (1848), 5 C. B. 440; Johnson *v.* Mid. Ry. (1849), 4 Exch. 367; Reedie *v.* N. W. Ry., Hobbit *v.* Same (1849), 13 Jur. 659; Seymour *v.* Maddox (1851), 20 L. J. Q. B. 327; General Steam Navigation Co. *v.* Morrison (1853), 1 C. L. R. 103; Metcalfe *v.* Hetherington (1855), 11 Exch. 257; Walker *v.* Goe (1859), 4 H. & N. 350; Dutton *v.* Powles (1861), 2 B. & S. 174; Holliday *v.* St. Leonard, Shoreditch, Vestry (1861), 11 C. B. N. S. 192; Thompson *v.* N. E. Ry. (1862), 2 B. & S. 119; Mersey Docks Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93; The Excelsior (1868), L. R. 2 A. & E. 268; Readhead *v.* Mid. Ry. (1869), L. R. 4 Q. B. 379; Fleming *v.* Manchester Corpn. (1881), 44 L. T. 517; R. *v.* Williams (1884), 9 App. Cas. 418; Lowther *v.* Curwen (1887), 58 L. T. 168; R. *v.* G. W. Ry. (1893), 62 L. J. Q. B. 572; The Bearn, [1906] P. 48; Bodo S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310; Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Walter Nelson, [1918] 2 K. B. 381; British Petroleum Co. *v.* A.-G. for Ceylon, [1926] A. C. 147.

262. ——.]—CLAPSON *v.* ALLEN, No. 84, *ante.*

263. ——.] — Pltf., as administrator to his deceased wife, declared that deft. was in occupation of a brewery & office, & a passage leading thereto from the public street, used by deft. for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street; yet deft. wrongfully & negligently permitted a trap door in the floor of the passage to be & remain open without being properly guarded & lighted; & the wife, who had been to the office as a customer of deft., & otherwise in deft.'s business, & was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap door being & remaining open & not properly guarded & lighted; whereby she was killed:—*Held:* (1) pltf.'s right to sue as administrator, under Lord Campbell's Act, 1846 (c. 93), sufficiently appeared, without express allegation of pecuniary damage; (2) the duty of deft., & breach, sufficiently appeared.—CHAPMAN *v.* ROTHWELL (1858), E. B. & E. 168; 27 L. J. Q. B. 315; 4 Jur. N. S. 1180; 120 E. R. 471.

Annotations:—*As to* (2) **Reld.** Hounsell *v.* Smyth (1860), 29 L. J. C. P. 203; Cowley *v.* Sunderland Corpn. (1861), 30 L. J. Ex. 127; Indermaur *v.* Dames (1866), L. R. 1 C. P. 274; Sandys *v.* Florence (1878), 47 L. J. Q. B. 598; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398.

264. ——.]—INDERMAUR *v.* DAMES, No. 208, *ante.*

265. —— Customers entering after business hours.]—MASON *v.* LANGFORD (1888), 4 T. L. R. 407.

266. Liability not dependent on contract — Dependent on tacit invitation.]—INDERMAUR *v.* DAMES, No. 208, *ante.*

(c) Spectators at Public Exhibitions.

See THEATRES.

(d) Persons Using Canals, Docks and Wharves.

See RAILWAYS; SHIPPING; WATERS & WATERCOURSES.

(e) Persons Resorting to Railway Premises.

See CARRIERS, Vol. VIII., pp. 85–91, 95, 96, Nos. 586–617, 641–645; RAILWAYS.

(f) Other Cases.

267. Tradesman in warehouse for business purpose—Induced to cross dangerous platform—Liability of warehouseman.]—PIKE *v.* DEAR (1853), 21 L. T. O. S. 59.

Innkeepers.]—*See* INNS & INNKEEPERS, Vol. XXIX., pp. 9, 10, Nos. 116–127.

Ferry owners.]—*See, generally,* FERRIES, Vol. XXIV., p. 975, Nos. 73 *et seq.*

Market owner.]—*See* MARKETS & FAIRS, Vol. XXXIII., p. 528, No. 52.

Shipowner.]—*See* SHIPPING.

C. Limitation of Invitor's Liability.

268. Invitee going beyond invitation.] — Action brought to recover compensation for injuries sustained by pltf., on the premises of defts., the Great Western Ry. Co. S. was a passenger on defts.' railway to Chelsea Station; she got out there, & proceeded, under the directions of one of the co.'s servants, along the platform with the view of leaving the station; finding no place of exit, & there being no person present, she arrived at the termination of the platform, & then proceeded down an incline on to the line of rails; an engine coming up, caught her clothes, & she sustained considerable injuries. It was dark at the spot where the accident occurred, & there were no lights beyond the platform:—*Held:* there was negligence on the part of pltf., she had gone on to a place

259 iii. —— —— ——.]—BRADY *v.* PARKER (1887), 14 R. (Ct. of Sess.) 783.—**SCOT.**

259 iv. —— —— ——.]—DOLAN *v.* BURNETT (1896), 20 R. (Ct. of Sess.) 550.—**SCOT.**

261 i. *Liability for dangerous opening in floor.*]—DENNY *v.* MONTREAL TELEGRAPH CO. (1878), 42 U. C. R. 577.—**CAN.**

PART II. SECT. 1, SUB-SECT. 2.—C.

268 i. *Invitee going beyond invitation.*]—STRUTHERS *v.* BURROW (1917), 40 O. L. R. 1.—**CAN.**

268 ii. ——.]—Pltf., an invitee upon deft.'s premises, fell through an open trap-door in the floor, admittedly not sufficiently guarded & was injured:—*Held:* although the trap was an unusual danger & unknown to pltf., deft.'s invitation to the pltf. being limited to a safe part of the premises, the liability of deft. was qualified.—CONNOR *v.* CORNELL (1925), 57 O. L. R. 35.—**CAN.**

268 iii. ——.]—While a person in attendance at a banquet given by an association in a hotel is an invitee of the hotel proprietor, & the latter is under a greater duty to protect him from dangers on the premises than that which is owed a mere licencee, yet in an action against the proprietor for injuries sustained by such person while in the hotel, the extent of the invitation is of the utmost importance & if the invitation did not extend to the time & place & the circumstances of the accident then the question whether the proprietor is liable is to be determined in view of the duty which he

Sect. 1.—*In regard to particular persons: Sub-sect.* 2, *C. & D.; sub-sect.* 3, *A*

where she ought not, & the question of sufficiency of lights did not arise.—SHORT *v.* GREAT WESTERN RY. CO. (1869), 34 J. P. 135.

269. ——.]—On a cliff at an English watering place a notice board was erected with a notice "Persons are warned against walking near the cliff. Keep inside the bank." The husband of pltf., whilst walking along the cliff, got beyond the bank, fell over the cliff, & was killed:—*Held:* there was no evidence of any invitation by defts., the owners of the cliff, to deceased to go beyond the bank, & no action lay against them for not fencing the cliff.—ANDERSON *v.* COUTTS (1894), 58 J. P. 369.

270. —— Invitation limited to places where invitee reasonably expected to go.]—MERSEY DOCKS & HARBOUR BOARD *v.* PROCTER, No. 59, *ante.*

Guest at inn.]—*See* INNS & INNKEEPERS, Vol. XXIX., p. 9, No. 118.

—— Tradesman on staircase of flats.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 101, No. 2387.

271. Limitation by notice to invitee.]—Defts. were a corpn. constituted for the purpose of the upper navigation of the river Thames by 29 & 30 Vict. c. 89, & under the powers of 29 & 30 Vict. c. 89, & of the previous statutes relating to the navigation which had become vested in them, defts. had constructed bridges & other works, & had acquired the right to use the whole of the towing paths along the river, & to take toll for the same. In the exercise of such right, defts. took an aggregate toll in one sum for the use of the entire navigation, & towing paths, which included the works defts. had constructed, as well as the natural soil which had been worn into the track of a towing path. Part of such natural towing path got into a dangerous state by the action of the water, & in consequence thereof pltf.'s horses whilst using it in towing a barge, for which the proper toll had been paid to defts., fell into the river & were drowned:—*Held:* as defts. took one toll for the use of the entire towing path, parts of which were artificial, it mattered not that the place where the accident happened was not artificial, but it was the duty of defts. to take reasonable care that the whole of the towing path was in such a state as not to expose those using it to undue danger, & for a neglect of such duty defts. were responsible to pltf. although they were a public body receiving their powers for public purposes.

Semble: defts. would not be liable for the defective state of the towing paths, if such state were a latent one, of the existence of which defts. might be ignorant though using reasonable care, or if they were to give notice of it to those who pay the tolls, or to inform them that they must take the towing paths as they find them.—WINCH *v.* THAMES CONSERVATORS (1874), L. R. 9 C. P. 378; 43 L. J. C. P. 167; 31 L. T. 128; 22 W. R. 879, Ex. Ch.

Annotations:—**Distd.** Gridley *v.* Thames Conservators (1886), 2 T. L. R. 469. **Reld.** Forbes *v.* Lee Conservancy Board (1879), 4 Ex. D. 116; Lee Conservancy Board *v.* Button (1879), 12 Ch. D. 383; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685; Yarmouth *v.* France (1887), 19 Q. B. D. 647; Thames Conservators *v.* Kent, [1918] 2 K. B. 272. **Mentd.** Nesbitt *v.* Mablethorpe U. C., [1918] 2 K. B. 1.

D. Invitation to Use Chattels.

272. General rule.]—SMITH *v.* STEELE, No. 247, *ante.*

273. Duty as to safe condition & fitness for purpose—Defective crane.]—Pltf. sued under Lord Campbell's Act, 1846 (c. 93), as widow of K. The declaration stated that K. in his lifetime was lawfully in & upon a certain railway station of defts. at W., & was there employed in unloading, & as servant of the consignees thereof, certain stone from a truck in which it had been conveyed to W. by defts. as carriers for the consignees for reward to defts., & was unloading the same by means & by use of a crane with certain tackle connected therewith by defts. provided as such carriers for the use of such consignees & their servants working the same in unloading the stone for reward to defts.; yet the crane & tackle connected therewith were through the negligence of defts. in such bad order & so badly adjusted, & kept adjusted, that K., in using the same, became & was greatly wounded & injured, & by reason of the wounds & injuries thereby occasioned to him afterwards & within twelve calendar months next before this suit, died:—*Held:* on the words that the same were dangerous to those who used them, being added after, & the words, by reason of the crane & tackle being in such bad order & so badly adjusted, & kept adjusted, after being added, the declaration was good.

Semble: without these amendments the declaration was good.

Defts. contracted as common carriers to carry stone for the master of the deceased, & to deliver the stone, & as further part & as means of such delivery, the stone was to be unloaded by means of a crane, which they were to provide for reward. They were thus bound to provide a crane for the use of the consignees, & therefore for the servants of the consignees. . . . Thus neither deceased nor his master was a mere stranger, but they were entitled to use the crane by reason of the contract & to assume the crane to be in a safe condition (BRETT, J.).—KING *v.* GREAT WESTERN RY. CO. (1871), 24 L. T. 583.

274. —— Staging round ship.]—HEAVEN *v.* PENDER, No. 9, *ante.*

275. —— Defective truck.]—Deft., a colliery owner, consigned coals sold by him to the buyers by rail in a truck rented by him from a waggon co. for the purposes of the colliery. Through the negligence of deft.'s servants the truck was allowed to leave the colliery in a defective state. In consequence of the defect in the truck injury was occasioned to pltf., one of the buyers' servants, who was employed in unloading the coals, & had got into the truck for that purpose:—*Held:* there was a duty on the part of deft. towards pltf. to exercise reasonable care with regard to the condition of the truck, & deft. was therefore liable to pltf. in respect of the injuries sustained by him.—ELLIOTT *v.* HALL (1885), 15 Q. B. D. 315; 54 L. J. Q. B. 518; *sub nom.* ELLIOTT *v.* NAILSTONE COLLIERY CO., 34 W. R. 16; 1 T. L. R. 628, D. C.

Annotations:—**Distd.** Lane *v.* Cox (1896), 45 W. R. 261; Earl *v.* Lubbock (1904), 74 L. J. K. B. 121; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Apld.** White *v.* Steadman, [1913] 3 K. B. 340. **Reld.** Hawkins *v.* Smith (1896), 12 T. L. R. 532.

276. —— Defective chain.]—Pltfs., stevedores, agreed to discharge a cargo of deals from deft.'s

owes to a mere licencee.—KNIGHT *v.* GRAND TRUNK PACIFIC DEVELOPMENT CO., [1926] 4 D. L. R. 87; [1926] 2 W. W. R. 557; 22 Alta. L. R. 237.—**CAN.**

PART II. SECT. 1, SUB-SECT. 2.—D.

1. *Duty as to safe condition & fitness for purpose—Furniture in waiting room.*]—The Railway Comrs. are not bound to provide waiting rooms at railway stations, but if they do, & thereby invite passengers to use them, they are bound to see that the furniture in them is safe & fit for use.—

ship, &, in accordance with the custom of the port, deft. undertook to provide them with all necessary derricks, cranes, chains, etc., reasonably fit for the purpose. A chain so supplied was defective & broke, & caused injuries to one of pltf.'s workmen, who sued them under the Employer's Liability Act, 1880 (c. 42). Pltfs. settled this action for £125, a sum which it was not suggested was an unreasonable one, & then sought to recover the amount so paid from deft. It was admitted by deft. on the one hand that there had been a breach by him of an implied warranty that the chain should be reasonably fit for the purpose for which it was supplied, & by pltfs. on the other hand that they might, by the exercise of reasonable care, have discovered the defect in the chain :—*Held :* the damages sought to be recovered were not too remote, inasmuch as the injuries to the workman were the natural consequence of deft.'s breach of warranty, upon which pltfs. were entitled to rely.—MOWBRAY *v.* MERRYWEATHER, [1895] 2 Q. B. 640 ; 65 L. J. Q. B. 50 ; 73 L. T. 459 ; 59 J. P. 804 ; 44 W. R. 49 ; 12 T. L. R. 14 ; 40 Sol. Jo. 9 ; 14 R. 767, C. A.

Annotations :—**Folld.** Vogan *v.* Oulton (1899), 81 L. T. 435. **Consd.** Britannia Hygienic Laundry Co. *v.* Thornycroft (1925), 94 L. J. K. B. 858. **Refd.** Hawkins *v.* Smith (1896), 12 T. L. R. 532 ; Scott *v.* Foley, Aikman (1899), 5 Com. Cas. 53 ; Bentley *v.* Metcalfe (1906), 75 L. J. K. B. 891.

277. —— Defective ladder.]—Pltf. chartered a ship from defts. for a single voyage. By the charterparty defts. warranted that the vessel was in every way fitted for the voyage & service, & to be so maintained by the owners. During the currency of the charterparty a stevedore engaged on the ship in the work of unloading sustained injuries by reason of the defective condition of an iron ladder leading to the hold. The stevedore sued the charterer for damages. The charterer defended the action, & in so doing acted reasonably, & judgment was given against him for damages & costs on the ground that he had committed a breach of duty towards the stevedore in not making an inspection of the vessel before inviting the stevedore on board :—*Held :* the charterer's liability to the stevedore was the natural consequence of defts.' breach of warranty ; & the charterer was entitled to recover from defts. the damages & costs paid by him to the stevedore, & his own costs, as between solr. & client, incurred in defending the action.—SCOTT *v.* FOLEY, AIKMAN & Co. (1899), 16 T. L. R. 55 ; 5 Com. Cas. 53.

278. —— ——.]—MARNEY *v.* SCOTT, No. 257, *ante*.

279. —— Defective tackle.]—Stevedore's workman while engaged in unloading a ship was injured by the fall of a bale of cargo. Part of the tackle used for the unloading was supplied by the ship, & the accident was caused by a defect in this part of the tackle. The workman having brought an action in the county ct. against the stevedore for compensation under Employers' Liability Act, 1880 (c. 42), the judge withdrew the case from the jury on the ground that the stevedore was not responsible for a defect in the ship's tackle, & his decision was affirmed by the Div. Ct. :—*Held :* the stevedore owed a duty to the workman to take reasonable care in seeing that this tackle was in a proper condition, & the action must be sent back for a new trial.—BIDDLE *v.* HART, [1907] 1 K. B. 649 ; 76 L. J. K. B. 418 ; 97 L. T. 66 ; 23 T. L. R. 262 ; 51 Sol. Jo. 229 ; 10 Asp. M. L. C. 469, C. A.

Annotation :—**Apld.** Monaghan *v.* Rhodes, [1920] 1 K. B. 487.

280. —— Rotten sack.]—HAWKINS *v.* SMITH (1896), 12 T. L. R. 532, D. C.

281. —— ——.]—Deft. supplied sacks to pltfs. for the purpose of being used in unloading a cargo of peas from a ship. One of these sacks, while it was being hoisted full of peas from the hold of the ship, broke & fell & injured a man who was engaged in the work. The injured man recovered from pltfs. £25 damages & costs. The sack in question, when supplied by deft., was unfit for the purpose for which it was supplied :—*Held :* pltfs. were entitled to recover, as damages for breach of warranty, the damages & costs which they had incurred.—VOGAN & Co. *v.* OULTON (1899), 81 L. T. 435 ; 16 T. L. R. 37, C. A.

Annotations :—**Refd.** Britannia Hygienic Laundry Co. *v.* Thornycroft (1926), 135 L. T. 83. **Mentd.** Scott *v.* Foley, Aikman (1899), 5 Com. Cas. 53.

SUB-SECT. 3.—DUTY TO LICENCEES.

A. Who is a Licencee.

282. Person permitted on railway premises—For purposes other than travel.]—A declaration in case by an insurance against a railway co. recited that pltfs. had insured the life of W. T. for £1,000 ; that defts. were owners of a railway on which they carried passengers from L. to B. & back ; & were also possessed of a landing place communicating with the railway, & forming an approach thereto from the river Thames for persons coming from the river for the purpose of being conveyed upon the railway & used it for that purpose ; that defts. were also possessed of a dumb barge moored near the landing place usually connected therewith by planks or gangways there placed for the purpose of enabling passengers intending to proceed from the river to & to go by the railway to pass from the barge to the landing place ; that they were also possessed of a step ladder, usually attached to the barge for the purpose of enabling persons to ascend upon the barge, & then proceed to the landing place, & thence to the railway ; that by reason of the premises it became the duty of defts. to keep the planks or gangways, after dark, so attached to the barge, whenever the step ladder was attached thereto, in order that all persons landing on the barge for the purpose aforesaid might with safety pass to the landing place ; or in case of the removal of the planks, to take care that all persons on the barge had due notice of such removal, of all which premises W. T. had

MACHETT *v.* RAILWAY COMRS. (1900), 21 N. S. W. L. R. 238.—**AUS.**

m. —— *Bar used for high jumping.*]—EDMONDSON *v.* MOOSE JAW SCHOOL DISTRICT BOARD OF TRUSTEES, [1920] 3 W. W. R. 979 ; 13 Sask. L. R. 516.—**CAN.**

PART II. SECT. 1, SUB-SECT. 3.—A.

282 i. *Person permitted on railway premises—For purposes other than travel.*]—Pltf. in attempting to post a letter on a train which had just commenced to move out of a station, & to which was attached a postal car with an opening in the door for posting letters, while following the car tripped & fell & was injured on a stake some inches out of the ground, which had been planted by defts. for the furtherance of alterations being made in the station :—*Held :* pltf. was a bare licencee upon the premises of defts., who under the circumstances were not liable to him.—SPENCE *v.* GRAND TRUNK RY. Co. (1896), 27 O. R. 303.—**CAN.**

282 ii. —— ——.]—Pltf. had come to deft.'s railway station to see an employee on business not connected with deft. & in passing along a platform he slipped on some ice & fell against a barrier which gave way & he fell through an opening and was injured :—*Held :* deft. was not liable ; pltf. was not an invitee, he was at best a bare licencee & had to take the premises as he found them.—CARLSON *v.* CANADIAN PACIFIC RY. Co. (Alta.), [1920] 1 W. W. R. 595 ; 51 D. L. R. 250.—**CAN.**

282 iii. —— ——.]—A person who goes upon premises as a mere licencee is not there at his own risk if he

Sect. 1.—*In regard to particular persons: Sub-sect.* 3, *A. & B.* (*a*).]

notice. It then averred that W. T. had by the leave & licence of defts., ascended out of a boat upon the barge, & was then intending to pass to the landing place, it being then night time & dark. Breach: that although the planks had been removed, defts. gave W. T. no notice of such removal, in consequence of which & by reason of the negligence of defts., & without any default on his part, W. T. fell into the river & was drowned. Special damage in that pltfs. were obliged to pay the amount of the policy much earlier than they otherwise would, during which time they would have received the premiums from W. T.:—*Held:* the declaration disclosed no duty on the part of defts. to keep the planks & gangways between the dumb barge & the landing place for the use of any persons but those who were going by the railway; & as it did not appear that W. T. was intending to go to or by the railway, no cause of action arose against defts.—WARD *v.* LONDON & BLACKWALL RY. Co. (1845), 6 L. T. O. S. 125.

283. Children frequenting premises adjacent to railway—Without protest from company—Licence not extending to railway.]—Pltf., a child two & a half years old, lived with his parents in one of a row of houses in front of which was a highway. On the other side of the highway there was a fence of posts & rails belonging to & repairable by a railway co. Inside the fence, on the co.'s premises, there was a siding, a pile of wooden railway sleepers distant two & a half inches from the fence, &, beyond them & about thirty five yards in a direct line from pltf.'s parents' house, the main line of the co.'s railway. Pltf. got or was assisted over or through the fence & when on the main line was run over by an express train of the co., sustaining serious injury. In an action against the co. for damages the jury found that pltf. got on to the line over or through the fence; that the co.'s servants knew that children were in the habit of playing on the pile of sleepers, but not that they were in the habit of getting on the main line, & that the evidence did not bring home knowledge to any particular servant, but that there must have been knowledge on the part of some of the co.'s servants; that the fence was not a reasonably fit fence for the purpose of separating the railway from the high road, having regard to the proximity of the houses on the other side of it; that children were in the habit of getting on to the pile of sleepers over or through the fence by the leave or licence of the co., but not elsewhere & that defts., having regard to all the circumstances, were guilty of negligence in not taking some sufficient means of preventing children from getting on to the line:—*Held:* the leave & licence, if any, to play on the pile of sleepers was confined to that spot, & did not extend to the main line; there was no duty on the co. to fence off the sleepers from the rest of their land & they were not liable.—JENKINS *v.* GREAT WESTERN RY. Co., [1912] 1 K. B. 525; 81 L. J. K. B. 378; 105 L. T. 882, C. A.

Annotations:—**Consd.** Clinton *v.* Lyons, [1912] 3 K. B. 198. **Refd.** Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398.

See, also, CARRIERS, Vol. VIII., pp. 94–96, Nos. 635–646; RAILWAYS.

284. Persons crossing railway at particular place—Licence by habitual user.]—Where persons are in the habit of crossing a railroad at a particular place, though there be no right of way there, it throws upon the co. the responsibility of taking reasonable precautions in their use of such place.

Though there was no right of way, still the circumstance of people being in the habit of passing threw upon the co. the responsibility of using reasonable care before moving over that portion of their line (WATSON, B.).—BARRETT *v.* MIDLAND RY. Co. (1858), 1 F. & F. 361, N. P.

Annotation:—**Distd.** Harrison *v.* N. E. Ry. (1874), 29 L. T. 844.

285. Person using way by permission—But without express leave.]—LOWERY *v.* WALKER, No. 256, *ante.*

286. Policeman entering premises—In execution of duty.]—GREAT CENTRAL RY. Co. *v.* BATES, No. 239, *ante.*

287. Guests.] — LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., No. 223, *ante.*

——.]—*See, also,* INNS & INNKEEPERS, Vol. XXIX., p. 10, Nos. 123, 125.

Compare Sub-sect. 3, B., *post.*

B. Nature of Duty.

(*a*) *In General.*

288. Duty to take reasonable care—To avoid injuring licencee.]—BARRETT *v.* MIDLAND RY. Co., No. 284, *ante.*

suffers injury through the negligent act of the servants of the owner committed, in the course of their employment, after the licencee has entered the premises. So where a person, who had been permitted to go upon a railway platform to see friends off by a train, was injured through the fault of the station employees in starting a train without closing the doors, the railway co. were held liable in damages.—TOUGH *v.* NORTH BRITISH RY. Co., [1914] S. C. 291.—**SCOT.**

285 i. *Person using way by permission—But without express leave.*]—KING *v.* NORTHERN NAVIGATION CO. (1912), 22 O. W. R. 697; 3 O. W. N. 1538; 27 O. L. R. 79; 6 D. L. R. 69.—**CAN.**

n. *Person on wharf—Seeing friend off.*]—YORK *v.* CANADA ATLANTIC S.S. CO. (1893), 24 N. S. R. 436; 22 S. C. R. 167.—**CAN.**

o. *Workman on scaffold.*]—NICOLSON *v.* MACANDREW & CO. (1888), 25 Sc. L. R. 607.—**SCOT.**

p. *Wife of seaman going on board to visit husband.*]—DARROCH (OR O'BRIEN) *v.* ENRICO ARBIB & CO., [1907] S. C. 975.—**SCOT.**

PART II. SECT. 1, SUB-SECT. 3.—B. (a).

288 i. *Duty to use reasonable care—To avoid injuring licencee.*]—HEWITT *v.* HOLLIDAY (1915), 20 C. L. R. 111.—**AUS.**

288 ii. —— ——.]—Pltf.'s son was given leave by a yardmaster of defts. to learn in the railway yard the duties of car checker, with the expectation that if he became competent he would be taken into the employment of defts. in that capacity, & he was free to devote as much or as little time to acquiring the necessary knowledge as he saw fit. While he was in the railway yard a few days after this permission had been given, he was killed by an engine of defts., which was running through the railway yard without the bell being rung, though the rules of the defts. required this to be done:—*Held:* deceased was a licencee, & defts. were bound to exercise reasonable care for his protection.—COLLIER *v.* MICHIGAN CENTRAL RY. Co. (1900), 1 C. L. T. 16; 27 A. R. 630.—**CAN.**

288 iii. —— —— .]—Pltf. purchased from an exhibition assocn. the privilege of selling refreshments under a certain building, during the holding of the exhibition on the grounds leased from a city corpn. In walking across a platform which was constructed between the building & the public sidewalk to give access to people requiring refreshments pltf. put her foot into a hole in the platform, which was out of repair, & was injured:—*Held:* she was a licencee, & the assocn. owed a duty to the persons whom they induced to go there to keep the place in proper repair.—MARSHALL *v.* INDUSTRIAL EXHIBITION ASSOCN. OF TORONTO (1901), 21 C. L. T. 368; 2 O. L. R. 62.—**CAN.**

288 iv. —— ——.]—FLYNN *v.* TORONTO INDUSTRIAL EXHIBITION ASSOCN. (1905), 5 O. W. R. 550; 9 O. L. R. 582.—**CAN.**

288 v. —— ——.]—*Held:* pltf., who was run down & injured by a car on the defts.' tramway line, while crossing it, was there, not as a trespasser, but by the leave & licence of defts., who thus owed him a duty to take reasonable care.—ANDREWS *v.* CANADIAN PACIFIC RY. Co. (1913), 23 W. L. R. 14; 3 W. W. R. 714; 18 B. C. R. 25; 9 D. L. R. 566.—**CAN.**

289. ——— ———.]—If a person permitted another to come on his premises & knew him to be on his premises, it was his duty to take reasonable care not to injure him (LOPES, L.J.).

If a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former (LORD ESHER, M.R.).—THATCHER *v.* GREAT WESTERN RY. CO. (1893), 10 T. L. R. 13, C. A.

Annotations:—**Consd.** Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. **Refd.** Coldrick *v.* Partridge, Jones, [1909] 1 K. B. 530; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272.

290. ——— ———.]—If an occupier of premises allows a man to come there to do work in which the occupier is interested, & the man is unacquainted with the existence of a hatchway which, owing to the darkness, he cannot see, the occupier is bound either to give him reasonable notice of the danger or to fence the hatchway so as to render it harmless.—DICKSON *v.* SCOTT (J. A.), LTD. (1914), 30 T. L. R. 256; 7 B. W. C. C. 1007, C. A.

291. Licencee must take with concomitant conditions & perils.]—No right is alleged: it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint, that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, &, it may be, perils. . . . All that can be said in this case is, that pltf. had a tacit permission to cross the waste. It was not the fault of defts. that he was ignorant of the existence & locality of the quarry, & of the danger he incurred by crossing the same in the dark (WILLIAMS, J.).—HOUNSELL *v.* SMYTH (1860), 7 C. B. N. S. 731; 29 L. J. C. P. 203; 1 L. T. 440; 6 Jur. N. S. 897; 8 W. R. 277; 141 E. R. 1003.

Annotations:—**Apld.** Binks *v.* South Yorkshire Ry. & River Dun Co. (1862), 3 B. & S. 244. **Folld.** Bolch *v.* Smith (1862), 7 H. & N. 736. **Refd.** Pickard *v.* Smith (1861), 4 L. T. 470; Gallagher *v.* Humphrey (1862), 27 J. P. 5 Witherley *v.* Regents Canal Co. (1862), 12 C. B. N. S. 2 Robbins *v.* Jones (1863), 33 L. J. C. P. 1; *Re* Williams *v* Groucott (1863), 4 B. & S. 149; R. *v.* Dant (1865), Le. & Ca. 567; Indermaur *v.* Dames (1866), L. R. 1 C. P. 274; Lowery *v.* Walker, [1910] 1 K. B. 173; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Crane *v.* South Suburban Gas Co., [1916] 1 K. B. 33.

292. ———.]—Where a party is expressly or impliedly allowed to go through premises, such party takes the risk of any dangers arising from the natural & ordinary state in which the premises are at the time, or from the business generally carried on there; but he does not take the risk arising from any act of positive negligence on the part of such owner or his servants, & the latter are under a duty to protect the licencee against any such extraordinary dangers.

The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way (COCKBURN, C.J.).—GALLAGHER *v.* HUMPHREY (1862), 6 L. T. 684; 27 J. P. 5; 10 W. R. 664.

Annotations:—**Consd.** Lowery *v.* Walker, [1910] 1 K. B. 173; Wilson *v.* Barry Ry. (1916), 116 L. T. 71; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. **Refd.** Scott *v.* London & St. Katherine Docks Co. (1865), 13 L. T. 148; Murley *v.* Grove (1882), 46 J. P. 360; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272.

293. ———.]—The workmen employed in a govt. dockyard were permitted by the govt. to cross certain land within the dockyard premises, to go to the water closets erected for their accommodation. A govt. contractor, by permission of the govt., had erected machinery in the aforesaid yard. A revolving shaft, a portion of this machinery, was so placed as to cross the shortest & most convenient way to these water closets. The shaft was partially covered, but not concealed, by planks, & was found by the jury to have been insufficiently covered. There were other, though not shorter or more convenient ways, to these

288 vi. ——— ———.]—CAMPBELL *v.* ZUBER, [1925] 4 D. L. R. 320.—**CAN.**

288 vii. ——— ———.]—A person who is carried in a car as a non-paying passenger, & is injured by the driver's negligence, may recover damages from the owner.—DRISCOLL *v.* COLLETTI, [1926] 2 D. L. R. 428; 58 O. L. R. 444.—**CAN.**

288 viii. ——— ———.]—The driver of a motor car is liable for injuries caused a gratuitous passenger by his negligence in driving the car.—LIMB *v.* STEWART (B. C.), [1926] 3 D. L. R. 550; [1926] 3 W. W. R. 205.—**CAN.**

288 ix. ——— ———.]—SORABJI HORMUSJI *v.* JAMSHEDJI MERWANJI (1914), I. L. R. 38 Bom. 552.—**IND.**

288 x. ——— ———.]—GENGE *v.* NORTH OTAGO AGRICULTURAL & PASTORAL ASSOCN. (1892), 11 N. Z. L. R. 423.—**N.Z.**

288 xi. ——— ———.]—Persons conducting shipping operations on wharves which the public are tacitly permitted to frequent for pleasure or business are bound to take reasonable care that no injury happens to the public so long as they keep out of the way of apparent danger, & do not get in the way of such operations.—WOOD *v.* SHAW, SAVILL & ALBION CO., LTD. (1893), 12 N. Z. L. R. 188.—**N.Z.**

288 xii. ——— ———.]—MESSER *v.* CRANSTON & CO. (1897), 35 Sc. L. R. 42.—**SCOT.**

291 i. *Licencee must take with concomitant conditions & perils.*]—Deceased, a boy selling newspapers, got on a street car at the rear end, & passed through the car to the front platform, where the driver was standing. He stepped to one side behind the driver, & fell off or disappeared from the car, there being no step on that side, & was killed by the car running over him:—*Held:* unless deceased was upon the cars as a passenger, on a contract of carriage express or implied, & not as a mere licencee or volunteer, he had no right of action against defts. for the absence of the step, which was no breach of duty to him, but must take the car as he found it.—BLACKMORE *v.* TORONTO STREET RY. CO. (1876), 38 U. C. R. 172.—**CAN.**

291 ii. ———.]—JONES *v.* GRAND TRUNK RY. CO. OF CANADA (1889), 18 S. C. R. 696.—**CAN.**

291 iii. ———.]—An employee of a co. which had contracted to deliver coal at a school building went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, & was accidentally injured by falling into a furnace pit in the basement on his way to the coal-bins. He did not apply to the School Board or the caretaker in charge of the premises for permission to enter before making his visit:—*Held:* in thus voluntarily visiting the premises for his own purposes & without notice to the occupants, he assumed all risks of danger from the condition of the premises & could not recover damages.—ROGERS *v.* TORONTO PUBLIC SCHOOL BOARD (1897), 27 S. C. R. 448.—**CAN.**

291 iv. ———.]—A mere licencee as distinguished from a person invited upon another's premises, or there upon that other's business as well as his own, must take the premises as he finds them.—THYKEN *v.* EXCELSIOR LIFE ASSURANCE CO., [1917] 2 W. W. R. 772; 11 Alta. L. R. 344; 34 D. L. R. 543.—**CAN.**

291 v. ———.]—Deft. & pltf. were neighbours. Deft., assisted by pltf., moved his house & fence off his land, the removal of the house leaving an excavation into which pltf.'s cow fell while running at large. Deft. had, on inquiry from pltf., expressed some intention of having the excavation filled up:—*Held:* pltf. could not recover damages; he was at best a bare licencee & must take the premises as he found them except, under certain circumstances, as to a hidden or concealed danger, which, so far as pltf. was concerned, the excavation was not.—PITTZEN *v.* SHOKLUK, [1921] 2 W. W. R. 686; 16 Alta. L. R. 482.—**CAN.**

291 vi. ———.]—KYNOCH *v.* BANK OF MONTREAL (B. C.), [1923] 3 D. L. R. 877; [1923] 3 W. W. R. 161; *affg.*, 69 D. L. R. 743.—**CAN.**

291 vii. ———.]—A mere licence, given by the owner to enter & use premises for which the licencee has full opportunity of inspecting, which contain no concealed cause of mischief, & in which any existing source of danger is apparent, throws no obligation upon the owner to guard the licencee against danger.—SULLIVAN *v.* WATERS (1864), 14 I. C. L. R. 460.—**IR.**

Sect. 1.—*In regard to particular persons: Sub-sect.* 3, *B.* (*a*) *&* (*b*)*; sub-sect.* 4.]

water closets. Pltf., a workman employed in the dockyard, but not by the contractor who had erected the machinery, in going to the water closet, accidentally fell near the shaft, which caught his arm & severely injured him. In an action against the contractor to recover damages for the injury:—*Held:* pltf.'s right to cross the yard was only the right not to be treated as a trespasser for so doing, & that deft. was under no obligation to fence the machinery at all, & therefore not liable for insufficiently fencing it, & that the action was not maintainable.

He had other ways to go, if he chose to use them; he chose this with the dangers attached to it. The authorities of the dockyard sanctioned the use of this way so far that pltf. might use it at his own peril (POLLOCK, C.B.).—BOLCH *v.* SMITH (1862), 7 H. & N. 736; 31 L. J. Ex. 201; 8 Jur. N. S. 197; 10 W. R. 387; 158 E. R. 666; *sub nom.* BOLETT *v.* SMITH, 6 L. T. 158.

Annotations:—**Consd.** Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817. **Apld.** Pritchard *v.* Lang (1889), 5 T. L. R. 639. **Consd.** Lowery *v.* Walker, [1910] 1 K. B. 173. **Refd.** Gallagher *v.* Humphrey (1862), 6 L. T. 684; Robbins *v.* Jones (1863), 33 L. J. C. P. 1; Scott *v.* London Dock Co. (1864), 34 L. J. Ex. 17; Griffiths *v.* L. & N. W. Ry. (1866), 14 L. T. 797; Indermaur *v.* Dames (1866), L. R. 1 C. P. 274; White *v.* France (1877), 2 C. P. D. 308; Burchell *v.* Hickisson (1880), 50 L. J. Q. B. 101; Clinton *v.* Lyons, [1912] 3 K. B. 198; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Kimber *v.* Gas Light & Coke Co., [1918] 1 K. B. 439.

294. ——.]—A railway co. have a right to carry on their business on their own premises in such a way as they think fit; &, so far as the conduct of such business is concerned, to use defective machinery, *e.g.*, for hoisting goods on their own premises, merely compensating the owners for any injury done thereby to such goods, & they are not guilty of negligence, or liable in an action for damages, under Fatal Accidents Act, 1846 (c. 93), *quoad* a third party lawfully on their premises who, without invitation by words or conduct on their part so to do, chose to pass under a heavy package of goods which was in the act of being hoisted by a crane, & which slipped from the sling by which it was defectively suspended, & fell upon & killed him whilst so passing under it, there being another way by which he might have gone without passing under the package in question, & the co. having no reason to expect that people would pass underneath it.—GRIFFITHS *v.* LONDON & NORTH-WESTERN RY. CO. (1866), 14 L. T. 797; 30 J. P. 553.

Annotation:—**Refd.** Tebbutt *v.* Bristol & Exeter Ry. (1871), 19 W. R. 383.

295. ——.]—INDERMAUR *v.* DAMES, No. 208, *ante.*

296. ——.]—Pltf., a custom house officer, had been in the habit of making use of a passage through the inside of a building in the course of erection, which was left open at both ends, to obtain access from the street on one side to certain bonded vaults on the other side, which it was his duty to superintend. Deft. was the sub-contractor for the construction of the pavement & other stonework on the passages of the building. Pltf., in passing through the passage, fell down an opening & was injured. The regular mode of access to the vaults was not through the passage, but through a gateway from the street:—*Held:* no obligation lay upon deft. to take precautions to guard pltf. from such an accident; &, the building being unfinished, if any licence could be inferred to have been given to pltf., it must be subject to the obvious risks incidental to the condition of the building.—CASTLE *v.* PARKER (1868), 18 L. T. 367; 32 J. P. 486.

297. ——.]—Deft. was the landlord of a house which was let out in apartments to several tenants each of whom had the privilege of using the roof, which was flat & covered with lead, having an iron rail on its outer edge, for the purpose of drying their linen; the access to the roof being by means of a low door at the stair head about two feet from the rail. Pltf., the occupier of one of the rooms, went upon the roof for the purpose of removing some linen, when, his foot slipping, & the rail being out of repair, & known by the landlord to be so, he fell through to the court yard below & was injured:—*Held:* the mere licence to the lodgers to use the roof as a drying ground imposed no duty upon deft. to fence it or to keep the fence in repair.—IVAY *v.* HEDGES (1882), 9 Q. B. D. 80.

Annotation:—**Distd.** Batchelor *v.* Fortescue (1883), 11 Q. B. D. 474.

298. ——.]—Deceased was employed by a builder to watch & protect certain unfinished buildings. Workmen were employed by deft., a contractor, on the land near to where deceased was on duty, to excavate the earth for the foundations of other buildings. In the performance of this operation they employed a steam crane & winch to which were attached a chain & iron bucket by means of which the earth was raised from the excavation & thence to the carts which were to carry it away. Deceased had nothing to do with the excavations, but was standing where he need not have been, watching deft.'s men at work, & allowing the bucket to pass some three feet over his head, when the chain broke, & the bucket & its contents falling upon him so injured him that he subsequently died:—*Held:* there was no evidence of negligence in deft.'s workmen; the deceased was at the most a bare licencee; & he stood where he did subject to all the risks incident to the position in which he had placed himself.—BATCHELOR *v.* FORTESCUE (1883), 11 Q. B. D. 474; 49 L. T. 644, C. A.

Annotations:—**Folld.** Tolhausen *v.* Davies (1888), 58 L. J. Q. B. 98. **Consd.** Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272. **Refd.** Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398.

299. ——.]—ANDERSON *v.* COUTTS, No. 269, *ante.*

300. —— **Danger increased by grantor.**]—GALLAGHER *v.* HUMPHREY, No. 292, *ante.*

301. —— ——.]—LOWERY *v.* WALKER, No. 256, *ante.*

302. —— **Unusual danger—Knowledge of grantor.**]—Pltf., who was carrying a Pomeranian dog, went with her husband into a teashop belonging to defts. for the purpose of having tea. She put the dog on the floor, keeping hold of its lead. A cat, who was rearing kittens at the time, came out of the storeroom, & sprang on the dog & bit him. Pltf. picked up the dog with the cat on its back & gave it to her husband. They then prepared to leave the shop when the cat sprang on pltf.'s shoulder & bit her arm. Pltf. brought an action against defts. claiming damages for the personal injuries sustained by her & also for the injury done to her dog. The jury found that pltf. took her dog on the premises by permission of defts., or with their acquiescence; that the cat, to the knowledge of defts., had while rearing kittens a disposition to attack a dog in her neighbourhood, & a person holding a dog; that the cat attacked the dog unprovoked; that pltf.'s injuries were the result of the cat attacking the dog; & that defts. did not in the circumstances take reasonable precautions of the safety of their

customers. They assessed the damages at £100, & the learned judge entered judgment for that amount. Defts. appealed. It was contended on behalf of pltf. that defts. were liable on the grounds that they had been guilty of (a) a breach of duty as possessors of a cat known to be vicious, & (b) a breach of the duty which they owed to pltf. as a customer whom they had invited into their shop:—*Held:* (1) there was no evidence to support the finding of the jury that a cat rearing kittens had a disposition to attack a person holding a dog, or their finding that defts. knew of the danger.

(2) Pltf. being on the premises with her dog by the permission but not by the invitation of defts., they would only be liable for damages caused by an unusual danger of which they knew or ought to have known, & that, there being no evidence that defts. knew of the danger, & the risk being so remote that they could not reasonably have anticipated it, they were not liable to pltf. for the injury done either to herself or her dog.—CLINTON *v.* LYONS (J.) & CO., LTD., [1912] 3 K. B. 198; 81 L. J. K. B. 923; 106 L. T. 988; 28 T. L. R. 462.

Annotation:—Generally, **Refd.** Manton *v.* Brocklebank, [1923] 2 K. B. 212.

303. —— —— ——.]—LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., No. 223, *ante.*

304. —— **Danger caused by second licencee.**]—The owner of land having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission, by placing a quantity of slates there in such a manner that pltf. in using the road sustained damage:—*Held:* (1) A. was liable to an action. (2) The declaration was not objectionable for not averring that the obstruction was placed on the road without permission; inasmuch as such an allegation, if traversed, would have presented an immaterial issue.—CORBY *v.* HILL (1858), 4 C. B. N. S. 556; 27 L. J. C. P. 318; 31 L. T. O. S. 181; 22 J. P. 386; 4 Jur. N. S. 512; 6 W. R. 575; 140 E. R. 1209.

Annotations:—As to (1) **Distd.** Hounsell *v.* Smyth (1860), 7 C. B. N. S. 731; Bolch *v.* Smith (1862), 7 H. & N. 736; Gallagher *v.* Humphery (1862), 27 J. P. 5; Castle *v.* Parker (1868), 18 L. T. 367. **Apld.** White *v.* France (1877), 2 C. P. D. 308. **Distd.** Burchell *v.* Hickisson (1880), 50 L. J. Q. B. 101. **Consd.** Heaven *v.* Pender (1883), 11 Q. B. D. 503. **Folld.** Kimber *v.* Gas Light & Coke Co., [1918] 1 K. B. 439. **Refd.** Marfell *v.* South Wales Ry. (1860), 7 Jur. N. S. 240; Pickard *v.* Smith (1861), 10 C. B. N. S. 470; Robbins *v.* Jones (1863), 33 L. J. C. P. 1; Gautret *v.* Egerton (1867), L. R. 2 C. P. 371; Smith *v.* London & St. Katherine Docks Co. (1868), L. R. 3 C. P. 326; Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817; Dublin, Wicklow & Wexford Ry. *v.* Slattery (1878), 3 App. Cas. 1155; Daniels *v.* Jones (1880), De Colyar's County Court Cases, 146; Tolhausen *v.* Davies (1888), 57 L. J. Q. B. 392; Harris *v.* Perry, [1903] 2 K. B. 219; Lowery *v.* Walker (1909), 101 L. T. 873; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398.

(*b*) *Concealed Danger.*

305. Knowledge of grantor.]—GAUTRET *v.* EGERTON, JONES *v.* EGERTON, No. 209, *ante.*

306. Duty to take care that no concealed danger.]—Pltf., a boy of four years, accompanied his sister, who was going on business to deft.'s house. A flight of steps, protected on either side by railings, led up to the front door. One of these railings had been for some time displaced, leaving a gap of eighteen inches between the rails on either side of it. Across this gap rope had been interlaced, but had worn away & had not been renewed. The sister had frequently been to the house, & had shortly before noticed that the rail was missing. On the day in question the sister went up the steps, but pltf. in following fell through the gap & was injured:—*Held:* pltf. could maintain no action against deft. for the injury he had sustained, as the only duty on the part of deft. towards him was to take care that there was no concealed danger, & of this there was no evidence.

He [pltf.] was there not as a trespasser, but as a companion & his position can be placed no higher than that he was there lawfully & was not a trespasser (LINDLEY, J.).—BURCHELL *v.* HICKISSON (1880), 50 L. J. Q. B. 101.

*Annotation:—***Consd.** Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398.

See, also, BAILMENT, Vol. III., p. 70, Nos. 115–118; LANDLORD & TENANT, Vol. XXXI., pp. 99, 100, Nos. 2381–2385; MASTER & SERVANT, Vol. XXXIV., pp. 497–499, Nos. 4107–4117.

SUB-SECT. 4.—DUTY TO TRESPASSERS.

307. No liability for injury.]—Pltf., a person of full age, contracted with deft. to carry certain goods for her in his cart. Deft. sent his servant with the cart, & pltf., by the permission of the servant, but without deft.'s authority, rode in the cart with her goods. On the way, the cart broke down, & pltf. was thrown out & severely injured:—*Held:* as deft. had not contracted to carry pltf., & as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained.

A person who undertakes to provide for the

PART II. SECT. 1, SUB-SECT. 3.—B. (b).

305 i. *Knowledge of grantor.*]—Where deft., a watchman, gratuitously assisted pltf. to pass through premises, over which deft., for the time being, had control, & deft. failed to warn pltf. of an open hatch, of the existence of which deft. was aware & pltf. was not so aware:—*Held:* deft. was liable for injuries sustained by pltf. through falling through the hatch.—JONES *v.* DICKIE & BRAEMER (1911), 1 W. W. R. [illegible] —**CAN.**

ii. ——.]—CONNOR *v.* HOWDEN, [1924] N. Z. L. R. 181.—**N.Z.**

306 i. *Duty to take care that no concealed danger.*]—The general rule is that if a person without permission or invitation crosses the land of another, he does so at his own risk, but where a landowner is aware of the fact that persons are habitually using a track across his land, there is a legal duty on him not negligently to do anything which may be a source of danger to them, or constitute a trap.—HOLLIDAY *v.* HEWITT (1915), 15 S. R. N. S. W. 257; 32 N. S. W. W. N. 67, 106.—**AUS.**

306 ii. ——.]—Persons who take a short cut over vacant land, without asking the owner's permission to do so, are at the highest bare licencees, & the only duty of the occupier of the land towards them is to give them warning of any concealed danger of which the occupier actually knows; the occupier must not place a trap upon the land.—ROBINSON *v.* DODGE, [1918] 1 W. W. R. 812; 18 Man. L. R. 533; 39 D. L. R. 679.—**CAN.**

306 iii. ——.]—PUBLIC TRUSTEE *v.* WAIHI, ETC., [1926] N. Z. L. R. 449.—**N.Z.**

306 iv. ——.]—ROSS *v.* M'CALLUM'S TRUSTEES, [1922] S. C. 322.—**SCOT.**

PART II. SECT. 1, SUB-SECT. 4.

307 i. *No liability for injury.*]—Pltf., a boy ten years of age, was upon deft.'s pier by their permission, but without express invitation nor in exercise of a right. Upon the pier defts. had a machine called a traveller, which was kept fixed & at rest only by means of heavy clamps, which could be raised. Pltf. sat down upon this traveller, & for the purpose of having a ride upon it, & while so sitting the clamps were raised & the traveller set in motion by other persons not deft.'s servants, & without pltf.'s knowledge, or consent, & pltf. was thereby injured:—*Held:* defts. were not liable to pltf. as he was only a bare licencee on the pier, & a trespasser on the traveller.—SLADE *v.* VICTORIAN RAILWAYS COMRS. (1888–89), 15 V. L. R. 190.—**AUS.**

307 ii. ——.]—A passenger aboard a railway train stormbound, left the train. Whilst proceeding along the line of the railway, in the direction of an adjacent public highway, he was struck by a locomotive engine & killed. For a number of years, travellers had been allowed to make use of the permanent way in order to reach the nearest

1.—*In regard to particular persons: Sub-sects. 4, 5 & 6.*]

conveyance of another, although he does so gratuitously, is bound to exercise due & reasonable care. The decision in *Lynch* v. *Nurdin*, No. 118, *ante*, proceeded wholly upon the ground that pltf. had taken as much care as could be expected from a child of tender years, in short, that pltf. was blameless, & consequently that the act of pltf. did not affect the question; but here pltf.'s conduct was blameful, as she had no business to get up into the cart without deft.'s permission (PARKE, B.).—LYGO *v.* NEWBOLD (1854), 9 Exch. 302; 2 C. L. R. 449; 23 L. J. Ex. 108; 22 L. T. O. S. 226; 2 W. R. 158; 156 E. R. 130.

Annotations:—**Refd.** Waite *v.* N. E. Ry. (1858), E. B. & E. 728; Singleton *v.* Eastern Counties Ry. (1859), 7 C. B. N. S. 287; Harris *v.* Perry, [1903] 2 K. B. 219; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; Grand Trunk Ry. of Canada *v.* Barnett, [1911] A. C. 361; Karavias *v.* Callinicos, [1917] W. N. 323; Glasgow City Corpn. *v.* Taylor, [1922] 1 A. C. 44; Pratt *v.* Patrick, [1924] 1 K. B. 488.

308. —— Unless through wilful act of owner of property.]—DEGG *v.* MIDLAND RY. CO., No. 15, *ante*.

309. —— ——.]—The P. M. railway co., under an arrangement with applts., used the yard & station of applts. at L. A P. M. train came into that station, discharged its passengers, & was proceeding backwards to its destination for the night when resp. jumped on board, intending to ride a short distance towards his home. He stood upon the rear platform of a car & was in that position when a collision took place between the train he was on & a train of applts. upon a lead of applts., by reason of the negligence of applts., whereby resp. was injured, & in respect thereof he sued applts. In the action the jury found that at the time of the accident resp. was not upon the P. M. co.'s train or the platform of the car by the co.'s permission:—*Held:* resp. was a trespasser, & although the applts. were under a duty to resp. not wilfully to injure him, they were not liable to him for mere negligence, & as the accident was due to the negligence of applt.'s servants & not to any wilful act resp. was not entitled to recover.—GRAND TRUNK RY. CO. OF CANADA *v.* BARNETT, [1911] A. C. 361; 80 L. J. P. C. 117; 104 L. T. ; 27 T. L. R. 359, P. C.

Annotations:—**Refd.** Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Hardy *v.* C. L. Ry., [1920] 3 K. B. 459.

310. —— Trespassing child—Lift working near highway.]—Defts. were in the habit of loading & unloading their vans at an aperture in the wall of their warehouse, which immediately abutted the highway. The aperture was 18 feet high & 6 feet wide, & the sill was about 3 feet 6 inches from the ground. Inside the aperture, about 2 feet from the outer edge of the sill, there was a lift, & on the wall outside a notice to the effect that the place was dangerous. Pltf., an infant, eight years of age, climbed up on the sill & leaned over to see what was inside, when the lift descended, striking him on the back of the head & causing the injuries complained of. In an action by pltf. against defts. for working the lift in a dangerous manner near the highway:—*Held:* pltf. at the time of the accident was a trespasser, the evidence was insufficient to make out his case.—STIEFSOHN *v.* BROOKE (1889), 53 J. P. 790; 5 T. L. R. 684.

.]—*See, also*, Part VII., Sect. 2, sub-sect. 3, *post*.

Trespasser on railway.]—*See* RAILWAYS.

Accident on land adjoining highways.]—*See* BOUNDARIES, Vol. VII., pp. 283–289, Nos. 135, 168.

-*See* LANDLORD & TENANT, Vol. XXXI., p. 347, No. 4897.

Injury to trespassing animals.]—*See* AGRICULTURE, Vol. II., p. 65, No. 415; ANIMALS, p. 213, Nos. 91 *et seq.*

Setting man traps & spring guns.]—*See* CRIMINAL LAW, Vol. XV., pp. 862, 863, Nos. 9468–9472; TRESPASS.

SUB-SECT. 5.—DUTY TO NEIGHBOURS.

Damage from trees & crops.]—*See* AGRICULTURE, Vol. II., pp. 63–66, 117, Nos. 397–418, 979.

Fences & party-walls.]—*See* BOUNDARIES, Vol. VII., pp. 281–310, Nos. 125 *et seq.*

Support of adjacent properties.]—*See* EASEMENTS, Vol. XIX., pp. 163–175, Nos. 1139 *et seq.*; MINES, Vol. XXXIV., pp. 725, 726, Nos. 1071–1073.

Landlords failure to repair.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 344–350, Nos. 4867 *et seq.*

See, also, NUISANCE; SEWERS & DRAINS; WATERS & WATERCOURSES.

SUB-SECT. 6.—DUTY TO THE PUBLIC.

See, generally, NUISANCE, pp. 152 *et seq.*, *post*.

311. Danger to persons using highway — Open cellar flap.]—A publican, who has a flap door in the foot pavement of the street, opening into a cellar underneath his house, is bound, when he

MEN'S CHRISTIAN ASSOCN. (Alta.), [1918] 3 W. W. R. 522.—**CAN.**

307 viii. ——.]—WALSH *v.* INTERNATIONAL BRIDGE & TERMINAL CO. (1919), 44 O. L. R. 117.—**CAN.**

307 ix. ——.]—HERDMAN *v.* MARITIME COAL CO. (1919), 49 D. L. R. 90.—**CAN.**

307 x. ——.]—COFFEE *v.* M'EVOY, [1912] 2 I. R. 95.—**IR.**

307 xi. ——.]—A girl of ten years of age was killed by an escape of steam from an unfenced pipe situated on a manufacturer's ground. She was not in his service & had no right to be on his ground:—*Held:* the father had no claim for damages inasmuch as there was no fault or negligence on the part of the deft.—FERGUSON *v.* LAIDLAW (1871), 43 Sc. Jur. 305.—**SCOT.**

307 xii. ——.]—GALLOWAY *v.* KING (1872), 10 Macph. (Ct. of Sess.) 788; 44 Sc. Jur. 449.—**SCOT.**

307 xiii. ——.]—ROSS *v.* KEITH (1888), 16 R. (Ct. of Sess.) 86; 26 Sc. L. R. 55.—**SCOT.**

308 i. —— *Unless through wilful act of owner of property.*]—SIEVERT *v.* BROOKFIELD (1904), 35 S. C. R. 494.—**CAN.**

308 ii. —— ——.]—BONDY *v.* SANDWICH, WINDSOR & AMHERSTBURG RY. CO. (1911), 19 O. W. R. 860; 2 O. W. N. 1476.—**CAN.**

308 iii. —— ——.]—CANADIAN PACIFIC RY. CO. *v.* HINRICH (1913), 26 W. L. R. 702; 5 W. W. R. 1088; 15 D. L. R. 472; 48 S. C. R. 557; 16 Can. Ry. Cas. 303.—**CAN.**

PART II. SECT. 1, SUB-SECT. 6.

q. *Danger to persons using highway—Insecure board walk leading to toll house.*]—CAMPBELL *v.* KINGSTON & BATH ROAD CO. (1891), 18 A. R. 286; *affd.* (1892), 20 S. C. R. 605.—**CAN.**

r. —— *Leaving plank on sidewalk.*]—In performing a contract for a town, contractors placed temporarily

uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving any injury by it.—PROCTOR *v.* HARRIS (1830), 4 C. & P. 337, N. P.

312. —— ——.]—Refreshment rooms & a coal cellar at a railway station were let by the co. to one S., the opening for putting coals into the cellar being on the arrival platform. A train coming in whilst the servants of a coal merchant were shooting coals into the cellar for S., pltf., a passenger, whilst passing as the jury found in the usual way out of the station, without any fault of his own, fell into the cellar opening, which the coal merchant's servants had negligently left insufficiently guarded :—*Held :* S., the occupier of the refreshment rooms & cellar, was responsible for this negligence. *Semble :* the railway co. also would be liable, but not the coal merchant.

No sound distinction in this respect can be drawn between the case of a public highway & a road which may be & to the knowledge of the wrongdoer probably will in fact be used by persons lawfully entitled so to do. The opening of the trap was an act equally likely to be injurious to such passengers as throwing a stumbling block in their way would have been (WILLIAMS, J.).—PICKARD *v.* SMITH (1861), 10 C. B. N. S. 470 ; 4 L. T. 470 ; 142 E. R. 535.

Annotations :—**Apld.** John *v.* Bacon (1870), L. R. 5 C. P. 437 ; Bower *v.* Peate (1876), 1 Q. B. D. 321 ; Hughes *v.* Percival (1883), 8 App. Cas. 443 ; Penny *v.* Wimbledon U. C., [1899] 2 Q. B. 72. **Consd.** Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465. **Refd.** Clothier *v.* Webster (1862), 12 C. B. N. S. 790 ; Gray *v.* Pullen (1864), 5 B. & S. 970 ; Fletcher *v.* Rylands (1866), L. R. 1 Exch. 265 ; Mersey Dock Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93 ; Welfare *v.* Brighton Ry. (1869), L. R. 4 Q. B. 693 ; Goslin *v.* Agricultural Hall Co. (1876), 1 C. P. D. 482 ; Whiteley *v.* Pepper (1876), 2 Q. B. D. 276 ; Dalton *v.* Angus (1881), 6 App. Cas. 740 ; Duke *v.* Courage (1882), 46 J. P. 453 ; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335 ; The Snark, [1900] P. 105 ; Cribb *v.* Kynoch, [1907] 2 K. B. 548 ; Wilson *v.* Hodgson's Kingston Brewery Co. & Burgmaier (1915), 80 J. P. 39; Cox *v.* Coulson, [1916] 2 K. B. 177.

313. —— ——.]—DE BOOS *v.* COLLARD (1892), 8 T. L. R. 338.

—— ——.]—*See* HIGHWAYS, Vol. XXVI., pp. 417, 418, Nos. 1362–1369.

314. —— **Matting on pavement.**] — Where a person puts an obstruction on the pavement & a foot passenger stumbles over it the owner is liable for the consequences, unless by gross & culpable negligence the foot passenger contributes to the accident.

If pltf. can be shown to have brought the injury on himself by want of reasonable care he cannot recover ; but then it is for deft. to make this out (LORD COLERIDGE, C.J.).—DE TEYRON *v.* WARING (1885), 1 T. L. R. 414.

315. —— **Article dropped from building.**]—Accidents may be of such a nature that negligence may be presumed from the mere fact of the accident ; the presumption depending on the nature of the accident. Pltf., while walking in a street in front of the house of a flour dealer, was injured by a barrel of flour falling upon him from an upper window :—*Held :* the mere fact of the accident, without any proof of the circumstances under which it occurred, was evidence of negligence to go to the jury in an action against the flour dealer, the declaration alleging that pltf. was injured by the negligence of deft's. servants.—BYRNE *v.* BOADLE (1863), 2 H. & C. 722 ; 3 New Rep. 162 ; 33 L. J. Ex. 13 ; 9 L. T. 450 ; 10 Jur. N. S. 1107 ; 12 W. R. 279 ; 159 E. R. 299.

Annotations :—**Folld.** Scott *v.* London Dock Co. (1864), 5 New Rep. 59 ; Briggs *v.* Oliver (1866), 4 H. & C. 403. **Consd.** Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523. **Refd.** Coleman *v.* S. E. Ry. (1866), 31 J. P. 23 ; Higgs *v.* Maynard (1866), Har. & Ruth. 581 ; Smith *v.* G. E. Ry. (1866), L. R. 2 C. P. 4 ; Pritchard *v.* Peto, [1917] 2 K. B. 173 ; Gayler & Pope *v.* Davies, [1924] 2 K. B. 75.

316. —— ——.] — FORD *v.* GLOUCESTER CO-OPERATIVE & INDUSTRIAL SOCIETY, LTD. (1910), 74 J. P. Jo. 100.

317. —— ——.] — WILLIAMS *v.* MCCOMBIE (1913), 48 L. Jo. 241.

318. —— **Unsafe condition of drinking fountain.**] During the progress of a royal procession through a borough a man climbed up a stone drinking fountain, which belonged to defts., & which was situate in a public highway, where it had stood for a great many years, & dislodged the finial, or top stone, which fell & injured a boy who was standing by. In answer to an action by the boy against the corpn. for damages for injuries sustained through the defective condition of the fountain, defts. denied negligence, & alleged that the accident was due to the fountain being used for an improper purpose which they could not have anticipated. There being a conflict of evidence as to the condition of the fountain, the jury awarded pltf. £21 damages, & judgment was entered accordingly. Upon an application for a new trial on the grounds of no evidence of negligence, & verdict against weight of evidence :—*Held :* the question was for the jury to decide, & there was ample evidence to justify the verdict.—MCLOUGHLIN *v.* WARRINGTON CORPN. (1910), 75 J. P. 57, C. A.

319. —— **Defective sun blind.**]—WHEELER *v.* MORRIS, No. 185, *ante*.

320. —— **Highway dedicated to public.**] — In an action on the case for an injury resulting to pltf. from falling down an unprotected area, the declaration stated, that deft. was possessed of the premises, & that they were adjoining a certain common & public street & highway. It appeared that deft. had agreed with the owner of the premises, two carcasses of houses, to finish one of them, for doing which he was to have the other ; & that workmen employed by him were then actually at work upon them ; but it did not appear that any conveyance had been made to him. The street in question, which had been formed for six years, & led from a public street to a new road across fields, over which the way had been publicly used for five or six years, was unfinished, one half only being lighted, the other neither lighted nor paved ; but the inhabitants had paid the highway & paving rates :—*Held :* this was sufficient evidence to go to a jury of a possession in deft., & of a dedication of the street to the public.

When the public are thus invited to go along a street, if, through the carelessness & negligence of the proprietors or occupiers of houses therein, an accident happens to an individual passing, the parties cannot afterwards turn round & say, that it was not a public road (BEST, C.J.).—JARVIS *v.*

across a sidewalk a two-inch plank, the whole edge of which was exposed. There was no light there at night. A girl, one night, struck her foot against the edge of the plank, fell & was injured :—*Held :* the plank was a trap.—SMALL *v.* WESTVILLE TOWN (1898), 40 N. S. R. 226.—**CAN.**

t. —— *Electric wires.*]—GLOSTER *v.* TORONTO ELECTRIC LIGHT CO. (1906), 38 S. C. R. 27.—**CAN.**

u. —— *Public right of travel over frozen bay—Hole cut in ice.*]—LITTLE *v.* SMITH (1914), 32 O. L. R. 518 ; 20 D. L. R. 399.—**CAN.**

a. —— *Unfenced quarry.*]—PRENTICE *v.* ASSETS CO., LTD. (1890), 17 R. (Ct. of Sess.) 484.—**SCOT.**

b. —— *Railway whistle frightening horse.*]—CLANCY *v.* GLASGOW & SOUTH WESTERN RY. CO. (1898), 25 R. (Ct. of Sess.) 581 ; 35 Sc. L. R. 462 ; 5 S. L. T. 331.—**SCOT.**

c. —— *Stepping stone.*]—SHEARER *v.* MALCOLM (1898), 35 Sc. L. R. 924.—**SCOT.**

Escape of horse while

Sect. 1.—*In regard to particular persons: Sub-sect.* 6. *Sects.* 2 & 3: *Sub-sect.* 1.]

DEAN (1826), 3 Bing. 447; 11 Moore, C. P. 354; 4 L. J. O. S. C. P. 144; 130 E. R. 585.

Annotations:—**Consd.** Barnes v. Ward (1850), 9 C. B. 392; Fisher v. Prowse (1862), 2 B. & S. 770.

321. —— Highway not yet dedicated to public.]—Deft., while erecting houses upon land adjoining a new road, which had not been dedicated to the public, had dug a trench across the road for the purpose of making drains. Pltfs.' servant, while driving pltfs.' horses along the road after dark, drove into the trench, no lights having been placed to warn persons using the road:—*Held:* deft. had not been guilty of any negligence, there being no duty cast upon him to protect any one using the road without licence.—MURLEY BROTHERS *v.* GROVE (1882), 46 J. P. 360, D. C.

Annotations:—**Apld.** Lowery v. Walker, [1910] 1 K. B. 173. **Refd.** Grand Trunk Ry. of Canada v. Barnett, [1911] A. C. 361.

322. —— ——.]—Defts., a local authority, who were carrying out road improvements, employed contractors to pull down a wall at the end of a cul de sac & to make a new road joining the old cul de sac to an existing highway. The contractors pulled down the wall & made up a section of the new road as a contractor's road & then closed further progress by erecting a wooden fence, but there was no night watchman or lamp to give warning of the obstruction. Between the fence & the existing highway with which the cul de sac was to be connected there was a dangerous ravine, but the lights on each side of that highway were clearly visible to any one entering the cul de sac & might induce a stranger to suppose that there was a continuous road. Pltf., who was driving a motor car at night, proceeded along the cul de sac & the contractor's road, &, not seeing the fence, crashed through it into the ravine & was seriously injured. In an action for negligence:—*Held:* although the place of the accident was not a highway but a private site, yet, as there was an invitation to go upon it, defts. were liable for the consequences of putting an unexpected obstruction in the path of the invitee, & pltf. was entitled to recover.—OLDHAM *v.* SHEFFIELD CORPN. (1927), 43 T. L. R. 222, C. A.

—— **Liability of highway authority.**] — *See* HIGHWAYS, Vol. XXVI., pp. 398–413.

323. Danger to persons using level crossing — Projecting rails.]—Pltf., having to pass by a footway over a part of which defts. had obtained statutory powers to place their lines, was injured by falling over the rails. Defts. had allowed the rails to project some inches above the ballast. Pltf. having recovered damages in the county ct., defts. appealed, on the ground that there was no evidence of negligence on their part:—*Held:* as it had been the duty of defts. to have maintained the footway at the point at which they had placed their lines upon it in as safe a condition for the public using it as it had previously been, pltf. was entitled to recover in the action.—ENNEW *v.* GREAT EASTERN RY. Co. (1885), 1 T. L. R. 519, D. C.

324. —— Brake van let loose — Act of trespassers.]—MCDOWALL *v.* GREAT WESTERN RY. CO., No. 166, *ante*.

Danger through non-repair of bridges.]—*See* HIGHWAYS, Vol. XXVI., pp. 587–588.

325. Danger from unfenced property — Cliff at watering place.]—ANDERSON *v.* COUTTS, No. 269, *ante*.

—*See* BOUNDARIES, Vol. VII., p. 281, Nos. 126 *et seq.*; HIGHWAYS, Vol. XXVI., p. 434, No. 1520; RAILWAYS & CANALS.

Danger to children.]—*See* Part VII., *post*.

SECT. 2.—IN REGARD TO WATER.

generally, WATERS & WATERCOURSES

326. Water accumulating naturally — Damage by flood—Liability to neighbour.]—PRINSEP *v.* BELGRAVIA ESTATE, LTD. (1895), 39 Sol. Jo. 381.

327. —— —— ——.]—LONGTON *v.* WINWICK ASYLUM VISITORS COMMITTEE (1912), 76 J. P. 113, C. A.

— **Liability to mine owners.**]—*See* MINES, Vol. XXXIV., pp. 724–726, Nos. 1063–1074.

—— —— **Liability of highway authorities.**]—*See* HIGHWAYS, Vol. XXVI., p. 407, Nos. 1287, 1289, 1290.

Water conducted or accumulated artificially—Principle of Rylands v. Fletcher.]—*See* NUISANCE, pp. 187 *et seq.*, *post*.

328. Water drained from house — Damage caused by negligence of employee—Obstruction of pipe from sink.]—Pltf. occupied the ground floor & deft. the third & fourth floors of the same building. Deft.'s employés, without his knowledge, were in the habit of emptying tea leaves into a sink leading from his premises to a pipe, & in consequence the pipe was choked, & an overflow of water ensued. The water came through the ceiling of pltf.'s rooms & did damage to certain goods which he had there. In an action against deft. for the damage sustained:—*Held:* pltf. was entitled to recover, as a duty was cast upon deft. to prevent an overflow, which duty he had failed to discharge.—ABELSON *v.* BROCKMAN (1889), 54 J. P. 119.

329. Negligence of statutory authority—Sewer authority.]—In an action against a local board of health, for damage sustained by an irruption of sewerage caused by the sewers being improperly constructed, former applications by pltf. to the board for compensation on similar occasions, with their answers awarding compensation, are admissible in evidence on his part, although this fact will not settle the question of responsibility for a particular sewer, coupled with the fact, that on the occasion in question the board appeared only to dispute their liability on the ground that the occurrence was occasioned by an extraordinary storm; &, with some, even though slight, evidence that it was caused by defective construction of the sewers, there will be sufficient evidence of liability. Nor will there be sufficient evidence that a storm was so extraordinary as to excuse the parties responsible for the sewers, unless the evidence extends over a considerable range of years, during which the sewers in question have been in existence. Where it appeared that a sewer had been connected with & caused to discharge its contents into one of smaller bore, this was treated as evidence of negligence in their construction, & sufficient to make the board

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being yoked.]—SMITH *v.* WALLACE & Co. (1898), 25 R. (Ct. of Sess.) 761.—**SCOT.**

e. *Insecure warehouse door.*]—BEVERIDGE *v.* KINNEAR & Co. (1883), 11 R. (Ct. of Sess.) 387; 21 Sc. L. R. 260.—**SCOT.**

f. *Rifle practice.*]—TAYLOR *v.* DICK (1897), 4 S. L. T. 297.—**SCOT.**

g. *Unfenced stream in public park.*]—STEVENSON *v.* GLASGOW CORPN., [1908] S. C. 1034; 45 Sc. L. R. 860; 16 S. L. T. 302.—**SCOT.**

h. *Playing cricket.*]—WARD *v.* ABRAHAM, [1910] S. C. 299.—**SCOT.**

liable, notwithstanding the storm; & pltf. was not bound to incur any expense in protecting his premises from the consequences of such negligence.

If the question had been raised, whether the board were bound to provide sewers sufficient to sustain the pressure caused by extraordinary storms, I should have ruled that they were not bound to provide for such storms. . . . If the accident had been caused by an extraordinary storm, it would have been the act of God, & deft. would not have been responsible (ERLE, J.).—BROWN *v.* SARGENT (1858), 1 F. & F. 112.

Annotations:—**Refd.** Hammond *v.* St. Pancras Vestry (1874), L. R. 9 C. P. 316; Stretton's Derby Brewery Co. *v.* Derby Corpn., [1894] 1 Ch. 431.

—— ——.]—*See, further*, SEWERS & DRAINS.

330. —— Canal company.] — A right of action against a canal co. for negligently keeping their sluices, by reason whereof the canal overflowed, not ousted by provisions in the Canal Act for compensation to parties affected by the works, & especially by the overflowing of the water over the sluices, etc.; those provisions relating to the due & proper management of the works, not to their negligent management.—COCKBURN *v.* EREWASH CANAL CO. (1862), 11 W. R. 34.

331. —— ——.]—Defts.' canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defts. were authorised to take land compulsorily & construct the canal, doing as little damage as might be, & to do all things necessary for making & preserving & using the canal, making satisfaction for all damages to be sustained by the owners of lands & hereditaments taken or prejudiced by the execution of the powers of the Act. Comrs. were appointed who were to determine from time to time what sum should be paid for the purchase of lands, & also to determine what other distinct sum should be paid by defts. as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals; provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months' notice to defts., who might inspect the mines, & might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defts. to inspect the mines, the owners were authorised to work them. The canal having been constructed & used for many years, pltf., who was owner of coal mines under the canal, gave defts. proper notice of his intention to work them; defts. did not inspect, & refused to purchase. Pltf. proceeded to work the mines, without regard to the surface, & without attempting to support it, & knowing that the effect would be to let down the surface, & probably disturb the strata, & that there was danger of the water escaping from the canal into the mines; but, except as above, pltf. did not work his mines in any negligent or unskilful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, & without doing so he could not have obtained the full benefit of his coal. The canal was in good order when pltf. commenced working his coal; & defts. did all they could to keep the canal watertight, by puddling, etc. During part of the time, while pltf.'s working was going on, they had dammed back the water, & so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for pltf. to work out his coal. Defts. were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated, & the water of the canal escaped through the cracks & flooded the workings, & pltf. was obliged to abandon his coal. Pltf. thereupon brought an action, charging that defts., having brought water into the canal, so carelessly & improperly managed the canal & the water, that the water escaped & flooded pltf.'s mine:—*Held:* an action of tort could not be maintained.—DUNN *v.* BIRMINGHAM CANAL CO. (1872), L. R. 8 Q. B. 42; 42 L. J. Q. 34; 27 L. T. 683; 21 W. R. 266, Ex. Ch.

Annotations:—**Refd.** Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418; Green *v.* Chelsea Waterworks Co. (1894), 70 L. T. 547.

332. —— ——.]—On the bank of a canal constructed under an old Act of Parliament a mill had been built. In consequence of the working of a coal mine the canal & mill had subsided, & water leaked from the canal into the mill. The mill owner brought an action against the canal co. for an injunction & for damages:—*Held:* though a co. authorised by Act of Parliament were not under the same liabilities as a private person, they were liable for damages if they were guilty of negligence, & the canal co. had been guilty of negligence, inasmuch as they might have prevented the damage; & they were bound to compensate the mill-owner.—EVANS *v.* MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. (1887), 36 Ch. D. 626; 57 L. J. Ch. 153; 57 L. T. 194; 36 W. R. 328; 3 T. L. R. 691.

Pollution of water.]—*See* FISHERIES, Vol. XXV., pp. 34–36, Nos. 328–338: SEWERS & DRAINS; WATERS & WATERCOURSES

—— ——.]—*See, further*, RAILWAYS & CANALS; WATERS & WATERCOURSES; WATER SUPPLY.

Abstraction of water.]—*See* WATERS & WATERCOURSES.

Interference with easement of water.] — *See, generally*, EASEMENTS, Vol. XIX., pp. 115 *et seq.*

SECT. 3.—IN REGARD TO FIRE.

SUB-SECT. 1.—FIRE KINDLED ACCIDENTALLY.

See Fires Prevention, Metropolis, Act 1774 (c. 78), s. 86.

333. Statutory protection — Effect on common law—Presumption of negligence.]—By the law of this country before it was altered by the statute 6 Ann. c. 31, s. 6, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such injury, would not be bound in the first instance to show how the fire began, but the presumption would be, unless it were shown to have originated from some external cause, that it arose from the neglect of some person in the house (LORD TENTERDEN, C.J.).—BECQUET *v.* MACCARTHY (1831), 2 B. & Ad. 951; 109 E. R. 1396.

Annotations:—**Refd.** Musgrove *v.* Pandelis (1919), 88 L. J. K. B. 915. **Mentd.** Alivon *v.* Furnival (1834), 1 Cr. M. & R. 277; Don *v.* Lippmann (1837), 5 Cl. & Fin. 1; Ferguson *v.* Mahon (1839), 11 Ad. & El. 179; Smith *v.* Nicholls (1839), 7 Dowl. 282; *Re* Baines (1840), 10 L. J. Q. B. 34; Meyer *v.* Ralli (1876), 1 C. P. D. 358; Rousillon *v.* Rousillon (1880), 14 Ch. D. 351; Sirdar Gurdyal Singh *v.* Rajah of Faridkote, [1894] A. C. 670; Feyerick *v.* Hubbard (1902), 71 L. J. K. B. 509; Emanuel *v.* Symon, [1908] 1 K. B. 302.

Sect. 3.—*In regard to fire: Sub-sects.* 1 *&* 2, *A*

334. —— —— ——.]—Fire Prevention (Metropolis) Act, 1774 (c. 78), s. 86, which enacts that no action shall be maintained against any person in whose house, or on whose estate, any fire shall accidentally begin, is not confined in its operation to those districts to which the limited clauses of the Act are restricted. It does not apply where a fire is produced by negligence: &, in that case, by the common law, an action lies against the party by whose negligence or that of his servants, a fire arises on his premises & damages the property of another. It does not apply where the fire is lighted intentionally, & mischief happens to result. —FILLITER *v.* PHIPPARD (1847), 11 Q. B. 347; 17 L. J. Q. B. 89; 10 L. T. O. S. 225; 11 J. P. 903; 12 Jur. 202; 116 E. R. 506.

Annotations:—**Refd.** *Re* Barker, *Ex p.* Gorely (1864), 4 De G. J. & Sm. 477; Musgrove *v.* Pandelis, [1919] 2 K. B. 43. **Mentd.** Grill *v.* General Iron Screw Collier Co. (1866), 35 L. J. C. P. 321.

335. —— **Whether "accident" includes negligence.**]—*Qu.:* whether the protection given by 6 Ann. c. 31, & Fire Prevention (Metropolis) Act, 1774 (c. 78), to a party in whose house or on whose estate a fire shall accidentally begin, extends to fires occasioned by the negligence of the owner or his servants, or whether it is confined to fires arising from pure accident in the limited sense of the word.

Sir William Blackstone's construction is, that although the fire be occasioned by the negligence of the party, he shall not be liable (LORD LYNDHURST, C.).—CANTERBURY (VISCOUNT) *v.* A.-G. (1843), 1 Ph. 306; 4 State, Tr. N. S. 767; 12 L. J. Ch. 281; 7 Jur. 224; 41 E. R. 648, L. C.

Annotations:—**Refd.** Filliter *v.* Phippard (1847), 11 Q. B. 347; Vaughan *v.* Taff Vale Ry. (1858), 3 H. & N. 743; Grill *v.* General Iron Screw Collier Co. (1866), 35 L. J. C. P. 321. **Mentd.** De Bode *v.* R. (1848), 13 Q. B. 364; Tobin *v.* R. (1864), 16 C. B. N. S. 310; Feather *v.* R. (1865), 35 L. J. Q. B. 200; Thomas *v.* R. (1874), L. R. 10 Q. B. 31; Bainbridge *v.* Postmaster-General, [1906] 1 K. B. 178; A.-G. for Straits Settlements *v.* Pang Ah Yew, [1925] A. C. 555.

336. —— ——.]—FILLITER *v.* PHIPPARD, No. 334, *ante*.

337. —— **Application of Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 86.**]—The only doubt that can be raised as to its [above Act] being of a local & personal character, is, that it is not of a local & personal character only: some of the clauses affecting all the Queen's subjects, as the 84th & 86th, relating to accidental fires; & the statute is, in that respect, public. If the defence in an action arose out of either of those clauses, it would probably be held that the statutable plea was not taken away. But the defence in this case arises under that part of the Act which is not public; in all other respects then, so far as it relates to accidental fires, the Act falls under the category of a statute of a local & personal nature; & we therefore all agree, that the statutable plea of the general issue, whereby to give the special matter in evidence, was taken away in this case (PARKE, B.).—RICHARDS *v.* EASTO (1846), 3 Dow. & L. 515; 15 M. & W. 244; 15 L. J. Ex. 163; 10 Jur. 695; 153 E. R. 840; *sub nom.* RICHARDS *v.* EASTHOPE, 8 L. T. O. S. 253.

Annotations:—**Refd.** Filliter *v.* Phippard (1847), 11 Q. B. 347; Moore *v.* Shepherd (1854), 10 Exch. 424. **Mentd.** Barnet *v.* Cox (1847), 9 Q. B. 617; Law *v.* Dodd (1848), 1 Exch. 845; Shepherd *v.* Sharp (1856), 1 H. & N. 115; Carr *v.* Royal Exchange Assce. (1862), 1 B. & S. 956; R. *v.* L. C. C., [1893] 2 Q. B. 454.

338. —— ——.]—FILLITER *v.* PHIPPARD, No. 334, *ante*.

339. —— **Effect of subsequent negligence—Failure to prevent spreading—Motor car.**]—Pltf. occupied rooms over a garage. Part of the garage was let to deft., who kept a motor car there. Deft.'s servant, who had little skill as a chauffeur, having occasion in the course of his employment to move the motor car, started the engine, & from some unexplained cause, & without negligence on the part of the servant, the petrol in the carburettor caught fire. If the servant had promptly turned off the tap leading from the petrol tank to the carburettor, the fire would have harmlessly burnt itself out. But he failed to do this; & the fire spread & burnt the car, the garage, & pltf.'s rooms & furniture. Pltf. brought an action for damages. Deft. pleaded that the fire accidentally began within the meaning of the above enactment. The judge at the trial found that deft.'s servant was negligent in not promptly turning off the petrol tap:—*Held:* (1) Fires Prevention (Metropolis) Act, 1774 (c. 78) did not protect a person who brought upon his premises an object likely to do damage if not kept in control, & a motor car ready to start, or such a car in charge of an unskilled chauffeur, was an object of that kind; (2) the fire which caused the damage was not that which took place in the carburettor, but was the fire which spread to the car; & this fire did not begin accidentally but was caused by the negligence of deft.'s servant.—MUSGROVE *v.* PANDELIS, [1919] 2 K. B. 43; 88 L. J. K. B. 915; 120 L. T. 601; 35 T. L. R. 299; 63 Sol. Jo. 353, C. A.

Annotations:—*As to* (1) **Consd.** Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341. **Refd.** Denholm *v.* Shipping Controller (1920), 124 L. T. 378. *As to* (2) **Refd.** Jefferson *v.* Derbyshire Farmers, [1921] 2 K. B. 281.

PART II. SECT. 3, SUB-SECT. 1.

337 i. *Statutory protection—Application of Fires Prevention (Metropolis) Act,* 1774 *(c.* 78*), s.* 86.]—BATCHELOR *v.* SMITH (1879), 5 V. L. R. (L.) 176.—**AUS.**

337 ii. ——.]—*Semble:* 6 Anne, c. 31, s. 6, & the above sect. are in force in South Australia.—HAVELBERG *v.* BROWN, [1905] S. A. L. R. 1.—**AUS.**

337 iii. ——.]—Deft. occupied a stall in the market, the cellar beneath which was used by pltfs. to keep goods in. He went out, leaving a fire in his stove, with no one to watch it, & a block of wood too close to the stove. A fire broke out which burned through the floor, & destroyed pltf.'s goods below, & the jury found that such fire was occasioned by deft.'s negligence:—*Held:* it was nevertheless an accidental fire, within the above sect. & deft. was not liable.—GASTON *v.* WALD (1860), 19 U. C. R. 586.—**CAN.**

337 iv. —— ——.]—LAIDLAW *v.* CROW'S NEST PASS RY. CO. (1909), 10 W. L. R. 17.—**CAN.**

337 v. —— ——.]—The English common law on the subject of fires applies to this colony; & so also does the above sect.—HUNTER *v.* WALKER (1898), 6 N. Z. L. R. 690.—**N.Z.**

k. *Who may sue—Tenant in common.*]—PHILLIPS *v.* PHILLIPS (1897), 34 N. B. R. 312.—**CAN.**

l. *Protection of forests & prairies—Camp fire not extinguished.*]—R. *v.* SAUNDERS (1907), 4 E. L. R. 149.—**CAN.**

m. —— *Failure to appoint fire guardian.*]—The failure of a municipality to appoint a fire guardian to carry out Prairie & Forest Fires Act, 1917, does not render it liable for the destruction of private properties by a prairie fire, in the absence of any evidence that the default of the municipality was connected with the damage to pltf.'s property.—SODERBERG *v.* MEDSTEAD RURAL MUNICIPALITY (Sask.), [1921] 1 W. W. R. 1130; 59 D. L. R. 702.—**CAN.**

n. —— ——.]—COATES *v.* MAYO SINGH LUMBER CO. (B. C.), [1925] 4 D. L. R. 345; [1925] 3 W. W. R. 513. —**CAN.**

o. —— *Necessity for proof of negligence.*]—Where a fire starts on a person's open veld & spreads to his neighbour's property, & does damage, direct proof of negligence is required before the neighbour can recover damages.—CAMBRIDGE MUNICIPALITY *v.* MILLARD, [1916] C. P. D. 724.—**S. AF.**

p. *Logs hauled in hot weather—Whether negligence per se—When adequate fire appliances provided.*]—The fact that during a spell of hot weather & high winds the humidity is as low as 47 does not render the hauling & handling of logs negligence *per se* if

340. Liability of master for servant.]—MUSGROVE *v.* PANDELIS, No. 339, *ante.*

——.]—*See, further*, MASTER & SERVANT, Vol. XXXIV., p. 144, Nos. 1132–1134.

Liability of carrier.]—*See* BAILMENT, Vol. III., pp. 79, 80, Nos. 175–177.

Liability of bailee.]—*See* BAILMENT, Vol. III., p. 99, No. 272.

Liability of tenant.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 367, No. 5135.

Liability of landlord.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 368, No. 5147.

Liability of shipowner.]—*See* SHIPPING.

SUB-SECT. 2.—FIRE KINDLED PURPOSELY.

A. In General.

341. General rule—Party kindling fire liable.]—BEAULIEU *v.* FINGLAM (1401), Y. B. 2 Hen. 4, fo. 18, pl. 6.

Annotations:—**Consd.** Piggot *v.* Eastern Counties Ry. (1846), 3 C. B. 229. **Refd.** Southern *v.* How (1617), Poph. 143; Canterbury *v.* A.-G. (1843), 1 Ph. 306; Reedie *v.* N. W. Ry., Hobbit *v.* Same (1849), 13 Jur. 659. **Mentd.** Blackamore's Case (1610), 8 Co. Rep. 156 a; Bowles's Case (1615), 11 Co. Rep. 79 b.

342. Liability for negligence.]—A declaration for negligently keeping a fire, by which pltf.'s house was burned, viz. *in parietibus partitionibus, ornamentis, etc.* is good.—LITTLETON *v.* COLE (1696), 5 Mod. Rep. 181; 87 E. R. 595.

343. ——.]—TURBERVILLE *v.* STAMP, No. 685, *post.*

344. ——.]—Case for negligently keeping his fire, *per quod, etc.* It lies not against lessee at will by lessor seised in fee; otherwise by lessor, termor for years, or a stranger.—PANTAM *v.* ISHAM (1701), 1 Salk. 19; 3 Lev. 359; 91 E. R. 18.

345. ——.]—DUNKLY *v.* WADE (1706), 2 Salk. 653; 91 E. R. 556.

Annotations:—**Refd.** Boucher *v.* Lawson (1735), Lee *temp.* Hard. 194. **Mentd.** Farewell *v.* Chaffey (1756), 1 Burr. 54.

346. What amounts to negligence—Bed placed near fire.]—Where a farm house was burnt by accident:—*Held:* the landlord was not bound to rebuild. The Lord Chancellor seemed to doubt whether the having a bed with a wooden frame, & with straw in the bottom hanging down through the interstices of the spars below, placed within about forty inches of the fireplace, where there was no fender, did not amount to culpable negligence; & if it was culpable negligence, the generality of the practice, he said, only made it the more necessary so to determine.—BAYNE *v.* WALKER (1815), 3 Dow, 233; 3 E. R. 1049, H. L.

347. Liability for act of servant.]—BEAULIEU *v.* FINGLAM (1401), Y. B. 2 Hen. 4, fo. 18, pl. 6.

Annotations:—**Refd.** Southern *v.* How (1617), Poph. 143; Canterbury *v.* A.-G. (1843), 1 Ph. 306; Reedie *v.* N. W. Ry., Hobbit *v.* Same (1849), 13 Jur. 659. **Mentd.** Blackamore's Case (1610), 8 Co. Rep. 156 a; Bowles's Case (1615), 11 Co. Rep. 79 b; Piggott *v.* Eastern Counties Ry. (1846), 3 C. B. 229.

——.]—*See, generally*, MASTER & SERVANT, Vol. XXXIV., p. 144, Nos. 1132–1136.

348. Liability for act of third party—Stranger.]—BEAULIEU *v.* FINGLAM (1401), Y. B. 2 Hen. 4, fo. 18, pl. 6.

Annotations:—**Refd.** Canterbury *v.* A.-G. (1843), 1 Ph. 306; Reedie *v.* N. W. Ry., Hobbit *v.* Same (1849), 13 Jur. 659. **Mentd.** Blackamore's Case (1610), 8 Co. Rep. 156 a; Bowles's Case (1615), 11 Co. Rep. 79 b; Southern *v.* How (1617), Poph. 143; Piggott *v.* Eastern Counties Ry. (1846), 3 C. B. 229.

349. —— **Guest.**]—CROGATE *v.* MORRIS (1610), as reported in 1 Brownl. 197; 123 E. R. 751.

Annotations:—**Mentd.** Anon. (1604), Poph. 163; Anon. (1614), 1 Roll. Rep. 47; White *v.* Stubbs (1671), 2 Saund. 294; Jeveson *v.* Moor (1699), 12 Mod. Rep. 262; Chance *v.* Weeden (1701), 2 Salk. 628; Crouther *v.* Oldfield (1706), 1 Salk. 364; Cockerel *v.* Armstrong (1737), 2 Com. 582; Cooper *v.* Monke (1738), Willes, 52; Robinson *v.* Raley (1757), 1 Burr. 316; Hall *v.* Harding (1769), 4 Burr. 2426; Atkinson *v.* Teasdale (1772), 2 Wm. Bl. 817; Wells *v.* Watling (1778), 2 Wm. Bl. 1233; Jones *v.* Kitchin (1797), 1 Bos. & P. 76; Pindar *v.* Wadsworth (1802), 2 East, 154; O'Brien *v.* Saxon (1824), 2 B. & C. 908; Piggott *v.* Kemp (1832), 1 Cr. & M. 197; Bardons *v.* Selby (1833), 9 Bing. 756; Crisp *v.* Griffiths (1835), 2

adequate fire-fighting equipment & men are available.—HIGGINS *v.* COMOX LOGGING CO. (B. C.), [1926] 4 D. L. R. 852; [1926] 3 W. W. R. 417.—**CAN.**

q. *Cotton kept in unventilated room—Occurrence of fire—During year's hottest period.*]—MULCHAND NEMI CHAND *v.* BASDEO RAM SARUP (1926), I. L. R. 48 All. 404.—**IND.**

PART II. SECT. 3, SUB-SECT. 2.—A.

342 i. *Liability for negligence.*]—Persons have a right to set out fire on their land for the purpose of clearing it, & if the flames spread under the influence of a wind suddenly arising, & cause damage to a neighbour, no action will lie without proof of negligence.—BUCHANAN *v.* YOUNG (1873), 23 C. P. 101.—**CAN.**

342 ii. ——.]—A person who starts a fire on his own property for purposes of husbandry, although not bound at all hazards to prevent the spread of fire to his neighbour's property, is yet bound to exercise caution & care proportionate to the risk of fire spreading & doing damage; & whatever falls short of taking every precaution that is reasonably possible under the circumstances, to prevent the spread of the fire, will be held to be negligence for which the person will be made liable in damages.—BOOTH *v.* MOFFATT (1896), 11 Man. L. R. 25.—**CAN.**

342 iii. ——.]—Where a person uses fire in his field in a customary way for the purposes of agriculture, or other industrial purposes, he is not liable for damages arising from the escape of the fire to other lands, unless the escape is due to his negligence.—*v.* BURGESS (1896), 11 Man. L. R. 75.—**CAN.**

342 iv. ——.]—BEATON *v.* SPRINGER (1897), 24 A. R. 297.—**CAN.**

342 v. ——.]—CHAZ *v.* CISTERCIENS REFORMES (1898), 12 Man. L. R. 330.—**CAN.**

342 vi. ——.]—PEACOCK *v.* COOPER (1899), 20 C. L. T. 201; 27 A. R. 128.—**CAN.**

342 vii. ——.]—MOSELEY *v.* KETCHUM (1910), 12 W. L. R. 721; 3 Sask. L. R. 29.—**CAN.**

342 viii. ——.]—HUDDLESTONE *v.* STEWART (Man.) (1910), 15 W. L. R. 590.—**CAN.**

342 ix. ——.]—WHITEHEAD *v.* McCLAIVE (Alta.) (1911), 19 W. L. R. 216.—**CAN.**

342 x. ——.]—RYAN *v.* GABRIEL (Sask.) (1912), 20 W. L. R. 649; 2 D. L. R. 18.—**CAN.**

342 xi. ——.]—KNOWLES *v.* ELLISON (1914), 30 W. L. R. 334; 7 W. W. R. 920; 20 D. L. R. 23.—**CAN.**

342 xii. ——.]—BUTCHER *v.* STUCKEY (1914), 26 W. L. R. 719; 5 W. W. R. 1171; 16 D. L. R. 839.—**CAN.**

342 xiii. ——.]—BIGRAS *v.* TASSE (1917), 40 O. L. R. 415; 38 D. L. R. 651.—**CAN.**

342 xiv. ——.]—DOUGHERTY *v.* SMITH (1887), 5 N. Z. L. R. 374 (S. C.).—**N.Z.**

342 xv. ——.]—MACKINTOSH *v.* MACKINTOSH (1864), 2 Macph. (Ct. of Sess.) 1357.—**SCOT.**

r. *Prairie Fires Ordinance—Object of—Protection of general public against carelessness.*]—GEDGE *v.* LINDSAY (1903), 7 Terr. L. R. 141.—**CAN.**

t. —— *What amounts to offence under—Failure to take care.*]—If a person kindles a fire on his own land & does not properly watch it to see that it does not get away, & it does get away, he lets or permits it to do so; that is, he abstains from taking the action that he ought to have taken to have prevented it so getting away, & therefore he is guilty of an offence under the above Ordinance.—MCCARTNEY *v.* MILLER (1905), 7 Terr. L. R. 367; 2 W. L. R. 87.—**CAN.**

-.]—A father is not liable for negligence in allowing his fourteen year old son to go out alone with a gun to shoot game, if the boy has been carefully trained in the use of a gun & ordinarily exercises great care in handling it: but the son will be liable in damages for the consequences of carelessness in firing the gun so as to start a prairie fire which destroys pltf.'s property.—TURNER *v.* SNIDER (1906), 16 Man. L. R. 79.—**CAN.**

b. —— —— ——.]—HOLLIDAY *v.* BUSSIAN (1906), 16 Man. L. R. 437.—**CAN.**

c. —— —— ——.]—CL WARD, KIRSTEIN *v.* WARD (1909), 2 Alta. L. R. 101; 9 W. L. R. 657; *affd.* (1910), 13 W. L. R. 83.—**CAN.**

-.]—IMPERIAL CO. *v.* BASHFORD (1911), 18 W. L. R. 188; 4 Sask. L. R. 360.—**CAN.**

e. —— —— ——.]—BETTGER *v.* TURNER (1914), 27 W. L. R. 625; 16 D. L. R. 484; 7 Sask. L. R. 228.—**CAN.**

f. —— —— ——.]—FALLIS *v.*

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Sect. 3.—*In regard to fire: Sub-sect.* 2, *A. & B.; sub-sect.* 3. *Sects.* 4 & 5: *Sub-sects.* 1 & 2, *A.*]

Cr. M. & R. 159; Solly *v.* Neish (1835), 2 Cr. M. & R. 355; Vivian *v.* Jenkin (1835), 3 Ad. & El. 741; Griffin *v.* Yates (1836), 2 Bing. N. C. 579; Curtis *v.* Headfort (1838), 6 Dowl. 496; Parker *v.* Riley (1838), 3 M. & W. 230; Bowler *v.* Nicholson (1840), 12 Ad. & El. 341; Salter *v.* Purchell (1841), 1 Q. B. 209; Bonzi *v.* Stewart (1842), 5 Scott, N. R. 1; Scott *v.* Chappelow (1842), 4 Man. & G. 336; Gibbons *v.* Mottram (1843), 6 Man. & G. 692; Cowper *v.* Garbett (1844), 13 M. & W. 33; Grinnell *v.* Wells (1844), 2 Dow. & L. 610; Edmunds *v.* Pinniger (1845), 7 Q. B. 558; Mortimer *v.* Moore (1845), 8 Q. B. 294; Milner *v.* Jordan (1846), 8 Q. B. 615; Price *v.* Woodhouse (1846), 16 M. & W. 1; Pryce *v.* Belcher (1846), 3 C. B. 58; Bennett *v.* Bull (1847), 1 Exch. 593; Kearns *v.* Durell (1848), 6 C. B. 596; Morgan *v.* Price (1849), 4 Exch. 615; Worsley *v.* South Devon Ry. (1851), 16 Q. B. 539; Thompson *v.* Eastwood (1852), 8 Exch. 69; R. *v.* Ashwell (1885), 16 Q. B. D. 190; Robertson *v.* Hartopp (1889), 43 Ch. D. 484; King *v.* Brown, Durant, [1913] 2 Ch. 416; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38.

Liability for act of contractor.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 155–167.

350. Liability of tenant—Tenant at will.]—Case will not lie against a tenant at will for negligently keeping his fire, whereby the premises were burned.—SALOP (COUNTESS) *v.* CROMPTON (1600), Cro. Eliz. 784; 78 E. R. 1014; *sub nom.* SHREWSBURY'S (COUNTESS) CASE, 5 Co. Rep. 13 b.

Annotations:—**Refd.** Panton *v.* Isham (1693), 3 Lev. 359; Blackmore *v.* White, [1899] 1 Q. B. 293. **Mentd.** Herne *v.* Bembow (1813), 4 Taunt. 764; Batthyany *v.* Walford (1886), 33 Ch. D. 624.

351. —— ——.]—PANTAM *v.* ISHAM, No. 344, *ante*.

.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 366–368, Nos. 5127–5143.

Liability of landlord.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 368, Nos. 5144–5148.

Liability of railway company.]—*See* RAILWAYS.

Liability of shipowners.]—*See* SHIPPING.

Liability for engines on highways.]—*See* HIGHWAYS, Vol. XXVI., p. 431, Nos. 1501–1503.

B. Under Statutory Powers.

See, generally, TORT.

Railway engines.]—*See* RAILWAYS.

SUB-SECT. 3.—LIABILITY OF FIRE BRIGADE.

See Metropolitan Fire Brigade Act, 1865 (c. 90), s. 12; Public Health Acts (Amendment) Act, 1907 (c. 53), s. 87.

352. Conversion of goods by firemen—Liability of officers for negligence.]—The metropolitan fire brigade during a fire took possession of the contents of a refreshment saloon for the purpose of protecting the property, but the officers of the brigade were guilty of negligence in not preventing the men of the brigade from taking some of the wine & other things, & consuming them:—*Held:* defts. under whose control & management the metropolitan fire brigade is placed by 28 & 29 Vict. c. 30, were liable for the loss of the goods so taken & consumed.—JOYCE *v.* METROPOLITAN BOARD OF WORKS (1881), 44 L. T. 811; 45 J. P. 667, D. C.

SECT. 4.—IN REGARD TO ANIMALS.

Rights & liabilities of owners.]—*See* ANIMALS, Vol. II., pp. 213 *et seq.*

Carriage of animals.]—*See* ANIMALS, Vol. II., pp. 275 *et seq.*

Diseased animals.]—*See* ANIMALS, Vol. II., pp. 295 *et seq.*

Liability for impounding animals.]—*See* DISTRESS, Vol. XVIII., pp. 445, Nos. 1818, 1819.

SECT. 5.—DANGEROUS OR INJURIOUS GOODS OR MATTER.

SUB-SECT. 1.—THE PRINCIPLE OF *RYLANDS* V. *FLETCHER*.

See NUISANCE, pp. 187 *et seq.*, *post*.

SUB-SECT. 2.—DANGEROUS ARTICLES.

A. In General.

353. Whether article dangerous—Question of law.]—Pltf. was injured by the explosion of a brazing lamp manufactured by defts. & by them supplied to a retail dealer from whom it was purchased by pltf.:—*Held:* the question of whether the lamp was an article dangerous in itself so as to impose a duty upon defts. in regard to it to a person to whom they supplied it or into whose hands it came was a question of law for the judge & not of fact for the jury. The manufacturer of a dangerous article, the nature of which he has disclosed or the danger of which is apparent on the face of it, is under no obligation to a third person who is injured owing to its imperfect manufacture.

If, therefore, a person dealing with an article of a dangerous nature which he knows to be dangerous hands it over to somebody else who is ignorant of its true nature without warning him, he commits a breach of duty not only to the person who contracts with him, but to all the persons who to his knowledge may use it. . . . Now comes this question: Assuming that the vendor of a chattel which does belong to the dangerous class delivers it with a proper warning to the recipient, does he

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BOLTON (Alta.), [1919] 1 W. W. R. 417.—**CAN.**

g. —— —— ——.]—In cases of damage by fire used for purposes of husbandry liability is negatived if the person kindling the fire has not been guilty of negligence except in cases dealt with by Prairie Fires Ordinance C. O. 1898.—MACDONALD *v.* ONYSCHUK (1921), 62 D. L. R. 641; 17 Alta. L. R. 314; [1921] 3 W. W. R. 612.—**CAN.**

h. —— —— *Spark arrester left open.*]—GIBSON *v.* WICKHAM (N. W. P.) (1907), 5 W. L. R. 319.—**CAN.**

k. —— —— ——.]—FAWCETT *v.* FERGUSON (Man.) (1910), 13 W. L. R. 572.—**CAN.**

l. —— —— ——.]—BIGELOW *v.* POWERS (1911), 20 O. W. R. 245; 3 O. W. N. 186; 25 O. L. R. 28.—**CAN.**

m. —— —— ——.]—MCKEE *v.* LAVARY (Sask.), [1923] 3 W. W. R. 727.—**CAN.**

n. —— —— *Title to sue.*]—ROBERTS *v.* MORROW (1909), 10 W. L. R. 32; 2 Sask. L. R. 15.—**CAN.**

o. —— —— *Non-repair of spark arrester.*]—CARTER *v.* NICHOL (1911), 19 W. L. R. 736; 1 W. W. R. 392; 4 Sask. R. 382.—**CAN.**

p. —— *Whether liability increased thereby.*]—Although the common-law liability for negligence is probably increased by the enactment of Prairie Fires Ordinance of Alberta, as to matters there dealt with, subject to this the common-law rules as to negligence in such matters apply.—HAUSER *v.* MCDONALD (Alta.) (1920), 1 W. W. R. 837.—**CAN.**

q. *Necessity for proof—Of origin of fire.*]—SKLARINK *v.* WHITEHOUSE (Sask.) (1912), 20 W. L. R. 654; 2 W. W. R. 723; 4 D. L. R. 327.—**CAN.**

r. —— ——.]—MARGACH *v.* MACKENZIE & MANN (1915), 32 W. L. R. 162; 34 W. L. R. 565; 10 W. W. R. 679.—**CAN.**

PART II. SECT. 3, SUB-SECT. 3.

t. *Liability of Chief Engineer.*]—HARRIS *v.* MARTER (1874), 15 N. B. R. (2 Pug.) 165.—**CAN.**

PART II. SECT. 5, SUB-SECT. 2.—A.

a. *Utmost care required.*]—FAULKNER *v.* WISCHER & CO., PROPRIETARY, LTD. & ROSENHAIN & CO., [1918] V. L. R. 513.—**AUS.**

b. ——.]—FOWELL *v.* GRAFTON

owe any further duty to the person who receives it from that recipient, or, where the danger is apparent on the face of the thing, does he owe a greater duty with regard to the manufacture of the article than if it was not a dangerous thing in itself? In my opinion he does not. If once he discloses the nature of the chattel he has done all that the law requires him to do (LUSH, J.).—BLACKER *v.* LAKE & ELLIOT, LTD. (1912), 106 L. T. 533, D. C.

Annotations:—**Apld.** Bates *v.* Batey, [1913] 3 K. B. 351. **Consd.** White *v.* Steadman, [1913] 3 K. B. 340.

354. Degree of care required.]—The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care: therefore, where deft., being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, & a damage accrued to pltf.'s son in consequence of the girl's presenting the gun at him & drawing the trigger, when the gun went off:—*Held:* deft. was liable to damages in an action upon the case.—DIXON *v.* BELL (1816), 5 M. & S. 198; 1 Stark. 287; 105 E. R. 1023.

Annotations:—**Distd.** Longmeid *v.* Holliday (1851), 6 Exch. 761. **Apld.** Clark *v.* Chambers (1878), 3 Q. B. D. 327. **Consd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Distd.** Ruoff *v.* Long, [1916] 1 K. B. 148. **Refd.** Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Heaven *v.* Pender (1883), 11 Q. B. D. 503; Williams *v.* Eady (1893), 10 T. L. R. 41; Earl *v.* Lubbock, [1905] 1 K. B. 253; Dominion Natural Gas Co. *v.* Collins & Perkins, [1909] A. C. 640; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; The Amerika, [1914] P. 167. **Mentd.** Richardson *v.* Chasen (1847), 10 Q. B. 756.

355. ——.]—While deft.'s porters were lowering bales of cotton from deft.'s warehouse, & his carter was receiving them into his lorry, pltf., who was waiting with a lorry to receive a load of cotton for his master, at the request of deft.'s carter assisted him, &, in consequence of the negligence of deft.'s porters, a bale of cotton fell upon & injured him. There was no negligence or want of reasonable care on the part of pltf. or of deft.'s carter:—*Held:* deft. was not liable to an action.

The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons (ERLE, C.J.).—POTTER *v.* FAULKNER (1861), 1 B. & S. 800; 31 L. J. Q. B. 30; 5 L. T. 455; 26 J. P. 116; 8 Jur. N. S. 259; 10 W. R. 93; 121 E. R. 911, Ex. Ch.

Annotations:—**Distd.** Wright *v.* L. & N. W. Ry. (1876), 1 Q. B. D. 252; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899. **Expld.** Heasmer *v.* Pickfords (1920), 36 T. L. R. 818. **Refd.** Tebbutt *v.* Bristol & Exeter Ry. (1870), L. R. 6 Q. B. 73; Bass *v.* Hendon U. D. C. (1912), 28 T. L. R. 317; Houghton *v.* Pilkington, [1912] 3 K. B. 308.

356. ——.]—A person using, or dealing with, an article dangerous in itself is bound to use great caution. If he does not do so, & if a third party is injured, the person injured has a right of action against the person dealing with the dangerous article. To support such an action there need be no privity of contract between the party injured & the person by whose breach of duty the injury is caused.—PARRY *v.* SMITH (1879), 4 C. P. D. 325; 48 L. J. Q. B. 731; 41 L. T. 93; 43 J. P. 801; 27 W. R. 801.

Annotations:—**Apld.** Whitby *v.* Brock (1888), 4 T. L. R. 241. **Consd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Refd.** Daniels *v.* Jones (1880), De Colyar's County Court Cases, 146; Cunnington *v.* G. N. Ry. (1883), 49 L. T. 392; Jackson *v.* Carshalton Gas Co. (1888), 5 T. L. R. 69; Clarke *v.* Army & Navy Co-op. Soc. (1902), 72 L. J. K. B. 153; Dominion Natural Gas Co. *v.* Collins & Perkins, [1909] A. C. 640.

357. ——.]—HEAVEN *v.* PENDER, No. 9, *ante*.

358. ——.]—They [defts.] knew that fireworks were a dangerous article. Therefore, there was a duty to manage with care their dealings with the fireworks. . . . The mere fact that the fireworks struck pltf. was sufficient *primâ facie* evidence of negligence (LORD ESHER, M.R.).—WHITBY *v.* BROCK (C. T.) & CO. (1888), 4 T. L. R. 241, C. A.

359. ——.]—WILLIAMS *v.* EADY (1893), 10 T. L. R. 41, C. A.

Annotation:—**Refd.** Latham *v.* Johnson & Nephew, 1 K. B. 398.

360. ——.]—DOMINION NATURAL GAS CO., LTD. *v.* COLLINS & PERKINS, No. 142, *ante*.

361. ——.]—Deft. gave a present of an airgun to his son, who was about 15 years old, & his son when shooting at a mill broke a window. Deft. in consequence of a complaint from the miller promised to smash the airgun, but did not do so. Afterwards deft.'s son, when playing with pltf., another boy, shot him in the eye. In an action by pltf. against deft. for negligence in allowing the boy to have the gun, the judge held that after the warning received by deft. it was negligence to allow the boy to use the gun, & he awarded pltf. damages:—*Held:* there was evidence to justify the judge's conclusion.—BEBEE *v.* SALES (1916), 32 T. L. R. 413, D. C.

362. Liability of manufacturer of dangerous article—To warn purchaser of dangerous character—Liability to third party—Article dangerous in itself.]—BLACKER *v.* LAKE & ELLIOT, LTD., No. 353, *ante*.

363. —— —— —— ——.]—Pltfs., who were the owners of a steamship, sent her to first defts., a firm of ship repairers, for the cleaning of the condenser, which was partly made of cast iron, & told them to use a cleaning fluid, known as the pluperfect liquid, which was manufactured by second defts. This fluid, which was a secret preparation & had a property, unknown to pltfs. & to first defts., of giving off hydrogen if it was in contact with cast iron, was used & gave off hydrogen which made an explosive mixture in contact with the air. A workman then went to the spot with a lighted candle, & an explosion occurred, doing damage to the ship. First defts. repaired the damage, & pltfs. claimed a declaration that they were not liable to pay for the repair, & damages for loss of use of the ship during the repair; & alternatively pltfs. claimed damages against second defts.:—*Held:* first defts. were not liable, but as the pluperfect liquid was dangerous in itself & the instructions issued with it failed to give any adequate warning, pltfs. were entitled to recover as against the second defts.—ANGLO-CELTIC SHIPPING CO., LTD. *v.* ELLIOTT & JEFFERY (1926), 42 T. L. R. 297.

364. —— —— —— **Article dangerous owing to unknown defect.**]—Defts., who were manufacturers of ginger beer, sold a bottle of ginger beer to a shopkeeper, who resold it to pltf. The bottle, which has been purchased by defts., was defective, but defts. when they sold it had no knowledge of the defect. Pltf., who was injured through the bursting of the bottle when it was being opened, brought an action against defts.

(1910), 15 O. W. R. 790; 20 O. L. R. 639.—**CAN.**

c. ——.]—SULLIVAN *v.* CREED, [1904] 2 I. R. 317.—**IR.**

d. ——.]—HOWIE *v.* AILSA SHIPCO., LTD., [1912] S. C. 1225.—**SCOT.**

e. *Liability of manufacturer of dangerous article—To warn purchaser of dangerous character.*]—TOLLINGTON & CO. *v.* JONES (Alta.) (1912), 21 W. L. R. 168; 2 W. W. R. 141; 4 D. L. R. 648.—**CAN.**

f. ——.]—CRAMB *v.* CALEDONIAN RY. CO. (1892), 29 Sc. L. R. 869.—**SCOT.**

Sect. 5.—*Dangerous or injurious goods or matter: Sub-sect.* 2, *A., B., C., D., E. & F.; sub-sect.* 3, *A., B. & C.; sub-sect.* 4, *A. & B.; sub-sects.* 5 & 6. *Sect.* 6: *Sub-sects.* 1, 2, 3 & 4. *Sect.* 7. *Part III. Sects.* 1–9: *Sub-sect.* 1, *A. & B.*]

in which the jury found that the accident was caused by the defect in the bottle; that the defect was not a latent defect which could not have been discovered by the exercise of reasonable care & skill, & that the defect was owing to the negligence of defts.:—*Held:* as defts. had in fact no actual knowledge of the defect in the bottle they were not liable, notwithstanding that such defect was discoverable by the exercise of ordinary care.—BATES *v.* BATEY & CO., LTD., [1913] 3 K. B. 351; 82 L. J. K. B. 963; 108 L. T. 1036; 29 T. L. R. 616.

See, further, SALE OF GOODS.

B. Electricity.

See ELECTRIC LIGHTING, Vol. XX., pp. 210–213, Nos. 72–84.

C. Explosives.

See PUBLIC HEALTH.

D. Gas.

See GAS, Vol. XXV., pp. 482–485, Nos. 71–88.

E. Water.

See WATERS & WATERCOURSES.

F. Carriage of Explosive or Dangerous Goods.

See CARRIERS, Vol. VIII., pp. 135–137, Nos. 894–900.

SUB-SECT. 3.—MACHINERY AND PLANT.

A. Unfenced Machinery.

See FACTORIES, Vol. XXIV., pp. 908–911, Nos. 65–81.

B. Defective Machinery.

365. What is defective machinery—Machine constructed in ordinary way at time of delivery—Subsequent improvements.]—HOWSON *v.* BARRETT (1888), 4 T. L. R. 449, C. A.

Liability of employer to servant—At common law.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 203–206, Nos. 1662–1692.

—— **Under Employers' Liability Act.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 222–228, Nos. 1848–1916.

—— **Under Workmen's Compensation Acts.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 238 *et seq.*

C. Defective Plant.

Liability of employer to servant—At common law.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 203–206, Nos. 1662–1691.

—— **Under Employers' Liability Act.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 225–228, Nos. 1884–1916.

—— **Under Workmen's Compensation Acts.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 238 *et seq.*

SUB-SECT. 4.—DANGEROUS OPERATIONS.

A. Launching Vessels.

See SHIPPING.

B. Mining.

See MASTER & SERVANT, Vol. XXXIV., pp. 301–304, Nos. 2498–2512; MINES & MINERALS, Vol. XXXIV., pp. 738 *et seq.*

SUB-SECT. 5.—WARRANTY OF FITNESS FOR PURPOSE.

See SALE OF GOODS.

SUB-SECT. 6.—WARRANTY ON SALE OF FOOD AND DRUGS.

Warranty generally.]—*See* SALE OF GOODS.

Adulteration & impoverishment of food & drugs.]—*See* FOOD & DRUGS, Vol. XXV., pp. 70–108, Nos. 1–319.

Sale of unwholesome food.]—*See* FOOD & DRUGS, Vol. XXV., pp. 108–115, Nos. 322–384.

Particular articles of food.]—*See* FOOD & DRUGS, Vol. XXV., pp. 116–131, Nos. 389–515.

SECT. 6.—IN REGARD TO FENCES.

SUB-SECT. 1.—DUTY TO FENCE LAND.

Duty to fence.]—*See* BOUNDARIES, Vol. VII., pp. 281 *et seq.*

Failure to repair fence—Straying cattle—Distress damage feasant.]—*See* DISTRESS, Vol. XVIII., pp. 441, 442, Nos. 1782–1785.

SUB-SECT. 2.—LIABILITY IN RESPECT OF ANIMALS ESCAPING.

See ANIMALS, Vol. II., pp. 217–221, 225–227, Nos. 126–142, 173–183; BOUNDARIES, Vol. VII., pp. 281, 282.

SUB-SECT. 3.—DUTY TO FENCE MINES AND QUARRIES.

See MINES, Vol. XXXIV., pp. 743, 749.

SUB-SECT. 4.—DUTY TO FENCE RAILWAYS.

See, generally, RAILWAYS.

Duties in regard to passengers.]—*See* CARRIERS, Vol. VIII., pp. 82, 106, Nos. 561, 701.

SECT. 7.—IN REGARD TO PARTY-WALLS.

See BOUNDARIES, Vol. VII., pp. 299, 300, 303, Nos. 230–240, 255, 257.

Part III.—Negligence in relation to Highways.

SECT. 1.—**LIABILITY OF HIGHWAY AUTHORITIES.**

Liability for nonfeasance & misfeasance.]—*See* HIGHWAYS, Vol. XXVI., pp. 398–410, Nos. 1239–1310.

Liability as sanitary authority.]—*See* HIGHWAYS, Vol. XXVI., pp. 410–413, Nos. 1311–1325.

Liability for non-lighting of highways.]—*See* HIGHWAYS, Vol. XXVI., pp. 390, 392, 393, 515, 516, Nos. 1171, 1187–1195, 2187–2190.

Liability for non-repair of bridges.]—*See* HIGHWAYS, Vol. XXVI., pp. 587, 588, Nos. 2779–2782.

Liability for maintenance of reinstated road.]—*See* HIGHWAYS, Vol. XXVI., p. 460, No. 1761.

SECT. 2.—**LIABILITY OF ADJOINING OWNERS.**

For animals straying on highway.]—*See* HIGHWAYS, Vol. XXVI., pp. 429, 430, Nos. 1486–1495.

For damage to users of highway.]—*See* HIGHWAYS, Vol. XXVI., p. 433, Nos. 1517, 1519.

SECT. 3.—**LIABILITY OF GAS COMPANIES.**

See GAS, Vol. XXV., pp. 482, 483, Nos. 71, 77, 78; HIGHWAYS, Vol. XXVI., pp. 420, 421, Nos. 1394–1396, 1402.

SECT. 4.—**LIABILITY OF RAILWAY COMPANIES.**

Level crossings.]—*See* RAILWAYS.

SECT. 5.—**LIABILITY OF TRAMWAY COMPANIES.**

See TRAMWAYS & LIGHT RAILWAYS.

SECT. 6.—**LIABILITY OF WATER COMPANIES.**

See WATER SUPPLY.

SECT. 7.—**LIABILITY OF CARRIERS.**

See CARRIERS, Vol. VIII., pp. 71 *et seq.*

SECT. 8.—**OBSTRUCTION OF HIGHWAY.**

See HIGHWAYS, Vol. XXVI., pp. 413 *et seq.*

SECT. 9.—**VEHICLES.**

SUB-SECT. 1.—NEGLIGENT DRIVING.

A. Question for the Jury.

366. General rule.] — In case, for negligent driving, the law or usage of the road is not the criterion of the negligence. Therefore where deft.'s carriage was on the wrong side of the road, & in attempting to pass on the near instead of the off side, pltf. sustained damages:—*Held:* it was for the jury to decide the question of negligence, without regard to the law of the road.—WAYDE *v.* CARR (LADY) (1823), 3 Dow. & Ry. K. B. 255; *sub nom.* WAYTE *v.* CARR, 1 L. J. O. S. K. B. 63.

367. ——.]—COLE *v.* FARLEY (1884), 1 T. L. R. 25.

368. ——.] — Looking at the judge's notes of the evidence, it would seem that he nonsuited on the ground of contributory negligence of pltf. himself rather than on the absence of evidence, of negligence on the part of the co.'s driver. But in either case, upon the evidence the question was one entirely for the jury. It was entirely a case for the jury whether the co.'s driver could better & more easily have avoided the collision than the other, & whether it had arisen from the fault of one or the other. There was not such clear & conclusive evidence of it as to justify the judge in a nonsuit (DENMAN, J.).—FINEGAN *v.* LONDON & NORTH WESTERN RY. CO. (1889), 53 J. P. 663; 5 T. L. R. 598.

369. ——.] — WARREN *v.* LONDON GENERAL OMNIBUS CO. (1900), 64 J. P. Jo. 52.

370. ——.] — Pltf. stepped out into the road in front of a motor omnibus belonging to defts., whereupon the driver, to avoid running over pltf., steered to his offside, released the clutch, applied the brakes, & locked the back wheels, with the result that the omnibus skidded & in doing so struck pltf. & injured him. At the trial of an action brought by pltf. against defts. to recover damages, the judge left to the jury the question as to whether the driver was negligent, & the further question as to whether the defts. had placed a nuisance on the highway, the omnibus having skidded & being liable to skid & cause injury without any negligence on the part of the driver. The jury found that there had been no negligence on the part of the driver, & disagreed upon the question of nuisance:—*Held:* judgment should be entered for defts.; &, further, the question of nuisance ought not to have been left to the jury at all.—PARKER *v.* LONDON GENERAL OMNIBUS CO., LTD. (1909), 101 L. T. 623; 74 J. P. 20; 26 T. L. R. 18; 53 Sol. Jo. 867; 7 L. G. R. 1111, C. A.

371. ——.] — LEAVER *v.* PONTYPRIDD URBAN DISTRICT COUNCIL, No. 379, *post.*

B. What Constitutes.

372. Failure to observe oncoming traffic—Brakes insufficient while descending hill.]—In an action for death, or injuries, sustained through being run over by a vehicle driven by a servant of deft., evidence that he might have seen pltf., or deceased, in time to pull up, if he had not been looking at his horses owing to the want of a "skid" in going down hill:—*Held:* sufficient evidence of negligence; even although there was some

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PART III. SECT. 9, SUB-SECT. 1.—A.

366 i. *General rule.*]—The question of speed is one for the jury.—INGLIS *v.* HALIFAX ELECTRIC TRAM CO. (1899), 32 N. S. R. 117.—**CAN.**

366 ii. ——.]—BANKS *v.* SHEDDEN FORWARDING CO. (1906), 11 O. L. R. 483; 7 O. W. R. 88.—**CAN.**

366 iii. ——.]—DUNHAM *v.* CAPE BRETON ELECTRIC CO. (1915), 48 N. S. R. 287.—**CAN.**

366 iv. ——.]—LYNAM *v.* DUBLIN UNITED TRAMWAYS CO. (1896), LTD., [1919] 2 I. R. 445.—**IR.**

PART III. SECT. 9, SUB-SECT. 1.—B.

g. *General rule.*]—The right of way which street railway cars have over the portion of the street on which the rails are laid, is not an exclusive right or a right requiring vehicles or pedestrians at all hazards to get out

Sect. 9.—Vehicles: Sub-sect. 1, B.]

negligence on the part of pltf. in crossing the road, yet deft. was liable if his servant, by the exercise of reasonable care, could have seen deceased, & avoided the accident.—SPRINGETT *v.* BALL (1865), 4 F. & F. 472.

373. Disregard of signal to stop — Denial of such signal by driver.]—JOLLY *v.* NORTH STAFFORDSHIRE TRAMWAYS CO. (1887), *Times*, July 27, D. C.

Annotation:—**Refd.** Downing *v.* Birmingham & Midland Trams, Dando *v.* Same (1888), 5 T. L. R. 40.

374. ——.]—The only question is whether there is evidence on which the jury might reasonably find for pltfs., & I think that, upon the facts, there is. The tram engine was coming down hill at a great speed, the ladies stopped & held up their hands; the tram engine came on, the pony as it came near him reared & swerved, & so the accident occurred. Could it be said that there was no evidence of negligence? I think there is. The facts in the case rather differ from *Jolly* v. *North Staffordshire Tramway Co.*, No. 373, *ante*, & here there was evidence to sustain the verdict (MANISTY, J.).—DOWNING *v.* BIRMINGHAM & MIDLAND TRAMS, DANDO *v.* SAME (1888), 5 T. L. R. 40, D. C.

375. ——.]—RATTEE *v.* NORWICH ELECTRIC TRAMWAY CO. (1902), 18 T. L. R. 562, C. A.

376. Horse too large for vehicle.]—Deft. was driving along the highway a 16-hands horse in a van which was far too small for such a horse, & in consequence the horse's houghs rubbed against the crossbar of the shafts of the van. Pltf.'s omnibus was standing at the kerb on its proper side. Deft.'s horse was startled by a slight collision with a cab, & afterwards violently collided with pltf.'s omnibus, producing damage. No accident would have happened to pltf.'s omnibus if deft.'s horse had not been too large for the van:—*Held:* the harnessing of the horse to such a van was the negligence which materially & proximately led to the accident.—BURKIN *v.* BILEZIKDJI (1889), 53 J. P. 760; 5 T. L. R. 673.

Annotation:—**Refd.** Engelhart *v.* Farrant (1896), 66 L. J. Q. B. 122.

377. Reckless or careless driving — Crowded thoroughfare.]—The car would pass within 2 or 3 inches of the pavement, where there were a great number of people, & where anything might project over the edge of the pavement & be caught by the splinter bar. It was the duty of the driver under those circumstances to take the greatest care, to go as slowly as possible, & to give some warning of the approach of the car. The evidence shows that the driver was going very fast & gave no signal of his approach. . . . There is thus ample evidence of negligence on his part (LORD ESHER, M.R.).—MARTIN *v.* NORTH METROPOLITAN TRAMWAYS CO. (1887), 3 T. L. R. 600, C. A.

378. —— **Dependent on surrounding circumstances.**]—LE LIEVRE *v.* GOULD, No. 26, *ante*.

379. —— **Insufficient room to pass stationary vehicle.**]—Two men who were wheeling a truck along a narrow road, on seeing a tramcar approach them, set the truck on end & backed it against the wall by which the road was bounded to allow the car room to pass. The driver of the car slowed down, & after the front part of the car had passed in safety, drove on at an increased speed, with the result that the car struck the truck which crushed one of the men against the wall & fatally injured him. In an action brought by the widow against the owner of the car under Lord Campbell's Act, 1846 (c. 93), the jury found a verdict for pltf.:—*Held:* there was evidence of negligence to go to the jury.—LEAVER *v.* PONTYPRIDD URBAN DISTRICT COUNCIL (1911), 76 J. P. 31; 56 Sol. Jo. 32, H. L.

380. Failure to observe over-taking traffic.]—WARREN *v.* LONDON GENERAL OMNIBUS CO. (1900), 64 J. P. Jo. 52.

381. Deviation from proper course.]—Where damage is done by a motor bus to fixtures erected upon the pavement, the fact that the motor bus has so far deviated from its proper course as to run on to the footpath, is evidence of negligent driving; & when any one places a motor bus or other vehicle, which is likely to skid, upon the highway, such person may be liable for placing a nuisance upon the road, & for negligent use of the highway.—ISAAC WALTON & CO., LTD. *v.* VANGUARD MOTOR BUS CO., LTD., GIBBONS *v.* VANGUARD MOTOR BUS CO., LTD. (1908), 72 J. P. 505; 25 T. L. R. 13; 53 Sol. Jo. 82; 7 L. G. R. 349, D. C.

Annotations:—**Refd.** Barnes U. D. C. *v.* London General Omnibus Co. (1908), 7 L. G. R. 359; Parker *v.* London General Omnibus Co. (1909), 101 L. T. 623; Wing *v.* London General Omnibus Co., [1909] 2 K. B. 652.

382. Collision with fixed structure on footway—Prima facie evidence.]—A motor omnibus constructed under authority & duly licenced was so built that when driven near to the kerb of the road the upper portion of it overhung the footpath & caused damage to electric light standards lawfully

of the way at their peril; &, notwithstanding the absence of any regulations as to speed, the cars must be run at such a rate as may be reasonable in the circumstances of each particular case.—EWING *v.* TORONTO RY. CO. (1897), 24 O. R. 694.—**CAN.**

h. *Failure to observe oncoming traffic.*]—The driver of a motor car travelling upon streets covered by a street railway, & subject to other heavy traffic is guilty of active negligence if he drives with a closed hood so that he can only look out through isinglass. —KINNEE *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (B. C.), [1917] 1 W. W. R. 1190.—**CAN.**

377 i. *Reckless or careless driving—Crowded thoroughfare.*]—BUNDY *v.* CARTER (1889), 21 N. S. R. 296.—**CAN.**

k. ——.]—CORK *v.* CANADA ICE CO. (1904), 3 O. W. R. 106.—**CAN.**

l. ——.]—MANNING *v.* NAAS (1906), 38 S. C. R. 226.—**CAN.**

m. ——.]—WALLINGFORD *v.* OTTAWA ELECTRIC RY. CO. (1907), 9 O. W. R. 49; 14 O. L. R. 383; 6 Can. Ry. Cas. 454.—**CAN.**

n. ——.]—LOTT *v.* SYDNEY & GLACE BAY RY. CO. (1907), 41 N. S. R. 153; 2 E. L. R. 309; 8 Can. Ry. Cas. 276.—**CAN.**

o. ——.]—MORTON *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1910), 15 B. C. R. 187.—**CAN.**

p. ——.]—CAMPBELL *v.* PUGSLEY (1912), 11 E. L. R. 561; 7 D. L. R. 177.—**CAN.**

q. ——.]—OGLE *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1913), 18 B. C. R. 692.—**CAN.**

r. ——.]—Taking hands off the steering wheel while driving an automobile is gross negligence in a driver, entitling a person to recover for injuries received when driving with him by his consent.—BORYS *v.* CHRISTOWSKI (1916), 34 W. L. R. 346; 10 W. W. R. 291.—**CAN.**

t. ——.]—GODFREY *v.* COOPER, HART *v.* COOPER, WARBURTON *v.* COOPER (1920), 51 D. L. R. 455; 17 O. W. N. 318; 46 O. L. R. 565.—**CAN.**

a. ——.]—The driver of a motor vehicle, in addition to exercising reasonable care & caution for the safety of others who have the right to use the highway, must anticipate the presence of others. The fact that he does not know of the presence of others does not justify him in assuming the road is clear, & is no excuse for conduct which would amount to recklessness, if he knew someone else was approaching.—JOHNSON *v.* GIFFEN (Alta.), [1921] 3 W. W. R. 596; 62 D. L. R. 635.—**CAN.**

b. ——.]—The driver of a motor car who insists upon passing another must see that he has room to do so, & in the absence of clear evidence of negligence, on the part of the driver of the other car, the ct. will be inclined to hold the driver of the overtaking car to blame.—MARTIN *v.* RALPH (1921), 54 N. S. R. 277; 57 D. L. R. 588.—**CAN.**

c. ——.]—BEST *v.* LEFROY (B. C.) (1922), 67 D. L. R. 455.—**CAN.**

d. ——.]—BIBEAULT *v.* RAMSEY, [1922] 3 W. W. R. 521; 69 D. L. R. 111.—**CAN.**

e. ——.]—MASON *v.* ELLIS, [1922]

erected on the footpath. In an action by the owners of the electric light standards for the damage so caused:—*Held:* the fact of the injury was *primâ facie* evidence of negligence on the part of the driver of the omnibus, &, in default of evidence that the accident could not be avoided by the exercise of reasonable care, the owners of the omnibus were liable.—BARNES URBAN DISTRICT COUNCIL *v.* LONDON GENERAL OMNIBUS CO. (1908), 100 L. T. 115; 73 J. P. 68; 7 L. G. R. 359, D. C.

383. Sudden stoppage of vehicle — To avoid accident.]—PARKER *v.* LONDON GENERAL OMNIBUS CO., LTD., No. 370, *ante*.

384. Breach of regulations under Motor Car Acts.]—The driver of a motor car, when nearing a cart & horse, knowing that his hooter was out of order, slowed down to six miles an hour. When abreast of the cart the horse became frightened & bolted. The driver was thrown & fatally injured. The dependant claimed compensation from the master, who brought in the driver of the motor car as a third party. The county ct. judge found that the damage to the hooter was not the cause of the accident, & that it was not negligence on the part of the driver of the car to continue running on the road with the hooter silent. The widow of the deceased could not therefore have maintained an action under Lord Campbell's Act, 1846 (c. 93), against the owner of the motor car for the loss of her husband. Accordingly he dismissed the respondent's claim for indemnity:—*Held:* there was evidence to support the county ct. judge's findings of fact. The mere breach of regulations made under the Motor Act, 1903 (c. 36), is not necessarily evidence of negligence.—LANKESTER *v.* MILLER, HETHERINGTON, THIRD PARTY (1910), 4 B. W. C. C. 80, C. A.

385. ——.]—Owing to a defect in the axle of defts.' motor lorry a wheel came off while the lorry was being driven in a public highway, & damaged pltf.'s van. Two days before the accident, defts. had received back the lorry from the makers, a firm of known competence, to whom it had been sent to be overhauled & repaired. In an action by pltf. for the damage sustained, the county ct. judge found that defts. were not, but that the repairers were, negligent, & he gave judgment for pltf. on the ground that there had been a breach of Motor Cars (Use & Construction) Order, 1904, art. II., reg. 6, which breach caused the damage:—*Held:* (1) the mere breach of Motor Cars (Use & Construction) Order, 1904, art. II., reg. 6, did not of itself afford a cause of action to pltf.; (2) defts. did not at common law owe an absolute duty to pltf. that the lorry should be in a safe & proper condition; (3) defts. were not liable for the alleged negligence of the repairers; (4) pltf. having failed to establish knowledge or negligence on the part of defts. was not entitled to recover.—PHILLIPS *v.* BRITANNIA HYGIENIC LAUNDRY CO., [1923] 1 K. B. 539; 92 L. J. K. B. 389; 128 L. T. 690; 39 T. L. R. 207; 67 Sol. Jo. 365; 21 L. G. R. 168, D. C.; *on appeal*, [1923] 2 K. B. 832, C. A.

Annotation:—As to (4) **Refd.** Gayler & Pope *v.* Davies, [1924] 2 K. B. 75.

386. Infringement of rule of road—Whether evidence of negligence.]—WAYDE *v.* CARR (LADY), No. 366, *ante*.

387. —— ——.]—CHAPLIN *v.* HAWES, No. 746, *post*.

388. —— ——.]—The mere fact of a man's driving on the wrong side of the road is no evidence of negligence, in an action brought against him for running over a person who was crossing the road on foot.—LLOYD *v.* OGLEBY (1859), 5 C. B. N. S. 667; 141 E. R. 268.

Rule of the road generally.]—*See* STREET & AERIAL TRAFFIC.

389. Infringement of lighting regulation — Insufficiently lighted vehicle.]—Pltf. claimed damages from defts. in respect of the alleged negligent

2 W. W. R. 688; 63 D. L. R. 395; 15 Sask. L. R. 425.—**CAN.**

f. ——.]—SILCAGE *v.* EMPIRE PLUMBING, ETC. CO. (Sask.), [1923] 1 D. L. R. 389; [1923] 1 W. W. R. 238.—**CAN.**

g. ——.]—AIKENS *v.* CITY OF KINGSTON & POLICE COMRS. OF KINGSTON, [1923] 3 D. L. R. 869; 53 O. L. R. 41.—**CAN.**

h. ——.]—SUFFERN *v.* MCGIVERN (B. C.), [1923] 3 W. W. R. 817; [1923] 4 D. L. R. 541.—**CAN.**

k. ——.]—GOUDY *v.* MERCER (1924), 34 B. C. R. 103.—**CAN.**

l. ——.]—GREEN *v.* GORDON (1925), 35 B. C. R. 92.—**CAN.**

m. ——.]—R. *v.* MURRAY (1852), 5 Cox, C. C. 509.—**IR.**

n. ——.]—GIBSON *v.* MILROY (1879), 6 R. (Ct. of Sess.) 890; 16 Sc. L. R. 476.—**SCOT.**

o. ——.]—GRANT *v.* GLASGOW DAIRY CO. (1881), 9 R. (Ct. of Sess.) 182; 19 Sc. L. R. 165.—**SCOT.**

p. ——.]—AULD *v.* M'BEY (1881), 8 R. (Ct. of Sess.) 495; 18 Sc. L. R. 312.—**SCOT.**

q. ——.]—Foot-passengers on a country road with footpaths on either side are entitled to walk upon the road itself, & the drivers of vehicles are bound to keep clear of them.—M'KECHNIE *v.* COUPER (1887), 14 R. (Ct. of Sess.) 345.—**SCOT.**

r. ——.]—MACANDREW *v.* TILLARD, [1909] S. C. 78; 46 Sc. L. R. 111; 16 S. L. T. 541.—**SCOT.**

t. ——.]—It is the duty of the driver of a vehicle entering a main thoroughfare from a side street to take care to do so in such a manner as not to endanger the traffic on the thoroughfare, &, if necessary, to give way to such traffic; but this does not entitle the traffic on the thoroughfare to continue its course & speed without regard to the entering vehicle, nor absolve such traffic from the duty of itself exercising due care to avoid the risk of a collision.—M'NAIR *v.* GLASGOW CORPN., [1923] S. C. 397.—**SCOT.**

u. ——.]—It is the duty of a passenger, when alighting from a tramcar, to look back & notice the state of the traffic in the road, but it is also the duty of the driver of a vehicle to pass tramcars with caution; & if he fail to keep his vehicle in reasonable control in so passing, & a passenger alighting from the tramcar is injured in consequence, the driver of the vehicle is responsible, even though the said passenger have neglected to look back.—BURKHARDT *v.* ELIAS, [1911] W. L. D. 199.—**S. AF.**

386 i. *Infringement of rule of road—Whether evidence of negligence.*]—Deft.'s servant, while driving at a rapid pace on the wrong side of the road, came into collision with pltf.'s horse, whereby pltf. was injured. There being no contributory negligence on the part of pltf.:—*Held:* deft. was liable.—MARTIN *v.* TAYLOR (1872), 9 N. S. R. 94.—**CAN.**

ii.
ROBINSON (1877), 2 R. & C. 364.—**CAN.**

386 iii. —— ——.]—RAMIE *v.* WALKER (1885), 6 R. & G. 175.—**CAN.**

386 iv. —— ——.]—STOUT *v.* ADAMS (1900), 35 N. B. R. 118.—**CAN.**

386 v. —— ——.]—COMPTON *v.* ALLWARD (1912), 19 W. L. R. 783; 1 D. L. R. 107; 1 W. W. R. 452; 22 Man. L. R. 92.—**CAN.**

vi. ——.]—In statutory provision & of proof of any regulation of the Lieutenant-General in Council under Motor Vehicles Act (Alta.), or of any municipal bye-law, the Act of a deft. in driving to the left of the centre line of a street is not negligence *per se* even though the rule of the road in this country is to keep to the right.—OSBORNE *v.* LANDIS (1916), 34 W. L. R. 118; 10 W. W. R. 226.—**CAN.**

386 vii. —— ——.]—The rule of the road does not abrogate the principles of the common law which govern a person using a highway & impose upon him the obligation *sic utere tuo ut alienum non lædas*. The rule does afford an evidential test as to the negligence of the one or the other driver which may be decisive in many cases in fixing responsibility, but it does not justify a driver in taking the risk of a collision which he might easily avoid in circumstances which would indicate to a man of ordinary prudence that an accident was likely to occur.—CARTER *v.* VADEBONCOEUR, [1922] 2 W. W. R. 405; 66 D. L. R. 118; 32 Man. L. R. 102.—**CAN.**

386 viii. —— ——.]—A person driving a vehicle on the left hand side of the road does so at his peril, even though there be no statutory obligation to keep to the right.—FLETT *v.* SANFORD, [1925] 4 D. L. R. 730 [1925] 3 W. W. R. 648; *revsg.*, [1925] 4 D. L. R. 136; [1925] 3 W. W. R. 174.—**CAN.**

386 ix. —— ——.]—PARKER *v.* BEATTY, [1919] W. L. D. 63.—**S. AF.**

Sect. 9.—*Vehicles: Sub-sect.* 1, *B., C., D. & E.; sub-sect.* 2.]

driving by night of their petrol lorry whereby pltf.'s steam lorry was run into & damaged. The particulars of negligence stated that defts. were only burning one light, that they were on the wrong side of the road, & did not sound their horn. By Locomotives on Highways Act, 1896 (c. 36), s. 2, & an order made thereunder defts. were bound to carry one lamp by night on their lorry:—*Held:* there was evidence on which the county ct. judge could find that defts. were guilty of negligence.—WINTLE *v.* BRISTOL TRAMWAYS & CARRIAGE CO., LTD. (1917), 86 L. J. K. B. 936; 117 L. T. 238; 15 L. G. R. 521; 81 J. P. Jo. 184, C. A.

Annotation:—**Refd.** Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

Lighting regulations generally.]—*See* STREET & AERIAL TRAFFIC.

Proceedings under Motor Car Acts.] — *See* STREET & AERIAL TRAFFIC.

C. Vehicles Driven by Persons Other than Owner.

390. Hired vehicles—Liability of party hiring—Hire by two—Joint or several.]—In an action against two, for negligently driving a chaise, if the two defts. have hired it jointly, & were jointly in the possession of it, both are liable for the accident. *Aliter*, if it belonged to one only, & the other was merely a passenger.—DAVEY *v.* CHAMBERLAIN (1802), 4 Esp. 229; 170 E. R. 701, N. P.

391. —— —— **Vehicle driven by servant of owner—Injury to third party.**]—FLEMING'S CASE (*circa* 1795), cited in 5 Esp, at p. 36; 170 E. R. 729.

Annotation:—**Consd.** Dean *v.* Branthwaite (1803), 5 Esp. 35.

392. —— —— —— ——.] — The owner of chaises & horses let out to hire, is liable for accidents arising from misconduct or negligence of the drivers, not the person who hires the chaise; the owner may therefore maintain trespass *vi et armis*, for an injury done to his horses & carriage while so employed, & against the person who has hired them.—DEAN *v.* BRANTHWAITE (1803), 5 Esp. 35; 170 E. R. 728, N. P.

Annotation:—**Apld.** Laugher *v.* Pointer (1826), 5 B. & C. 547.

393. —— —— —— ——.] — HOUGHTON'S CASE (*circa* 1810), cited in 8 Dow. & Ry. at p. 577.

Annotation:—**Apld.** Laugher *v.* Pointer (1826), 5 B. & C. 547.

394. —— —— —— **Admission of liability.**]—A party, consisting of deft. & others, hired for a day's excursion a carriage & post horses, driven by postilions, who were the servants of the owner of the horses. Deft. rode upon the box. The postilions, in endeavouring to force their way into a line of carriages, overturned a gig, & seriously injured pltf., who was in the gig. Deft., at the time & afterwards, held himself out as responsible for the accident, & used expressions showing that he had a control over the postilions at the time it happened:—*Held:* he was liable in trespass.—M'LAUGHLIN *v.* PRYOR (1842), 4 Man. & G. 48; Car. & M. 354; 4 Scott, N. R. 655; 11 L. J. C. P. 169; 6 Jur. 372; 134 E. R. 21.

Annotations:—**Consd.** Gordon *v.* Rolt (1849), 4 Exch. 365. **Distd.** Holmes *v.* Mather (1875), L. R. 10 Exch. 261. **Refd.** Burgess *v.* Gray (1845), 1 C. B. 578; Pidgeon *v.* Legge (1857), 21 J. P. 743. **Mentd.** Performing Right Soc. *v.* Mitchell & Booker (Palais De Danse), [1924] 1 K. B. 762; Falcon *v.* Famous Players Film Co., [1926] 1 K. B. 393.

395. —— —— **To owner of vehicle.**] — DEAN *v.* BRANTHWAITE, No. 392, *ante*.

396. —— —— **Assumption of control — By friend of hirer.**]—A. borrowed of B. a horse & chaise, & went in it, accompanied by C., on an excursion of pleasure, C. driving. By C.'s mismanagement, the horse & chaise were driven against & injured pltf.'s horse:—*Held:* an action on the case might be maintained for the injury against A., on a declaration charging that he was possessed of & driving the horse & chaise, & that by his negligent driving the injury was occasioned.—WHEATLEY *v.* PATRICK (1837), 2 M. & W. 650; Murp. & H. 183; 6 L. J. Ex. 193; 150 E. R. 917.

Annotations:—**Refd.** Samson *v.* Aitchison, [1912] A. C. 844; Pratt *v.* Patrick, [1924] 1 K. B. 488.

397. —— —— —— ——.] — STEAD *v.* BLIGH (1898), 62 J. P. 458.

—— **Liability of master for negligent driving of servant.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 140, 141, Nos. 1101–1110.

398. Vehicle driven by third party — With owner's permission—Owner present.]—SAMSON *v.* AITCHISON, No. 667, *post*.

399. —— —— ——.]—Deft. was in his motor car, with him, on his invitation, being two friends E. & P. E. drove the car &, owing to his negligence, it collided with another vehicle, & P. sustained injuries from which he died. P.'s widow sued deft. under Lord Campbell's Act, 1846 (c. 43), for damages:—*Held:* as deft. was in the car, & there was no evidence that he had abandoned his right of control, he was liable notwithstanding that by a casual delegation he had entrusted its actual physical management & mechanical control to E.—PRATT *v.* PATRICK, [1924] 1 K. B. 488; 93 L. J. K. B. 174; 130 L. T. 735; 40 T. L. R. 227; 68 Sol. Jo. 387; 22 L. G. R. 185.

400. —— **Son of owner—Owner not present.**]—Deft. was the owner of a motor car which was being driven by his son. Deft. was not in the car, but his driver was sitting beside his son. A collision occurred between deft.'s car & a car belonging to pltf. owing to the negligent driving of deft.'s son. In an action for damage caused by the collision deft. stated that he permitted his son to use the car, but never allowed him to go out without the driver:—*Held:* there was evidence that deft. was responsible for his son's negligence.—REICHARDT *v.* SHARD (1914), 31 T. L. R. 24, C. A.

Annotation:—**Refd.** Pratt *v.* Patrick, [1924] 1 K. B. 488.

Liability of master for servant.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 140, 141, Nos. 1101–1110.

PART III. SECT. 9, SUB-SECT. 1.—C.

391 i. *Hired vehicles—Liability of party hiring—Vehicle driven by servant of owner—Injury to third party.*]—BOWE *v.* CANADIAN OIL CO., LTD. (1921), 54 N. S. R. 553.—**CAN.**

391 ii. —— —— —— ——.]—THOMPSON *v.* REYNOLDS, GIBSON *v.* REYNOLDS, [1926] N. 131.—**IR.**

396 i. —— —— *Assumption of control—By friend of hirer.*]—The doctrine that the occupant of a carriage is not identified as to negligence with the driver applies only where the occupant is a mere passenger having no control over the management of the carriage. Where, therefore, the hirer of a carriage allows one of his friends to drive & an accident results from the latter's negligence, the former cannot recover.—FLOOD *v.* LONDON WEST VILLAGE (1896), 23 A. R. 530.—**CAN.**

396 ii. —— —— —— ——.]—Where the owner riding in his own conveyance hands over the actual physical control of such conveyance to another person he is *primâ facie* liable for injuries done to a third person by the negligent driving of the person in control.—SAMSON *v.* AITCHISON (1911), 30 N. Z. L. R. 838.—**N.Z.**

a. —— —— —— *By brother of hirer.*]—Pltf. was run down by deft.'s automobile & injured, by reason of the negligence of deft.'s brother, who was driving it; but it appeared that the brother was not the servant or agent of deft., who merely allowed him to use the automobile, & had no control over his actions:—*Held:* deft. was not liable in damages for pltf.'s injuries.—LANE *v.* CRANDELL (Alta.) (1912), 21 W. L. R. 793; 2 W. W. R. 675; 5 D. L. R. 580.—**CAN.**

b. *Vehicle driven by third party—Daughter of owner—Owner not present.*]—TIMARU BOROUGH *v.* SQUIRE, [1919] N. Z. L. R. 151.—**N.Z.**

D. Injury to Pedestrians.

401. Duty of driver to give place to pedestrian.]—A servant of a railway co., while in the execution of his duty as such, committed a trespass by driving his waggon along a private road. While going along that road, he did not leave room between his waggon & the wall for a foot passenger to pass. In consequence the waggon, in turning out of the private road into a public road, crushed pltf.'s husband against the wall & killed him. In leaving the case to the jury, the judge did not ask them in so many words to consider whether the accident was or was not inevitable:—*Held:* (1) it was the duty of the driver of the waggon to see that there was room for any possible foot passenger to pass between his waggon & the wall, more especially as he was a trespasser, & as he did not do so he was guilty of negligence. (2) A judge is not bound to call the attention of the jury to every possible ground of defence, &, therefore, he was not guilty of misdirection by omitting to do so.—DUNN *v.* NORTH STAFFORDSHIRE RY. CO. (1866), 30 J. P. 760.

Rights & liabilities as between drivers & pedestrians generally.]—*See* STREET & AERIAL TRAFFIC.

402. Injury must be attributable to negligence of driver—Effect of contributory negligence of pedestrians.]—In an action for an injury to a person crossing a public highway, by driving against him & knocking him down, the jury must be satisfied that the injury was attributable to the negligence of the driver, & to that alone, before they can find a verdict for pltf.; & if they think that it was occasioned in any degree by the improper conduct of pltf. in crossing the road in an incautious & imprudent manner, they must find their verdict for deft.—HAWKINS *v.* COOPER (1838), 8 C. & P. 473, N. P.

403. ——— ———.]—(1) To sustain an action for an injury caused by the negligent driving of deft., the injury must have been caused by the negligence of deft. only, without the negligence of pltf. contributing in any way to the accident.

(2) It is the duty of a person, who is driving over a crossing for foot passengers at the entrance of a street, to drive slowly, cautiously & carefully; but it is also the duty of a foot passenger to use due care & caution in going upon such crossing, so as not to get among the carriages, & thus receive injury.—WILLIAMS *v.* RICHARDS (1852), 3 Car. & Kir. 81, N. P.

Annotation:—As to (2) **Apld.** Cotton *v.* Wood (1860), 8 C. B. N. S. 568.

404. Failure to pull up in time—Broken rein.]—(1) A foot passenger has a right to cross the carriage road, & a person driving a carriage along the road is liable to an action if he do not take care so as to avoid driving against a foot passenger who is crossing the road; & if a person thus driving cannot pull up in time, because his reins break, that is no defence, as he is bound to have proper tackle. (2) In an action of trespass for driving a carriage against pltf., the defence of inevitable accident must be specially pleaded.—COTTERILL *v.* STARKEY (1839), 8 C. & P. 691, N. P.

Annotation:—As to (1) **Dbtd.** Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

405. Infringement of rule of road — Whether evidence of negligence.]—LLOYD *v.* OGLEBY, No. 388, *ante*.

E. Resulting in Manslaughter.

See CRIMINAL LAW, Vol. XV., pp. 798, 799, Nos. 8639–8652.

SUB-SECT. 2.—DEFECTIVE VEHICLES.

406. Defective tackle — Liability of master.]—Master liable for accident in consequence of chain stay of cart breaking, when horse ran away & damage was done, for his negligence, in not having the tackle good.—WELSH *v.* LAWRENCE (1818), 2 Chit. 262.

Annotation:—**Consd.** Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

407. No duty owed between parties.]—A. contracted with the Postmaster General to provide a mail coach to convey the mail bags along a certain line of road; & B. & others also contracted to horse the coach along the same line. B. & his co-contractors hired C. to drive the coach:—*Held:* C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction.—WINTERBOTTOM *v.* WRIGHT (1842), 10 M. & W. 109; 11 L. J. Ex. 415; 152 E. R. 402.

Annotations:—**Apld.** Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Collis *v.* Selden (1868), L. R. 3 C. P. 495. **Expld.** Heaven *v.* Pender (1883), 11 Q. B. D. 503. **Apprvd.** Earl *v.* Lubbock, [1905] 1 K. B. 253. **Apld.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Refd.** Burgess *v.* Gray (1845), 1 C. B. 578; Blakemore *v.* Bristol & Exeter Ry. (1858), 8 E. & B. 1035; Thompson *v.* Lucas (1868), 17 W. R. 520; George *v.* Skivington (1869), 21 L. T. 495; Hawkins *v.* Smith (1896), 12 T. L. R. 532; Cale. Ry. *v.* Warwick (1897), 77 L. T. 570; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539. **Mentd.** Howard *v.* Shepherd (1850), 9 C. B. 297; Gerhard *v.* Bates (1853), 2 E. & B. 476; Lumley *v.* Gye (1853), 2 E. & B. 216; Moule *v.* Garrett (1870), L. R. 5 Exch. 132.

408. ———.]—Deft. contracted to keep in repair a number of vans owned by a firm. Pltf. was a driver in the employment of the firm, & while he was driving one of the vans a wheel came off & he sustained injuries by falling from the van. The van had been in the hands of deft.'s workmen shortly before & on the day of the accident, & pltf.'s cause of action was based upon the negligence of the workmen in failing properly to inspect & repair the defective state of the van, & the negligent manner in which the repairs were done:—*Held:* deft. was under no duty to pltf., & there was no cause of action.—EARL *v.* LUBBOCK, [1905] 1 K. B. 253; 74 L. J. K. B. 121; 91 L. T. 830; 53 W. R. 145; 21 T. L. R. 71; 49 Sol. Jo. 83, C. A.

Annotations:—**Consd.** Cavalier *v.* Pope, [1906] A. C. 428; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Apld.** Bates *v.* Batey, [1913] 3 K. B. 351. **Distd.** White *v.* Steadman, [1913] 3 K. B. 340. **Refd.** Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Lucy *v.* Bawden, [1914] 2 K. B. 318; Brackley *v.* Mid. Ry. (1916), 85 L. J. K. B. 1596; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

409. ———.]—PHILLIPS *v.* BRITANNIA HYGIENIC LAUNDRY CO., No. 385, *ante*.

———.]—*Compare* Part I., Sect. 2, sub-sect. 1, *ante*.

410. Latent defect—Presumption of negligence.]—In an action in a county ct., for negligently driving a horse & cart, pltf. having simply proved the fact of a collision, under circumstances which might or might not amount to negligence, deft. proved that the accident arose from the horse suddenly beginning to kick, whereby the shafts of the cart were broken, & the driver thrown out, when the horse started off, & ran against & injured pltf.'s horse. The judge of the county ct., upon this evidence, ordered a verdict for pltf., being of opinion that the breaking of the shafts, even under the circumstances stated by deft.'s witnesses, showed a defect in the cart, which raised a presumption of negligence in the owner.—TEMPLEMAN

PART III. SECT. 9, SUB-SECT. 2.

c. *Failure to equip street car—With air brakes.*]—WINTER *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1910), 15 B. C. R. 81.—CAN.

Sect. 9.—*Vehicles: Sub-sects.* 2, 3, 4, 5, 6 & 7.]

v. HAYDON (1852), 12 C. B. 507; 19 L. T. O. S. 218; 16 J. P. 537; 138 E. R. 1005.

Annotations:—**Refd.** Moffatt *v.* Bateman (1869), L. R. 3 P. C. 115; Phillips *v.* Britannia Hygienic Laundry Co. [1923] 1 K. B. 539.

411. —— Broken axle-tree.]—In an action against a party as owner of a coach for so carelessly managing it, & allowing it to be used in such an unsafe condition, that one of the wheels came off, whereby it fell upon pltf.:—*Held:* it was for pltf. to show that the wheel came off, & the coach fell, through some cause for which deft. would be responsible; &, it being consistent with his evidence that the axle-tree had broken, & that he was not owner, there was no case. *Semble:* supposing he had been owner, the breaking of the axle-tree would have been no proof of negligence; but it appearing that he was driver, pltf. was nonsuited.—DOYLE *v.* WRAGG (1857), 1 F. & F. 7, N. P.

412. Absence of gross negligence — Gratuitous service.]—Action for negligence by deft. in conveying pltf., who was a decorator & gardener in his service, to perform for him certain work. Deft. drove, & while on the road the kingbolt of the carriage broke, the horses bolted, the carriage was overturned & pltf. injured. There was no evidence of gross neglect on the part of deft.:—*Held:* (1) in the absence of any evidence of gross negligence on the part of deft., pltf. was not entitled to recover damages; (2) the evidence did not disclose such negligence as to render deft., performing a gratuitous service for pltf., responsible.—MOFFATT *v.* BATEMAN (1869), L. R. 3 P. C. 115; 6 Moo. P. C. C. N. S. 369; 22 L. T. 140; 34 J. P. 275; 16 E. R. 765, P. C.

Annotations:—**Distd.** Coughlin *v.* Gillison, [1899] 1 Q. B. 145. **Consd.** Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

413. Defective steering gear of motor car — Absence of knowledge of defect.]—A motor car which has its steering gear, by reason of wear, in such imperfect condition that the driver is liable to lose control of the steering, is a thing which on a highway is necessarily dangerous to persons using the highway, & to cause it to be driven on a highway amounts to negligence even in the absence of knowledge of the defect.—HUTCHINS *v.* MAUNDER (1920), 37 T. L. R. 72.

Annotation:—**Refd.** Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

Defect in hired vehicle.]—*See* BAILMENT, Vol. III., pp. 87, 88, Nos. 206, 208, 211, 213.

SUB-SECT. 3.—VEHICLES LEFT UNATTENDED.

414. Presumption of negligence.]—When a pony & van wholly unattended dash into pltf.'s shop window adjoining a highway there is a *primâ facie* case of negligence (MCCARDIE, J.).—GAYLER & POPE, LTD. *v.* DAVIES (B.) & SON, LTD., [1924] 2 K. B. 75; 93 L. J. K. B. 702; 131 L. T. 507; 40 T. L. R. 591; 68 Sol. Jo. 685.

415. ——.]—Deft. was the owner of a motor car & frequently allowed a friend of his to drive it. On the occasion in question deft. got out of the car & allowed his friend to drive it to the latter's house, which was in a road with a very steep gradient. Deft.'s friend left the car in the road outside the house & after half an hour the car started down the hill & crashed into the area of pltf.'s house. In a county ct. action for damages for negligence the judge found that deft.'s friend was negligent & that deft. was responsible for such negligence, & he awarded pltf. damages:—*Held:* the fact of the car having run down the hill of itself when it was left unattended was sufficient evidence of negligence, &, although deft. was not in control of the car when the accident happened, yet, as he had the right of control, there was evidence on which the judge could find that deft. was responsible as principal.—PARKER *v.* MILLER (1926), 42 T. L. R. 108, C. A.

416. Interference of third party.]—ILLIDGE *v.* GOODWIN, No. 188, *ante*.

417. —— Young children.]—LYNCH *v.* NURDIN, No. 118, *ante*.

418. —— Motor car left out of gear.]—RUOFF *v.* LONG & CO., No. 186, *ante*.

419. —— Brakes out of order — Only wheel blocks keeping vehicle in position.]—MARTIN *v.* STANBOROUGH, No. 205, *ante*.

420. Liability of master for servant — Scope of servant's employment.]—Deft., a contractor under a district board, was engaged in constructing a sewer, & employed men with horses & carts. The men so employed were allowed an hour for dinner, but were not permitted to go home to dine or to leave their horses & carts. One of the men went home about a quarter of a mile out of the direct line of his work to his dinner, & left his horse unattended in the street before his door. The horse ran away & damaged certain railings belonging to pltf.:—*Held:* it was properly left to the jury to say whether the driver was acting within the scope of his employment, & that they were justified in finding that he was.—WHATMAN *v.* PEARSON (1868), L. R. 3 C. P. 422; *sub nom.* WHITMAN *v.* PEARSON, 37 L. J. C. P. 156; 18 L. T. 290; *sub nom.* WHITMORE *v.* PEARSON, 16 W. R. 649.

Annotations:—**Distd.** Edwards *v.* St. Mary, Islington, Vestry (1889), 22 Q. B. D. 338. **Refd.** Burns *v.* Poulson (1873), L. R. 8 C. P. 563; Sanderson *v.* Collins (1904), 73 L. J. K. B. 358; Bradley *v.* Wallaces, [1913] 3 K. B. 629; Myers *v.* Bradford Corpn. (1913), 110 L. T. 254; Rand *v.* Craig, [1919] 1 Ch. 1.

ANIMALS, Vol. II., pp. 230–231, Nos. 206–209; HIGHWAYS, Vol. XXVI., p. 437, Nos. 1545–1549.

PART III. SECT. 9, SUB-SECT. 3.

d. *General rule — Presumption of negligence.*]—Upon proof given by a pltf. that deft.'s horse, harnessed to a cart, was running away unattended along a highway, whereby pltf., being lawfully on the highway, was injured, there is *primâ facie* evidence of negligence.—HEENAN *v.* IREDALE (1900), 19 N. Z. L. R. 387.—**N.Z.**

e. —— ——.]—SHAWS *v.* CROALL & SONS (1885), 12 R. (Ct. of Sess.) 1186.—**SCOT.**

f. —— ——.]—M'EWAN *v.* CUTHILL (1897), 25 R. (Ct. of Sess.) 57.—**SCOT.**

g. —— ——.]—MILNE & CO. *v.* NIMMO (1898), 25 R. (Ct. of Sess.) 1150.—**SCOT.**

h. —— ——.]—In every case it is a question of circumstances whether the driver of a horse & cart who leaves them unattended in a public place is guilty of negligence.—HENDRY *v.* M'DOUGALL, [1923] S. C. 378.—**SCOT.**

416 i. *Interference of third party.*]—COLLYER *v.* MCAULEY (Man.), [1919] 1 W. W. R. 1073; 46 D. L. R. 140.—**CAN.**

416 ii. ——.]—Deft.'s servant in charge of his motor truck left it standing with the motor running, on the left-hand side of a street, thus violating a statute & bye-law. In the car was a friend whom, contrary to deft.'s orders, he had frequently taken with him in the car & whom he had permitted at times to drive it. The friend started up the car & turned it to cross diagonally to the right side of the street & negligently collided with pltf.'s car. There was no question of contributory negligence:—*Held:* the negligence of the servant in taking the car to the wrong side of the street combined with the friend's interference was the effective cause of the accident, & therefore deft. was liable.—MCGUIRE *v.* HEMBLING, [1925] 1 D. L. R. 883; [1925] 1 W. W. R. 536.—**CAN.**

SUB-SECT. 4.—VEHICLES OF UNUSUAL WEIGHT OR CHARACTER.

See HIGHWAYS, Vol. XXVI., pp. 430–432, Nos. 1496–1510.

SUB-SECT. 5.—INJURY TO LIGHTING APPARATUS OF HIGHWAYS.

Property of gas company.]—*See* GAS, Vol. XXV., pp. 479–481, Nos. 56–65.

Injury to street lamps.]—*See* GAS, Vol. XXV., p. 480, Nos. 58–61.

SUB-SECT. 6.—OFFENCES AGAINST MOTOR CAR ACTS.

See STREET & AERIAL TRAFFIC.

SUB-SECT. 7.—PRACTICE AND PROCEDURE.

421. Injury to plaintiff & wife — Right of plaintiff to recover damages in one action.]—In an action against a deft. for the injury occasioned by careless driving of his servant, pltf. may recover for injury done to his wife, as well as himself, without bringing a separate action for each.—ALISON *v.* FOISTER (1823), 1 C. & P. 21, N. P.

422. Particulars of injury — When ordered.]—In an action of tort for an injury to the person, as by careless driving, particulars will be ordered as to the nature & extent of the injuries, or of the claim for compensation, on an affidavit showing reasonable ground for the application.—WICKS *v.* MACNAMARA (1858), 3 H. & N. 568; 27 L. J. Ex. 419; 157 E. R. 595.

Discovery & interrogatories—Reports of medical & other officers on accidents.]—*See* DISCOVERY, Vol. XVIII., pp. 139–141, Nos. 892–906.

—— **Communication with or in presence of opposite party.**]—*See* DISCOVERY, Vol. XVIII., p. 143, No. 925.

—— **Interrogatories.**]—*See* DISCOVERY, Vol. XVIII., pp. 212, 213, Nos. 1599–1610.

423. Defences — Inevitable accident — Must be specially pleaded.]—COTTERILL *v.* STARKEY, No. 404, *ante*.

—— —— **Liability of master for servant.**]—*See* MASTER & SERVANT, Vol. XXXIV., p. 133, Nos. 1020–1021.

.]—*See, generally*, Part X., Sect. 6, sub-sect. 4, *post*.

424. —— **Previous adjudication — Complaint under statute.**]—The adjudication of a complaint against the driver of a Metropolitan stage carriage under London Hackney Carriages Act, 1843 (c. 86), for damage done to the carriage of the complainant, is no answer to an action against the owner of the carriage for the negligence of his servant, & the damage done to the carriage & to pltf. who was injured by the concussion.—ORGAR *v.* HORNE (1845), 5 L. T. O. S. 93.

425. —— —— —— **Acceptance of compensation.**]—Pltf. was knocked off his cab by the furious driving of an omnibus of defts., for which one of defts.' drivers was summarily convicted under London Hackney Carriages Act, 1843 (c. 86), s. 28. Pltf. gave evidence upon the hearing but was not complainant. The magistrate asked him if £10 would compensate him for his injuries, & he said certainly not. The magistrate adjudged the payment of half this amount by the driver under the latter part of the said section, & pltf. accepted the money which was actually paid by defts.

Pltf. brought this action for damages for the negligence of defts.' driver, & defts. pleaded as a bar thereto this award of the magistrate & pltf.'s acceptance of the amount.

The action was tried in a county ct., & pltf. admitted the magistrate's adjudication & his own acceptance of the money, but no record of the conviction was produced. The county ct. judge considered this no sufficient evidence of the order; & that if it were, the order was no answer to the action. The jury found a verdict of £100:—*Held:* pltf.'s admission was sufficient evidence of the order; & that by his acceptance of the money his claim for compensation had become *res judicata*, & could not be maintained.—WRIGHT *v.* LONDON GENERAL OMNIBUS CO. (1877), 2 Q. B. D. 271; 46 L. J. Q. B. 429; 36 L. T. 590; 41 J. P. 486; 25 W. R. 647, D. C.

Annotations:—**Distd.** Vallance *v.* Falle (1884), 53 L. J. Q. B. 459. **Folld.** Birmingham Corpn. *v.* Allsopp (1918), 88 L. J. K. B. 549.

426. —— —— —— ——.]—Defts.' servant, in the course of driving their motor lorry, did damage to the extent of £29 11*s.* 1*d.* to an electric standard belonging to pltfs., who summoned defts. to appear before two justices, on a charge under Gas Works Clauses Act, 1847 (c. 15), s. 20. The justices awarded pltfs. the sum of £5 in satisfaction. Afterwards pltfs. brought an action in the county ct. against defts., claiming the balance of £24 11*s.* 1*d.* as damages for the negligence of their servant, & the county ct. judge gave pltfs. judgment for that amount:—*Held:* the words of Gas Works Clauses Act, 1847 (c. 15), s. 20, "by way of satisfaction" meant "in full satisfaction," & the award of the justices was a bar to the maintenance of the county ct. action.—BIRMINGHAM CORPN. *v.* ALLSOPP (S.) & SONS, LTD. (1918), 88 L. J. K. B. 549; 119 L. T. 775; 35 T. L. R. 24; 16 L. G. R. 862, D. C.

—— **Contributory negligence.**]—*See* Part X., Sect. 2, *post*.

427. Evidence — Statement by occupant of vehicle causing damage.]—If the carriage of A. strike against the cart of B., & a person who sees it demand the address of the owner of the carriage, the address given by a person in the carriage is admissible in evidence; but a statement that any damage done will be paid for is not so.

In an action for negligent driving, a plan, which is to be put into the hands of the witnesses, should merely show the street, the pavement, the turnings, corners, etc., & not the supposed position of the carriages; but, if it does so, the judge

PART III. SECT. 9, SUB-SECT. 7.

k. *Addition of parties — Plaintiffs.*]—In an action against a street railway co. for damages for running an electric car into pltf. & his horse & waggon in which his son was seated with him, who was also injured, the son was added as a party pltf. in an action already commenced by the father alone.—LIDDIARD *v.* TORONTO RY. CO. (1903), 23 C. L. T. 156; 5 O. L. R. 371; 2 O. W. R. 145.—CAN.

l. *Trial by jury—Special order — When granted.*]—WOOLLACOTT *v.* WINNIPEG ELECTRIC STREET RY. CO. (1895), 10 Man. L. R. 482.—CAN.

m. —— *Discretion of judge.*]—GRIFFITHS *v.* WINNIPEG ELECTRIC RY. CO. (1907), 16 Man. L. R. 512.—CAN.

n. *Defences — Lameness of horse—Result of negligence of veterinary surgeon.*]—MILLETT *v.* ERNST (1920), 53 N. S. R. 545.—CAN.

o. *Pleading gross negligence with general issue—Whether pleadings defective.*]—ELLIS *v.* KANNA (1879), 6 Nfld. L. R. 197.—NFLD.

Sect. 9.—*Vehicles: Sub-sect.* 7. *Sect.* 10. *Parts IV., V. & VI. Sects.* 1, 2, 3, 4 & 5: *Sub-sects.* 1, 3. *Sects.* 6–16.]

will not allow it to be used.—BEAMON *v.* ELLICE (1831), 4 C. & P. 585, N. P.

428. —— Plan of place of accident.]—BEAMON *v.* ELLICE, No. 427, *ante.*

—— **Matters forming part of res gesta.**]—*See* EVIDENCE, Vol. XXII., p. 59, Nos. 331–334.

Improper question—Whether plaintiff insured.]—*See* EVIDENCE, Vol. XXII., p. 463, No. 4859.

SECT. 10.—**LIABILITY OF OWNERS OF ANIMALS**

See ANIMALS, Vol. II., pp. 229–235, 247, 257, Nos. 198–230, 305, 378.

Part IV.—Negligence in relation to Wharves and Docks.

See SHIPPING; WATERS & WATERCOURSES.

Part V.—Negligence in and Neglect of Statutory Duties.

See PUBLIC AUTHORITIES; STATUTES, & Titles *passim.*

Part VI.—Negligence Arising out of Special Relations.

SECT. 1.—AUCTIONEERS.

Liability of auctioneer to vendor.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 27–29, 37, Nos. 202–204, 213, 214, 264.

SECT. 2.—BAILEES.

See BAILMENT, Vol. III., pp. 58–70, 72–92, 98, 99, 108, 109, 111–117, Nos. 33–74, 83–86, 96–118, 133–240, 269–272, 333, 336, 339, 354–402.

Liability of agister.]—*See* ANIMALS, Vol. II., pp. 252, 253, Nos. 344–347.

NOTE.—*The references in this section are to* BANKERS, Vol. III.

Duty of bank—To honour acceptances.]—*See* p. 170, No. 281.

—— **To know customer's signature.**]—*See* p. 172, No. 294.

—— **To inquire into transfer of account.**]—*See* pp. 187, 188, No. 376.

—— **As to collection of cheques, bills, etc.**]—*See* pp. 201–212, Nos. 457–528.

—— **As to payment of cheques, bills, etc.**]—*See* pp. 200, 213–230, 237–243, Nos. 452, 529–627, 665–692.

As to payment of orders with receipt attached.]—*See* p. 243, Nos. 693–695.

—— **As to forged or altered cheques & other documents.**]—*See* pp. 231–237, Nos. 633–664.

—— **As to safe custody of securities & other valuables.**]—*See* pp. 256, 257, Nos. 760–766.

As to discounting bills.]—*See* p. 260, No. 780.

As to advances on bonds, scrip, etc.]—*See* pp. 273, 274, Nos. 852–854.

Duty of customer—As to drawing cheques.]—*See* p. 172, No. 293.

—— **As to forged or altered cheques.**]—*See* p. 230, Nos. 628, 629.

—— **As to pass book.**]—*See* pp. 244, 245, Nos. 703–705.

Negligence of customer as defence to action against bank.]—*See* pp. 126, 172, 231–233, 273, Nos. 25, 295, 635, 636, 640–644, 852.

Liability of bank for negligence of employees.]—*See* pp. 148, 163, 164, 165, Nos. 175, 248, 254.

SECT. 4.—BARRISTERS.

Liability for negligence.]—*See* BARRISTERS, Vol. II., pp. 337, 338, Nos. 268–275.

SECT. 5.—CARRIERS.

SUB-SECT. 1.—CARRIAGE OF PERSONS.

Liability for damage to passengers or their luggage.]—*See* CARRIERS, Vol. VIII., pp. 41, 48, 57, 62, 64, 70–130, 227, Nos. 246, 299, 303, 376, 418, 436, 463–870, 1462–1465.

Liability of ferry owner.]—*See* FERRIES, Vol. XXIV., pp. 975, 976.

SUB-SECT. 2.—CARRIAGE OF GOODS.

Liability for loss, damage, or delay.]—*See* CARRIERS, Vol. VIII., pp. 5–68, 137–143, 225–227, Nos. 1–462, 901–946, 1438–1465.

Carriers as warehousemen.]—*See* BAILMENT, Vol. III., pp. 79–82, Nos. 175–184.

SUB-SECT. 3.—CARRIAGE OF ANIMALS.

See ANIMALS, Vol. II., pp. 275–282, Nos. 517–555; CARRIERS, Vol. VIII., pp. 130–135, Nos. 872-893; FERRIES, Vol. XXIV., p. 975, No. 80.

SECT. 6.—COMPANIES.

NOTE.—*The references in this section are to* COMPANIES, Vols. IX. & X.

Duties of promoter.]—*See* pp. 45, 46, Nos. 67–71.

Duty of company—As to custody of share certificate on transfer.]—*See* p. 382, No. 2420.

—— **As to registration of transfer.**]—*See* p. 382, Nos. 2421, 2422.

Liability of directors.]—*See* pp. 468–470, 471, 487, 492, Nos. 3056–3074, 3088, 3193, 3232.

Liability of secretary.]—*See* p. 543, No. 3579.

Liability of auditor.]—*See* p. 556, Nos. 3675, 3676.

Liability of liquidator.]—*See* p. 1000, Nos. 6942–6944.

SECT. 7.—EXECUTORS.

NOTE.—*The references in this section are to* EXECUTORS, Vols. XXIII. & XXIV.

Duties of representative.]—*See, generally,* pp. 318–530, Nos. 3820–5970.

Liability of representative for own negligence.]—*See* pp. 257, 569, 658, Nos. 3146, 6068, 6849, 6850.

Liability of representative for negligence of deceased.]—*See, generally,* pp. 646–651, Nos. 6728–6771.

Liability of representative to pay costs.]—*See* pp. 825, 827, 828, 830, 834, Nos. 8580, 8581, 8594, 8595, 8597–8604, 8623, 8672.

SECT. 8.—INNKEEPERS AND BOARDING-HOUSE KEEPERS.

See INNS & INNKEEPERS, Vol. XXIX., pp. 5–18, 19, Nos. 45–226, 243; LANDLORD & TENANT, Vol. XXX., pp. 517, 518, Nos. 1725–1730.

429. Hotel keeper recommending visitor to private house—Accommodation at hotel not available—Theft by visitor—Liability of hotel keeper.]—Deft., a hotel proprietor, had a visitor, for whom he had no longer a room, & asked pltf., who lived close by, to take the visitor in. During the visitor's stay at the hotel there had been nothing to suggest that he was not perfectly respectable, & deft. formed the honest opinion that the visitor was a respectable man. On a previous occasion deft. had told pltf. that he would send only "nice people" to her. Pltf. took the visitor in, & the visitor committed a theft. In an action for negligence on the part of deft. in not making inquiries about the visitor:—*Held:* on the assumption that deft. was under a duty to pltf., yet, as no inquiries which deft. could have made could reasonably have led him to suspect that the visitor was not respectable, the action failed.—HUGHES *v.* BAILLY (1920), 36 T. L. R. 398, D. C.

SECT. 9.—INSURERS AND INSURED.

Duty of insurance agent.]—*See* INSURANCE, Vol. XXIX., pp. 78–82, Nos. 374–412.

Duty of insurer to disclose.]—*See* INSURANCE, Vol. XXIX., pp. 49, 50, 163, Nos. 117–129, 1187–1194.

SECT. 10.—MASTER AND SERVANT.

Liability of master to servant.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 194 *et seq.*

Liability of master to third persons for negligence of servant.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 23–27, 123–167, Nos. 26–55, 942–

Liability of shipowners for negligence of pilot.]—*See* SHIPPING.

Liability of clubs for negligence of employees.]—*See* CLUBS, Vol. VIII., pp. 518, 519, Nos. 89, 91.

SECT. 11.—MEDICAL PRACTITIONERS, DENTISTS, CHEMISTS, ETC.

Liability of medical practitioners.]—*See* MEDICINE & PHARMACY, Vol. XXXIV., pp. 548, 549, Nos. 67–73.

Liability of hospitals & public institutions.]—*See* MEDICINE & PHARMACY, Vol. XXXIV., p. 550, Nos. 86, 87.

Liability of chemists.]—*See* MEDICINE & PHARMACY, Vol. XXXIV., p. 560, No. 198.

SECT. 12.—MORTGAGOR AND MORTGAGEE.

See MORTGAGE, Vol. XXXV., pp. 474, 476–480, 483–485, 640, 644, Nos. 2087, 2098–2113, 2118–2120, 2124–2126, 2133–2136, 2161–2165, 2172, 3702, 3743–3761.

SECT. 13.—PARTNERS.

See PARTNERSHIP, pp. 372, 376, Nos. 490, 491, 526–528, *post.*

SECT. 14.—PAWNBROKERS.

See PAWNS & PLEDGES.

SECT. 15.—PRINCIPAL AND AGENT.

Liability of agent to principal.]—*See* AGENCY, Vol. I., pp. 429–448, Nos. 1214–1371.

Liability of principal for negligence of agent.]—*See* AGENCY, Vol. I., pp. 600, 601, Nos. 2316–2321.

Liability of agent for negligence of employees.]—*See* AGENCY, Vol. I., p. 395, No. 975.

Liability of agent of mine.]—*See* MINES, Vol. XXXIV., pp. 738–741, Nos. 1153–1173.

Liability of stock-broker.] — *See* STOCK EXCHANGE.

SECT. 16.—PUBLIC AUTHORITIES, BODIES AND OFFICIALS.

See, generally, PUBLIC AUTHORITIES.

Liability of sheriffs.]—*See* EXECUTION, Vol. XXI., pp. 472, 535, 542, 543, 545, 580, 581, Nos. 528, 529, 1103, 1168–1179, 1204, 1567–1576; SHERIFFS & BAILIFFS.

Liability of officer of county court.]—*See* COUNTY COURTS, Vol. XIII., pp. 453–455, Nos. 34, 35, 43, 44, 49, 59.

Liability of returning officer at municipal election.]—*See* ELECTIONS, Vol. XX., p. 187, Nos. 1633–1635.

Liability of clerk of the peace.]—*See* MAGISTRATES, Vol. XXXIII., p. 380, Nos. 898, 899.

Liability of Postmaster-General.]—*See* POST OFFICE; TELEGRAPHS & TELEPHONES.

Liability of Crown for negligence of officers.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 522, Nos. 282–283.

SECT. 17.—SHIPOWNERS.

See, generally, SHIPPING.

Liability for damage to fisheries.]—*See* FISHERIES, Vol. XXV., pp. 39, 40, Nos. 366–376.

Jurisdiction of Admiralty Courts.] —*See* ADMIRALTY, Vol. I., pp. 139–149, Nos. 467–570.

SECT. 18.—SOLICITOR AND CLIENT.

See SOLICITORS.

SECT. 19.—STOCKBROKERS.

See STOCK EXCHANGE.

SECT. 20.—SURETY AND CREDITOR.

Effect of negligence of creditor.]—*See* GUARANTEE, Vol. XXVI., pp. 188–190, Nos. 1450–1463, 1467–1473.

Duty of creditor on avoidance of guarantee.]—*See* GUARANTEE, Vol. XXVI., pp. 210, 211, Nos. 1657–1661.

Duty of surety on avoidance of guarantee.]—*See* GUARANTEE, Vol. XXVI., p. 211, Nos. 1662–1664.

SECT. 21.—TRUSTEES.

See, generally, TRUSTS & TRUSTEES.

Trustees of savings banks.]—*See* BANKERS, Vol. III., p. 136, Nos. 103, 104.

SECT. 22.—VENDOR AND PURCHASER.

Sale of land.]—*See* SALE OF LAND.

Sale of goods.]—*See* SALE OF GOODS.

Negligence affecting constructive notice.]—*See* EQUITY, Vol. XX., pp. 319–329, Nos. 662–729.

SECT. 23.—PERSON PROFESSING SPECIAL SKILL.

See Part I., Sect. 2, sub-sect. 3, E. (*b*), *ante*.

SECT. 24.—OTHER CASES.

430. Liability of clergyman — Neglect to celebrate divine service.]—No action on the case lies against a parson bound to celebrate divine service, etc., in a chapel within a manor, to the lord, *hominibus, tenentibus et servientibus suis*, for a breach of his duty.—WILLIAMS'S CASE (1592), 5 Co. Rep. 72 b ; 77 E. R. 163.

Annotations :—**Consd.** Jones *v.* Stone (1700), 1 Ld. Raym. 578. **Reld.** Marys's Case (1612), 9 Co. Rep. 111 b. **Mentd.** Fowler *v.* Sanders (1617), Cro. Jac. 446 ; Dewell *v.* Sanders (1618), Cro. Jac. 490 ; Jeveson *v.* Moor (1699), 12 Mod. Rep. 262 ; Ashby *v.* White (1704), 2 Ld. Raym. 938 ; Kendall *v.* John (1708), Fortes. Rep. 104.

431. Negligence in regard to bill of exchange—Duty of holder.]—UNION BANK OF SPAIN & ENGLAND *v.* LEVISON (1887), 4 T. L. R. 13.

—— ——.]—*See, generally*, BILLS OF EXCHANGE, Vol. VI., pp. 221–297, Nos. 1379–1979.

Duty to exclude facilities for alteration.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 383, 384, Nos. 2516–2518.

432. —— Failure of transferee to inquire into title—Not available as defence.]—Mere negligence on the part of the transferee of a negotiable instrument to avail himself of means at his disposal to detect the bad title of the transferor, cannot be pleaded as a defence to an action on the instrument by the transferee.—VENABLES *v.* BARING BROTHERS & Co., [1892] 3 Ch. 527 ; 61 L. J. Ch. 609 ; 67 L. T. 110 ; 40 W. R. 699 ; 36 Sol. Jo. 556.

Negligence in certification of lunatic.] — *See* LUNATICS, Vol. XXXIII., pp. 265–267, Nos. 1850–1856.

Duty of administrator of convict's estate.] — *See* CRIMINAL LAW, Vol. XIV., pp. 495, 496, Nos. 5459–5461.

Negligence of underlessee—Exclusion of relief against forfeiture.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 496, Nos. 6424, 6425.

Negligence of witness—Liability for giving false evidence.]—*See* EVIDENCE, Vol. XXII., p. 445, No. 4628.

Negligence of grantee of bill of sale.]—*See* BILLS OF SALE, Vol. VII., p. 135, No. 762.

Liability of directors of building society.]—*See* BUILDING SOCIETIES, Vol. VII., p. 472, No. 112.

Part VII.—Children.

SECT. 1.—DUTY TO TAKE CARE.

See, generally, Part I., Sect. 2, *ante*.

433. Liability dependent on breach of duty.]—A child three years & a half old strayed upon a railway & had its leg cut off by a passing train :—*Held :* in the absence of any evidence to show that the child got there through some neglect or default on the part of the co., they were not responsible for the injury.

I was wholly unable to discover any evidence of negligence on the part of the servants of the co. (ERLE, C.J.).—SINGLETON *v.* EASTERN COUNTIES RY. Co. (1859), 7 C. B. N. S. 287 ; 114 E. R. 827 ; *sub nom.* SINGLETON *v.* SOUTH-EASTERN RY. Co., 34 L. T. O. S. 67.

434. ——.]—Defts.' line crossed a public footpath on the level ; but defts. had not erected any gate or stile, as provided by Railways Clauses Consolidation Act, 1845 (c. 20), s. 61. Pltf., a child of four years & a half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut o by a passing train :—*Held :* there was evidence to go to the jury that the accident was caused by the neglect of defts. to fence.—WILLIAMS *v.* GREAT WESTERN RY. Co. (1874), L. R. 9 Exch. 157 ; 43 L. J. Ex. 105 ; 31 L. T. 124 ; 22 W. R. 531.

Annotations :—**Distd.** Wakelin *v.* L. & S. W. Ry. (1886), 12 App. Cas. 41. **Consd.** Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13.

435. ——.] — In a field belonging to defts., & abutting on a highway, children were in the habit of playing. A cart track crossed the field to a level crossing over a railway, & on the other side of the railway there was a piece of land used for

the purpose of tipping rubbish. By arrangement with the railway co. defts. had the use of the tip, & their carts were constantly crossing the field to the tip. Pltf., a child of one year & nine months, who had been playing in the field wandered to the level crossing, & then along the railway line, where she was injured by a passing train. There was no evidence that any child playing in the field had ever before gone over the level crossing. In an action to recover damages in respect of those injuries, the jury found that defts. were negligent in leaving the gate from the highway into the field, & also the level crossing gate open, & judgment was entered for pltf. :—*Held :* pltf. was not entitled to recover inasmuch as the facts did not establish any duty on the part of defts. towards pltf., & there was no evidence that the accident was in fact caused by any act or omission of defts.' servants.

The real *causa causans* of the accident was the gross neglect of the father & mother (VAUGHAN WILLIAMS, L.J.).—SCHOFIELD *v.* BOLTON CORPN. (1910), 26 T. L. R. 230 ; 54 Sol. Jo. 213, C. A.

Annotations :—**Refd.** Jenkins *v.* G. W. Ry., [1912] 1 K. B. 525 ; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398.

436. ——.] — The owners of an hotel with a yard adjoining covenanted with the tenant to keep the outside of the premises in good structural repair & condition. The yard was separated from the highway by a wall made of upright flagstones, which had not been repaired & was in a rotten & dangerous condition. A child who was lawfully in the yard, while playing with other children there, placed her hands on a part of the wall which fell, causing her serious injury :—*Held :* the owners not being in occupation & control of the premises were not liable in negligence to an invitee, & although the condition of the wall was such as to make it a public nuisance to persons passing along the highway, pltf. had no right of action, as the accident happened to her when she was in the yard, & not on public premises.—BROMLEY *v.* MERCER, [1922] 2 K. B. 126 ; 91 L. J. K. B. 577 ; 127 L. T. 282 ; 38 T. L. R. 496, C. A.

437. ——.] — Children were, to the knowledge of applts., in the habit of swinging on applts.' gate, which was defective. Whilst doing so a child of resp. was killed, & resp. brought this action against applts. for damages :—*Held :* the case was not so clear that it ought to be stopped *in limine*, & that it should go to trial.

In order to get a verdict, pursuer must not only show a breach of duty, but must show that the accident occurred owing to that breach of duty (LORD DUNEDIN).—DARNGAVIL COAL CO., LTD. *v.* M'KINLAY (1923), 128 L. T. 772 ; 87 J. P. 66 ; 67 Sol. Jo. 276, H. L.

438. Proper precautions taken.] — BAILEY *v.* NEAL (1888), 5 T. L. R. 20, D. C.

439. Legality of right of child in particular place—Origin or mode of acquisition immaterial.] — COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND, No. 450, *post.*

440. Against concealed trap.] — LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., No. 223, *ante.*

Employment of young persons.]—*See* MASTER & SERVANT, Vol. XXXIV., p. 195, Nos. 1594–1597.

Allurement or temptation.]—*See* Sect. 2, sub-sect. 2, B., *post.*

Danger.]—*See* Sect. 2, sub-sect. 2, C., *post.*

Trespassers, licencees or invitees.]—*See* Sect. 2, sub-sect. 3, *post.*

SECT. 2.—DEGREE OF CARE REQUIRED.

SUB-SECT. 1.—IN GENERAL.

See, generally, Part I., Sect. 2, sub-sect. 3, *ante.*

441. General rule.] — GLASGOW CORPN. *v.* TAYLOR, No. 453, *post.*

SUB-SECT. 2.—KNOWLEDGE IMPOSING HIGHER DEGREE OF CARE.

A. Natural Disposition of Children.

442. Knowledge of disposition presumed.] — LYNCH *v.* NURDIN, No. 118, *ante.*

443. ——.] — Pltf., a boy of the age of four years, while passing along a highway, climbed upon a fence situate upon deft.'s adjoining land & separating it from the highway, for the purpose of looking at other boys at play on the further side of the fence, & not for the purpose of climbing over it. The fence, which was so defective as to constitute a nuisance, fell upon pltf. & injured him :—*Held :* as pltf. in climbing upon the fence was merely indulging the natural instinct of a boy of his age, & doing an act which deft. ought to have contemplated as likely to be done by children using the highway, deft. was not entitled to avail himself of the defence that the injury was caused by pltf.'s own act, & pltf. was entitled to recover.—HARROLD *v.* WATNEY, [1898] 2 Q. B. 320 ; 67 L. J. Q. B. 771 ; 78 L. T. 788 ; 46 W. R. 642 ; 14 T. L. R. 486 ; 42 Sol. Jo. 609, C. A.

Annotations :—**Distd.** Giles *v.* L. C. C. (1903), 68 J. P. 10. **Consd.** Barker *v.* Herbert, [1911] 2 K. B. 633 ; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398 ; Hardy *v.* C. L. Ry., [1920] 3 K. B. 459. **Distd.** Bromley *v.* Mercer, [1922] 2 K. B. 126. **Refd.** McDowall *v.* G. W. Ry., [1903] 2 K. B. 331 ; Glasgow Corpn. *v.* Taylor, [1922] 1 A. C. 44. **Mentd.** Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341.

444. ——.] — COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND, No. 450, *post.*

B. Existence of Allurement or Temptation.

445. Duty to guard against.] — LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., No. 223, *ante.*

446. Neglect to take precautions against.] — LYNCH *v.* NURDIN, No. 118, *ante.*

PART VII. SECT. 1.

438 i. *Proper precautions* SHILSON *v.* NORTHERN ONTARIO LIGHT & POWER CO., LTD. (1919), 45 O. L. R. 449 ; 16 O. W. N. 39.—**CAN.**

PART VII. SECT. 2, SUB-SECT. 2.—B.

p. *General rule.*]—The owner of machinery on unfenced ground, open to children as a place for playing, is not liable for an injury to a child incurred in the course of his play, where the child is not allured to the place by the machinery, or tempted to meddle with it whilst there, where the use he was making of it when hurt was merely incidental to & had no part in the game which he was playing, & where the owner had no reason to anticipate danger to children from the machinery which was harmless in itself in its proper position & was, unknown to the owner, made capable of harm only by the mischievous interference of some outsider.—PLAWIUK *v.* ADVANCE RUMELY THRESHER CO. INCORPORATED (Alta.) (1922), 70 D. L. R. 533 ; [1922] 3 W. W. R. 866.—**CAN.**

446 i. *Neglect to take precautions against.*]—PRATTIS *v.* BEXLEY MUNICIPALITY (1915), 15 S. R. N. S. W. 232.—**AUS.**

446 ii. ——.]—CANADIAN PACIFIC RY. CO. *v.* COLEY (1907), 3 E. L. R. 126, 127.—**CAN.**

446 iii. ——.]—GREEN *v.* BRITISH COLUMBIA ELECTRIC RY. CO. & DOMINION CREOSOTING CO. (1915), 32 W. L. R. 393 ; 9 W. W. R. 75 ; 35 D. L. R. 543.—**CAN.**

446 iv. ——.]—BRIGNULL *v.* GRIMSBY VILLAGE, [1925] 2 D. L. R. 1096 ; 56 O. L. R. 525.—**CAN.**

446 v. ——.]—DUFF *v.* NATIONAL TELEPHONE CO., LTD. (1889), 16 R. (Ct. of Sess.) 675 ; 26 Sc. L. R. 512.—**SCOT.**

446 vi. ——.]—ROYAN *v.* M'LENNANS (1889), 17 R. (Ct. of Sess.) 103 ; 27 Sc. L. R. 79.—**SCOT.**

Sect. 2.—*Degree of care required: Sub-sect.* 2, *B. & C.; sub-sect.* 3. *Sects.* 3 *&* 4: *Sub-sect.* 1.]

447. ——.]—Deft. occupied a cellar in Maiden Lane where workmen of his were engaged in scene painting. The area over the cellar was open, & there was a protecting bar round the opening. On Aug. 16, 1884, a little girl was leaning against the rail looking down into the cellar, watching the men at their work, when it gave way, & she fell down into the area & was severely injured. The judge was of opinion that there was no case against deft. as the child was not when she fell using the highway, & had no right to lean against the bar, & so he directed a verdict for deft.:—*Held:* there must be a new trial, as there was evidence of negligence which ought to have gone to the jury.—JEWSON *v.* GATTI (1886), 2 T. L. R. 441, C. A.

Annotations:—**Consd.** Harrold *v.* Watney, [1898] 2 Q. B. 320; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Glasgow Corpn. *v.* Taylor, [1922] 1 A. C. 44. **Refd.** Cooke *v.* Mid. G. W. Ry. of Ireland, [1909] A. C. 229; Barker *v.* Herbert, [1911] 2 K. B. 633.

448. ——.] — COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND. No. 450, *post.*

449. ——.]—GLASGOW CORPN. *v.* TAYLOR, No. 453, *post.*

C. Existence of Danger.

450. Duty to guard against.] — A railway co. kept a turntable unlocked, & therefore dangerous for children, on their land close to a public road. The co.'s servants knew that children were in the habit of trespassing & playing with the turntable, to which they obtained easy access through a well-worn gap in a fence which the railway co. were bound by statute to maintain. A child between four & five years old playing with other children on the turntable having been seriously injured:—*Held:* there was evidence for a jury of actionable negligence on the part of the railway co.

[There was] evidence from which a jury might well infer not merely a licence, but an invitation, which fixed defts. with a high responsibility towards those people to whom such an invitation would mainly appeal, namely, those who from their tender age would be deemed incapable of caution & therefore of contributory negligence (LORD COLLINS).

The authorities from *Lynch* v. *Nurdin*, No. 118, *ante*, downwards establish, it would appear to me, first, that every person must be taken to know that young children & boys are of a very inquisitive & frequently mischievous disposition, & are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, & public places may not unlikely be frequented by children of tender years & boys of this character; &, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children & boys of this kind are rightfully entitled to frequent, & are not unlikely actually to frequent, unattended or unguarded & in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, & to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred (LORD ATKINSON).

The origin of the legal right to be in the particular place in which the boy or child comes in contact with the vehicle or machine, or the mode in which that legal right has been acquired, is, in my view, irrelevant. The right may be only the restricted right of a bare licencee, or it may be the more extended right of a person invited (LORD ATKINSON).—COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND, [1909] A. C. 229; 78 L. J. P. C. 76; 100 L. T. 626; 25 T. L. R. 375; 53 Sol. Jo. 319, H. L.

Annotations:—**Consd.** Lowery *v.* Walker, [1910] 1 K. B. 173; Schofield *v.* Bolton Corpn. (1910), 26 T. L. R. 230; Clinton *v.* Lyons, [1912] 3 K. B. 198. **Distd.** Jenkins *v.* G. W. Ry., [1912] 1 K. B. 525. **Expld.** Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398. **Consd.** Crane *v.* South Suburban Gas Co., [1916] 1 K. B. 33. **Expld.** Hardy *v.* C. L. Ry., [1920] 3 K. B. 459. **Consd.** Glasgow Corpn. *v.* Taylor, [1922] 1 A. C. 44. **Refd.** Barker *v.* Herbert, [1911] 2 K. B. 633; Rickards *v.* Lothian, [1913] A. C. 263; Wheeler *v.* Morris (1915), 113 L. T. 644; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253.

451. ——.]—LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., No. 223, *ante.*

452. —— **Danger not familiar or obvious.**] — GLASGOW CORPN. *v.* TAYLOR, No. 453, *post.*

453. —— **Danger familiar or obvious.**]—Where the danger is familiar & obvious no special responsibility attaches to the owner of land in respect of an accident to a child of tender years: but where the damage is not familiar & obvious, but is known to the owner of the land, he is not justified in allowing things of attractive appearance, known to him to be dangerous, to be in a place of public resort & recreation without any special care & warning.

The liability of defts. in cases of this kind rests, I think, in the last resort upon their knowledge that by their action they may bring children of tender years, unable to take care of themselves, yet inquisitive & easily tempted, into contact, in a place in which they, the children, have a right to be, with things alluring or tempting to them, & possibly in appearance harmless, but which, unknown to them & well known to defts., are hurtful or dangerous if meddled with (LORD ATKINSON).

A measure of care appropriate to the inability . . . of those who are immature . . . is due from others, who know of or ought to anticipate the presence of such persons within the scope & hazard of their own operations (LORD SUMNER).—GLASGOW CORPN. *v.* TAYLOR, [1922] 1 A. C. 44; 91 L. J. P. C. 49; 126 L. T. 262; 86 J. P. 89; 38 T. L. R. 102; 20 L. G. R. 205, H. L.

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446 vii. ——.] — HORSBURGH *v.* SHEACH (1900), 3 F. (Ct. of Sess.) 268; 38 Sc. L. R. 197; 8 S. L. T. 321.—**SCOT.**

446 viii. ——.]—WILSON *v.* GLASGOW & SOUTH WESTERN RY. CO., [1915] S. C. 215.—**SCOT.**

446 ix. ——.]—BOYD *v.* GLASGOW IRON & STEEL CO., LTD., [1923] S. C. 758.—**SCOT.**

446 x. ——.]—M'KENNA *v.* COATBRIDGE MAGISTRATES, [1924] S. C. 356.—**SCOT.**

PART VII. SECT. 2, SUB-SECT. 2.—C.

450 i. *Duty to guard against.*]—CARROLL *v.* FREEMAN (1893), 23 O. R. 283.—**CAN.**

450 ii. ——.]—MCSHANE *v.* TORONTO, HAMILTON & BUFFALO RY. CO. (1899), 31 O. R. 185.—**CAN.**

450 iii. ——.]—SEAMONE *v.* FANCY, [1924] 1 D. L. R. 650; 56 N. S. R. 487.—**CAN.**

450 iv. ——.]—When persons engaged in dangerous operations know that those who are too young or too infirm to take care of themselves are exposed to risk therefrom they are charged with a special duty for their protection.—HAUGHTON *v.* NORTH BRITISH RY. CO. (1892), 20 R. (Ct. of Sess.) 113; 30 Sc. L. R. 111.—**SCOT.**

450 v. ——.]—HASTIE *v.* EDINBURGH MAGISTRATES, [1907] S. C. 1102; 44 Sc. L. R. 829; 15 S. L. T. 194.—**SCOT.**

450 vi. ——.]— TRANSVAAL PROVINCIAL ADMINISTRATION *v.* COLEY, [1925] App. D. 24.—**S. AF.**

SUB-SECT. 3.—WHEN CHILD TRESPASSER, LICENCEE OR INVITEE.

See, generally, Part II., Sect. 1, sub-sects. 2, 3, 4, *ante*.

454. Trespasser.]—LYNCH *v.* NURDIN, No. 118, *ante*.

455. ——.]—PENNINGTON *v.* SIMPSON (1867), 15 L. T. 631.

456. ——.]—COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND, No. 450, *ante*.

457. ——.]—A railway co. had at one of their stations in London a moving staircase which led from the booking hall to the underground platforms next the lines. The staircase was open to the street in the sense that there was no physical obstruction to prevent any one in the booking hall walking on to the staircase. There was a ticket collector stationed at a barrier at the bottom of the staircase. Children from the neighbourhood were in the habit of frequently, especially in the evening, playing upon the staircase by running down it & up again, but they were always warned off both by the ticket collector at the bottom & by the clerk in the booking office. A railway policeman, whose duties took him into the booking hall twice an hour, always drove the children away when he saw them there. On the evening of the accident hereinafter mentioned the policeman drove the children away, but when he was gone they returned, & with them was pltf., a boy of five & a half years of age, in charge of an older boy. The latter before going into the booking hall looked round to see if the policeman had gone away. The older boy played on the staircase, leaving pltf. in the booking hall. In the booking hall the rubber band, which worked the staircase round a wheel, was open to sight & touch by any one in the booking hall. Pltf. placed his hand in such a position that it was caught by the moving band & seriously injured. Pltf. claimed damages, on the ground that defts. were negligent in that they took no precaution to prevent children from playing in the booking hall & on & with the staircase, & permitted pltf. to be in the booking hall, & did not guard or watch the staircase or wheel & moving balustrade:—*Held:* pltf. was, in the circumstances, a trespasser, & defts. were not liable.—HARDY *v.* CENTRAL LONDON RY. Co., [1920] 3 K. B. 459; 89 L. J. K. B. 1187; 124 L. T. 136; 36 T. L. R. 843; 64 Sol. Jo. 683, C. A.

458. Licencee.]—COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND, No. 450, *ante*.

459. ——.]—LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., No. 223, *ante*.

460. ——.]—JENKINS *v.* GREAT WESTERN RY. Co., No. 283, *ante*.

461. Invitee.]—COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND, No. 450, *ante*.

462. ——.]—LATHAM *v.* JOHNSON (R.) & NEPHEW, LTD., No. 223, *ante*.

SECT. 3.—**INTERVENTION OF THIRD PARTY.**

See, generally, Part I., Sect. 4, sub-sect. 3, *ante*.

463. Whether available as a defence.]—LYNCH *v.* NURDIN, No. 118, *ante*.

464. ——.]—Deft. exposed in a public place for sale, unfenced & without superintendence, a machine which might be set in motion by any passer by, & which was dangerous when in motion. Pltf., a boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, & his fingers were crushed:—*Held:* pltf. could not maintain any action for the injury.—MANGAN *v.* ATTERTON (1866), L. R. 1 Exch. 239; 4 H. & C. 388; 35 L. J. Ex. 161; *sub nom.* ATTERTON *v.* MANGAN, 14 L. T. 411; 30 J. P. 360; 14 W. R. 771.

Annotation:—**Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327.

465. ——.]—COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND, No. 450, *ante*.

SECT. 4.—**CONTRIBUTORY NEGLIGENCE.**

SUB-SECT. 1.—OF CHILD.

See, generally, Part XI., *post*.

466. When child incapable of contributory negligence—When incapable of caution.]—COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND, No. 450, *ante*.

467. Contributory negligence of child & adult distinguished.]—LYNCH *v.* NURDIN, No. 118, *ante*.

468. ——.]—Defts., a railway co., in place of a public footway crossing their line on the level, built a bridge over their line, & also over a roadway adjoining. The bridge was fenced with

PART VII. SECT. 2, SUB-SECT. 3.

454 i. *Trespasser.*]—PATTERSON *v.* WOOLLAHRA BOROUGH (1895), 16 N. S. W. L. R. 228; 12 N. S. W. W. N. 63.—**AUS.**

454 ii. ——.]—SMITH *v.* HAYES (1898), 29 O. R. 283.—**CAN.**

454 iii. ——.]—NEWELL *v.* CANADIAN PACIFIC RY. Co. (1906), 12 O. L. R. 21; 7 O. W. R. 771.—**CAN.**

454 iv. ——.]—ROBINSON *v.* HAVELOCK (1914), 32 O. L. R. 25; 20 D. L. R. 537; 6 O. W. N. 90; 7 O. W. N. 60.—**CAN.**

454 v. ——.]—WALLACE *v.* PETTIT (1923), 55 O. L. R. 82.—**CAN.**

454 vi. ——.]—VERDUN CITY *v.* YEOMAN, [1925] 2 D. L. R. 448; [1925] S. C. R. 177.—**CAN.**

454 vii. ——.]—STINSON *v.* CANADIAN WESTERN GAS, LIGHT, HEAT & POWER Co., [1925] 4 D. L. R. 529; *affg.*, [1925] 3 D. L. R. 34.—**CAN.**

454 viii. ——.]—DAVIDSON *v.* MONKLANDS RYS. Co. (1855), 17 Dunl. (Ct. of Sess.) 1038; 27 Sc. Jur. 541.—**SCOT.**

454 ix. ——.]—BALFOUR *v.* BAIRD & BROWN (1857), 20 Dunl. (Ct. of Sess.) 238; 30 Sc. Jur. 124.—**SCOT.**

PART VII. SECT. 4, SUB-SECT. 1.

q. *General rule.*]—A boy of five years may be guilty of contributory negligence if he does not take the care of himself which is to be expected of a child of that age, as, for example, if in broad daylight he runs up against an obvious obstacle on the pavement of a street.—PLANTZA *v.* GLASGOW CORPN., [1910] S. C. 786.—**SCOT.**

466 i. *When child incapable of contributory negligence—When incapable of caution.*]—MCINTYRE *v.* BUCHANAN (1857), 14 U. C. R. 581.—**CAN.**

466 ii. —— ——.]—BURBIDGE *v.* STARR MANUFACTURING Co., LTD. (1921), 54 N. S. R. 121; 56 D. L. R. 658.—**CAN.**

r. —— *Child aged six years.*]—It is negligence in a co. operating electric cars on the streets of a city not to have such guards for the front wheels as will prevent persons falling on the track from being run over, & the co. will be liable in damages to any person injured in consequence of such negligence, unless there is sufficient contributory negligence on the part of such persons to constitute a defence. No such contributory negligence could be attributed to a child under six years old.—WALD *v.* WINNIPEG ELECTRIC RY. Co. (1908), 18 Man. L. R. 134; *affd.* (1909), 41 S. C. R. 431.—**CAN.**

t. —— ——.]—GRANT *v.* CALEDONIAN RY. Co. (1870), 9 Macph. (Ct. of Sess.) 258; 43 Sc. Jur. 115.—**SCOT.**

a. —— *Child aged fifteen years.*]—A boy of 15 can be guilty of contributory negligence.—ALLIS-CHAMBERS-BULLOCK Co., LTD. *v.* BOLDUC (1908), 6 E. L. R. 185.—**CAN.**

b. —— *Child aged eleven years.*]—MUELLER *v.* BRITISH COLUMBIA ELECTRIC Co. (B. C.) (1911), 19 W. L. R. 278; 1 W. W. R. 56.—**CAN.**

c. —— ——.]—A boy of eleven years of age, playing tag in a public street, was run over by a motor car:—*Held:* he was of an age to know that it was dangerous to run across a street frequented by motor cars without taking proper care, & he had been guilty of contributory negligence & was not entitled to damages.—

Sect. 4.—*Contributory negligence: Sub-sects.* 1 & 2. *Sects.* 5 & 6. *Part VIII.*]

wooden hoardings, where it crossed the rails, & with open ornamental work, with triangular openings, where it crossed the road. Pltf., a child about four years of age, went upon the bridge, in company with another child, for the purpose of crossing over, & instead of walking straight forwards, he placed his back against the hoardings, & slid along, until he came to the ornamental ironwork, when he fell through backwards on to the road, & was injured. In an action to recover compensation, evidence was called to speak to the dangerous character of the bridge. The jury found that pltf. was lawfully using the bridge when the accident occurred, & that the bridge was not reasonably safe for all Her Majesty's subjects:—*Held:* there was evidence of negligence to go to the jury, & it was defts.' duty to keep the bridge in such a state as not to be dangerous to any one using it in a lawful manner, & there was no negligence on the part of pltf. contributory to the accident.

What may amount to contributory negligence in a grown up person may not be so in the case of a child of pltf.'s age (KELLY, C.B.).—LAY *v.* MIDLAND RY. CO. (1875), 34 L. T. 30; *previous proceedings* (1874), 30 L. T. 529.

469. Whether bar to relief.]—Contributory negligence does not disentitle an infant of tender age to recover for an injury sustained; otherwise where such injury is occasioned entirely by the negligence of the infant.—GARDNER *v.* GRACE (1858), 1 F. & F. 359, N. P.

470. ——.]—Defts. were owners of a warehouse, in front of which was a cellar in a public street. The opening of the cellar was covered with a flap or lid, which defts. raised, & leant against a wall, when they wanted access to the cellar. While it was leaning against the wall, pltf. H., a young child, who had been warned not to meddle with it, climbed up upon it, & caused it to fall upon himself, & he was injured by the fall:—*Held:* defts. were not liable for the injury.

The lid also fell upon & injured other pltf. A.:—*Held:* defts. were not liable to him, if he was a joint actor with H.; they were liable, if he was not.—HUGHES *v.* MACFIE, ABBOTT *v.* MACFIE (1863), 2 H. & C. 744; 3 New Rep. 394; 33 L. J. Ex. 177; 9 L. T. 513; 10 Jur. N. S. 682; 12 W. R. 315; 159 E. R. 308.

Annotations:—**Distd.** Jewson *v.* Gatti (1886), 2 T. L. R. 381. **Apld.** Harrold *v.* Watney (1898), 14 T. L. R. 364. (*See* 14 T. L. R. 486.) **Reld.** Lay *v.* Mid. Ry. (1874), 30 L. T. 529; Clark *v.* Chambers (1878), 3 Q. B. D. 327.

Negligence of party in charge of child.]—*See* Sect. 5, *post.*

SUB-SECT. 2.—OF PERSON IN CHARGE OF CHILD.

471. Whether valid defence—Identification of child with person in charge.]—Pltf., a child of five years old, was under the care of his grandmother, who purchased a ticket for him, & another for herself, to go from A. to B. on defts.' railway. While crossing the line at A. to be ready for their train they were both knocked down & injured by another train. The accident was partly owing to defts.' negligence, & partly to such negligence on the part of the grandmother as would disentitle her to recover damages from defts. for the injury:—*Held:* pltf. not being able to take care of himself, & being under his grandmother's care, there was such an identification between the grandmother & pltf., that, by reason of her negligence, pltf. was unable to maintain an action for the injury to himself.—WAITE *v.* NORTH EASTERN RY. CO. (1859), E. B. & E. 728; 28 L. J. Q. B. 258; 32 L. T. O. S. 334; 5 Jur. N. S. 936; 7 W. R. 311; 120 E. R. 682, Ex. Ch.

Annotations:—**Consd.** Armstrong *v.* L. & Y. Ry. (1875), L. R. 10 Exch. 47. **Distd.** Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1. **Reld.** Austin *v.* G. W. Ry. (1867), 8 B. & S. 327; Rooth *v.* N. E. Ry. (1867), L. R. 2 Exch. 173. **Mentd.** Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; Nunan *v.* Southern Ry., [1923] 2 K. B. 703.

Compare Part XI., Sect. 5, *post.*

472. —— **Negligence of person in charge real causa causans of accident.**]—SCHOFIELD *v.* BOLTON CORPN., No. 435, *ante.*

HARGRAVE *v.* HART (Man.) (1912), 22 W. L. R. 710; 9 D. L. R. 521.—**CAN.**

d. —— *Child aged eight years.*]—It is not the law in Ontario that no child of eight years can be guilty of contributory negligence, the capacity of the particular child is the test.—DOWNING *v.* GRAND TRUNK RY. CO. (1921), 49 O. L. R. 36; 58 D. L. R. 423; 19 O. W. N. 417.—**CAN.**

e. —— ——.]—JACKSON *v.* LOGUE (1922), 57 N. S. R. 413.—**CAN.**

f. ——.]—DEACON *v.* REGINA CORPN. (Sask.), [1923] 4 D. L. R. 271.—**CAN.**

g. —— *Child aged three years.*]—MORRAN *v.* WADDELL (1883), 11 R. (Ct. of Sess.) 44; 21 Sc. L. R. 28.—**SCOT.**

h. —— *Child aged four years.*]—A machine to be employed in the repair of a vessel was brought to a public quay & on its being found unfitted for the work was left standing on the quay. One of the workmen at the end of the day tied the wheels of the machine firmly with a piece of rope so as to render it harmless unless the rope was cut or loosed. In the evening while some children were playing with the machine the fastening of which had been removed in some unknown manner a boy of 4 got his hand so severely injured by the wheels as to necessitate amputation. In an action of damages at the instance of the father of the boy against the owners of the machine on the ground that as they had left a dangerous machine in a public place they were liable for any injury caused by it:—*Held:* the machine having been made secure against accidents although not against a deliberate removal of the safeguard which had been provided the owners were not liable.

A child of four years of age is not capable of contributory negligence.—M'GREGOR *v.* ROSS & MARSHALL (1883), 10 R. (Ct. of Sess.), 725; 20 Sc. L. R. 462.—**SCOT.**

k. —— *Child aged five years.*—M'LELLAND *v.* JOHNSTONE (1902), 4 F. (Ct. of Sess.) 459; 39 Sc. L. R. 326; 9 S. L. T. 379.—**SCOT.**

l. —— *Child aged four years & eight months.*]—A boy, aged four years & eight months, while attempting to cross a street, & paying no attention to the traffic, was run over & injured by a tramcar. In an action of damages against the tramway co.:—*Held:* the boy had been guilty of contributory negligence.—CASS *v.* EDINBURGH & DISTRICT TRAMWAYS CO., LTD., [1909] S. C. 1068; 46 Sc. L. R. 734; [1909] 1 S. L. T. 513.—**SCOT.**

469 i. *Whether bar to relief.*]—WALLACE *v.* CANADIAN PACIFIC RY. CO. (1912), 23 O. W. R. 99; 4 O. W. N. 133; 6 D. L. R. 864.—**CAN.**

469 ii. ——.]—MORAN *v.* BURROUGHS (1912), 27 O. L. R. 539; 4 O. W. N. 539; 10 D. L. R. 181.—**CAN.**

PART VII. SECT. 4, SUB-SECT. 2.

m. *Whether valid defence.*]—GREER *v.* STIRLINGSHIRE ROAD TRUSTEES (1882), 9 R. (Ct. of Sess.) 1069; 19 Sc. L. R. 887.—**SCOT.**

n. ——.]—Two children aged three years & five years respectively who were crossing a crowded city street unattended by any person in charge of them were knocked down & injured by a passing vehicle. In an action by the father for reparation it was proved that the driver was to blame:—*Held:* it was not a good defence that pursuer had constituted to the accident by allowing such young children to be in a place of danger without some one in charge of them.—MARTIN *v.* WARDS (1887), 14 R. (Ct. of Sess.) 814; 24 Sc. L. R. 586.—**SCOT.**

o. ——.]—HARDIE *v.* SNEDDON, [1917] S. C. 1.—**SCOT.**

p. ——.]—TAYLOR *v.* DUMBARTON TRAMWAYS CO., LTD., [1918] S. C. 96-7, H. L.—**SCOT.**

SECT. 5.—**LIABILITY OF PARENT FOR INJURY CAUSED BY CHILD.**

See INFANTS, Vol. XXVIII., p. 180, Nos. 394, 395.

SECT. 6.—**LIABILITY OF EDUCATION AUTHORITIES.**

See EDUCATION, Vol. XIX., pp. 556, 557, 563, 606, 607, Nos. 17–24, 50–52, 314–317.

Part VIII.—Liability of Persons Jointly Interested.

See, generally, TORT.

473. Liability of innocent party.]—Any person acting by the orders of the insured, & who is any wise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter, before the policy is effected; & where any misrepresentation arises from his fraud or negligence, the policy is void. Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two gave him credit ought to bear the loss.—FITZHERBERT *v.* MATHER (1785), 1 Term Rep. 12; 99 E. R. 944.

Annotations:—**Mentd.** Huckman *v.* Fernie (1838), 3 M. & W. 505; Cornfoot *v.* Fowke (1840), 6 M. & W. 358; Wheelton *v.* Hardisty (1857), 8 E. & B. 232; Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511; Stribley *v.* Imperial Marine Insce. (1876), 1 Q. B. D. 507; Blackburn Low *v.* Vigors (1887), 12 App. Cas. 531.

—— **Owner of vehicle let on hire.**]—*See* BAILMENT, Vol. III., p. 115, No. 383.

474. Joint liability—Joint hirers of vehicle—Negligent driving.]—DAVEY *v.* CHAMBERLAIN, No. 390, *ante.*

475. Election of party to be sued—No joint cause of action against both.]—In an action in the case against A. & B. the declaration alleged that A. & B. were jointly possessed of a house, & that the cellar door trap being improperly left open, pltf. fell through. It appeared in proof that A. was the tenant of a beerhouse, & that B. was employed by the landlord to repair it, & that during the repairs pltf. fell through the cellar door:—*Held:* there was no joint cause of action against A. & B. & pltf. must elect one of them.—BRYANT *v.* SHORT & ELDREDGE (1852), 19 L. T. O. S. 209.

476. Admissibility of evidence against one defendant—Evidence called by other defendant.]—Where it appears at the close of pltf.'s case that there is no evidence against one of two or more defts., it is entirely within the discretion of the judge whether he will then direct a verdict in his favour, or will wait till the whole evidence in the cause closes.

P. brought an action against two defts., G. & H., for negligence. At the close of pltf.'s case there was no evidence against G., but there was evidence against H. The judge declined at that time to enter a verdict for G., but said he would wait till the close of the evidence in the cause. H. called witnesses, the effect of whose evidence was to throw the blame on G. They were cross-examined by G.'s counsel. Ultimately a verdict was found against G. & in favour of H.:—*Held:* the judge was not obliged to enter a verdict in favour of G. at the close of pltf.'s case, & the evidence subsequently adduced might properly be taken into consideration against G., just as if H. had been called by P., G.'s counsel having had the opportunity of cross-examining.—PARNELL *v.* GREAT WESTERN RY. CO. (1876), 34 L. T. 126; *on appeal, sub nom.* PURNELL *v.* GREAT WESTERN RY. CO., 1 Q. B. D. 636, C. A.

Annotations:—**Mentd.** Horwell *v.* General Omnibus Co. (1877), 46 L. J. Q. B. 700; Rourke *v.* White Moss Colliery Co. (1877), 2 C. P. D. 205; Dewar *v.* Tasker (1906), 95 L. T. 87.

477. What defendants may be joined—Separate torts.]—Pltfs. brought an action against defts. for negligently excavating near pltf.'s house, & thereby damaging it. Defts. in their defence denied liability, & attributed the damage wholly or in part to the negligence of a water co. in leaving their water main insufficiently stopped. On an application by pltfs. to add the water co. as defts.:—*Held:* the causes of action against defts. & the water co. being in respect of separate torts, though the resulting damage might be the same in each case, the water co. could not be joined as defts.—THOMPSON *v.* LONDON COUNTY COUNCIL, [1899] 1 Q. B. 840; 68 L. J. Q. B. 625; 80 L. T. 512; 47 W. R. 433; 43 Sol. Jo. 379, C. A.

Annotations:—**Dbtd.** Payne *v.* British Time Recorder Co., [1921] 2 K. B. 1. **Apld.** The Koursk, [1924] P. 140. **Mentd.** Taylor *v.* Cambridge Gazette Co. & Kilner (1899), 43 Sol. Jo. 604; Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504; Compania Sansinena de Carnes Congeladas *v.* Houlder, [1910] 2 K. B. 354.

Liability of shipowners.]—*See* SHIPPING.

Liability of hackney cab proprietors.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 34–36, 140, 141, Nos. 111–130, 1101–1110; STREET & AERIAL TRAFFIC.

Liability of partners.]—*See* PARTNERSHIP.

Part IX.—Proof of Negligence.

SECT. 1.—FUNCTIONS OF JUDGE AND JURY.

SUB-SECT. 1.—IN GENERAL.

See, generally, EVIDENCE, Vol. XXII., pp. 22–34, Nos. 32–114.

478. General principles.]—It is a fit question for the jury to decide, whether it was the duty of defts. to have supported pltfs.' wall, while they were removing the adjoining wall, & to have inquired & ascertained that there was no cellar beneath the yard, before they deposited a heavy load of bricks upon it. If the jury should decide this question in the affirmative, defts'. negligence & misconduct in these particulars are such as render them liable in law (ABBOTT, C.J.).—KING *v.* WILLIAMSON & CLAPTON (1822), Dow. & Ry. N. P. 35.

Annotation:—**Mentd.** Nicholson *v.* Brooke (1848), 2 Exch. 213.

479. ——.]—On the platform of defts.' station a weighing machine was placed close to the line. Pltf. being at the station on an occasion when it was much crowded, fell over the machine & was hurt; the machine had been in the same position for five years, & no complaint had ever been made of it:—*Held:* it was for the judge to decide whether there was any evidence to go to the jury of negligence on the part of defts.

Whether there is any evidence is always a question to be determined by the judge.—CORNMAN *v.* EASTERN COUNTIES RY. Co. (1859), 4 H. & N. 781; 29 L. J. Ex. 94; 33 L. T. O. S. 302; 5 Jur. N. S. 657; 157 E. R. 1050.

Annotations:—**Apld.** Blackman *v.* L. B. & S. C. Ry. (1869), 17 W. R. 769. **Reld.** Cotton *v.* Wood (1860), 8 C. B. N. S. 568; Cowley *v.* Sunderland Corpn. (1861), 6 H. & N. 565; Crafter *v.* Met. Ry. (1866), Har. & Ruth. 164; Smith *v.* G. E. Ry. (1866), 36 L. J. C. P. 22; Ayles *v.* S. E. Ry. (1868), L. R. 3 Exch. 146; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317; Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817; G. W. Ry. *v.* Davies (1878), 39 L. T. 475.

480. ——.] — Defts. having contracted with pltf. to receive his ship into their dock at a specified time, & having given him notice that they could then receive her, she was brought to the dock in ballast upon a stormy day, under the charge of her captain & a pilot. Owing to the breaking of one of the chains of the dock gates, defts. were unable to let her in. The captain, after consultation with the pilot as to the best course to be pursued, anchored the ship outside the gates. At the turn of the tide she grounded on a sand-bank & broke her back. Pltf. having brought an action against defts. for the damage done to the ship, two questions were put to the jury upon the trial: (*a*) was it possible to have taken the ship to a place of safety; & (*b*) if so, was it the captain's or the pilot's fault that she was not taken thereof? On question (*a*) the jury were unable to agree, & in reply to (*b*), found that neither the captain nor the pilot had been guilty of negligence. The judge thereupon directed a verdict for pltf., with leave to enter it for deft., the ct. to draw inferences of fact consistent with the finding of the jury:—*Held:* on the facts & finding of the jury, the damage done to the ship might be fairly & reasonably considered as the consequence of defts.' breach of contract.

It is necessary to ascertain the facts of the case as found by the jury, for with evidence so contradictory & repugnant we cannot find any verdict ourselves. It is not our province. If the facts can be ascertained, then what is the law applicable to them? We apprehend when the facts of the case are known it is the province of the ct. to say for what matters damages are to be given, but the amount of damages is a question for the jury quite as much as the credit due to the witnesses (POLLOCK, C.B.).

The decision of twelve jurymen instructed from the bench in the rules of law, but exercising their own judgment on a subject connected with the business of life with which they are familiar, would practically lead to a result often more just & equitable than any mere rule of law could arrive at (POLLOCK, C.B.).—WILSON *v.* NEWPORT DOCK CO. (1866), L. R. 1 Exch. 177; 4 H. & C. 232; 35 L. J. Ex. 97; 14 L. T. 230; 12 Jur. N. S. 233; 14 W. R. 558; 2 Mar. L. C. 313.

Annotations:—**Mentd.** Barratt *v.* L. B. & S. C. Ry. (1877), De Colyar's County Court Cases, 195; The San Onofre, [1922] P. 243.

481. ——.]—METROPOLITAN RY. CO. *v.* JACKSON, No. 134, *ante*.

482. ——.] — Where there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury.

S. went to the Dublin & Kingstown railway station to accompany a relative who was going by the up train to Dublin. It was necessary to cross the line in order to get the ticket. S. went through a gate, down a pathway, & across the line in front of the train going to Dublin, which was then slowly approaching the station from Kingstown. The time was night. There were notice boards warning persons not to cross the line at that point, but there was evidence that the railway servants never interrupted any persons who did cross the line there. S. crossed in safety, he obtained a ticket for his relative, who, with two friends, was standing on the bank by the side of the up line. The train to Dublin had, in the meantime, arrived, & was standing still. S. having got the ticket began to recross the line, being then, not in front of the Dublin train, but behind it, in consequence of which that train prevented him seeing anything on the down line from Dublin; & he moved on. As he was going on the down line, which ran from Dublin to Kingstown, the down express train caught him & he was killed. It was a rule of the railway that the express train should always sound a whistle on approaching the station, & the driver of that train swore that he had whistled twice, & some other servants of the railway co. swore that they had heard the whistling. The friends

PART IX. SECT. 1, SUB-SECT. 1.

478 i. *General principles.*]—It is for the judge to say whether any facts have been established in evidence from which negligence may be inferred, & for the jury to say whether or not from those facts negligence ought to be inferred.—TOBIN *v.* CANADIAN PACIFIC RY. Co. (1912), 20 W. L. R. 676: 1 W. W. R. 1252; 5 Sask. L. R. 381; 2 D. L. R. 173.—**CAN.**

478 ii. ——.]—PORTER *v.* O'CONNELL (1915), 43 N. B. R. 458.—**CAN.**

478 iii. ——.]—HARRIS *v.* WINNIPEG ELECTRIC RY. Co. (Man.), [1919] 1 W. W. R. 453.—**CAN.**

q. *Whether questions to jury must be in writing.*]—BALFOUR *v.* TORONTO RY. Co. (1903), 23 C. L. T. 241; 5 O. L. R. 735; 2 O. W. R. 671.—**CAN.**

r. *Judge may proceed on common knowledge & experience of mankind—Where simple operations or ordinary conditions in question.*]—LOUGHNEY *v.* CALEDONIAN RY. Co. (1902), 39 Sc. L. R. 289.—**SCOT.**

of S. had, in their evidence for pltf., sworn that they were in a situation to hear the whistle if it had been sounded, & that they had not heard it; & one of them who could see the down train approaching, swore that he heard the "rumbling" of the approaching train, but heard no whistle: —*Held:* (1) this was a case which was properly left to the jury, for that where there was contradictory evidence on facts, the jurors & not the judge must decide upon them.

(2) The contributory negligence of pltf. must be established affirmatively, & the absence of evidence to negative any such negligence will not entitle defts. to a verdict as it would do if the burden of proving that the accident happened without any such negligence lay upon pltf. . . . Both in pleading & in practice the contributory negligence of pltf. has always been dealt with as if it was a separate issue from that of defts.' negligence & has always been so presented to the jury, the judge directing that the affirmative lay upon defts. (LORD PENZANCE).—DUBLIN, WICKLOW & WEXFORD RY. CO. *v.* SLATTERY (1878), 3 App. Cas. 1155; 39 L. T. 365; 43 J. P. 68; 27 W. R. 191, H. L.

Annotations:—As to (1) **Distd.** Davey *v.* L. & S. W. Ry. (1883), 12 Q. B. D. 70. **Consd.** Wright *v.* Mid. Ry. (1885), 1 T. L. R. 406, n. **Apld.** Finegan *v.* L. & N. W. Ry. (1889), 53 J. P. 663. **Reld.** Everett *v.* Griffiths, [1921] 1 A. C. 631. *As to* (2) **Consd.** Bettany *v.* Waine (1885), 1 T. L. R. 588; **Apld.** Williams *v.* Whittall (1885), 2 T. L. R. 165; Wakelin *v.* L. & S. W. Ry. (1886), 12 App. Cas. 41. **Reld.** Bentley *v.* L. & Y. Ry. (1886), 3 T. L. R. 196. *Generally,* **Consd.** Cutsford *v.* Johnson (1913), 108 L. T. 138; Canadian Pacific Ry. *v.* Frechette, [1915] A. C. 871; Banbury *v.* Bank of Montreal, [1918] A. C. 626. **Reld.** Clarke *v.* Mid. Ry. (1880), 43 L. T. 381; Cohen *v.* Met. Ry. (1890), 6 T. L. R. 146; Smith *v.* S. E. Ry., [1896] 1 Q. B. 178; Totanto Ry. *v.* King, [1908] A. C. 260; Grand Trunk Ry. *v.* McAlpine, [1913] A. C. 838; Norman *v.* G. W. Ry., [1915] 1 K. B. 584; Sharpe *v.* Southern Ry., [1925] 2 K. B. 311. **Mentd.** McKay *v.* McNally (1879), 41 L. T. 230; Lowery *v.* Walker, [1910] 1 K. B. 173; Paul *v.* G. E. Ry. (1920), 36 T. L. R. 344.

483. Verdict set aside by judge — Restored on appeal.] — MACAULEY *v.* GREAT NORTHERN, PICCADILLY & BROMPTON RY. CO. (1909), *Times*, Apr. 30, C. A.

Proper questions for jury where contributory negligence.]—*See* Part XI., Sect. 1, sub-sect. 1, *post.*

SUB-SECT. 2.—WITHDRAWAL OF CASE FROM JURY OR NONSUIT.

A. In General.

484. Judge must hear evidence tendered by plaintiff.]—A judge at the trial of an action cannot, after the case has been opened, nonsuit pltf. without his consent & without hearing the evidence tendered by him.—FLETCHER *v.* LONDON & NORTH WESTERN RY. CO., [1892] 1 Q. B. 122; 61 L. J. Q. B. 24; 65 L. T. 605; 40 W. R. 182; 8 T. L. R. 77, C. A.

Annotations:—**Mentd.** Isaacs *v.* Evans (1900), 16 T. L. R. 480; Cross *v.* Rix (1912), 77 J. P. 84.

B. No Case made out.

485. General rule.] —It is also clear that the *onus* of showing a non-delivery pursuant to the contract, lay upon pltf. There was, however, no evidence at all of a failure to deliver at the Bristol & Exeter Ry. There was no case, therefore, for the consideration of either judge or jury (WILLIAMS, J.).—MIDLAND RY. CO. *v.* BROMLEY (1856), 17 C. B. 372; 3 Saund. & M. 139; 25 L. J. C. P. 94; 26 L. T. O. S. 272; 20 J. P. 118; 2 Jur. N. S. 140; 4 W. R. 258; 139 E. R. 1116.

Annotation:—**Mentd.** Trow *v.* Railway Passengers Assce. (1860), 29 L. J. Ex. 218.

486. ——.] —Pltf. went to a public-house by appointment to meet a friend, &, as his friend had not arrived, walked into the parlour & there fell through a hole in the floor, which was being repaired. As far as appeared, his only object in coming to the house was to meet his friend. In an action against the landlord for negligence in not fencing the hole, & in which pltf. alleged that he was in the house as a guest, the jury found for pltf.

The ct. refused a rule to enter a nonsuit, which was asked for on the ground that there was no evidence, either of negligence on the part of deft., or of pltf. being in the house as a guest.—AXFORD *v.* PRIOR (1866), 14 W. R. 611.

487. ——.]—GIBLIN *v.* MCMULLEN, No. 32, *ante.*

488. ——.]—Pltf. was a servant of a railway co., & defts. were builders employed by the co. in repairing their station. Ptlf., in course of his usual duty at night, closed some gates between this station & a warehouse also belonging to the co., & in doing so was struck by a heavy plank & seriously injured. Defts.' servants were seen at work upon the wall just above these gates a few hours before the accident, & it was suggested they had placed this plank across the gates whilst open for the purpose of a scaffolding, & left it there when they finished their day's work. One of the gates was fastened back by a rope, which pltf. had to untie before he could shut it. There was no evidence that defts. or their servants knew these gates were usually shut at night. Pltf. was nonsuited:—*Held:* this nonsuit was right, as the evidence fell short of raising any presumption of negligence against defts.—PEARSON *v.* PLUCKNETT (1869), 20 L. T. 662.

489. ——.]—A customer in a butcher's shop passed behind the butcher's servant & was accidentally stabbed by a knife which the latter had placed under his arm while he reached down a joint. In an action against the butcher:—*Held:* the fact of his servant having put the knife under his arm was not sufficient evidence of negligence to go to the jury.—DOBSON *v.* COMFORT (1869), 19 L. T. 800, N. P.

490. ——.]—DANIEL *v.* METROPOLITAN RY. CO. (DIRECTORS, ETC.), No. 183, *ante.*

491. ——.] —Deft. was the proprietor of a yard & premises used for the sale of horses. Pltf. attended a sale & was walking up the yard behind a row of spectators who were watching a horse then on sale. In order to show the horse's pace a servant of deft. led it with a halter down a lane formed by the spectators on one side & a blank wall on the other. There was no barrier between the horse & the spectators, & when the horse was about ten yards from pltf. another servant of deft. struck it with a whip in order to make it trot. On being struck the horse swerved into & through the crowd, & kicked & injured pltf. It was a usual thing for a man to be stationed with a whip at the particular point when horses were brought out for sale. There was no evidence as to the kind of blow that was given, nor the character of the horse, nor how it was being led, nor that it was customary to put a barrier for the protection of the public in yards where horses were being sold. Pltf. sued deft. to recover damages for injuries caused by the negligence of deft.'s servant:—*Held:* there was no evidence upon which the jury could reasonably find negligence on the part of deft.—ABBOTT *v.* FREEMAN (1876), 35 L. T. 783, C. A.

492. ——.] —CAWTE *v.* OLYETT & FRANCIS (1888), 5 T. L. R. 56, C. A.

Sect. 1.—*Functions of judge and jury: Sub-sect.* 2, *B., C. & D.*]

493. ——.]—PATTEN *v.* WHEELER & WARREN (1888), 4 T. L. R. 507, D. C.

494. ——.]—PERRY *v.* BRASS & SON (1889), 5 T. L. R. 253, D. C.

495. ——.]—NEWMAN *v.* LONDON & SOUTH WESTERN RY. CO. (1890), 55 J. P. 375; 7 T. L. R. 138.

496. ——.]—COHEN *v.* METROPOLITAN RY. CO. (1890), 6 T. L. R. 146, D. C.

Annotation:—**Refd.** Delaney *v.* Met. Ry. (1920), 89 L. J. K. B. 878.

497. Right of court of appeal—When judge below fails to withdraw case.]—GIBLIN *v.* MCMULLEN, No. 32, *ante*.

498. Plaintiff must show negligent or unusual conduct.]—A public footway crossed a railway on a level. Pltf., while crossing on the footway in the evening, after dark, was knocked down & injured by a train of defts. on the crossing. He stated in evidence at the trial, that he did not see the train until it was close upon him; that he saw no lights on the train & heard no whistling. He stated also, that he did not hear any caution or warning given to him by any servant of the co. The driver & fireman of the engine were called on behalf of the co., & stated that there were lamps on the engine & train, which were lighted in due course on the night in question, at the commencement of the journey, & which, if lighted, could be seen for a considerable distance by any one standing at the crossing. A porter in defts.' employ also stated that he had seen pltf. at the crossing on the night in question, & had called to him not to cross. The judge at the trial ruled that there was evidence to go to the jury of negligence on the part of defts. which caused the injury to pltf.:—*Held:* there was no evidence of negligence to go to the jury.

It is not enough, in order to make out a case to go to the jury, that the party injured did not see a light or hear a whistle. He must give evidence which ought to satisfy a jury that there was something negligent or unusual in the conduct of business on that night (MELLOR, J.).—ELLIS *v.* GREAT WESTERN RY. CO. (1874), L. R. 9 C. P. 551; 43 L. J. C. P. 304; 30 L. T. 874, Ex. Ch.

Annotations:—**Refd.** Woodley *v.* Met. Dist. Ry. (1877), 2 Ex. D. 384; Dublin, Wicklow & Wexford Ry. *v.* Slattery (1878), 3 App. Cas. 1155; Clarke *v.* Mid. Ry. (1880), 43 L. T. 381.

499. Reasonable men unable to infer negligence.]—BROWN *v.* GREAT WESTERN RY. CO., No. 506, *post*.

500. ——.]—PIKE *v.* WEST LONDON EXTENSION RY. CO. (1888), 4 T. L. R. 715, C. A.

501. Plaintiff's evidence showing success impossible.]—Pltf. brought an action in the county ct. against defts., a body of persons who had organised a livestock show, to recover damages for personal injuries sustained by her in consequence of an advertisement board outside the premises having been blown down upon her. From the evidence given on behalf of pltf., it appeared that defts. were not the parties really liable & thereupon the county ct. judge nonsuited pltf., but deprived defts. of costs on the ground that they had not given every assistance to pltf. to enable her to determine who was the party liable:—*Held:* as the evidence for pltf. showed that she never could have recovered against defts., the judge should have entered judgment for them instead of nonsuiting pltf.—WESTGATE *v.* CROWE, [1908] 1 K. B. 24; 77 L. J. K. B. 10; 97 L. T. 769; 24 T. L. R. 14; 52 Sol. Jo. 13, D. C.

Annotation:—**Mentd.** Higgins *v.* Higgins, [1916] 1 K. B. 640.

C. Facts Justifying Inferences in favour of Either Party.

502. Whether case should go to jury.]—In an action for an injury occasioned by deft.'s negligence, *e.g.* negligent driving, pltf., to warrant the judge in leaving the case to the jury, must give proof of well defined negligence, & not merely some evidence of negligence, on the part of deft.; &, where the evidence given is equally consistent with there having been no negligence on the part of deft. as with there having been negligence, it is not competent for the judge to leave it to the jury to find either alternative; such evidence must be taken as amounting to no proof of negligence.—COTTON *v.* WOOD (1860), 8 C. B. N. S. 568; 29 L. J. C. P. 333; 7 Jur. N. S. 168; 141 E. R. 1288.

Annotations:—**Consd.** Hammack *v.* White (1862), 11 C. B. N. S. 588; Scott *v.* London Docks Co. (1864), 11 L. T. 383; Briggs *v.* Oliver (1866), 4 H. & C. 403. **Apld.** Jolly *v.* North Staffordshire Tram. Co. (1887), *Times*, July 27. **Refd.** Lovegrave *v.* London, Brighton, etc. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669; Smith *v.* G. E. Ry. (1866), L. R. 2 C. P. 4; Webber *v.* G. W. Ry. (1866), 4 H. & C. 582; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317; Turner *v.* G. W. Ry. (1875), 34 L. T. 22;

PART IX. SECT. 1, SUB-SECT. 2.—B.

498 i. *Plaintiff must show negligent or unusual conduct.*]—STOKER *v.* WELLAND RY. CO. (1863), 13 C. P. 386.—**CAN.**

498 ii. ——.]—GILES *v.* GREAT WESTERN RY. CO. (1875), 36 U. C. R. 360.—**CAN.**

498 iii. ——.]—HOWE *v.* HAMILTON & NORTH WESTERN RY. CO. (1878), 3 A. R. 336.—**CAN.**

498 iv. ——.]—JONES *v.* GRAND TRUNK RY. CO. (1880), 45 U. C. R. 193.—**CAN.**

498 v. ——.]—EATON CO. *v.* SANGSTER (1895), 24 S. C. R. 708.—**CAN.**

498 vi. ——.]—HOLLAND *v.* CANADIAN PACIFIC RY. CO. (1895), 33 N. B. R. 78.—**CAN.**

498 vii. ——.]—Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against deft., & the actual cause of the accident is purely a matter of speculation or conjecture.—CANADA PAINT CO. *v.* TRAINOR (1898), 28 S. C. R. 352.—**CAN.**

498 viii. ——.]—BROWN *v.* WATEROUS ENGINE WORKS CO. (1904), 24 C. L. T. 315; 8 O. L. R. 37; 3 O. W. R. 943.—**CAN.**

498 ix. ——.]—It is not improper to receive evidence as to what may have been done by defts. subsequently to remedy the defects or dangers complained of, but the jury should be warned that such evidence taken by itself is no evidence of negligence. If there be no other evidence of negligence, the case should be withdrawn from the jury.—TOLL *v.* CANADIAN PACIFIC RY. CO. (1908), 8 W. L. R. 795; 1 Alta. L. R. 318; 8 Can. Ry. Cas. 294.—**CAN.**

498 x. ——.]—LATHAM *v.* HEAPS (1912), 20 W. L. R. 819; 2 W. W. R. 83; 17 B. C. R. 211; 2 D. L. R. 313.—**CAN.**

498 xi. ——.]—O'DELL *v.* TORONTO RY. CO. (1919), 44 O. L. R. 350; 15 O. W. N. 236.—**CAN.**

498 xii. ——.]—BRESLIN *v.* DUBLIN UNITED TRAMWAY CO. (1911), 45 I. L. T. 220.—**IR.**

PART IX. SECT. 1, SUB-SECT. 2.—C.

502 i. *Whether case should go to jury.*]—Where the evidence called for pltf. is equally consistent with the wrong complained of having been caused by the negligence of pltf. & with its having been caused by the negligence of deft. the case should not be left to the jury.—FRASER *v.* VICTORIAN RAILWAY COMRS. (1909), 8 C. L. R. 54.—**AUS.**

502 ii. ——.]—Where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury.—JACKSON *v.* HYDE (1869), 28 U. C. R. 294.—**CAN.**

502 iii. ——.]—DANGER *v.* LONDON STREET RY. CO. (1899), 30 O. R. 493.—**CAN.**

502 iv. ——.]—MCNEIL *v.* DOMINION IRON & STEEL CO. (1904), 40 N. S. R. 513.

502 v. ——.]—Pltf. was a passenger by a night train on deft. co.'s railway between Montreal & Toronto. After retiring to the berth assigned to her, an upper one, she endeavoured to make some change in the manner in which the berth was made up. She

Allen *v.* New Gas Co. (1876), 1 Ex. D. 251; Manzoni *v.* Douglas (1880), 6 Q. B. D. 145; Crisp *v.* Thomas (1890), 63 L. T. 756.

503. ——.] — The conclusion might be drawn either one way or the other, & it ought to have had no influence with the jury, because a fact which is indifferent with respect to an issue to be tried, & is consistent with the finding either one way or the other, is not evidence to go to the jury to dispose of the issue (POLLOCK, C.B.).—COOKE *v.* WARING (1863), 2 H. & C. 332; 32 L. J. Ex. 262; 9 L. T. 257; 159 E. R. 138.

Annotations:—**Reld.** Bodger *v.* Nicholls (1873), 28 L. T. 441. **Mentd.** Read *v.* Edwards (1864), 34 L. J. C. P. 31; Fletcher *v.* Rylands (1865), 3 H. & C. 774; Ward *v.* Hobbs (1877), 47 L. J. Q. B. 90; Theyer *v.* Purnell, [1918] 2 K. B. 333.

504. ——.]—BRIGGS *v.* OLIVER, No. 602, *post*.

505. ——.] — Where an accident happened on a railway co.'s line owing to a latent defect in a foreign truck which could not have been detected by the ordinary examination:—*Held:* as the facts proved were as consistent with the exercise of due & reasonable care as with negligence, pltf. *v.* NORTH LONDON . Co. (1883), Cab.

506. ——.]—Pltf., when lawfully passing over a level crossing at a station of defts.' line, was knocked over by a train, of the approach of which no notice had been given to him. It was proved that the train had run through the station at the rate of 25 miles an hour, & pltf. admitted that he was somewhat deaf, & had not looked up the line before attempting to cross. The judge nonsuited him on the ground that he was responsible for the accident. On appeal to the Div. Ct. the nonsuit was set aside & a new trial ordered:—*Held:* the order for a new trial must be upheld, as the jury might reasonably have found on the evidence that pltf. had not acted without reasonable care, & defts. had been guilty of gross negligence.

Whenever facts which are not in conflict admit of two reasonable constructions, one in favour of pltf., the other in favour of deft., it is for the jury & not the judge to draw the inference. On the other hand, where the facts admit of but one reasonable construction, it is for the judge to decide the case upon the only ground on which it can be decided by any reasonable man (BOWEN, L.J.).—BROWN *v.* GREAT WESTERN RY. Co. (1885), 1 T. L. R. 614. C. A.

507. ——.] — A railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman who was employed by the railway co. to take charge of the gates & crossing during the day was withdrawn at night. The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line. An action on the ground of negligence having been brought by the administratrix of deceased, the jury found a verdict for pltf.:—*Held:* (1) even assuming, but without deciding, there was evidence of negligence on the part of the co., yet there was no evidence to connect such negligence with the accident; there was therefore no case to go to the jury & the ry. co. were not liable.

(2) *Semble:* where contributory negligence is alleged, the burden of proving it affirmatively rests upon deft.

I am of opinion that the *onus* of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon defts., & that in the absence of evidence tending to that conclusion, pltf. is not bound to prove the negative in order to entitle her to a verdict in her favour. . . . In expressing my own opinion I have added the words "in the first instance," because in the course of the trial the *onus* may be shifted to pltf. so as to justify a finding in defts.' favour to which they would not otherwise have been entitled (LORD WATSON).—WAKELIN *v.* LONDON & SOUTH WESTERN RY. Co. (1886), 12 App. Cas. 41; 56 L. J. Q. B. 229; 55 L. T. 709; 51 J. P. T. L. R. 233, H. L.; *affg.* (1884), [1896] 1 Q. B. 189, n, C. A.

Annotations:—*As to* (1) **Consd.** Smith *v.* S. E. Ry., [1896] 1 Q. B. 178. **Distd.** Moore *v.* Ransome's Dock Committee (1898), 14 T. L. R. 539. **Consd.** Pomfret *v.* L. & Y. Ry., [1903] 2 K. B. 718; Evans *v.* Astley, [1911] A. C. 674; McKenzie *v.* Chilliwack Corpn., [1912] A. C. 888; Papworth *v.* Battersea B. C. (1914), 79 J. P. 105. **Apld.** Kerr (or Lendrum) *v.* Ayr Steam Shipping Co., [1915] A. C. 217. **Distd.** Craig *v.* Glasgow Corpn. (1919), 35 T. L. R. 214. **Apld.** Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. **Reld.** Murgatroyd *v.* Blackburn & Over Darwen Tram. Co. (1886), 3 T. L. R. 180; McDonald *v.* S.S. Banana, [1908] 2 K. B. 926; Lewis *v.* Ronald (1909), 101 L. T. 534; Low (or Jackson) *v.* General Steam Fishing Co., [1909] A. C. 523; Marshall *v.* S.S. Wild Rose, [1910] A. C. 486; Walker *v.* Murrays (1911), 4 B. W. C. C. 409; Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523; Janvier *v.* Sweeney, [1919] 2 K. B. 316; Smith *v.* G. W. Ry., [1921] 2 K. B. 237. *As to* (2) **Reld.** Bettany *v.* Waine (1885), 1 T. L. R. 588; Brown *v.* G. W. Ry. (1885), 52 L. T. 622; Evans *v.* Rhymney L. B. (1887), 4 T. L. R. 72; Marshall *v.* Prince, [1914] 3 K. B. 1047; Jefferson *v.* Paskell (1915), 85 L. J. K. B. 398; Craig *v.* Glasgow Corpn. (1919), 35 T. L. R. 214. *Generally*, **Reld.** Griffiths *v.* East & West India Dock Co. (1888), 5 T. L. R. 43; Smith *v.* Baker (1889), 5 T. L. R. 518; Barker *v.* L. & S. W. Ry. (1891), 8 T. L. R. 31; Davidson *v.* M'Robb or Officer, [1918] A. C. 304; Sharpe *v.* Southern Ry., [1925] 2 K. B. 311. **Mentd.** Bender *v.* S.S. Zent (1909), 100 L. T. 639.

508. ——.] — JOLLY *v.* NORTH STAFFORDSHIRE TRAMWAYS CO. (1887), *Times*, July 27, D. C.

Annotation:—**Consd.** Downing *v.* Birmingham & Midland Trams, Dando *v.* Same (1888), 5 T. L. R. 40.

509. ——.] — PIKE *v.* WEST LONDON EXTENSION RY. CO. (1888), 4 T. L. R. 715, C. A.

510. ——.]—DALLAS *v.* GREAT WESTERN RY. Co., No. 568, *post*.

D. Some Evidence of Negligence.

511. General rule.] — PHILPOTTS *v.* EWERS (1850), 15 L. T. O. S. 300.

next tried to reach the other end of the berth from the inside, but, just as she leaned to the inside of the car, there was a violent lurch & jerk which threw her into the middle of the passage way, on her back, inflicting severe injuries:—*Held:* there being doubt as to the proper inference to be deduced from the facts in proof, there being two reasonable but different views that might be taken, the case was improperly withdrawn from the jury, & pltf. was entitled to an order for a new trial with costs.—SMITH *v.* CANADA PACIFIC RY. CO. (1901), 34 N. S. R. 22.—**CAN.**

502 vi. ——.]—PLOUFFE *v.* CANADA IRON FURNACE CO. (1905), 6 O. W. R. 500; 10 O. L. R. 37—**CAN.**

502 vii. ——.]—PRESTON *v.* TORONTO RY. CO. (1905), 11 O. L. R. 56; 6 O. W. R. 786; 8 O. W. R. 504.—**CAN.**

502 viii. ——.]—LOFFMARK *v.* ADAMS RIVER LUMBER CO., LTD. (1912), 17 B. C. R. 440; 22 W. L. R. 547.—**CAN.**

502 ix. ——.]—SKIDMORE *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (B. C.) [1922] 2 W. W. R. 1036; 68 D. L. R. 32. —**CAN.**

502 x. ——.]—RANDALL *v.* OTTAWA ELECTRIC CO., 24 C. L. T. 262.—**CAN.**

PART IX. SECT. 1, SUB-SECT. 2.—D.

511 i. *General rule.*]—BODEN *v.* ASSOCIATED GOLD MINES OF W. A., LTD. (1906), 6 W. A. L. R. 214.—**AUS.**

511 ii. ——.]—FALCONER *v.* EUROPEAN & NORTH AMERICAN RY. CO. (1872), 14 N. B. R. (1 Pug.) 179.—**CAN.**

Sect. 1.—*Functions of judge and jury: Sub-sect.* 2, *D.*]

512. ——.]—(1) Pltf., a labourer, in the service of a railway co., was employed to fill trucks with ballast at a pit, & to move them when filled along temporarily laid rails on to the permanent rails, & there attach them to an engine. Whilst so employed, one of the temporary rails, in consequence of its having been insecurely placed, through the negligence of another servant of the co., whose duty it was to superintend the laying of them, springing up from the pressure of the loaded truck, struck pltf., & severely injured him: —*Held:* the injury having been occasioned by the negligence of a fellow-workman of pltf., whilst both were engaged in a common occupation, the co. were not responsible, in the absence of evidence that they had knowingly entrusted the duty of laying the rails to an incompetent person.

(2) Pltf. was employed by defts. in constructing a scaffolding for a large building which they were engaged in erecting. Being short of materials, pltf. applied to one M., the foreman of the scaffolders, for the necessary supply of boards. M. applied to P., who was defts.' general foreman or manager, who refused to furnish them, saying that pltf. must get on as he best could. Pltf. proceeded with his work, &, having no flooring to stand on, placed his foot upon a putlog, from the rounded surface of which he slipped, &, falling to the ground, was crippled. In an action against defts.. charging them with negligence in not supplying sufficient materials, whereby the danger of the work was unnecessarily aggravated, the jury found that the scaffolding was insufficient & unsafe, to the knowledge of both the general manager P., & the foreman of the scaffolders, M., but not to the knowledge of defts., who personally never interfered with the works; & further that pltf. himself was guilty of no negligence:—*Held:* defts. were not responsible, pltf. & P. being fellow-workmen engaged in a common service, & there being no evidence of personal negligence on defts.' part, in failing to supply sufficient & safe materials, or in selecting an incompetent foreman.

It is not enough for pltf. to show that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of deft.; but he must go on & give evidence of some specific act of negligence on the part of the person against whom he seeks compensation (WILLES, J.).—LOVEGROVE *v.* LONDON, BRIGHTON, ETC. RY. CO., GALLAGHER *v.* PIPER (1864), 16 C. B. N. S. 669; 4 New Rep. 291; 33 L. J. C. P. 329; 10 L. T. 718; 10 Jur. N. S. 879; 12 W. R. 988; 143 E. R. 1289.

Annotations:—As to (2) **Consd.** Applebee *v.* Percy (1874), L. R. 9 C. P. 647. **Refd.** Murphy *v.* Smith (1865), 19 C. B. N. S. 361; Feltham *v.* England (1866), L. R. 2 Q. B. 33; Allen *v.* New Gas Co. (1876), 1 Ex. D. 251. *Generally*, **Mentd.** Hall *v.* Johnson (1865), 3 H. & C. 589; Wilson *v.* Merry (1868), L. R. 1 Sc. & Div. 326; Cribb *v.* Kynoch, [1907] 2 K. B. 548.

513. ——.]—JAMES *v.* GREAT WESTERN RY. CO., No. 5, *ante*.

514. ——.]—GIBLIN *v.* MCMULLEN, No. 32, *ante*.

515. ——.]—B. was in the last carriage of a railway train. Before reaching the station at which he was to alight the train had to pass through a tunnel. In that tunnel there was a heap of hard rubbish lying by the side of the rails, irregular in form & height, then a short sloping piece of ground, then a piece of flat platform, like the main platform, but narrower & within the tunnel. Beyond these was the main platform

511 iii. ——.]—LANDREVILLE *v.* GOUIN (1884), 6 O. R. 455.—**CAN.**

511 iv. ——.]—PEART *v.* GRAND TRUNK RY. CO. (1886), 10 O. L. R. 753, P. C.—**CAN.**

v. ——.]—Where the jury might have found as legitimate inferences of fact that a fire escaped because an ash pan was full, & that the result might with reasonable care have been avoided: —*Held:* there was sufficient evidence of negligence to go to the jury, & a nonsuit was improper.—MCGIBBON *v.* NORTHERN RY. CO. (1887), 14 A. R. 91.—**CAN.**

511 vi. ——.]—CURRY *v.* CANADIAN PACIFIC RY. CO. (1889), 17 O. R. 65.—**CAN.**

511 vii. ——.]—KEENAN *v.* YEATS (1889), 28 N. B. R. 148.—**CAN.**

511 viii. ——.]—CANADIAN PACIFIC RY. CO. *v.* FLEMING (1893), 22 S. C. R. 33.—**CAN.**

511 ix. ——.]—Deceased was seen approaching the railway track in a vehicle just before the passing of a train; immediately after the train passed the deceased & the horses were found dead at the crossing; the statutory signals of the approach of the train were not given:—*Held:* sufficient evidence of negligence to be submitted to the jury.—JOHNSON *v.* GRAND TRUNK RY. CO. (1893), 25 O. R. 64; *affd.* (1894), 21 A. R. 408.—**CAN.**

511 x. ——.]—Where there was evidence of negligence & want of proper & reasonable care, which should have been submitted to the jury:—*Held:* the judge erred in withdrawing the case from the jury & a new trial should be ordered.—NEW GLASGOW IRON, COAL & RY. CO. *v.* TOBIN (1894), 1 Cout. Dig. 577.—**CAN.**

511 xi. ——.]—FORD *v.* METROPOLITAN RY. CO. (1902), 22 C. L. T. 227; 4 O. L. R. 29; 1 O. W. R. 287.—**CAN.**

511 xii. ——.]—GRIFFITHS *v.* HAMILTON ELECTRIC & CATARACT POWER CO. (1903), 23 C. L. T. 293; 6 O. L. R. 296; 2 O. W. R. 594.—**CAN.**

511 xiii. ——.]—SCOTT *v.* FERNIE LUMBER CO. (1904), 25 C. L. T. 51; 11 B. C. R. 91.—**CAN.**

511 xiv. ——.]—RANDALL *v.* AHEARN & SOPER CO. (1904), 34 S. C. R. 698.—**CAN.**

511 xv. ——.]—CHAMPAGNE *v.* GRAND TRUNK RY. CO. (1905), 5 O. W. R. 218; 9 O. L. R. 589.—**CAN.**

511 xvi. ——.]—WABASH RAILROAD CO. *v.* MISENER (1906), 27 C. L. T. 154; 38 S. C. R. 94.—**CAN.**

511 xvii. ——.]—LONDON & WESTERN TRUSTS CO. *v.* LAKE ERIE & DETROIT RIVER RY. CO. (1906), 12 O. L. R. 28; 7 O. W. R. 511.—**CAN.**

511 xviii. ——.]—WRIGHT *v.* GRAND TRUNK RY. CO. (1906), 12 O. L. R. 114; 7 O. W. R. 636.—**CAN.**

511 xix. ——.]—TINSLEY *v.* TORONTO RY. CO. (1908), 17 O. L. R. 74; 12 O. W. R. 389; 8 Can. Ry. Cas. 90.—**CAN.**

511 xx. ——.]—MILLIGAN *v.* TORONTO RY. (1908), 17 O. L. R. 530; 12 O. W. R. 967; 8 Can. Ry. Cas. 434.—**CAN.**

511 xxi. ——.]—MCINTYRE *v.* COOTE (1909), 19 O. L. R. 9; 13 O. W. R. 1098.—**CAN.**

511 xxii. ——.]—SIMINGTON *v.* MOOSE JAW STREET RY. CO. (1913), 26 W. L. R. 167; 5 W. W. R. 659; 15 D. L. R. 94; 6 Sask. L. R. 409.—**CAN.**

511 xxiii. ——.]—CHARLES *v.* NORTON GRIFFITHS CO., LTD. (1913), 18 B. C. R. 179.—**CAN.**

511 xxiv. ——.]—In an action for damages for injury sustained by pltf. being struck by an electric tramcar of defts. when attempting to cross defts.' tracks upon a public highway, the jury disagreed:—*Held:* there was legal evidence of negligence for the jury, & the case could not have been withdrawn from the jury; & the judge was right in refusing to nonsuit.—MACKENZIE *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1914), 26 W. L. R. 577; 19 B. C. R. 1.—**CAN.**

511 xxv. ——.]—DE VRIES *v.* CANADIAN PACIFIC RY. CO. (1916), 33 W. L. R. 827; 10 W. W. R. 85.—**CAN.**

511 xxvi. ——.]—JARVIS *v.* LONDON STREET RY. CO. (1919), 45 O. L. R. 167; 48 D. L. R. 342; 15 O. W. N. 421.—**CAN.**

511 xxvii. ——.]—WALLACE *v.* GRAND TRUNK RY. CO. (1921), 64 D. L. R. 75; 49 O. L. R. 117.—**CAN.**

511 xxviii. ——.]—A workman whose duty it was to oil engines was found lying in the engine pit & suffered injuries. He could not give any explanation as to how he was there:—*Held:* there was no case of negligence proved to justify the judge in sending the case for trial before a jury.—RODDA *v.* CANADIAN PACIFIC RY. CO. (Sask.) (1922), 67 D. L. R. 197.—**CAN.**

511 xxix. ——.]—JEWELL *v.* GRAND TRUNK RY. CO. OF CANADA (1924), 55 O. L. R. 617; 30 Can. Ry. Cas. 55.—**CAN.**

511 xxx. ——.]—SMITH *v.* CANADIAN NATIONAL RYS., [1924] 1 D. L. R. 1140; [1924] 1 W. W. R. 527; 29 Can. Ry. Cas. 51; 20 Alta. L. R. 81.—**CAN.**

511 xxxi. ——.]—COUGHLAN *v.* MONKS & CO., LTD., [1918] 2 I. R. 584.—**IR.**

511 xxxii. ——.]—CULLEN *v.* DUBLIN UNITED TRAMWAYS CO. (1896), LTD., [1920] 2 I. R. 63.—**IR.**

511 xxxiii. ——.]—DUNCAN *v.* PERTHSHIRE CRICKET CLUB (1904), 42 Sc. L. R. 327.—**SCOT.**

itself. The train only partially went up to the main platform, leaving the last two carriages within the tunnel, which had no light within it, & on the occasion in question was filled with steam. The last carriage but one came opposite the narrow platform, the last carriage was opposite the hard rubbish. A passenger in the last carriage but one, who was called as a witness at the trial, heard the name of the station called out in the usual way & got out upon the narrow platform. He then heard a groaning, & proceeding further back into the tunnel found B. lying on the rubbish with his legs between the wheels of the last carriage, but neither of them had touched him. B.'s leg was broken, & he had received other injuries, from the effects of all of which he died. The witness heard the warning "Keep your seats" & shortly afterwards the train moved on. On these facts the judge at the trial held that there was no evidence of negligence to go to the jury, & he directed a nonsuit. Owing to a strong expression of opinion by the jurymen he took their finding, on the assumption that there ought to be a verdict for pltf., as to the amount of damages. The nonsuit was then entered, with leave to move to enter the verdict for the damages assessed:—*Held:* the ruling at *Nisi Prius* could not be sustained; the case ought not to have been withdrawn from the consideration of the jury, for the evidence furnished matter on which it was necessary to take the opinion of a jury.—BRIDGES *v.* NORTH LONDON RY. CO. (DIRECTORS, ETC.) (1874), L. R. 7 H. L. 213; 43 L. J. Q. B. 151; 30 L. T. 844; 38 J. P. 644; 23 W. R. 62, H. L.; *revsg.* (1871), L. R. 6 Q. B. 377, Ex. Ch.

Annotations:—**Consd.** Whittaker *v.* Manchester & Sheffield Ry. (1870), L. R. 5 C. P. 464, n.; Gill *v.* G. E. Ry. (1872), 26 L. T. 945; L. & N. W. Ry. *v.* Hellawell (1872), 26 L. T. 557; Robson *v.* N. E. Ry. (1876), 2 Q. B. D. 85. **Folld.** Rose *v.* N. E. Ry. (1876), 2 Ex. D. 248. **Expld.** Met. Ry. *v.* Jackson (1877), 3 App. Cas. 193. **Consd.** Dublin, Wicklow, & Wexford Ry. *v.* Slattery (1878), 3 App. Cas. 1155; Maddox *v.* L. C. & D. Ry. (1878), 38 L. T. 458. **Refd.** Cockle *v.* L. & S. E. Ry. (1872), L. R. 7 C. P. 321; Gee *v.* Met. Ry. (1873), L. R. 8 Q. B. 161; Weller *v.* L. B. & S. C. Ry. (1874), 43 L. J. C. P. 137; Pearson *v.* Cox (1877), 2 C. P. D. 369; Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817; Woodley *v.* Met. Dist. Ry. (1877), 2 Ex. D. 384; Clarke *v.* Mid. Ry. (1880), 43 L. T. 381; Sharpe *v.* Southern Ry. (1925), 133 L. T. 693.

516. ——.]—Defts.' railway crossed a level crossing which was some 20 yards distant from a foot-bridge. Both the crossing & the bridge were private crossings intended for the use of persons employed in a neighbouring manufactory. About 30 yards from the crossing was a box where a railway man was commonly stationed, who was sometimes shouted to by persons wishing to pass the level crossing with carts, & answered "All right." Pltf., a boy of eleven years of age, who was employed at the manufactory, having occasion to go over the line, was waiting at the level crossing until one train had passed, but was knocked down & severely injured, when in the act of crossing, by another train, which he had not observed, & which was passing in the opposite direction immediately afterwards. At the trial there was evidence that the bridge was dirty & not lighted at the time of the accident; that the train did not whistle; that pltf. knew the bridge, having crossed it several times; & that the man at the box used to bring out a stick to stop him from going over the bridge, but that when the accident happened he was not present. There was no evidence to show what the man's special duties were, or whether he had any duties in respect to foot passengers. Upon the evidence the judge was asked to nonsuit pltf.:—*Held:* there was evidence of negligence to go to the jury, & the conduct of the railway man was a distinct breach of duty which amounted to negligence & contributed to the accident.—CLARKE *v.* MIDLAND RY. CO. (1880), 43 L. T. 381.

517. ——.]—In an action brought under Lord Campbell's Act, 1846 (c. 93), by a widow for the loss of her husband, it was proved that deceased intended to travel on defts.' line to N. from W., by a train leaving at 9.50 p.m. On the up platform, from which he would have had to start, there was no waiting room, & the night being very cold, he had gone into that on the down platform. When the train was heard approaching, deceased went quickly along the down platform, so as to cross over to the up platform, which he could only reach by going over a level crossing. In attempting to cross the line when the train was only about 20 yards from the level crossing he was knocked down by the engine & killed. At the approach of a train it was usual for a porter to stand at the level crossing & warn the passengers; but on the occasion in question there was no porter there, & no notice was given of the danger, either by any bell being rung or any whistling by the driver of the engine:—*Held:* there being evidence of the negligence of defts. the case had been properly allowed to go to the jury, as both the primary facts in the case & the inference of fact to be drawn from them were not so clear that the jury acting fairly & impartially had been bound to come to a conclusion conclusive against pltf.—WRIGHT *v.* MIDLAND RY. CO. (1885), 1 T. L. R. 406, C. A.

Annotation:—**Apld.** Brown *v.* G. W. Ry. (1885), 52 L. T. 622.

518. ——.]—Pltf.'s husband was run over & killed by a train of defts. under the following circumstances. Defts.' line crossed a public highway on the level. There was a gatekeeper's lodge near the crossing, where a servant of defts. was stationed, whose duty under the co.'s regulations was to attend to the carriage gates at the crossing, &, whenever a train was approaching, to stand by the rails &, if the line was clear, exhibit as a signal a white flag by day or a white light by night. There were lamps on the carriage gates which showed, when they were closed across the highway, a white light, &, when they were closed across the line, a red light. Deceased, who lived near the crossing on the other side of the line, called at the gatekeeper's lodge between 8 & 9 o'clock on a December night to inquire whether his wife was there, & found the gatekeeper sitting in his lodge reading. Being told that his wife was not there, he left the lodge. Though a train had been signalled, the gatekeeper gave him no warning & did not go out to signal the train. Deceased attempted to cross at the level crossing, & was caught by the train & killed. The train carried lights which were visible by any one about to cross at the level crossing for a distance of more than 600 yards. The engine driver whistled ten seconds before the train passed over the crossing, which it did at the rate of from thirty five to forty miles an hour. The engine driver stated in evidence that, when approaching the crossing, he saw the white light on the carriage gates, but did not receive any hand signal from the gatekeeper:—*Held:* there was upon the above facts evidence to go to the jury of negligence on the part of defts. by which, & not by any negligence on his own part, the death of pltf.'s husband was caused, & therefore the judge at the trial was right in not withdrawing the case from the jury.—SMITH *v.* SOUTH EASTERN RY. CO., [1896] 1 Q. B. 178; 65 L. J. Q. B. 219; 73 L. T. 614;

Sect. 1.—*Functions of judge and jury: Sub-sect.* 2, *D. & E.* (*a*) *&* (*b*)*; sub-sect.* 3.]

60 J. P. 148; 44 W. R. 291; 12 T. L. R. 67; 40 Sol. Jo. 96, C. A.

Annotation:—**Reld.** Mercer *v.* S. E. & C. Ry.'s Managing Committee, [1922] 2 K. B. 549.

519. ——.]—Pltf. sued deft. co. to recover damages for personal injuries sustained by her at one of their railway stations. She intended travelling from that station. The night was very foggy, & the lamps on the platform did not show through the fog. While walking along the platform pltf. fell on to the rails & was injured. Several other people had fallen off the platform earlier on the same evening. The jury found that the accident was due to the negligence of defts.:—*Held:* pltf. was entitled to recover as the circumstances imposed upon defts. a duty to take all reasonable precautions to protect pltf. effectively from the dangers besetting all movement on the platform on the night in question, & there was evidence which entitled the jury to find defts. had failed to discharge the duty that rested upon them.—LONDON, TILBURY, & SOUTHEND RY. CO. *v.* PATERSON (1913), 29 T. L. R. 413, H. L.; *affg.* S. C. *sub nom.* PATERSON *v.* LONDON, TILBURY, & SOUTHEND RY. CO. (1912), *Times*, Mar. 16, C. A.

Annotations:—**Reld.** Norman *v.* G. W. Ry., [1914] 2 K. B. 153; Brackley *v.* Mid. Ry. (1916), 114 L. T. 1150.

520. Scintilla of evidence or mere surmise.]—On the platform of a railway station there were two doors in close proximity to each other, the one, for necessary purposes, had painted over it the words "For gentlemen," the other had over it the words "Lamp-room." Pltf., having occasion to go to the urinal, inquired of a stranger where he should find it, & having received a direction, by mistake opened the door of the "lamp-room" & fell down some steps & was injured. In an action against the railway co.:—*Held:* in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting pltf., on the ground that there was no evidence of negligence on the part of the co.

A scintilla of evidence, or a mere surmise that there may have been negligence on the part of defts., clearly would not justify the judge in leaving the case to the jury: there must be evidence on which they might reasonably & properly conclude that there was negligence (WILLIAMS, J.).—TOOMEY *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1857), 3 C. B. N. S. 146; 6 W. R. 44; 140 E. R. 694; *sub nom.* TOONEY *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., 27 L. J. C. P. 39; 30 L. T. O. S. 135.

Annotations:—**Apld.** Cornman *v.* Eastern Counties Ry. (1859), 4 H. & N. 781. **Consd.** Cotton *v.* Wood (1860), 8 C. B. N. S. 568; Gee *v.* Met. Ry. (1873), L. R. 8 Q. B. 161. **Reld.** Nicholson *v.* L. & Y. Ry. (1865), 34 L. J. Ex. 84; Crafter *v.* Met. Ry. (1866), Har. & Ruth. 164; Indermaur *v.* Dames (1866), L. R. 1 C. P. 274; Smith *v.* G. E. Ry. (1866), L. R. 2 C. P. 4; Ryder *v.* Wombwell (1868), L. R. 4 Exch. 32; Blackman *v.* L. B. & S. C. Ry. (1869), 17 W. R. 769; Dublin, Wicklow & Wexford Ry. *v.* Slattery (1878), 3 App. Cas. 1155; Hall *v.* Jupe (1880), 49 L. J. Q. B. 721.

E. Evidence of Contributory Negligence.

(a) In General.

521. Whether case may be withdrawn from jury.]—A railway crossed an occupation way which connected lands of pltf. lying on each side of the railway, & which was also a public footway. The crossing being on the level, at the point of intersection the railway co. put up high gates of which they gave a key to pltf. The gates obstructed the footway, but the co. did not make a bridge over the railway, or provide a stile for foot passengers in pursuance of Railway Clauses Consolidation Act, 1845 (c. 20), ss. 46, 61, 68. The key having been lost, one of the gates was left open, & some colts of pltf. having escaped on to the railway were killed by a passing train:—*Held:* it was a question for the jury, whether pltf. by his own negligence had contributed to the accident.—ELLIS *v.* LONDON & SOUTH WESTERN RY. CO. (1857), 2 H. & N. 424; 26 L. J. Ex. 349; 29 L. T. O. S. 389; 21 J. P. 791; 3 Jur. N. S. 1008; 5 W. R. 682.

Annotations:—**Reld.** Sneesby *v.* L. & Y. Ry. (1874), L. R. 9 Q. B. 263. **Mentd.** Wyatt *v.* G. W. Ry. (1865), 13 W. R. 837.

522. ——.]—SKELTON *v.* LONDON & NORTH WESTERN RY. CO., No. 91, *ante*.

523. ——.]—Pltf., a passenger by defts.' railway, in getting into a railway carriage at a station, placed his left hand on the back of the open door to aid him in mounting the step. There was conflicting evidence as to whether there was a proper handle affixed to the carriage, to the right hand of the door. The night was dark, & pltf. did not see any handle. He had a parcel in his right hand. Before he had completely entered the carriage, the guard, without any previous warning, closed the door, & crushed his hand between the back of the door & the door post. In an action for the injury thus sustained:—*Held:* there was evidence of negligence on the part of the co.'s servant, & no evidence of such contributory negligence on the part of pltf. as to entitle defts. to a nonsuit.—FORDHAM *v.* LONDON, BRIGHTON, & SOUTH COAST RY. CO. (1869), L. R. 4 C. P. 619; 38 L. J. C. P. 324; 17 W. R. 896, Ex. Ch.; *affg.* (1868), L. R. 3 C. P. 368.

Annotations:—**Distd.** Richardson *v.* Met. Ry. (1868), 37 L. J. C. P. 300; Maddox *v.* L. C. & D. Ry. (1878), 38 L. T. 458. **Reld.** Siner *v.* G. W. Ry. (1869), 20 L. T. 114.

524. ——.]—The female pltf. was one of a crowd of passengers assembled at defts.' railway station. The crowd, caused by special excursion traffic, of which defts. had previous notice, had been allowed to enter the station & to disperse over the platform at will. No precautions were taken to regulate its movements. On the approach of a train pltf. aforesaid was, through the pressure caused by the swaying of the crowd, thrust off the platform & hurt. An action for negligence being brought against defts. in respect of the injury thus occasioned, pltfs. were nonsuited on the ground that the above facts were no evidence of negligence:—*Held:* the nonsuit must be set aside, as the precautions to be taken by the co., the character of the crowd, & all the other circumstances, were questions for the jury.

Negligence, & in particular contributory

PART IX. SECT. 1, SUB-SECT. 2.—E. (a).

521 i. *Whether case may be withdrawn from jury.*]—The power to nonsuit on the ground of contributory negligence is restricted to cases where it is indisputable that the misfortune would not have occurred but for pltf.'s own want of proper care. Where the facts, or the proper inference from the facts, are in dispute, the case must go to the jury.—SCRIVER *v.* LOWE (1900), 21 C. L. T. 27; 32 O. R. 290.—**CAN.**

521 ii. ——.]—COOPER *v.* LONDON STREET RY. CO. (1913), 23 O. W. R. 767; 4 O. W. N. 623; 9 D. L. R. 368.—**CAN.**

521 iii. ——.]—FREEDMAN *v.* WINNIPEG CORPN. (Man.), [1918] 3 W. W. R. 479; 43 D. L. R. 126.—**CAN.**

521 iv. ——.]—The fact that contributory negligence is set up as a defence does not entitle pltf. to have the case go to the jury where there is no evidence of the deft.'s negligence for the jury.—ROSSINGTON *v.* WINNIPEG ELECTRIC RY. CO., [1924] 3 W. W. R. 714; 34 Man. L. R. 541.—**CAN.**

negligence, is always a question for the jury, unless it would be a palpable want of reason in them to find for pltfs. (BRETT, J.).—HOGAN *v.* SOUTH-EASTERN RY. CO. (1873), 28 L. T. 271; 37 J. P. 296.

525. ——.]—FINEGAN *v.* LONDON & NORTH WESTERN RY. CO., No. 368, *ante*.

526. ——.]—The question in this case is whether that negligence on the part of defts. caused the accident to pltf. . . . A question of contributory negligence ought never to be withdrawn from the consideration of a jury except in a very extreme case, but when the evidence is so strong that it would be wholly unreasonable for the jury to find otherwise than that pltf. had been guilty of contributory negligence, then it is the duty of the ct. to stop the case (LORD ESHER, M.R.).—GRIFFITHS *v.* EAST & WEST INDIA DOCK CO. (1889), 5 T. L. R. 371, C. A.

(*b*) *Plaintiff's Own Act Proximate Cause.*

527. No case for jury.]—DAVEY *v.* LONDON & SOUTH WESTERN RY. CO., No. 759, *post*.

528. ——.]—Where in an action for damages for personal injuries it appears from pltf.'s own evidence that the injuries he sustained were particularly attributable to his omission to take ordinary precautions against a danger created by deft.'s breach of duty, there is no case to go to the jury.—SAYER *v.* HATTON (1885), 1 Cab. & El. 492.

529. ——.]—CALLENDER *v.* CARLTON IRON CO., LTD. (1894), 10 T. L. R. 366, H. L.

SUB-SECT. 3.—MATTERS FOR JURY.

530. Whether facts amount to negligence.]—Case against a railway co. for so carelessly & improperly managing & directing an engine on their railway by their servants, that sparks flew from the engine upon a stack of beans standing in an adjoining field, belonging to pltf., whereby the stack was destroyed. A case stated for the opinion of the ct., under Civil Procedure Act, 1833 (c. 42), alleged that the engines used upon the railway were such as were usually employed on railways, for the purpose of propelling the trains & carriages thereon; & that the engine, from which the sparks that set fire to the stack in question flew, was used at the time in the ordinary manner, & for purposes authorised by the Act of Parliament incorporating the co.:—*Held:* the facts stated were not sufficient to enable the ct. to infer negligence on the part of defts. so as to justify the directing of the entry of a verdict for pltf.; but they did not show such an absence of negligence as to warrant the directing of the entry of a non-suit.—ALDRIDGE *v.* GREAT WESTERN RY. CO. (1841), 3 Man. & G. 515; 1 Dowl. N. S. 247; 2 Ry. & Can. Cas. 852; 4 Scott, N. R. 156; 133 E. R. 1246.

Annotations:—**Refd.** Templeman *v.* Haydon (1852), 12 C. B. 507; Blyth *v.* Birmingham Waterworks Co. (1856), 20 J. P. 247.

531. ——.]—(1) What state of facts, as found by a jury, would be sufficient to support a charge of negligence, so as to give a ground of action by a bailor against the bailee.

(2) Negligence not to be inferred, unless the state of facts cannot otherwise be explained.

In the present instance, the action being for negligence, the special verdict finds facts & leaves the ct. to say whether negligence has, or not, been proved. Negligence is a question of fact, & not of law, & should have been disposed of by the jury (LORD BROUGHAM).—TOBIN *v.* MURISON (1845), 5 Moo. P. C. C. 110; 9 Jur. 907; 13 E. R. 431, P. C.

532. ——.]—In an action against a canal co. for damage caused by the emission of sparks from the engines of a steamboat used by them; evidence being given that there were some mechanical applicances which were used to prevent the emission of sparks, & that there were species of fuel & modes of dealing with the furnaces for that object, which had not been adopted, etc., the question was left to the jury whether there had been a neglect by defts. of any practicable precautions which they reasonably ought to have used.—LONGMAN *v.* GRAND JUNCTION CANAL CO. (1863), 3 F. & F. 736.

533. ——.]—A porter of a railway co. closed the door of a compartment so quickly as to strike the back of a passenger who was getting in, & crush the finger of a child who had got in before the last passenger, & was seating himself, between the hinges:—*Held:* the question of negligence on the part of the porter, & contributory negligence on the part of the child, was for the jury, & there was sufficient to prevent the case being withdrawn from their cognisance.—COLEMAN *v.* SOUTH EASTERN RY. CO. (1866), 4 H. & C. 699; 31 J. P. 23; 12 Jur. N. S. 944.

534. ——.]—Where the question, whether or not a railway co. has been negligent, depends upon the nice distinction between that which is reasonably safe, & that which is not so, it is a question entirely of degree, & one exclusively & emphatically for the decision of a jury; & where a jury, with all the evidence before them, have found a verdict, the ct. will not interfere to disturb their finding by granting a rule to set the verdict aside on the ground that there was no evidence of negligence.—LEISHMAN *v.* LONDON, BRIGHTON, & SOUTH COAST RY. CO. (1870), 23 L. T. 712; 19 W. R. 106.

535. ——.]—HOGAN *v.* SOUTH-EASTERN RY. CO., No. 524, *ante*.

536. ——.]—In an action for negligence the question whether the facts amount to negligence is for the jury.

PART IX. SECT. 1, SUB-SECT. 3.

530 i. *Whether facts amount to negligence.*]—KENNY *v.* COOK (1848), 4 U. C. R. 268.—**CAN.**

530 ii. ——.]—DEVLIN *v.* BAIN (1862), 11 C. P. 523.—**CAN.**

530 iii. ——.]—SHERWOOD *v.* HAMILTON CITY (1875), 37 U. C. R. 410.—**CAN.**

530 iv. ——.]—MAKINS *v.* PIGGOTT (1898), 29 S. C. R. 188.—**CAN.**

530 v. ——.]—The question of negligence is for the jury.—DAVIS *v.* COMMERCIAL BANK OF WINDSOR (1899), 32 N. S. R. 366.—**CAN.**

530 vi. ——.]—HAWLEY *v.* WRIGHT (1901), 34 N. S. R. 365.—**CAN.**

530 vii. ——.]—ANDREAS *v.* CANADIAN PACIFIC RY. CO. (1905), 26 C. L. T. 72; 37 S. C. R. 1.—**CAN.**

530 viii. ——.]—MACKENZIE *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1914), 19 B. C. R. 1.—**CAN.**

530 ix. ——.]—DIPLOCK *v.* CANADIAN NORTHERN RY. CO. (1916), 33 W. L. R. 453; 9 W. W. R. 1052.—**CAN.**

530 x. ——.]—GERARD *v.* OTTAWA GAS CO. (1918), 43 O. L. R. 264; 43 D. L. R. 447.—**CAN.**

530 xi. ——.]—DOWSON *v.* TORONTO & YORK RADIAL RY. CO. (1918), 43 O. L. R. 158; 43 D. L. R. 377.—**CAN.**

530 xii. ——.]—BRUNELLE *v.* GRAND TRUNK RY. CO. (1918), 43 O. L. R. 220; 44 D. L. R. 48.—**CAN.**

530 xiii. ——.]—LUCK *v.* TORONTO RY. CO. (1920), 48 O. L. R. 581; 58 D. L. R. 145; 19 O. W. N. 330.—**CAN.**

530 xiv. ——.]—The question of negligence in all collision cases is a matter of fact to be determined by the jury under proper directions, & the circumstances in each case must be considered by the jury irrespective of any other case.—NOBLE *v.* STEWART (1923), 51 N. B. R. 94.—**CAN.**

530 xv. ——.]—LOGAN [1925] 2 I. R. 211.—**IR.**

530 xvi. ——.]—MORTON COOLEY *v.* EDINBURGH & GLASGOW RY. CO. (1845), 8 Dunl. (Ct. of Sess.) 288; 18 Sc. Jur. 134.—**SCOT.**

Sect. 1.—*Functions of judge and jury: Sub-sects.* 3 : 4, *A. & B.*]

Pltf. was a passenger by defts.' railway. The train in which she was overshot the platform. The porters called to the passengers to keep their seats, but not so that pltf. could hear. The train was not backed. Pltf. waited some time, & then got out, & was injured in alighting:—*Held:* there was evidence to go to the jury of negligence on the part of defts.—ROSE *v.* NORTH EASTERN RY. Co. (1876), 2 Ex. D. 248; 46 L. J. Q. B. 374; 35 L. T. 693; 41 J. P. 532; 25 W. R. 205, C. A.

Annotation:—**Refd.** Jackson *v.* Met. Ry. (1877), 26 W. R. 175.

537. ——.]—Where the conduct of a railway co.'s servant is such as to lead a passenger to think that he is intended to alight, & it proves to be dangerous to alight, there is, in the absence of evidence of contributory negligence on the part of the passenger, evidence of negligence on the part of the company for a jury to consider.

Pltf., a female, arrived by defts.' railway at a small station, as the part of the train in which she was riding reaching beyond the end of the short platform. The only servant of the co. being engaged, pltf. attempted, after waiting until she feared the train would move on, to descend without assistance, &, in so doing, she slipped & was injured:—*Held:* there was evidence of negligence on the part of the co., which ought to be left to a jury.—ROBSON *v.* NORTH EASTERN RY. Co. (1876), 2 Q. B. D. 85; 46 L. J. Q. B. 50; 35 L. T. 535; 41 J. P. 294; 25 W. R. 418, C. A.

—. Rose *v.* N. E. Ry. (1876), 2 Ex. D. 248.
Consd. Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817
Refd. Met. Ry. *v.* Jackson (1877), 3 App. Cas. 193.

538. ——.]—JONES *v.* GREAT WESTERN RY. Co. (1877), 41 J. P. Jo. 308.

539. ——.]—WATSON *v.* ELLIS (1885), 1 T. L. R. 317; 49 J. P. Jo. 148, D. C.

540. ——.]—RUDDY *v.* LONDON & SOUTH WESTERN RY. Co. (1892), 8 T. L. R. 658, C. A.

541. ——.]—BURROWS *v.* LONDON GENERAL OMNIBUS Co. (1894), 10 T. L. R. 298, C. A.

542. ——.]—BARRY RY. Co. *v.* WHITE (1901), 17 T. L. R. 644, H. L.; *affg.* S. C. *sub nom.* WHITE *v.* BARRY RY. Co. (1899), 15 T. L. R. 474, C. A.

543. —— **Alternative methods of work.**]—Where there are two modes of doing a work in a public highway from which damage may result to a passer by, the one mode more dangerous than the other, though both are usual modes, it is for the jury to say whether the adoption of the former mode amounts under all the circumstances to negligence. A passer by who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a "volunteer assistant," so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work.—CLEVELAND *v.* SPIER (1864), 16 C. B. N. S. 399; 143 E. R. 1183.

544. What facts amount to contributory negligence.]—FLETCHER *v.* PETO, No. 120, *ante.*

545. ——.]—COLEMAN *v.* SOUTH EASTERN RY. Co., No. 533, *ante.*

546. ——.]—HOGAN *v.* SOUTH-EASTERN RY. Co., No. 524, *ante.*

547. ——.]—JONES *v.* GREAT WESTERN RY. Co. (1877), 41 J. P. Jo. 308.

548. ——.]—In an action to recover compensation under Employers' Liability Act, 1880 (c. 42), it appeared that pltf. was in the employment of deft., who was a wharfinger, & for the purposes of his business the owner of carts & horses. It was the duty of pltf. to drive the carts & to load & unload the goods which were carried in them. Among the horses was one of a vicious nature & unfit to be driven even by a careful driver. Pltf. objected to drive this horse, & told the foreman of the stable that it was unfit to be driven, to which the foreman replied that pltf. must go on driving it, & that if any accident happened his employer would be responsible. Pltf. continued to drive the horse, & while sitting on his proper place in the cart was kicked by the animal, & his leg was broken:—*Held:* upon the facts a jury might find deft. to be liable, for there was evidence of negligence on the part of his foreman, & the circumstances did not conclusively show that the risk was voluntarily incurred by pltf.—YARMOUTH *v.* FRANCE (1887), 19 Q. B. D. 647; 57 L. J. Q. B. 7; 36 W. R. 281; 4 T. L. R. 1, C. A.

Annotations:—**Consd.** Osborne *v.* L. & N. W. Ry. (1888), 21 Q. B. D. 220; Thrussell *v.* Handyside (1888), 20 Q. B. D. 359; Amos *v.* Duffy (1890), 6 T. L. R. 339. **Refd.** Walsh *v.* Whiteley (1888), 21 Q. B. D. 371; Membury *v.* G. W. Ry. (1889), 14 App. Cas. 179; Sanders *v.* Barker (1890), 6 T. L. R. 324; Smith *v.* Baker, [1891] A. C. 325; Baker *v.* James, [1921] 2 K. B. 674; Letang *v.* Ottawa Elec. Ry., [1926] A. C. 725. **Mentd.** Bound *v.* Lawrence (1891), 60 L. J. M. C. 137; Hunt *v.* G. N. Ry. [1891] 1 Q. B. 601; London & Eastern Counties Loan & Discount Co. *v.* Creasey, [1897] 1 Q. B. 768; Thompson *v.* City Glass Bottle Co., [1901] 2 K. B. 483; Corbett *v.* Pearce, [1904] 2 K. B. 422; Smith *v.* Associated Omnibus Co. (1907), 96 L. T. 675; National Provincial & Union Bank of England *v.* Charnley, [1924] 1 K. B. 431.

549. ——.]—FINEGAN *v.* LONDON & NORTH WESTERN RY. Co., No. 368, *ante.*

550. ——.]—It must be for the jury whether there had been negligence on the part of deft. or "contributory" negligence on the part of pltf. (LORD COLERIDGE, C.J.).—GURLING *v.* HURST & Co. (1889), 6 T. L. R. 94, D. C.

551. ——.]—RUDDY *v.* LONDON & SOUTH WESTERN RY. Co. (1892), 8 T. L. R. 658, C. A.

544 i. *What facts amount to contributory negligence.*]—MCKINNON *v.* MORRIS (1885), 11 V. L. R. 176.—**AUS.**

544 ii. ——.]—MARVIN *v.* BUTTERWELL (1867), N. B. Dig. 536.—**CAN.**

544 iii. ——.]—BENNETT *v.* GRAND TRUNK RY. Co. (1882), 7 A. R. 470.—**CAN.**

544 iv. ——.]—MAW *v.* KING & ALBION TOWNSHIPS (1883), 8 A. R. 248.—**CAN.**

544 v. ——.]—EDGAR *v.* NORTHERN RY. Co. (1884), 11 A. R. 452.—**CAN.**

544 vi. ——.]—GRAND TRUNK RY. Co. OF CANADA *v.* ROSENBERGER (1884), 9 S. C. R. 311.—**CAN.**

544 vii. ——.]—GRAND TRUNK RY. Co. *v.* BECKETT (1887), 16 S. C. R. 713; Cam. Cas. 228.—**CAN.**

544 viii. ——.]—ATKINSON *v.* GRAND TRUNK RY. Co. (1889), 17 O. R. 220.—**CAN.**

544 ix. ——.]—BROWN *v.* LONDON STREET RY. Co. (1901), 21 C. L. T. 369; 2 O. L. R. 53.—**CAN.**

544 x. ——.]—MARSHALL *v.* CATES (1903), 24 C. L. T. 38; 10 B. C. R. 153.—**CAN.**

544 xi. ——.]—GALLINGER *v.* TORONTO RY. Co. (1904), 25 C. L. T. 10; 8 O. L. R. 698; 4 O. W. R. 522.—**CAN.**

544 xii. ——.]—HINSLEY *v.* LONDON STREET RY. Co. (1907), 16 O. L. R. 350; 11 O. W. R. 743.—**CAN.**

544 xiii. ——.]—CANADIAN PACIFIC RY. Co. *v.* HANSON (1908), 40 S. C. R. 194.—**CAN.**

544 xiv. ——.]—SHRONDRA *v.* WINNIPEG ELECTRIC RY. Co. (1911), 21 Man. L. R. 622.—**CAN.**

544 xv. ——.]—MORRIS *v.* HALIFAX ELECTRIC TRAMWAY CO., LTD. (1917), 50 N. S. R. 451.—**CAN.**

544 xvi. ——.]—JOHNSON *v.* ARCHIBALD (1924), 57 N. S. R. 49.—**CAN.**

544 xvii. ——.]—BIRKETT *v.* GRAND TRUNK RY. Co., 25 C. L. T. 1.—**CAN.**

544 xviii. ——.]—The question of contributory negligence is for the jury to determine.—VALLEE *v.* GRAND TRUNK RY. Co., 21 C. L. T. 109; 1 O. W. R. 224.—**CAN.**

544 xix. ——.]—POTTER *v.* NORTH BRITISH RY. Co. (1873), 11 Macph. (Ct. of Sess.) 664.—**SCOT.**

544 xx. ——.]—CAMPBELL *v.* ORD & MADDISON (1873), 1 R. (Ct. of Sess.) 149; 11 Sc. L. R. 54.—**SCOT.**

544 xxi. ——.]—THOMSON *v.* NORTH BRITISH RY. Co. (1876), 4 R. (Ct. of Sess.) 115; *sub nom.* GIRDWOOD *v.* NORTH BRITISH RY. Co., 14 Sc. L. R. 97.—**SCOT.**

552. ——.]—BARRY RY. CO. *v.* WHITE (1901), 17 T. L. R. 644, H. L.; *affg.* S. C. *sub nom.* WHITE *v.* BARRY RY. CO. (1899), 15 T. L. R. 474, C. A.

553. Defence of volenti non fit injuria.]—Under recent decisions, it is for the jury to find if the knowledge of the existence of the danger in such case proves the willingness of the servant to confront it (MATTHEW, J.).—BAXTER *v.* WYMAN & SONS (1888), 4 T. L. R. 255, D. C.

SUB-SECT. 4.—GRANT OF NEW TRIAL.

A. Non-Direction.

554. Verdict justified by evidence.] — (1) If one does an injury by unavoidable accident, an action does not lie; *aliter*, if any blame attaches to him, though he be innocent of any intention to injure; as if he drive a horse too spirited, or pull the wrong rein, or use imperfect harness, & the horse taking fright kills another horse.

(2) In such a case the ct. refused to grant a new trial, though the judge who presided, after summing up, told the jury deft. was liable, even though the accident were unavoidable, & no blame were imputable to him; omitting to direct the jury to consider whether the accident was unavoidable or occasioned by any fault in deft.—WAKEMAN *v.* ROBINSON (1823), 1 Bing. 213; 8 Moore, C. P. 63; 1 L. J. O. S. C. P. 70; 130 E. R. 86.

Annotations:—*As to* (2) **Refd.** Hall *v.* Fearnley (1842), 3 Q. B. 919; Stanley *v.* Powell, [1891] 1 Q. B. 86. *Generally*, **Refd.** Cotterill *v.* Starkey (1839), 8 C. & P. 691.

555. ——.] — A railway embankment, after some years' use, having fallen, & passengers being injured, they sued the co. for negligence:—*Held:* the fall of the embankment was *primâ facie* evidence of its insufficiency, & was conclusive, if no evidence was given to rebut it.—GREAT WESTERN RY. CO. OF CANADA *v.* BRAID, GREAT WESTERN RY. CO. OF CANADA *v.* FAWCETT (1863), P. C. C. N. S. 101; 1 New Rep. L. T. 31; 27 J. P. 596; 9 Jur. N. S. 339; 11 W. R. 444; 15 E. R. 640, P. C.

Annotations:—**Distd.** Hatfield (Owners) *v.* Glasgow (Owners), The Glasgow (1914), 84 L. J. P. 161. **Refd.** Scott *v.* London Dock Co. (1864), 34 L. J. Ex. 17; Longmore *v.* G. W. Ry. (1865), 19 C. B. N. S. 184; Czech *v.* General Steam Navigation Co. (1867), L. R. 3 C. P. 14; Montreal City *v.* Watt & Scott, [1922] 2 A. C. 555.

B. Misdirection.

556. General rule.] — Pltf.'s horse & cart were standing at his shop door unattended, & close behind them were drawn up deft.'s horse & cart, also unattended. Defts.' cart came into collision with pltf.'s cart, & pltf.'s horse broke through his shop window:—*Held:* there was evidence of contributory negligence on the part of pltf.,

553 i. *Defence of volenti non fit injuria.*]—*Held:* the question whether pltf. fully appreciated the nature of the risks involved, & voluntarily undertook them, was one of fact for the jury.—BROUGHTON *v.* FIELDING (1910), 10 S. R. N. S. W. 367; 27 N. S. W. W. N. 78.—**AUS.**

553 ii. ——.]—WESTON *v.* RAILWAYS COMR. (1916), 16 S. R. N. S. W. 199; 33 N. S. W. W. N. 160.—**AUS.**

553 iii. ——.]—In an action for compensation for personal injuries caused by negligence, a deft. who invokes the doctrine of *volenti non fit injuria* must have a finding by the jury that the person injured voluntarily incurred the risk, unless it so plainly appears by pltf.'s evidence as to justify the judge in withdrawing it from the jury & dismissing the action.—CANADA FOUNDRY CO. *v.* MITCHELL (1904), 25 C. L. T. 27; 35 S. C. R. 452.—**CAN.**

553 iv. ——.]—RORISON *v.* BUTLER BROTHERS (1911), 31 C. L. T. 396.—**CAN.**

553 v. ——.]—MCPHEE *v.* CANADIAN PACIFIC RY. CO. (1915), 32 W. L. R. 125; 23 D. L. R. 561.—**CAN.**

553 vi. ——.]—MILLER *v.* SMITH & CO. & CANADIAN PACIFIC RY. CO. (Sask.), [1925] 2 W. W. R. 360.—**CAN.**

553 vii. ——.]—LETANG *v.* OTTAWA ELECTRIC RY. CO., [1926] A. C. 725; [1926] 3 D. L. R. 457; [1926] 3 W. W. R. 88; Q. R. 41 K. B. 312.—**CAN.**

553 viii. ——.]—MCKEE *v.* MALCOLMSON, [1925] N. 120.—**IR.**

553 ix. ——.]—ROBERTSON *v.* PRIMROSE & CO., [1910] S. C. 111.—**SCOT.**

t. *What is reasonable care.*]—VIETS *v.* CHUTE (1875), 1 R. & C. 159.—**CAN.**

u. ——.]—What is reasonable care is a question of fact to be decided by the jury, according to the facts of the case.—RAMSAY *v.* TORONTO RY. CO. (1913), 5 O. W. N. 556; 30 O. L. R. 127.—**CAN.**

a. ——.] — ORTH *v.* HAMILTON, GRIMSBY & BEAMSVILLE ELECTRIC RY. CO. (1918), 43 O. L. R. 137; 43 D. L. R. 544.—**CAN.**

b. *Whether greater precautions required.*]—*Held:* it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the co. to take greater precautions than it did & to be much more careful than in ordinary cases where these conditions did not exist.—LAKE ERIE & DETROIT RIVER RY. CO. *v.* BARCLAY (1900), 30 S. C. R. 360.—**CAN.**

c. *Submission of specific questions to jury.*]—In an action founded on negligence it is advisable that specific questions should be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence.—ALASKA PACKERS ASSOCN. *v.* SPENCER (1904), 10 B. C. R. 473; 35 S. C. R. 362.—**CAN.**

d. *Capacity of infant to be guilty of contributory negligence.*] —The capacity of an infant to be guilty of contributory negligence is a question for the jury.—BURTCH *v.* CANADIAN PACIFIC RY. CO. (1906), 8 O. W. R. 837; 13 O. L. R. 632.—**CAN.**

e. *Negligence of employer.*]—LAN *v.* FOLEY BROTHERS (1916), 50 N. S. R. 21.—**CAN.**

PART IX. SECT. 1, SUB-SECT. 4.—A.

554 i. *Verdict justified by evidence.*]—Where all questions of substance have been passed upon by a jury a new trial should not be granted.—PRUETT *v.* GRAND TRUNK PACIFIC RY. CO. (Sask.), [1917] 2 W. W. R. 662.—**CAN.**

554 ii. ——.]—GLASS *v.* PAISLEY RACE COMMITTEE (1902), 5 F. (Ct. of Sess.) 14.—**SCOT.**

PART IX. SECT. 1, SUB-SECT. 4.—B.

556 i. *General rule.*] — FAUX *v.* WILLIAMSTOWN BATHING CO., LTD. (1903), 29 V. L. R. 459.—**AUS.**

556 ii. ——.]—HANDASYDE *v.* MELBOURNE GENERAL MOTOR BUS CO., LTD., [1916] V. L. R. 16.—**AUS.**

556 iii. ——.]—WHITE *v.* NEW SOUTH WALES RAILWAY COMRS. (1923), 23 S. R. N. S. W. 365; 40 N. S. W. W. N. 71.—**AUS.**

556 iv. ——.]—COFIELD *v.* WATERLOO CASE CO., LTD. (1924), 34 C. L. R. 363.—**AUS.**

556 v. ——.]—STANTON *v.* WELLER (1842), 1 Ont. Dig. 901.—**CAN.**

556 vi. ——.]—WOLHAUPTER *v.* FOLEY (1858), 4 All. 90.—**CAN.**

556 vii. ——.]—LUCAS *v.* MOORE CORPN. (1879), 3 A. R. 602.—**CAN.**

556 viii. ——.]—LETT *v.* ST. LAWRENCE & OTTAWA RY. CO., HINTON *v.* ST. LAWRENCE & OTTAWA RY. CO. (1882), 1 O. R. 545.—**CAN.**

556 ix. ——.]—PEERS *v.* ELLIOTT (1892), 23 N. S. R. 276; 21 S. C. R. 19.—**CAN.**

556 x. ——.]—SMITH *v.* NOVA SCOTIA TELEPHONE CO. (1894), 26 N. S. R. 275.—**CAN.**

556 xi. ——.]—GLIDDEN *v.* TOWN OF WOODSTOCK (1895), 33 N. B. R. 388.—**CAN.**

556 xii. ——.]—WILLIAMS *v.* BARTLING (1899), 29 S. C. R. 548.—**CAN.**

556 xiii. ——.]—HESSE *v.* SAINT JOHN RY. CO. (1899), 30 S. C. R. 218.—**CAN.**

556 xiv. ——.]—Upon a trial by jury, the judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts, the extent to which he should do so depending on the circumstances of the case he is trying, &, where the form of the charge was defective in this respect, &, consequently, left the jury in a confused state of mind as to the questions in issue, there should be a new trial.—SPENCER *v.* ALASKA PACKERS' ASSOCN. (1904), 35 S. C. R. 362.—**CAN.**

556 xv. ——.]—DAVIES *v.* CANADIAN AMERICAN COAL & COKE CO. (1905), 7 Terr. L. R. 240; 1 W. L. R. 55.—**CAN.**

556 xvi. ——.]—HILLYER *v.* WILKINSON PLOUGH CO. (1905), 5 O. W. R. 748; 9 O. L. R. 711.—**CAN.**

556 xvii. ——.]—JAMIESON *v.* HARRIS (1905), 35 S. C. R. 625.—**CAN.**

556 xviii. ——.]—In consequence of the want of more explicit directions to the jury on the question of law & the misdirection as to the issues:—*Held:* defts. were entitled to a new trial.—RED MOUNTAIN RY. CO. *v.* BLUE (1907), 39 S. C. R. 390.—**CAN.**

556 xix. ——.]—In an action for damages for injuries suffered by pltf. in consequence of putting his foot in a frog which it was alleged had not been properly packed the trial judge charged the jury that, if the frog was unpacked,

Sect. 1.—*Functions of judge and jury: Sub-sect.* 4, *B. & C.*]

which the judge was bound to leave to the jury.—WALTON *v.* LONDON, BRIGHTON & SOUTH COAST RY. Co. (1866), Har. & Ruth. 424; 14 W. R. 395; *sub nom.* LONDON, BRIGHTON & SOUTH COAST RY. Co. *v.* WALTON, 14 L. T. 253.

557. ——.]—LANGTON *v.* LANCASHIRE & YORKSHIRE RY. Co. (1886), 3 T. L. R. 18, C. A.

558. ——.]—In considering whether there has been any substantial miscarriage . . . there would be a substantial miscarriage if a definition of negligence was presented to the jury, which was reasonably likely to lead to confusion (BOWEN, L.J.).—NASH *v.* CUNARD S.S. Co. (1891), 7 T. L. R. 597, C. A.

559. ——.] — WILKINSON *v.* GRAVES (1893), 9 T. L. R. 464, D. C.

560. Point not raised at trial.]—In an action against a railway co. for negligence in the management of their railway at one of their stations, whereby pltf., a passenger, was injured, the defence relied on by defts.' counsel was, that the accident arose entirely from pltf.'s own want of caution, & that the co. were wholly blameless. The evidence showed that pltf. arrived at the station about two minutes or less before the time of departure of the train, & that, in running along the line, at a place where he ought not to have gone, in order to reach the train, which was some distance ahead on the opposite side of the railway, he fell over a switch-handle, & was considerably hurt The judge left it to the jury to say whether the injury to pltf. was occasioned by the negligence & want of proper care of defts., or resulted entirely from pltf.'s own carelessness, as the co. contended. The jury having found for pltf.:—*Held:* the judge was, under the circumstances, warranted in leaving the case to the jury upon the only points raised by the parties; & the omission to call their attention to the intermediate case of the negligence of both parties being contributory to the accident, was no misdirection. *Qu.:* whether the doctrine of contribution is applicable to a case of this sort, of tort founded upon contract.—MARTIN *v.* GREAT NORTHERN RY. Co. (1855), 16 C. B. 179; 3 C. L. R. 817; 24 L. J. C. P. 209; 1 Jur. N. S. 613; 3 W. R. 477; 139 E. R. 724; *sub nom.* STONE *v.* GREAT NORTHERN RY. Co., 25 L. T. O. S. 144.

Annotations:—**Distd.** Cormnan *v.* Eastern (1859), 4 H. & N. 781. **Mentd.** Browne *v.* Dunn 6 R. 67.

561. Failure to direct on all possible grounds of defence.]—DUNN *v.* NORTH STAFFORDSHIRE RY. Co., No. 401, *ante.*

562. Evidence not amounting to negligence.]—Pltf., while passing along an occupation road which crossed defts.' railway on a level, was knocked down & injured by a train of defts., owing, as was alleged, to defts.' negligence. There were gates across the road left unfastened, & defts. had at one time kept a gatekeeper, but had ceased to keep one some time before the accident. About three years before the accident defts. had obtained powers under an Act to make a new road & discontinue the level occupation road; the powers of the Act were to be exercised within five years, & then to cease; & nothing had been done as to the road till after the accident. The jury negatived negligence in the driver of the engine; but found for pltf. on the ground generally of "negligence as to the crossing." The judge, in summing up, had left to the jury as evidence of negligence in defts. (*inter alia*), the omission to keep a gatekeeper, & the omission to exercise the powers of their Act:—*Held:* a misdirection.

We are sending the case down for a new trial (because) a miscarriage may have arisen from the judge leaving as evidence of negligence what appears to us to be no evidence of negligence at all (MELLOR, J.).—CLIFF *v.* MIDLAND RY. Co. (1870), L. R. 5 Q. B. 258; 22 L. T. 382; 34 J. P. 357; 18 W. R. 456.

Annotations:—**Distd.** Ellis *v.* G. W. Ry. (1874), L. R. 9 C. P. 551. **Refd.** Clarke *v.* Mid. Ry. (1880), 43 L. T. 381.

563. Evidence amounting to negligence.]—MOORE *v.* RANSOME'S DOCK COMMITTEE (1898), 14 T. L. R. 539, C. A.

564. No other verdict possible despite misdirection.]—On Sept. 14, 1898, the son of G., applt., at 1.30 p.m. loaded twelve cows at M. D. station on a truck of resp. co. The cows were consigned to C., another station twenty-five miles distant, & at the time of loading were in good condition. Applt. had on other occasions sent cattle from M. D. to C. & they had usually arrived

the co. would be liable, whether pltf. was guilty of contributory negligence or not:—*Held:* this was a misdirection, &, notwithstanding the question of contributory negligence was submitted to the jury & answered in pltf.'s favour, there should be a new trial.—STREET *v.* CANADIAN PACIFIC RY. (1908), 18 Man. L. R. 334.—**CAN.**

556 xx. ——.]—WALKER *v.* WABASH RY. Co. (1909), 18 O. L. R. 21; 13 O. W. R. 250; 8 Can. Ry. Cas. 487.—**CAN.**

556 xxi. ——.]—HARRIS *v.* JAMIESON (1909), 7 E. L. R. 175.—**CAN.**

556 xxii. ——.]—RAYFIELD *v.* BRITISH COLUMBIA ELECTRIC RY. Co. (1910), 15 B. C. R. 361.—**CAN.**

556 xxiii. ——.]—KING LUMBER Co., LTD. *v.* CANADIAN PACIFIC RY. Co. (1912), 17 B. C. R. 502.—**CAN.**

556 xxiv. ——.]—MYERS *v.* TORONTO RY. Co. (1913), 5 O. W. N. 587; 30 O. L. R. 263.—**CAN.**

556 xxv. ——.]—OAKSHOTT *v.* POWELL (1913), 24 W. L. R. 654; 4 W. W. R. 983; 12 D. L. R. 148; 6 Alta. L. R. 168.—**CAN.**

556 xxvi. ——.]—A new trial will not be granted on the ground of misdirection if the charge taken as a whole fully & fairly leaves the facts to the jury, notwithstanding it contains objectionable isolated expressions or statements.—PORTER *v.* O'CONNELL (1915), 43 N. B. R. 458.—**CAN.**

556 xxvii. ——.]—PESCOVITCH *v.* WESTERN CANADA FLOUR MILLS (1915), 31 W. L. R. 921; 25 Man. L. R. 575.—**CAN.**

556 xxviii.——.]—ENGLAND *v.* COLBURNE (1919), 52 N. S. R. 349.—**CAN.**

556 xxix. ——.]—GAVIN *v.* KETTLE VALLEY RY. Co. (B. C.), [1919] 2 W. W. R. 611; 58 S. C. R. 501; 47 D. L. R. 65.—**CAN.**

556 xxx. ——.]—HURST *v.* MURRAY (1920), 40 O. L. R. 680; 54 D. L. R. 534; 18 O. W. N. 345.—**CAN.**

556 xxxi. ——.]—MATTHEWS *v.* CANADIAN EXPRESS Co. (1910), 8 E. L. R. 28.—**CAN.**

556 xxxii. ——.]—HANLY *v.* SHANNON (1834), 2 Ir. L. Rec. N. S. 111.—**IR.**

556 xxxiii. ——.]—PHILPOTT *v.* CORK & MACROOM RY. Co. (1879), 4 L. R. Ir. 522.—**IR.**

556 xxxiv. ——.]—DEVLIN *v.* BELFAST CORPN., [1907] 2 I. R. 437.—**IR.**

556 xxxv. ——.]—SANDYS *v.* HARRISON, [1926] I. R. 243.—**IR.**

556 xxxvi. ——.]—NEW ZEALAND RAILWAY COMRS. *v.* TRASK (1894), 13 N. Z. L. R. 139.—**N.Z.**

556 xxxvii. ——.]—FRASER *v.* YOUNGER & SONS (1867), 5 Macph. (Ct. of Sess.) 861.—**SCOT.**

556 xxxviii. ——.]—MACDONALD *v.* WYLLIE & SONS (1898), 1 F. (Ct. of Sess.) 339; 36 Sc. L. R. 262; 6 S. L. T. 209.—**SCOT.**

561 i. *Failure to direct on all possible grounds of defence.*]—In an action by pltf. claiming damages for injuries received through falling down a hatchway which deft.'s servants had opened for the purpose of obtaining access to pltf.'s cellar, & which they had failed to close, the judge failed to put to the jury the question of contributory negligence relied upon by deft.:—*Held:* there must be a new trial.—MURRAY *v.* MARITIME TELEGRAPH & TELEPHONE Co., LTD. (1919), 52 N. S. R. 314.—**CAN.**

564 i. *No other verdict possible despite misdirection.*] — *Held:* the judge's charge was open to objection but as under the findings of the jury & the evidence pltf. could not possibly recover, a new trial should be refused.—BRENNER *v.* TORONTO RY. Co. (1908), 40 S. C. R. 540.—**CAN.**

564 ii. ——.]—LEECH *v.* LETHBRIDGE CITY, [1921] 3 W. W. R. 319; 62 S. C. R. 123; 59 D. L. R. 449.—**CAN.**

by 8 p.m. On this occasion they did not arrive till after midnight, & were then found to be in a damaged & exhausted condition. G. then brought an action against respt. co. in the county ct., on the ground that the injuries had been caused by resp.'s negligence. After evidence had been given in support of pltf.'s case, counsel for the defence submitted that there was no evidence of negligence to go to the jury, but the judge held that a *primâ facie* case had been made out. Evidence was then given by the co. to the effect that the delay in the arrival of the cattle was due solely to shunting operations to avoid passenger trains. The judge thereupon withdrew the case from the jury, & gave judgment for the co. G. appealed:—*Held:* though the county ct. judge was wrong in withdrawing the case from the jury, & should have left it to them with a strong direction to find a verdict for defts., yet that it would be useless to send the case back for trial, as the only verdict that could be found on the evidence must be a verdict for defts.—GODDARD *v.* MIDLAND RY. CO. (1899), 80 L. T. 624.

C. Verdict Against Evidence.

565. General rule.]—A new trial ought not to be granted on the ground that the verdict of the jury was against the weight of the evidence, unless the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find.—METROPOLITAN RY. CO. *v.* WRIGHT (1886), 11 App. Cas. 152; 55 L. J. Q. B. 401; 54 L. T. 658; 34 W. R. 746; 2 T. L. R. 553, H. L.

Annotations:—**Refd.** How *v.* L. & N. W. Ry., [1892] 1 Q. B. 391; Banbury *v.* Bank of Montreal, [1918] A. C. 626; Calmenson *v.* Merchants Warehousing Co. (1920), 125 L. T. 129. **Mentd.** Webster *v.* Friedeberg (1886), 17 Q. B. D. 736; Murtagh *v.* Barry (1890), 59 L. J. Q. B. 388; Phillips *v.* Martin (1890), 15 App. Cas. 193; Allcock *v.* Hall, [1891] 1 Q. B. 444; Ferrand *v.* Bingley Township L. B. (No. 1) (1891), 36 Sol. Jo. 58; Hampson *v.* Guy (1891), 64 L. T. 778; Brazier *v.* Camp (1894), 63 L. J. Q. B. 257; Seaton *v.* Sheridan (1896), 12 T. L. R. 285; Jones *v.* Spencer (1897), 77 L. T. 536; Cox *v.* English, Scottish & Australian Bank, [1905] A. C. 168; Neville *v.* London Express Newspapers, [1917] 2 K. B. 564.

566. ——.]—It seems to me that the dock co. undertook the charge of the ship. . . . If there is to be trial by jury, it is not right that we should interfere with a verdict which might have been found by reasonable men (WILLS, J.).—MACCUNN *v.* LONDON & ST. KATHARINE DOCKS CO. (1887), 3 T. L. R. 539, D. C.; *on appeal*, 3 T. L. R. 618, C. A.

567. ——.]—This ct., adopting the principles laid down by the House of Lords, always refused to grant a new trial on the ground that the verdict was against the weight of the evidence, unless the verdict was one which the jury could not properly have found on the evidence before them (LINDLEY, L.J.).—AVIS *v.* GREAT EASTERN RY. CO. (1892), 8 T. L. R. 693, C. A.

568. ——.]—Where there is evidence on which the jury might reasonably act, their finding should not be disturbed. So held in action for damages by pltf., who suffered personal injuries in attempting to pass over a level crossing.

If the evidence was such that upon the facts & the inferences from the facts the jury might answer those questions either in one way or in the other, the case could not be withdrawn from the jury (LORD ESHER, M.R.).—DALLAS *v.* GREAT

PART IX. SECT. 1, SUB-SECT. 4.—C.

565 i. *General rule.*]—PERTH CORPN. *v.* WATSON (1915), 18 W. A. L. R. 8.—**AUS.**

565 ii. ——.]—SOUTH AUSTRALIAN CO. *v.* RICHARDSON (1915), 20 C. L. R. 181.—**AUS.**

565 iii. ——.]—THATCHER *v.* GREAT WESTERN RAILROAD CO. (1855), 4 C. P. 543.—**CAN.**

565 iv. ——.]—New trial ordered, as the verdict was against the weight of evidence.—CAMERON *v.* MILLOY (1864), 14 C. P. 340.—**CAN.**

565 v. ——.]—LEVOY *v.* MIDLAND RY. CO. (1883), 3 O. R. 623.—**CAN.**

565 vi. ——.]—WILTON *v.* NORTHERN RY. CO. (1884), 5 O. R. 490.—**CAN.**

565 vii. ——.]—WATSON *v.* COLCHESTER MUNICIPALITY (1885), 6 R. & G. 549.—**CAN.**

565 viii. ——.]—PARKER *v.* WHITE (1888), 27 N. B. R. 442.—**CAN.**

565 ix. ——.]—BLAKE *v.* CANADIAN PACIFIC RY. CO. (1889), 17 O. R. 177.—**CAN.**

565 x. ——.]—DOYLE *v.* DIAMOND FLINT GLASS CO. (1905), 6 O. W. R. 207; 10 O. L. R. 567.—**CAN.**

565 xi. ——.]—TORONTO RY. CO. *v.* MITCHELL (1905), Cout. 349.—**CAN.**

565 xii. ——.]—SIMS *v.* GRAND TRUNK RY. CO. (1906), 12 O. L. R. 39; 7 O. W. R. 648.—**CAN.**

565 xiii. ——.]—MCDOUGALL *v.* AINSLIE MINING & RY. CO. (1907), 42 N. S. R. 226; 4 E. L. R. 275.—**CAN.**

565 xiv. ——.]—MCGRAW *v.* TORONTO RY. CO. (1908), 18 O. L. R. 154; 13 O. W. R. 129.—**CAN.**

565 xv. ——.]—DYNES *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1910), 15 B. C. R. 429; 47 S. C. R. 395.—**CAN.**

565 xvi. ——.]—ZUFELT *v.* CANADIAN PACIFIC RY. CO. (1911), 19 O. W. R. 77; 2 O. W. N. 1063; 23 O. L. R. 602.—**CAN.**

565 xvii. ——.]—ALEXE *v.* CANADIAN WESTERN LUMBER CO., LTD. (B. C.) (1912), 22 W. L. R. 559; 3 W. W. R. 267; 8 D. L. R. 1.—**CAN.**

565 xviii. ——.]—DART *v.* TORONTO RY. CO. (1912), 23 O. W. R. 380; 4 O. W. N. 315; 8 D. L. R. 121.—**CAN.**

565 xix. ——.]—STEVENS *v.* CANADIAN PACIFIC RY. CO. (1913), 23 O. W. R. 939; 4 O. W. N. 697; 10 D. L. R. 88.—**CAN.**

565 xx. ——.]—ARMISHAW *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1913), 18 B. C. R. 152.—**CAN.**

565 xxi. ——.]—COTTINGHAM *v.* LONGMAN (1913), 26 W. L. R. 650; 5 W. W. R. 969; 15 D. L. R. 296; 48 S. C. R. 542.—**CAN.**

565 xxii. ——.]—WINNIPEG ELECTRIC RY. CO. *v.* SCHWARTZ (1913), 27 W. L. R. 439; 5 W. W. R. 1298; 16 D. L. R. 681; 49 S. C. R. 80.—**CAN.**

565 xxiii. ——.]—SCHELL *v.* R. (1915), 31 W. L. R. 834; 24 D. L. R. 755; 8 Sask. L. R. 275.—**CAN.**

565 xxiv. ——.]—BELL *v.* JOHNSTON BROTHERS, LTD. (1917), 25 B. C. R. 82.—**CAN.**

565 xxv. ——.]—BILLINGTON *v.* HAMILTON STREET RY. CO. (1917), 39 O. L. R. 25; 34 D. L. R. 708.—**CAN.**

565 xxvi. ——.]—GALLAGHER *v.* TORONTO RY. CO. (1918), 41 O. L. R. 143; 13 O. W. N. 199; 40 D. L. R. 114.—**CAN.**

565 xxvii. ——.]—ARMSTRONG CARTAGE & WAREHOUSE CO. *v.* GRAND TRUNK RY. CO. (1918), 42 O. L. R. 660; 14 O. W. N. 152; 43 D. L. R. 122.—**CAN.**

565 xxviii. ——.]—HERMAN *v.* CANADIAN PACIFIC RY. CO. (Sask.), [1919] 3 W. W. R. 45.—**CAN.**

565 xxix. ——.]—DUNPHY *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (B. C.), [1919] 3 W. W. R. 201; 48 D. L. R. 38.—**CAN.**

565 xxx. ——.]—SCOTT *v.* TORONTO RY. CO. (1919), 45 O. L. R. 511; 48 D. L. R. 569; 16 O. W. N. 225.—**CAN.**

565 xxxi. ——.]—HOBSON *v.* RICHMOND CORPN. (1923), 32 B. C. R. 369.—**CAN.**

565 xxxii. ——.]—SMITH *v.* SOUTH VANCOUVER CORPN. & RICHMOND CORPN., [1923] 2 D. L. R. 535; 31 B. C. R. 481; [1923] 1 W. W. R. 417.—**CAN.**

565 xxxiii. ——.]—MOLDOWAN *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1923), 32 B. C. R. 428.—**CAN.**

565 xxxiv. ——.]—MCKIBBEN *v.* NIAGARA, ST. CATHARINES & TORONTO RY. CO., [1923] 1 D. L. R. 394; 53 O. L. R. 164.—**CAN.**

565 xxv. ——.]—LANDELS *v.* CHRISTIE, [1923] 1 D. L. R. 509; [1923] S. C. R. 39.—**CAN.**

565 xxxvi. ——.]—SMITH *v.* BROWNE (1891), 28 L. R. Ir. 1.—**IR.**

565 xxxvii. ——.]—STEELE *v.* BELFAST CORPN., [1920] 2 I. R. 125, 133.—**IR.**

565 xxxviii. ——.]—CASEY *v.* MARTIN (1920), 54 I. L. T. 185.—**IR.**

565 xxxix. ——.]—POWER *v.* DUBLIN UNITED TRAMWAYS CO., [1926] I. R. 302.—**IR.**

565 xl. ——.]—FRASERS *v.* EDINBURGH STREET TRAMWAYS CO. (1882), 10 R. (Ct. of Sess.) 264.—**SCOT.**

565 xli. ——.]—FLORENCE *v.* MANN (1890), 28 Sc. L. R. 215.—**SCOT.**

565 xlii. ——.]—PHILIPS *v.* HUMBER (1904), 41 Sc. L. R. 626.—**SCOT.**

565 xliii. ——.]—MITCHELL *v.* CALEDONIAN RY. CO., [1909] S. C. 746.—**SCOT.**

565 xliv. ——.]—BURNS *v.* NORTH BRITISH RY. CO., [1914] S. C. 754.—**SCOT.**

e. *Evidence doubtful.*]—GRIEVE *v.* ONTARIO & ST. LAWRENCE STEAMBOAT CO. (1855), 4 C. P. 387.—**CAN.**

f. ——.]—ROBINSON *v.* BLETCHER (1857), 15 U. C. R. 159.—**CAN.**

g. ——.]—On the trial of an

Sect. 1.—*Functions of judge and jury: Sub-sect.* 4, *C. & D. Sect.* 2: *Sub-sect.* 1, *A. & B.*]

WESTERN RY. CO. (1893), 57 J. P. 584; 9 T. L. R. 344, C. A.

569. Evidence doubtful—Judge dissatisfied with verdict.]—In an action against a person for negligently keeping his fire, whereby pltf.'s house was burned, if the jury find a verdict for deft., the ct. will not grant a new trial on the ground that the evidence was doubtful, & the judge dissatisfied with the verdict.—SMITH *v.* CROMPTON (1695), 5 Mod. Rep. 87; 87 E. R. 536; *sub nom.* SMITH *v.* BRAMPSTON, 2 Salk. 644; *sub nom.* SMITH *v.* FRAMPTON, 1 Ld. Raym. 62; 2 Salk. 644.

Annotations:—**Refd.** Farewell *v.* Chaffey (1756), 1 Burr. 54. **Mentd.** Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Smith d. Dormer *v.* Parkhurst (1738), Andr. 315; Witham *v.* Lewis (1744), 1 Wils. 48.

570. Verdict supported to some extent.]—BARFEILD *v.* GREAT WESTERN RY. CO. (1854), 24 L. T. O. S. 99.

571. ——.]—ROBERTS *v.* GREAT EASTERN RY. CO. (1872), 36 J. P. Jo. 52.

D. Improper Verdict.

572. Jury failing to appreciate point.]—S. was attempting to cross at a railway station on a level crossing, when an engine ran over & killed him. An action being brought by the widow & children for compensation, at the trial a verdict was found that both parties were to blame, but the railway co. should bear the greater responsibility:—*Held:* (1) this was not a verdict for defts.; (2) it was so vague that the jury could not have rightly appreciated the point whether the negligence of deceased, if any, contributed to the accident, &, therefore, a third trial ordered.—SOUTH EASTERN RY. CO. *v.* SMITHERMAN (1883), 47 J. P. 773, H. L.

SECT. 2.—BURDEN OF PROOF.

SUB-SECT. 1.—OF NEGLIGENCE.

A. General Rule.

See, generally, EVIDENCE, Vol. XXII., pp. 35–39, Nos. 119–155.

573. Burden lies upon party alleging negligence.]—HAMMACK *v.* WHITE, No. 590, *post.*

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action against a railway co. for an injury caused by negligently running their engine over a level crossing, one witness for pltf. swore the engine was running rapidly, & that the whistle was not blown nor the bell rung, but in this he was contradicted by the driver & fireman:—*Held:* a verdict for pltf. ought not to be set aside.—NORTHRUP *v.* CANADIAN PACIFIC RY. CO. (1894), 32 N. B. R. 365.—**CAN.**

PART IX. SECT. 1, SUB-SECT. 4.—D.

572 i. *Jury failing to appreciate point.*]—When a case has been properly submitted to a jury, & their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence notwithstanding that the trial judge was dissatisfied with the verdict.—STONOR *v.* LAMB (Y. T.) (1906), 4 W. L. R. 26.—**CAN.**

h. *Findings of jury — Sympathy shown—To person in poor circumstances.*]—MCGUNIGAL *v.* GRAND TRUNK RY. CO. (1873), 33 U. C. R. 194.—**CAN.**

k. —— *General findings — Effect of.*]—Where questions are submitted to the jury, they should be asked specifically to find what was the negligence of deft. which caused the injury, & general findings of negligence will not support a verdict unless the same is shown to be the direct cause of the injury.—MADER *v.* HALIFAX ELECTRIC TRAMWAY CO. (1905), 37 S. C. R. 94.—**CAN.**

l. —— *Inconsistent & conflicting.*]—Where the findings of the jury were conflicting & inconsistent to such a degree as to satisfy the ct. that there had been a mistrial, a new trial was directed.—GRAND TRUNK RY. CO. *v.* MOORE (1906), Cout. 401.—**CAN.**

m. —— ——.]—BALL *v.* WABASH RY. CO. (1915), 35 O. L. R. 84; 9 O. W. N. 258.—**CAN.**

n. —— ——.]—MCGANN *v.* DONALD (A. B.), LTD., DONALD (A. B.), LTD. *v.* MCGANN, [1920] N. Z. L. R. 528.—**N.Z.**

o. —— *Vague & uncertain.*]—HUDSON *v.* SMITH'S FALLS ELECTRIC POWER CO., LTD. (1913), 24 O. W. R. 539; 4 O. W. N. 1227; 11 D. L. R. 479.—**CAN.**

p. —— ——.]—COOP *v.* ROBERT SIMPSON CO. (1918), 42 O. L. R. 488; 14 O. W. N. 59; 42 D. L. R. 626.—**CAN.**

q. —— ——.]—WOOLSTON *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1919), 25 B. C. R. 518.—**CAN.**

r. —— ——.]—MCFETRIDGE *v.* CANADIAN PACIFIC RY. CO. (B. C.), [1926] 4 D. L. R. 30; [1926] 3 W. W. R. 279.—**CAN.**

t. —— *Perverse.*]—WYERS *v.* WINLOW (1913), 24 O. W. R. 401; 4 O. W. N. 1080; 10 D. L. R. 587.—**CAN.**

a. *Failure of jury to answer questions.*]—PUDSEY *v.* DOMINION ATLANTIC RY. CO. (1896), 25 S. C. R. 691.—**CAN.**

b. ——.]—MARSHALL *v.* GOWANS (1911), 20 O. W. R. 37; 3 O. W. N. 69; 24 O. L. R. 522.—**CAN.**

c. *Oral & written answers of jury —Consistency of.*]—HERRON *v.* TORONTO RY. CO. (1912), 28 O. L. R. 59; 4 O. W. N. 691.—**CAN.**

PART IX. SECT. 2, SUB-SECT. 1.—A.

573 i. *Burden lies upon party alleging negligence.*]—BRIDGES *v.* ONTARIO ROLLING MILLS CO. (1890), 19 O. R. 731.—**CAN.**

573 ii. ——.]—The mere fact that a horse, while being driven along the highway, has been frightened by the whistle of a steam engine, used by defts. for the purpose of their lawfully operated waterworks, is not sufficient to make them responsible for damages resulting from the horse having run away. Some positive evidence of negligence in the use of the whistle must be given, or at least some evidence that its use might be expected to cause such an accident, so as to cause it to be a nuisance to the highway.—ROE *v.* LUCKNOW VILLAGE (1893), 21 A. R. 1.—**CAN.**

573 iii. ——.]—In an action to recover damages for death caused by alleged negligence, the *onus* is on pltf. to prove not only that deft. was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death.—YOUNG *v.* OWEN SOUND DREDGE & CONSTRUCTION CO. (1899), 21 C. L. T. 15; 27 A. R. 649.—**CAN.**

573 iv. ——.]—MACPHERSON *v.* MACLACHLAN (1904), 36 N. S. R. 435.—**CAN.**

573 v. ——.]—In actions for damages for the destruction of pltf.'s property by fire spreading from the adjoining land of deft.:—*Held:* it was not necessary for deft. to explain the cause of the fire; the burden was on pltfs. of showing that it was caused by deft.—CLARK *v.* WARD, KIRSTEIN *v.* WARD (1910), 13 W. L. R. 83.—**CAN.**

573 vi. ——.]—FARMER *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1911), 16 B. C. R. 423.—**CAN.**

573 vii. ——.]—ROSTROM *v.* CANADIAN NORTHERN RY. CO. (1912), 21 W. L. R. 225; 2 W. W. R. 260; 22 Man. L. R. 250; 3 D. L. R. 302.—**CAN.**

573 viii. ——.]—ROOT *v.* VANCOUVER POWER CO., LTD. (1912), 17 B. C. R. 203.—**CAN.**

573 ix. ——.]—Pltf. was injured as result of an explosion in a building, & brought this action to recover damages for his injuries, alleging that the explosion was caused by natural gas which had accumulated in or under the building through negligence of deft. co.:—*Held:* the *onus* was upon pltf., his case rested almost entirely on conjecture, & he had not satisfied the *onus*.—KARABELAS *v.* CANADIAN WESTERN NATURAL GAS CO. (1914), 28 W. L. R. 669; 16 D. L. R. 791.—**CAN.**

573 x. ——.]—A driver of an automobile is justified in departing from the rule of the road in an emergency caused by another's negligence, but the *onus* of proof of such negligence rests upon said driver.—MCGREGOR *v.* LOUDON (1914), 29 W. L. R. 809; 7 W. W. R. 221.—**CAN.**

573 xi. ——.]—TILL *v.* TOWN OF OAKVILLE (1915), 33 O. L. R. 120; 21 D. L. R. 113.—**CAN.**

573 xii. ——.]—In an action for negligence alleged to have been the cause of damage which has occurred, pltf. in order to succeed must give some affirmative evidence of negligence.—HOLDEN *v.* MOSKOVITCH (Sask.), [1920] 3 W. W. R. 825.—**CAN.**

573 xiii. ——.]—Where facts are as easily ascertainable by pltf. as by deft. it is for him who alleges negligence to prove it.—GAGNON *v.* LANGIS (1920), 48 N. B. R. 76.—**CAN.**

573 xiv. ——.]—MYALL *v.* QUICK (Alta.) (1921), 62 D. L. R. 509; [1922] 1 W. W. R. 1.—**CAN.**

573 xv. ——.]—GUNN *v.* OAK HALL, LTD. (1922), 55 N. S. R. 265.—**CAN.**

573 xvi. ——.]—The burden of proof is on pltf. to establish that deft. at the time of a collision was encroaching on pltf.'s half of the road.—HOUGH *v.* BELLERIVE, [1922] 3 W. W. R. 490; 69 D. L. R. 254.—**CAN.**

573 xvii. ——.]—*Held:* where a suppliant by his Petition of Right claimed damages for the loss of a barge destroyed by an explosion in a govt. grain elevator, whilst it was being loaded with grain therefrom, & which explosion it was alleged was due to the negligence of persons in charge thereof, the burden of proof is upon the suppliant, who must show affirmatively that there was such

574. ——.]—Pltfs. were assignees for valuable consideration of bills of lading for 1,000 barrels of oilcake shipped on board the *Figlia Maggiore*, at New York, & which the master had agreed "to deliver in like good order & condition at the port of London." The vessel was at the time under a charterparty, of which the shippers were ignorant, the master having put up the ship as a general ship. The oilcake was stowed with hogsheads of tobacco, oaken staves being placed between them. A suit having been brought by pltfs. against the shipowner for damage suffered by the oilcake on the voyage:—*Held:* the *onus* of proving negligence lay on pltfs.—THE FIGLIA MAGGIORE (1868), L. R. 2 A. & E. 106; 37 L. J. Adm. 52; 18 L. T. 532; 3 Mar. L. C. 97.

Annotations:—**Refd.** The Freedom (1869), L. R. 2 A. & E. 346; The Nepoter (1869), L. R. 2 A. & E. 375. **Mentd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74.

575. ——.]—A horse drawing a brougham in a public street bolted & ran away; he threw a shoe just after he bolted, about 20 yards off, & a second one about three strides after. The coachman tried his hardest to stop the horse, but was not able to do so. Pltf. did not hear anyone call out or any shout:—*Held:* upon the facts pltf. had not made out a *primâ facie* case of negligence, & pltf. was properly nonsuited.—MANZONI *v.* DOUGLAS (1880), 6 Q. B. D. 145; 50 L. J. Q. B. 289; 45 J. P. 391; 29 W. R. 425.

Annotations:—**Consd.** Gayler & Pope *v.* Davies, [1924] 2 K. B. 75. **Refd.** Manton *v.* Brocklebank, [1923] 2 K. B. 212.

576. ——.]—It is for pltf. to show a negligence of the foreman from which the accident ensued (LORD COLERIDGE, C.J.).

There is nothing to show that the foreman had any reason to apprehend what ensued (A. L. SMITH, J.).—BOOKER *v.* HIGGS (1887), 3 T. L. R. 618, D. C.

577. ——.]—Eight cows having been safely loaded in a truck at D. for conveyance to B., on the arrival of the train at B. it was found that of these one had a leg broken, & that three others were injured about the hips & rump. The owner of the cows having brought an action for negligence against the railway co., & having proved the injuries, & given his opinion that they were caused by undue shunting & jerking of the train:—*Held:* the *onus* of proof being on pltf., & no affirmative evidence having been given by him of negligence on the part of the railway co., defts. were entitled to judgment.—SMITH *v.* MIDLAND RY. CO. (1887), 57 L. T. 813; 52 J. P. 262; 4 T. L. R. 68, D. C.

Annotation:—**Distd.** Ainsly *v.* G. N. Ry. (1891), 8 T. L. R. 148.

578. ——.]—Inasmuch as the resps. had shown that they had used the best form of locomotive, the *onus* lay upon applts. to show that resps. had been guilty of negligence (*per* CUR.).—PORT GLASGOW & NEWARK SAILCLOTH CO. *v.* CALEDONIAN RY. CO. (1893), 9 T. L. R. 300, H. L.

Annotation:—**Refd.** Canadian Pacific Ry. *v.* Roy, [1902] A. C. 220.

579. ——.]—Pltf.'s horse was carried by railway from Waterloo to Guildford under a contract which relieved the railway co. from liability for loss or damage, "except upon proof that the same was occasioned by neglect or default on the part of the co. or their servants." The horse was properly boxed at Waterloo & upon arrival at Surbiton the train was divided, & the front portion was shunted to allow a horsebox to be taken off. The horse box in which pltf.'s horse was was in the rear portion of the train. Before the front portion of the train was backed on to the rear portion the horse was heard groaning & on the box being opened it was found lying on its back with its feet in the air, the ropes to the headstall being still secured & drawn tight. The horse was got out, when it was found to be injured in two or three places. There was no evidence of any improper slowing down or stopping of the train at Surbiton. The box was then converted into a loose box by taking out the partitions, which left exposed the hooks or hinges on which the partitions hung, & the horse was sent on by a later train to Guildford. The ct. came to the conclusion that there was no evidence that any of the injuries were occasioned between Surbiton & Guildford. In an action against the railway co. to recover damages for the injury to the horse:—*Held:* there was no evidence of any "neglect or default" on the part of the railway co. & pltf. was not entitled to recover.—RUSSELL *v.* LONDON & SOUTH WESTERN RY. CO. (1908), 24 T. L. R. 548, C. A.

Annotation:—**Consd.** United Machine Tool Co. *v.* G. W. Ry. (1914), 30 T. L. R. 312.

580. ——.]—MCKENZIE *v.* CHILLIWACK CORPN., No. 136, *ante*.

B. When Burden Shifted.

See EVIDENCE, Vol. XXII., pp. 39–41, Nos. 161–177.

581. After primâ facie proof—Burden shifted to defendant.]—Deft.'s attorney having negligently suffered judgment by default against his client. In an action by the client against his attorney:—*Held:* the former having proved a *primâ facie* case of negligence, the *onus* lay on the latter to

573 xvii. ——.]—Where, by the breaking of a tool steel hook commonly used for the purpose for which it was in use at the time of breaking, an accident occurred, causing injuries to a workman pltf.:—*Held:* the rule *res ipsa loquitur* did not apply & the *onus* of proving negligence fell upon pltf., & from the evidence he had failed to discharge the *onus*.—MCKEOWN *v.* CANADIAN NATIONAL RYS. (Sask.), [1923] 1 D. L. R. 95; [1922] 3 W. W. R. 1009.—**CAN.**

573 xix. ——.]—UNION S.S. CO. *v.* HOBBS (1893), 12 N. Z. L. R. 98.—**N.Z.**

573 xx. ——.]—The burden of proving negligence is on pltf. who alleges it.—KING *v.* AUCKLAND ELECTRIC TRAMWAY CO., LTD. (1912), 31 N. Z. L. R. 924.—**N.Z.**

573 xxi. ——.]—LOCKWOOD *v.* AUCKLAND ELECTRIC TRAMWAY CO., LTD., [1917] N. Z. L. R. 857.—**N.Z.**

573 xxii. ——.]—GALLOWAY *v.* ANDERSON, [1920] N. Z. L. R. 8.—**N.Z.**

573 xxiii. ——.]—READFORD *v.* NATHAN & CO., LTD., [1920] N. Z. L. R. 823.—**N.Z.**

573 xxiv. ——.]—DOUGLAS *v.* GRAY (1890), 17 R. (Ct. of Sess.) 858.—**SCOT.**

573 xxv. ——.]—GOLDBERG *v.* GLASGOW & SOUTH WESTERN RY. CO., [1907] S. C. 1035.—**SCOT.**

PART IX. SECT. 2, SUB-SECT. 1.—B.

581 i. *After primâ facie proof—Burden shifted to defendant.*]—MIDDLETON *v.* MELBOURNE TRAMWAY & OMNIBUS CO., LTD. (1913), 16 C. L. R. 572.—**AUS.**

581 ii. —— ——.]—CATARAQUI BRIDGE CO. *v.* HOLCOMB (1861), 21 U. C. R. 273.—**CAN.**

581 iii. —— ——.]—CRAWFORD *v.* UPPER (1889), 16 A. R. 440.—**CAN.**

581 iv. —— ——.]—TAIT *v.* JACKSON, 20 C. L. T. 234.—**CAN.**

581 v. —— ——.]—LAFVENDAI *v.* NORTHERN FOUNDRY & MACHINE CO. (Man.) (1911), 19 W. L. R. 350; 2 W. W. R. 40.—**CAN.**

581 vi. —— ——.]—Where an accident has happened resulting in injury, though the happening of the accident in itself may not be evidence of negligence, yet where pltf. establishes that deft. owed to him a duty to take care, & also establishes that the injuries complained of resulted from a condition of things apparently incompatible with the performance of that duty, the maxim *res ipsa loquitur* applies, & the *onus* is cast upon deft. of accounting for the accident.—LINDSAY *v.* DAVIDSON (1911), 19 W. L. R. 433; 1 W. W. R. 125; 4 Sask. L. R. 351.—**CAN.**

581 vii. —— ——.]—FLEMING *v.* TORONTO RY. CO. (1912), 23 O. W. R.

Sect. 2.—*Burden of proof: Sub-sect.* 1, *B., C. & D.; sub-sect.* 2. *Sect.* 3: *Sub-sects.* 1 & 2. *Sect.* 4: *Sub-sect.* 1.]

show that defensive proceedings would have put his client in no better situation, & not upon the client to prove that he had a good defence.—GODEFROY *v.* JAY (1831), 7 Bing. 413; 5 Moo. & P. 284; 9 L. J. O. S. C. P. 122; 131 E. R. 159.

Annotations:—**Mentd.** Boorman *v.* Brown (1842), 3 Q. B. 511; Thomson *v.* Clanmorris, [1900] 1 Ch. 718.

582. —— ——.]—Property had been conveyed to deft. by way of indemnity, which being no longer required, a reconveyance was executed, but the title deeds were not forthcoming; & on a bill filed, the master found that they were lost, while in deft.'s custody:—*Held:* the *onus* was on deft. to disprove negligence.—BROWN *v.* SEWELL (1853), 11 Hare, 49; 1 Eq. Rep. 61; 22 L. J. Ch. 1063; 22 L. T. O. S. 32; 17 Jur. 708; 68 E. R. 1182.

Presumption of negligence.]—*See* Sect. 4, *post.*

Actions on bills of lading.]—*See* SHIPPING.

C. Breach of Statutory Duty.

Collision at sea—Breach of Admiralty regulations.]—*See* SHIPPING.

—— **Negligence of compulsory pilot.**]—*See* SHIPPING.

Accidents at level crossings.]—*See* RAILWAYS.

Breach of coal regulations.]—*See* MINES, Vol. XXXIV., pp. 740, 741, No. 1168.

Breach of statutory duties generally.]—*See* PUBLIC AUTHORITIES; STATUTES, & Titles *passim.*

D. In Particular Instances.

Bailment—Duty to take care.]—*See* BAILMENT, Vol. III., pp. 63, 89, Nos. 65–68, 222, 223.

Carriers—Negligence in carriage of persons.]—*See* CARRIERS, Vol. VIII., pp. 73, 93, Nos. 492, 631–633.

—— **Negligence in carriage of goods.**]—*See* CARRIERS, Vol. VIII., pp. 43, 44, 65, Nos. 261, 440.

—— **Negligence in carriage of animals.**]—*See* ANIMALS, Vol. II., p. 281, No. 550.

SUB-SECT. 2.—OF CONTRIBUTORY NEGLIGENCE.

583. Whether burden lies on plaintiff or defendant.]—DUBLIN, WICKLOW & WEXFORD RY. CO. *v.* SLATTERY, No. 482, *ante.*

584. ——.]—DAVEY *v.* LONDON & SOUTH WESTERN RY. CO., No. 759, *post.*

585. ——.]—In an action for negligence pltf. must prove facts from which the proper inference is that the injury was caused by the negligence of deft., & not by his own.—BETTANY *v.* WAINE (1885), 1 T. L. R. 588, D. C.

586. ——.]—DE TEYRON *v.* WARING, No. 314, *ante.*

587. ——.]—A very serious misapprehension appears to exist with regard to contributory negligence. There seems to be an impression that in actions of negligence the *onus* is on pltf., not only of proving negligence on the part of defts. but also to negative the fact of contributory negligence on his part. This is not so (MANISTY, J.).—HOLLAND *v.* NORTH METROPOLITAN TRAMWAYS CO. (1886), 3 T. L. R. 245.

588. ——.]—WAKELIN *v.* LONDON & SOUTH WESTERN RY. CO., No. 507, *ante.*

T. 3.—**WHAT MUST BE PROVED.**

SUB-SECT. 1.—EXISTENCE OF DUTY.

See Part I., Sect. 2, sub-sect. 1, *ante.*

SUB-SECT. 2.—PRESUMPTION OF NEGLIGENCE.

See Sect. 4, *post.*

SECT. 4.—**PRESUMPTION OF NEGLIGENCE—RES IPSA LOQUITUR.**

SUB-SECT. 1.—INFERENCE FROM ESTABLISHED FACTS.

589. When presumption arises.]—TOBIN *v.* MURISON, No. 531, *ante.*

385; 4 O. W. N. 323; 27 O. L. R. 332; 8 D. L. R. 507.—**CAN.**

581 viii. —— ——.]—WOOLMAN *v.* CUMMER (1912), 23 O. W. R. 504; 4 O. W. N. 371; 8 D. L. R. 135.—**CAN.**

581 ix. —— ——.]—IMPERIAL TOBACCO CO. OF CANADA, LTD. *v.* HART (1918), 51 N. S. R. 379; 36 D. L. R. 63.—**CAN.**

581 x. —— ——.]—SEROTA *v.* BELWAY, [1919] 2 W. W. R. 904; 47 D. L. R. 621; 12 Sask. L. R. 349.—**CAN.**

581 xi. —— ——.]—BRAWLEY *v.* TORONTO RY. CO. (1919), 46 O. L. R. 31; 16 O. W. N. 316.—**CAN.**

581 xii. —— ——.]—HEIGASON *v.* HOWARD, [1922] 1 W. W. R. 865; 65 D. L. R. 81; 32 Man. L. R. 88.—**CAN.**

581 xiii. —— ——.]—MOCK *v.* REGINA TRADING CO., LTD. & MCGREGOR, [1922] 2 W. W. R. 1241; 68 D. L. R. 159.—**CAN.**

581 xiv. —— ——.]—EAST INDIAN RY. CO. *v.* KIRKWOOD (1919), I. L. R. 48 Calc. 757.—**IND.**

581 xv. —— ——.]—FLANNERY *v.* WATERFORD & LIMERICK RY. CO. (1877), I. R. 11 C. L. 30.—**IR.**

581 xvi. —— ——.]—NELSON COLLEGE *v.* SAVAGE & SONS (1906), 26 N. Z. L. R. 21.—**N.Z.**

581 xvii. —— ——.]—Where a borrower returns the article borrowed in a damaged condition & damages are claimed in respect thereof, the *onus* lies on him to prove that he exercised reasonable care in the use he made of the article.—BAIN *v.* STRANG (1889), 16 R. (Ct. of Sess.) 186.—**SCOT.**

581 xviii. —— ——.]—MILNE *v.* TOWNSEND (1892), 19 R. (Ct. of Sess.) 830.—**SCOT.**

581 xix. —— ——.]—BALLARD *v.* NORTH BRITISH RY. CO., [1923] S. C. 43, H. L.—**SCOT.**

581 xx. —— ——.]—MILLER *v.* DURBAN CORPN. (1926), 47 N. L. R. 241.—**S. AF.**

PART IX. SECT. 2, SUB-SECT. 2.

583 i. *Whether burden lies on plaintiff or defendant.*]—Pltf. was injured by falling into a trench opened by deft., under a permit from the City, across the sidewalk of a public street, for the purpose of connecting his premises with the main drain:—*Held:* there was no *onus* on the part of pltf. to disprove contributory negligence, but deft. must maintain his defence independently of pltf.'s case.—SHANNAHAN *v.* RYAN (1887), 20 N. S. R. (8 R. & G.) 142; 8 C. L. T. 379.—**CAN.**

583 ii. ——.]—In an action to recover damages for negligence, tried with a jury, where contributory negligence is set up as a defence, the *onus* of proof of the two issues is respectively upon pltf. & deft.—MORROW *v.* CANADIAN PACIFIC RY. CO. (1894), 21 A. R. 149.—**CAN.**

583 iii. ——.]—From the moment pltf. makes out a *primâ facie* case, that the injury was caused by the negligence of deft., the *onus* is cast on deft., if he sets it up, to show & obtain a finding of contributory negligence.—MCMILLAN *v.* WESTERN DREDGING CO. (1895), 4 B. C. R. 122.—**CAN.**

583 iv. ——.]—BELL *v.* CAPE BRETON ELECTRIC CO., LTD. (1905), 37 N. S. R. 298.—**CAN.**

583 v. ——.]—RICKETTS *v.* SYDNEY & GLACE BAY RY. CO. (1905), 37 N. S. R. 270.—**CAN.**

583 vi. ——.]—MAITLAND *v.* MACKENZIE (1913), 28 O. L. R. 506; 4 O. W. N. 1059.—**CAN.**

583 vii. ——.]—The *onus* of proving pltf.'s negligence & that it is the cause of the injury, is upon deft.—TESSIER *v.* OTTAWA CORPN. (1918), 41 O. L. R. 205; 13 O. W. N. 234; 40 D. L. R. 12.—**CAN.**

d. Special pleading—Whether necessary.]—In trespass for driving against pltf.'s horse, that the accident happened from pltf.'s negligence, or without any fault of deft., could not be shown under the general issue, but must have been pleaded specially.—MACDONALD *v.* MONK (1833), 3 O. S. 20.—**CAN.**

Held: evidence of contributory negligence is properly admissible under a defence of "not guilty by statute" without any special plea of contributory negligence.—DOAN *v.* MICHIGAN CENTRAL RY. CO. (1890), 17 A. R. 481.—**CAN.**

PART IX. SECT. 4, SUB-SECT. 1.

589 i. *When presumption arises.*]—Mere fact that a person lawfully walking along a street is run over by vehicle raises *primâ facie* case of negligence.—BRUNDELL *v.* WANE (1881), 7 V. L. R. (L.) 319.—**AUS.**

589 ii. ——.]—The mere happening

590. ——.]—The mere happening of an accident is not sufficient evidence of negligence to be left to the jury; but pltf. must give some affirmative evidence of negligence on the part of deft.

Where, therefore, it was shown that deft. was riding a horse at a walk, when the animal became restive, &, rushing on to the pavement, knocked down & killed the husband of pltf.; but the witnesses for pltf. also proved that deft. was doing his best to prevent the accident:—*Held:* this was no evidence of negligence; taking the evidence of the witnesses for pltf. altogether, it was clear that deft. was carried on to the pavement against his will, & there was therefore nothing to turn the scale of evidence against deft., & to show that he was responsible for the consequences of the accident.—HAMMACK *v.* WHITE (1862), 11 C. B. N. S. 588; 31 L. J. C. P. 129; 5 L. T. 676; 8 Jur. N. S. 796; 10 W. R. 230; 142 E. R. 926.

Annotations:—**Apld.** Scott *v.* London Dock Co. (1864), 34 L. J. Ex. 17. **Consd.** Fletcher *v.* Rylands (1866), L. R. 1 Exch. 265. **Distd.** Smith *v.* G. E. Ry. (1866), L. R. 2 C. P. 4. **Folld.** Manzoni *v.* Douglas (1880), 6 Q. B. D. 145. **Consd.** Gayler & Pope *v.* Davies, [1924] 2 K. B. 75. **Refd.** Byrne *v.* Boadle (1863), 2 H. & C. 722; R. *v.* Dant (1865), Le. & Ca. 567; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317; Fowler *v.* Lock (1872), 7 C. P. 272; Holmes *v.* Mather (1875), 44 L. J. Ex. 176; Lilly *v.* Tilling & L. C. C. (No. 1) (1912), 57 Sol. Jo. 59; Manton *v.* Brocklebank [1923] 2 K. B. 212; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

591. ——.]—HIGGS *v.* MAYNARD (1866), Har. & Ruth. 581; 14 L. T. 332; 12 Jur. N. S. 705; 14 W. R. 610.

592. ——.]—The doctrine of presumption of negligence from the mere fact of an accident must not be pushed too far.—AGASSIZ *v.* LONDON TRAMWAY CO. (1872), 27 L. T. 492; 21 W. R. 199.

593. ——.]—Defts. were empowered by a local Act to construct & maintain certain waterworks & to appropriate certain streams & waters. The Act provided that as compensation for the taking of the water from a certain dike defts. should cause to flow from a reservoir into such dike a specified quantity of water per minute during every lawful working day; & further provided that in case of neglect on the part of defts. by, or in consequence of, which the specified quantity of water should not so flow, defts. should for every day on which such neglect should occur forfeit & pay to the occupiers of each of the mills & works affected thereby the sum of £5, & should, in addition make compensation for loss, damage or injury sustained by such occupiers in respect of which such penalties should be insufficient compensation. Pltfs., who were eight mill occupiers, alleged that by reason of the neglect of defts., the specified quantity of water did not flow into such dike for a period including forty three working days, & each pltf. claimed £215, the amount of the penalties of £5 per day for forty three days. At the trial of the action pltfs. proved that there was sufficient water in the reservoir to enable defts. to send down the statutory quantity, & that the pipes, if not defective, were sufficient in size to send down that quantity. It was further proved that such pipes require care & attention from time to time, but that defts.' pipes had not been inspected for a period of thirty years:—*Held:* defts. were under an obligation to use reasonable care to send down the statutory quantity of water, & the evidence given by pltfs. established a *primâ facie* case of neglect & cast upon defts. the burden of proving that they had used reasonable care.—BEAUMONT *v.* HUDDERSFIELD CORPN. (1902), 67 J. P. 57; 19 T. L. R. 97; 47 Sol. Jo. 127; 1 L. G. R. 118, C. A.

Annotation:—**Mentd.** Meltham Spinning Co. *v.* Huddersfield Corpn. (1903), 89 L. T. 403.

594. ——.]—A motor omnibus belonging to defts., in which pltf. was a passenger, "skidded" upon a road the surface of which was greasy from rain, & ran into an electric light standard, & pltf. was in consequence injured. At the trial of an action brought by pltf. in the county ct. in respect of the injury so occasioned to her, there was no evidence given for pltf. of anything, beyond the above-mentioned facts, in the nature of negligence on the part of any servant of defts. in the driving or management of the omnibus, or of any defect in the construction or condition of the particular omnibus, or that motor omnibuses generally were of such a character as to constitute a nuisance, but it was apparently assumed, & not disputed by defts., that motor omnibuses however well constructed, had a tendency to skid when the road was greasy. Defts. called no witnesses except as to quantum of damage. The case was left to the jury, who found a verdict for pltf., but subsequently the county ct. judge, being of opinion that there was no evidence for the jury of liability on the part of defts., entered judgment for them:—*Held:* upon the above-mentioned facts, there was no evidence for the jury that defts. allowing the motor omnibus to run under the circumstances constituted a nuisance, & therefore the decision of the county ct. judge was correct.

Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident & so much of the surrounding circumstances as was essential to its occurrence, of an accident is not as a general rule *primâ facie* evidence of negligence. If the cause of an injury is shown there may or may not be, according to the circumstances, evidence for the jury.—UNION BREWERY *v.* HUTCHENS (1918), 20 W. A. L. R. 82.—**AUS.**

589 iii. ——.]—CANADIAN PACIFIC RY. CO. *v.* LAWSON, Cass. Dig. 2 ed. 729.—**CAN.**

589 iv. ——.]—The owner of a building, from which a cornice overhanging the sidewalk falls, because the nails fastening it to the building have become loosened by ordinary decay, & injures a passer-by, is liable in damages without proof of knowledge on his part of the dangerous condition of the cornice, the defect being one that could have been ascertained by him by reasonable inspection.—ROBERTS *v.* MITCHELL (1894), 21 A. R. 433.—**CAN.**

589 v. ——.]—BACON *v.* GRAND TRUNK RY. CO. (1906), 12 O. L. R. 196; 7 O. W. R. 753.—**CAN.**

589 vi. ——.]—MCDONALD *v.* SYDNEY (1912), 12 E. L. R. 163; 8 D. L. R. 99; 49 C. L. J. N. S. 73; 46 N. S. R. 438.—**CAN.**

589 vii. ——.]—The maxim *res ipsa loquitur* was applicable against deft.; when a street car leaves the rails & collides with a vehicle lawfully upon the highway the *onus* is upon the railway co. to show an absence of negligence on its part, for the happening of such an event is more consistent with the existence of negligence than with the absence of it.—ALLIANCE INSURANCE CO. *v.* WINNIPEG ELECTRIC RY. CO., [1921] 2 W. W. R. 816; 31 Man. L. R. 251.—**CAN.**

589 viii. ——.]—CALGARY WATER POWER CO., LTD. *v.* FEGLES CONSTRUCTION CO., LTD., [1923] 1 D. L. R. 694; 19 Alta. L. R. 256; [1923] 1 W. W. R. 326.—**CAN.**

589 ix. ——.]—TROTT *v.* KINGSBURY (Sask.), [1923] 4 D. L. R. 663.—**CAN.**

589 x. ——.]—If two persons are hunting together & a gun in the hands of one goes off so that the other is shot in the foot, then, in an action by the latter against the former for damages, a presumption of negligence arises against deft., who must show both that the shooting was accidental & that it was not due to neglect or want of due caution.—BAYLEY *v.* LOVE, [1924] 3 W. W. R. 155: [1924] 3 D. L. R. 1093; 34 B. C. R. 195.—**CAN.**

589 xi. ——.]—SHERLAW *v.* LEWIS (1913), 32 N. Z. L. R. 1052.—**N.Z.**

589 xii. ——.]—Where a runaway horse & carriage runs down a person in broad daylight in a public street the presumption is that the owner of the horse & carriage is in fault.—SNEE *v.* DURKIE (1903), 6 F. (Ct. of Sess.) 42; 41 Sc. L. R. 39; 11 S. L. T. 397.—**SCOT.**

f. Fire not of itself evidence of

Sect. 4.—Presumption of negligence—Res ipsa loquitur: Sub-sects. 1 & 2.]

were within the sole control & management of defts., or their servants, so that it is not unfair to attribute to them a *primâ facie* responsibility for what happened (FLETCHER MOULTON, L.J.).—WING *v.* LONDON GENERAL OMNIBUS CO., [1909] 2 K. B. 652; 78 L. J. K. B. 1063; 101 L. T. 411; 73 J. P. 429; 25 T. L. R. 729; 53 Sol. Jo. 713; 7 L. G. R. 1093, C. A.

Annotations:—**Apld.** Parker *v.* London General Omnibus Co. (1909), 101 L. T. 623. **Reld.** Newberry *v.* Bristol Tramways & Carriage Co. (1912), 11 L. G. R. 69; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

595. ——.]—In Apr. 1922, pltfs. delivered their motor lorry to defts. to be completely overhauled & repaired & to be put in a safe condition. No restriction was placed by pltfs. on the amount of work to be done or the expense to be incurred on the motor lorry. In June defts. re-delivered the lorry to pltfs., purporting to have carried out the work required to be done satisfactorily. Two days after the lorry was returned to pltfs., & while it was being used in the normal course of business on the highway, a stub axle broke & a wheel came off which collided with & injured a motor van belonging to one P. P. subsequently brought an action against pltfs. in the county ct. to recover damages for negligence, & the county ct. judge gave judgment for P. That decision was reversed by the Div. Ct., with costs, & the Ct. of Appeal affirmed the decision of the Div. Ct. also with costs. In the various proceedings the present pltfs. incurred taxed costs amounting to £111 10s., & in addition solr. & client costs amounting to £35 10s. Pltfs. were unable to recover anything from P. in respect of these costs. In an action brought by pltfs. against defts. for negligence & breach of contract in failing to use reasonable care, skill & diligence in overhauling & repairing the motor lorry, the jury returned a verdict for pltfs.:—*Held:* as the defect in the stub axle was due to "fatigue" of the metal, & could not be discovered by a reasonable inspection, there was no evidence of negligence fit to be left to the jury against defts.

I think also that this is a case in which the rule *res ipsa loquitur* does not apply because it seems to me only to apply where pltf., in complaining, has no knowledge or means of knowledge as to what the actual cause of an accident was, & all that he is in a position to say is that it occurred in reference to a matter of which the person of whom pltf. was complaining had full control & full knowledge, & the thing of which he was complaining would not have happened if the person complained of had exercised ordinary care (BANKES, L.J.).

The doctrine of *res ipsa loquitur*, as I understand it, is this: Where you have a subject-matter entirely under the control of one party, & something happens while it is under the control of that party, which would not in the ordinary course of things happen without negligence you may presume negligence from the mere fact that it happens, because such a thing could not happen without negligence. There is the case where a cask tumbled out of the door of a warehouse on to a passer by, & it was said against deft.: you are in sole control of this warehouse, & in the ordinary course of things casks do not tumble out of warehouses on to the heads of passers by unless somebody has been careless. If nothing else is proved about how this cask tumbled out, *res ipsa loquitur*, the jury are entitled to find that it tumbled out by negligence, that being the more probable way in which it happened (SCRUTTON, L.J.).—BRITANNIA HYGIENIC LAUNDRY CO. *v.* THORNYCROFT (JOHN I.) & CO. (1925), 95 L. J. K. B. 237; 135 L. T. 83; 42 T. L. R. 198, C. A.

596. Sparks from railway engine.]—In an action for negligently setting fire to a barn by a spark from a locomotive engine, evidence is admissible that other engines of the co. emitted sparks which flew to a distance, in order to show the possibility of the fire having been caused by such a spark.

The fact of a fire having been caused by a spark from a steam engine is *primâ facie* evidence of negligence in the owner of the engine.—PIGGOT *v.* EASTERN COUNTIES RY. CO. (1846), 3 C. B. 229; 15 L. J. C. P. 235; 7 L. T. O. S. 209; 10 Jur. 571; 136 E. R. 92.

Annotation:—**Reld.** Perren *v.* Monmouthshire Ry. & Canal Co. (1853), 17 Jur. 533.

597. ——.]—In an action against a railway co. for carelessly letting sparks fly from their engines, so as to set the herbage, etc., on fire, it is not necessary to prove any specific negligence.—GIBSON *v.* SOUTH-EASTERN RY. CO. (1858), 1 F. & F. 22, N. P.

See, further, RAILWAYS.

598. Loss of money—Entrusted to bank clerk.—Deft. entered into a bond, as surety, for the due & faithful performance by one C. of his duty as clerk to a provincial bank. C. being sent by the manager of the bank, at the request of a customer, to his residence, about eleven miles distant from the bank, for the purpose of receiving a large sum of money to be placed to his account, a considerable portion of it being in gold & silver, on his way back dropped the money from his pocket, & lost it:—*Held:* the loss of the money was *primâ facie* evidence of gross negligence on the part of C.—MELVILLE *v.* DOIDGE (1848), 6 C. B. 450; 18 L. J. C. P. 7; 12 L. T. O. S. 127; 12 Jur. 922; 136 E. R. 1324.

599. Contamination of water by products of gas manufacture.]—By a local Act, a co. was incorporated for the purpose of supplying Birmingham with gas; & by a further local Act, s. 160, it was enacted that "if the co. shall at any time cause or suffer to be conveyed or to flow into any stream, pond, or place of water within the limits of the said Act, any washing, substance, or thing which shall be produced by making or supplying gas," they shall forfeit £200. In 1854 the co. erected a gas tank about forty five yards from pltf.'s well. The site was selected in 1852 by an experienced mining engineer on behalf of the co. as a fit & proper site, & the land was in that year accordingly purchased for the purpose; & during 1853 & 1854 the tank was erected on the solid sandstone, with proper material, & in a proper manner in all respects with reference to ordinary circumstances. The co. knew that the mines in the neighbourhood had been worked, but they did not know that the mines had been worked near any part of their land. In 1838 there were workings under half the co.'s land; & from 1848 to 1855 these workings were brought to within sixty yards of the tank, in consequence of which the floor of the tank cracked, & the washings in it flowed out & percolated to pltf.'s well, thereby rendering the water unfit for domestic purposes:—*Held:* the co. had suffered the washings to flow

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negligence.]—The fact that a fire takes place is not of itself evidence of negligence, its occurrence being quite consistent with due care having been taken; there must be some affirmative evidence of negligence, or of some fact from which a proper inference may be drawn.—WOLFE CO. *v.* R. (1921), 20 Exch. C. R. 306; 57 D. L. R. 266.—**CAN.**

g. ——.]—PRYCE *v.* SMALL (1909), 28 N. Z. L. R. 590.—**N.Z.**

nto the well within sect. 160, &, consequently vere liable to the penalty.

The co. have not exonerated themselves from the presumption that the contamination was the esult of negligence on the part of defts. in their vorks. *Primâ facie*, it was the result of negligence. t was for the co. to purge themselves from the *primâ facie* presumption of negligence. But if here was negligence, they may properly be said o have suffered that which was occasioned by the construction of their works. The presumption of law is, that the mischief was occasioned by negligence. The works were of a description which must always be attended with danger; & defts. constructed them with due care with reference to ordinary circumstances. But here the circumstances were of an extraordinary nature, on account of the excavations in the neighbourhood; defts. do not show that they might not have constructed the tank in a different manner, whereby the mischief might have been avoided (COCKBURN, C.J.).—HIPKINS *v.* BIRMINGHAM & STAFFORDSHIRE GAS LIGHT CO. (1860), 6 H. & N. 250; 30 L. J. Ex. 60; 158 E. R. 103; *sub nom.* BIRMINGHAM & STAFFORDSHIRE GAS-LIGHT CO. v. HIPKINS, 7 Jur. N. S. 213; 9 W. R. 168, Ex. Ch.

Annotation:—**Refd.** Millington *v.* Griffiths (1874), 30 L. T. 65.

600. Surrounding circumstances within control of defendant—Article falling on passer by.]—BYRNE *v.* BOADLE, No. 315, *ante*.

601. —— ——.]—Pltf., a custom house officer, in discharge of his duty, entered defts.' premises, &, while passing under a crane, was injured by the fall of some bags of sugar. There was no warning of the danger, & no explanation of the cause of the accident by defts.:—*Held:* as the goods were under the management of the servants of defts., & something happened out of the ordinary course, of which there was no explanation, there was reasonable evidence of negligence.—SCOTT *v.* LONDON DOCK CO. (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L. J. Ex. 220; 13 L. T. 148; 11 Jur. N. S. 204; 13 W. R. 410; 159 E. R. 665, Ex. Ch.

Annotations:—**Folld.** Briggs *v.* Oliver (1866), 4 H. & C. 403. **Consd.** Fletcher *v.* Rylands (1866), L. R. 1 Exch. 265. **Distd.** Higgs *v.* Maynard (1866), Har. & Ruth. 581; Smith *v.* G. E. Ry. (1866), L. R. 2 C. P. 4; Moffatt *v.* Bateman (1869), L. R. 3 P. C. 115. **Apld.** Burke *v.* M. S. & L. Ry. (1870), 22 L. T. 442. **Consd.** Bridges *v.* North London Ry. (1871), L. R. 6 Q. B. 377; Manzoni *v.* Douglas (1880), 6 Q. B. D. 145. **Distd.** Snook *v.* Grand Junction Waterworks Co. (1886), 2 T. L. R. 308; Crisp *v.* Thomas (1890), 63 L. T. 756. **Refd.** Coleman *v.* S. E. Ry. (1866), 31 J. P. 23; Czech *v.* General Steam Navigation Co. (1867), 17 L. T. 246; Scholfield *v.* Londesborough, [1895] 1 Q. B. 536; Hurlstone *v.* L. Elec. Ry. (1913), 29 T. L. R. 514; Travers *v.* Cooper, [1915] 1 K. B. 73; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272; The Santa Catharina (1919), 88 L. J. P. 170.

602. —— ——.]—Pltf. going to the doorway of a house in which deft. had offices, was pushed out of the way by a servant of deft., who was watching a packing case which belonged to deft., & was leaning against the wall of the house. Pltf. fell, & the packing case fell on his foot & injured him. There was no evidence as to who placed the packing case against the wall or what caused its fall:—*Held:* there was a *primâ facie* case against deft. to go to the jury, the fall of the packing case being some evidence that it had been improperly placed against the wall.

It is a matter of the first importance that, where the existence or non-existence of negligence is equally consistent with the facts, the judge ought not to leave the case to the jury (MARTIN, B.).—BRIGGS *v.* OLIVER (1866), 4 H. & C. 403; 35 L. J. Ex. 163; 14 L. T. 412; 30 J. P. 391; 14 W. R. 658.

Annotation:—**Refd.** Tebbutt *v.* Bristol & Exeter Ry. (1871), 19 W. R. 383.

603. —— ——.]—K., passing along the public highway under a railway bridge formed by iron girders resting on brick piers, & constructed to carry the railway line of defts., a brick from one of the piers fell upon & caused him injury. No special negligence in constructing the piers, or in omitting to keep them in proper repair, was imputed to defts. On a subsequent examination of the pier, from which the brick had become detached, the pltf. found that the bricks had become loose at one part, & there was an orifice in which the brick that had caused the injury fitted, & that several other bricks had also fallen out at the same place & left an orifice. No evidence to account for this loosening was adduced on the part of defts., & it did not appear that the existence of the decay had been brought to their knowledge or was the consequence of their omitting to keep the piers properly repaired, but it appeared from pltf.'s evidence that, just prior to the accident happening, a train had passed over the bridge which might have so shaken the piers as to cause the bricks to become loose:—*Held:* the happening of the occurrence supplied *primâ facie* evidence of negligence, which, being unrebutted by defts., was sufficient to support the verdict found for pltf.—KEARNEY *v.* LONDON & BRIGHTON RY. CO. (1871), L. R. 6 Q. B. 759; 40 L. J. Q. B. 285; 24 L. T. 913; 20 W. R. 24, Ex. Ch.

Annotations:—**Consd.** Solomons *v.* Stepney B. C. (1905), 69 J. P. 360. **Refd.** Beaumont *v.* Huddersfield Corpn. (1902), 67 J. P. 57; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523.

604. —— **Accident from driving of omnibus.**]—BARNES URBAN DISTRICT COUNCIL *v.* LONDON GENERAL OMNIBUS CO., No. 382, *ante*.

605. Presumption of no accident with reasonable care.]—With regard to the second part of the case, the question of negligence . . . the principle of *res ipsa loquitur* applies. . . . The unexplained presence of the stone in the bun is *primâ facie* evidence of negligence on the part of the person who made the bun. . . . The direction of the judge to the jury on this question of negligence was most careful, & was quite satisfactory up to a certain point; but at a point in his summing up there came a passage which, as it seemed to him, might have led the jury to arrive at the result which was, in his opinion, unsatisfactory (COLLINS, M.R.).—CHAPRONIERE *v.* MASON (1905), 21 T. L. R. 633, C. A.

Negligence of teacher.]—*See* EDUCATION, Vol. XIX., p. 563, Nos. 50, 51.

Negligence of carriers.]—*See* CARRIERS, Vol. VIII., pp. 91–94, Nos. 618–634.

Negligence of innkeeper.]—*See* INNS & INNKEEPERS, Vol. XXIX., p. 13, No. 166.

SUB-SECT. 2.—CAUSE OF ACCIDENT UNKNOWN.

606. No necessity for proof of negligence.]—A jury having found that an explosion occurred

PART IX. SECT. 4, SUB-SECT. 2.

606 i. *No necessity for proof of negligence.*]—ISBISTER *v.* DOMINION FISH CO. (1910), 19 Man. L. R. 430; *affd.* (1911), 43 S. C. R. 637.—**CAN.**

606 ii. ——.]—FALCONER *v.* JONES (1913), 24 O. W. R. 672; 4 O. W. N. 1373; 11 D. L. R. 769.—**CAN.**

606 iii. ——.]—CURRY *v.* SANDWICH, WINDSOR & AMHERSTBURG RY. CO. (1914), 7 O. W. N. 140, 739: 18 D. L. R. 685.—**CAN.**

606 iv. ——.]—KOLARI *v.* MOND NICKEL CO. (1914), 32 O. L. R. 470; 20 D. L. R. 412.—**CAN.**

Sect. 4.—*Presumption of negligence—Res ipsa loquitur: Sub-sect.* 2. *Sects.* 5 & 6. *Part X. Sect.* 1: *Sub-sect.* 1.]

through the neglect of deft. co. to supply suitable machinery & to take proper precautions, & that the resulting injury to the pltf. was not in any way due to his negligence, the verdict was upheld by the unanimous judgment of two cts. :—*Held:* an order by the Supreme Ct. setting aside the verdict on the ground that there was no exact proof of the fault which certainly caused the injury must be reversed. Proof to that effect may be reasonably required in particular cases; it is not so where the accident is the work of a moment, & its origin & course incapable of being detected.—MCARTHUR *v.* DOMINION CARTRIDGE CO., [1905] A. C. 72; 74 L. J. P. C. 30; 91 L. T. 698; 53 W. R. 305: 21 T. L. R. 47, P. C.

Annotations:—**Refd.** Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Quebec Ry. Light, Heat & Power Co. *v.* Vandry, [1920] A. C. 662.

607. ——.]—Pursuer was driving two cows carefully along a road on a winter evening. The road was imperfectly lighted, but it was possible to see a fair distance. A tramcar belonging to defenders was being driven along the road. The driver did not see the man with the cows, & if he had seen them would have been driving more slowly. The first thing that the driver saw was the head & shoulders of a cow close to the car. He put on his brake, but the car hit & grazed the cow, & before the car stopped, about three yards further on, the driver felt a bump. The driver then got down & found the pursuer unconscious on the near side of the car. In an action for personal injuries pursuer alleged that he had been knocked down by the car owing to the negligence of the driver in not keeping a good look out, & was thereby rendered insensible & suffered from concussion, in consequence of which he had no recollection of the circumstances immediately preceding the accident. Defenders did not dispute the alleged negligence, but they contended that pursuer had failed to prove that the car struck him at all or that if it did this was due to the alleged negligence. There was no evidence by any person who actually saw the accident, but the judge at the trial found that the true inference was that pursuer was knocked down by the car owing to the driver's not keeping a proper look out, & he awarded the pursuer damages :—*Held:* the facts supported the judge's inference & pursuer was entitled to recover.—CRAIG *v.* GLASGOW CORPN. (1919), 35 T. L. R. 214, H. L.

SECT. 5.—DISCOVERY, INSPECTION, AND INTERROGATORIES.

See DISCOVERY, Vol. XVIII., pp. 209, 212, 213, Nos. 1561, 1599–1610.

Inspection of reports.]—*See* DISCOVERY, Vol. XVIII., pp. 139–141, Nos. 892–906.

Interrogatories.]—*See* DISCOVERY, Vol. XVIII., pp. 192, 209, 212, 213, 229, 230, Nos. 1403, 1561, 1599–1610, 1752–1754.

SECT. 6.—IN PARTICULAR INSTANCES.

Carriers.]—*See* CARRIERS, Vol. VIII., pp. 91–94, Nos. 618–634.

Innkeepers.]—*See* INNS & INNKEEPERS, Vol. XXIX., pp. 12–14, Nos. 161–187.

Libel—Negligence in publication.]—*See* LIBEL & SLANDER, Vol. XXXII., pp. 81, 82, Nos. 1120–1124.

Part X.—Defences.

SECT. 1.—CONSENT—VOLENTI NON FIT INJURIA.

SUB-SECT. 1.—NATURE OF DEFENCE.

608. Depends on voluntary acceptance of risk.]—Pltf., a workman, employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water which was being drawn up by machinery.

Evidence was given that the tackle was improper, not being fitted with a safe hook, & that a jiddy should have been used. Pltf. worked with the hook making no complaint of it. A jiddy had been provided by the master, who had directed that it should be used when earth was raised. Pltf., in his master's presence, had complained that the jiddy was not used for water. The master was at the workings several times each day :—*Held:* the master was not liable, because, assuming the injury to have arisen from the defect of the hook, the workman himself voluntarily used it, & it was not shown that the injury was not caused by his own rashness, & assuming it to have arisen from the neglect to use the jiddy, the master, having provided a proper apparatus, was not liable for the neglect of pltf.'s fellow workmen in omitting to use it.—GRIFFITHS *v.* GIDLOW (1858), 3 H. & N. 648; 27 L. J. Ex. 404; 31 L. T. O. S. 300; 22 J. P. 675; 157 E. R. 628.

Annotation:—**Refd.** Weblin *v.* Ballard (1886), 17 Q. B. D. 122.

-.]—WARDLEWORTH *v.* WALKER (1873), 37 J. P. Jo. 52.

610. ——.]—Pltf., a workman in the employ of a contractor engaged by defts., had to work in

606 v. ——.]—LONG *v.* MCLAUGHLIN (N. B.), [1926] 3 D. L. R. 918.—**CAN.**

606 vi. ——.]—R. *v.* CONSUMERS' GAS CO. OF TORONTO, [1926] Exch. C. R. 137.—**CAN.**

606 vii. ——.]—FARRELL *v.* LIMERICK CORPN. (1911), 45 I. L. T. 169.—**IR.**

606 viii. ——.]—WALKER *v.* OLSEN (1882), 9 R. (Ct. of Sess.) 946; 19 Sc. L. R. 708.—**SCOT.**

606 ix. ——.]—*MILLIKEN v.* GLASGOW CORPN., [1918] S. C. 857.—**SCOT.**

PART X. SECT. 1, SUB-SECT. 1.

608 i. *Depends on voluntary acceptance of risk.*]—There are three positions as to which the maxim *volenti non fit injuria* may apply: (1) where there is danger inherent in the work itself, & where precautions are actually or commercially impossible, or where none are in fact taken, & where the workman consents, in the sense of agreeing voluntarily, to engage in the work with that knowledge & under those conditions; (2) where the work is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, & the workman undertakes to do it, in which case he thereby voluntarily subjects himself to the risks inevitably accompanying it; & (3) where the inevitable consequence of the employee discharging his duty would obviously be to occasion him personal injury, & where it is clearly brought home to his mind that the risk he ran was from a danger both foreseen & appreciated.—FAIRWEATHER *v.* CANADIAN GENERAL ELECTRIC CO. (1913), 28 O. L. R. 300; 24 O. W. R. 164; 4 O. W. N. 892.—**CAN.**

a dark tunnel rendered dangerous by the passing of trains. After he had been working a fortnight he was injured by a passing train. The jury found that the defts. in not adopting any precautions for the protection of pltf. had been guilty of negligence:—*Held:* pltf. having continued in his employment with full knowledge, could not make defts. liable for an injury arising from danger to which he voluntarily exposed himself.—WOODLEY *v.* METROPOLITAN DISTRICT RY. CO. (1877), 2 Ex. D. 384; 46 L. J. Q. B. 521; 36 L. T. 419; 42 J. P. 181, C. A.

Annotations:—**Apld.** Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685. **Consd.** Yarmouth *v.* France (1887), 19 Q. B. D. 647. **Distd.** Thrussell *v.* Handyside (1888), 20 Q. B. D. 359. **Consd.** Membery *v.* G. W. Ry. (1889), 14 App. Cas. 179. **Reld.** Charles *v.* Taylor, Walker (1878), 38 L. T. 773.

611. ——.]—THOMAS *v.* QUARTERMAINE, No. 10, *ante*.

612. ——.]—Where a workman was employed on a staging in the middle of the river Thames, which was protected on one side only, & it was part of his duty to work on the unprotected side, & in the course of his employment he fell over at night & was drowned, the jury found that the structure was defective, & that deceased lost his life in consequence of the defect; but they also found that he knew of the defect, & was willing to incur the risk:—*Held:* his widow could not recover damages from his employer.—CHURCH *v.* APPLEBY BROTHERS (1888), 58 L. J. Q. B. 144; 60 L. T. 542; 5 T. L. R. 88, D. C.

613. ——.]—A railway co. agreed with a contractor that he should shunt their trucks upon their line, & should supply horses & men for that purpose, the co. to provide boys to assist in the shunting when they had boys, & when they had not the shunting to be done without boys. For several years pltf. as the servant of the contractor shunted trucks on the co.'s line, sometimes with & sometimes without boys. The operation of shunting is dangerous to any man performing it without assistance. Pltf. on one occasion asked the co.'s foreman for a boy, but as the co. could not provide one proceeded to shunt trucks alone, & without any negligence on his part was injured by a truck running over him. In an action by him against the co.:—*Held:* (1) there was no evidence for the jury of any negligence or breach of duty on the part of the railway co. towards pltf., & he had therefore no cause of action; (2) pltf. was also prevented from recovering because he had voluntarily done the work with full knowledge of the risk he ran.

Where a man is not physically constrained, where he can at his option do a thing or not, & he does it the maxim *volenti non fit injuria* applies (LORD BRAMWELL).—MEMBERY *v.* GREAT WESTERN RY. CO. (1889), 14 App. Cas. 179; 58 L. J. Q. B. 563; 61 L. T. 566; 54 J. P. 244; 38 W. R. 145; 5 T. L. R. 468, H. L.; *affg.* (1888), 4 T. L. R. 504, C. A.; *revsg.*, 4 T. L. R. 265, D. C.

Annotation:—**Reld.** Thrussell *v.* Handyside (1888), 20 Q. B. D. 359.

614. -PYNER *v.* BULLARD, KING & CO. (1897), 14 T. L R. 57, C. A.

615. -Deft. was the owner of premises to which water was laid on, & he had a cistern on the fourth floor. Pltf. became tenant of the ground floor & took his supply of water from deft. A leakage from the cistern having been noticed by pltf. he informed deft., who instructed a competent plumber to remedy it. In consequence of the negligence of the plumber an overflow occurred, which damaged pltf.'s goods:—*Held:* deft. was not liable, since pltf. had assented to the water being on the premises & therefore deft. by instructing a competent plumber to remedy the leakage had discharged his duty to pltf.—BLAKE *v.* WOOLF, [1898] 2 Q. B. 426; 67 L. J. Q. B. 813; 79 L. T. 188; 62 J. P. 659; 47 W. R. 8; 42 Sol. Jo. 688, D. C.

Annotations:—**Reld.** Charing Cross, West End & City Electricity Supply Co. *v.* London Hydraulic Power Co., [1913] 3 K. B. 442; Rickards *v.* Lothian, [1913] A. C. 263; Cockburn *v.* Smith, [1924] 2 K. B. 119. **Mentd.** Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762; Noble *v.* Harrison, [1926] 2 K. B. 3

——.]—A cricketer, while playing that game on an open space, vested in & controlled by the London County Council, ran upon an iron indicator provided by the council in order to show the number of the pitch, there being about a hundred cricket-pitches on the ground. His eye was destroyed by the accident:—*Held:* the council were not liable for negligence, because if a grown man chooses to go, for purposes of recreation, upon a ground upon which there is an open & obvious danger, the owner of the ground cannot be liable for injuries resulting from that danger.—GILES *v.* LONDON COUNTY COUNCIL (1903), 68 J. P. 10; 2 L. G. R. 326.

617. ——.]—POWELL *v.* JUNIOR ARMY & NAVY STORES, LTD. (1912), 76 J. P. Jo. 244.

618. ——.]—At technical classes provided by defts., a borough council, pltf., a lad of nineteen years of age, used a small circular saw driven by electricity which had no guard or "sword" to it. Pltf.'s hand was drawn into the machine so that his thumb had to be amputated.

Pltf., in giving evidence against defts. in an action for negligence on the ground that there was no such guard or "sword" said that he knew the saw was dangerous, & that it would be less dangerous if guarded, but he had never suggested to the instructor that it should be guarded.

The judgment of a county ct. judge in favour of pltf. was set aside on the ground that he seemed to have thought that as there was a mode of protecting this saw & defts. had not adopted it, they were guilty of negligence.

He ought to have ascertained whether the method of guarding the front of the saw that had been suggested was such a regular & well-recognised method of working circular saws that defts. ought to have employed it. Further, the ct. held that the maxim *volenti non fit injuria* applied.

Accordingly judgment was entered for defts.—SMERKINICH *v.* NEWPORT CORPN. (1912), 76 J. P. 454; 10 L. G. R. 959, D. C.

619. ——.]—It must be shown, first, that pltf. clearly knew & appreciated the nature & character of the risk which he ran; & secondly, that he voluntarily incurred it. Until both are established, the maxim *volenti non fit injuria* cannot apply. If, however, a person, with full knowledge & appreciation of the risk & danger attending a certain act, voluntarily does that act, it must be assumed that he voluntarily incurred the attendant risk & danger, & the maxim *volenti non fit injuria* directly applies (LORD ATKINSON).—CANADIAN PACIFIC RY. CO. *v.* FRÉCHETTE, [1915] A. C. 871; 84 L. J. P. C. 161; 113 L. T. 1116; 31 T. L. R. 529, P. C.

Annotation:—**Reld.** Montreal City *v.* Watt & Scott, [1922] 2 A. C. 555.

620. ——.]—Pltf., the head master of a non-provided school, sued the managers of the school for damages for personal injury occasioned by the bursting of a boiler. The defective condition of the boiler had been pointed out to some of the managers by pltf., but not to all those who were

Sect. 1.—*Consent—Volenti non fit injuria: sects.* 1 & 2, *A.*]

managers at the date of the accident. The managers relied on Education Act, 1902 (c. 19), s. 7 (1) (*d*), & further contended that pltf. accepted the risk, & that as he knew of the defective condition of the boiler he was debarred from recovering on the principle laid down in *Griffiths* v. *London & St. Katharine Docks Co.*, No. 623, *post*:—*Held:* (1) the managers were liable to keep the schoolhouse in repair, whether required to do so by the local education authority or not; (2) the managers were not a legal body with succession & so notice given to the managers at one time would not operate as against managers subsequently appointed; (3) each manager had been guilty of negligence on appointment in not ascertaining & remedying the defect in the heating apparatus; (4) pltf. was not negligent & did not voluntarily incur the risk; (5) the doctrine of *Griffiths* v. *London & St. Katharine Docks Co.*, No. 623, *post*, does not apply to a case where pltf. establishes personal negligence on the part of the employer in failing to provide proper premises & appliances.—ABBOTT *v.* ISHAM (1920), 90 L. J. K. B. 309; 124 L. T. 734; 85 J. P. 30; 37 T. L. R. 7; 18 L. G. R. 719.

Annotation:—**Refd.** Baker *v.* James, [1921] 2 K. B. 674.

621. Application to recreation—Accident at game.]—CLEGHORN *v.* OLDHAM, No. 60, *ante*.

Under Employers Liability Act.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 232, 233, Nos. 1973–1982.

SUB-SECT. 2.—WHAT AMOUNTS TO ACCEPTANCE OF RISK.

A. Knowledge.

622. General rule.]—If a servant or other person is employed on premises, & he is well aware of the dangerous places therein, & accidentally suffers injury by falling or otherwise, he has no right of action against the master, for he impliedly undertakes the risks of the service.—BROOKS *v.* COURTNEY (1869), 20 L. T. 440; 33 J. P. 453.

Annotation:—**Refd.** Weblin *v.* Ballard (1886), 17 Q. B. D. 122.

623. ——.]—In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of, the danger.—GRIFFITHS *v.* LONDON & ST. KATHARINE DOCKS CO. (1884), 13 Q. B. D. 259; 53 L. J. Q. B. 504; 51 L. T. 533; 49 J. P. 100; 33 W. R. 35, C. A.

Annotations:—**Consd.** Yarmouth *v.* France (1887), 19 Q. B. D. 647. **Distd.** Abbott *v.* Isham (1920), 90 L. J. K. B. 309; Monaghan *v.* Rhodes, [1920] 1 K. B. 487. **N.F.** Baker *v.* James, [1921] 2 K. B. 674. **Refd.** Sayer *v.* Hatton (1885), Cab. & El. 492; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685; Groves *v.* Fuller (1888), 4 T. L. R. 474; Williams *v.* Birmingham Battery & Metal Co., [1899] 2 Q. B. 338; Lloyd *v.* Woolland (1902), 87 L. T. 73.

624. ——.]—GURLING *v.* HURST & CO. (1889), 6 T. L. R. 94, D. C.

625. ——.]—PRITCHARD *v.* LANG (1889), 5 T. L. R. 639, D. C.

626. ——.]—AMOS *v.* DUFFY (1890), 6 T. L. R. 339, C. A.

627. ——.]—Deft. was the owner of a house which consisted of a basement & two upper floors, the rooms on each floor being separately let. The house was entered by a front door on the ground floor level which was approached from the street by a flight of six or seven steps, these steps being protected on each side by a coping about 8 inches high. On either side of the steps was an area. The steps remained in deft.'s possession & control. Pltf., the wife of one of the tenants occupying the house, slipped on the steps & fell into the area, sustaining considerable injuries. In an action by pltf. against deft., claiming damages in respect of those injuries, the jury found that the defect in the steps in consequence of which the accident occurred consisted not in any disrepair of the steps themselves, but in the absence of a railing; that this defect was due to the negligence of deft.; & that both pltf. & the deft. knew before the accident of the existence of the defect:—*Held:* the only obligation upon deft. in reference to the approach to the house was to avoid exposing pltf. to any unexpected danger without giving her warning; as the danger was patent to every one, & pltf. in fact knew of it, she had voluntarily taken upon herself to bear the risk; &, therefore, she had established no cause of action.—LUCY *v.* BAWDEN, [1914] 2 K. B. 318; 83 L. J. K. B. 523; 110 L. T. 580; 30 T. L. R. 321.

Annotations:—**Consd.** Fairman *v.* Perpetual Investment Bldg. Soc., [1923] A. C. 74. **Refd.** Dobson *v.* Horsley, [1915] 1 K. B. 634; Groves *v.* Western Mansions (1916), 33 T. L. R. 76; Hart *v.* Rogers, [1916] 1 K. B. 646; Wilson *v.* Barry Ry. (1916), 116 L. T. 71; Dunster *v.* Hollis, [1918] 2 K. B. 795; Murphy *v.* Hurly, [1922] 1 A. C. 369.

628. Necessity for notice of concealed danger.]—A trespasser, having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, & thereby letting it off.—ILOTT *v.* WILKES (1820), 3 B. & Ald. 304; 106 E. R. 674.

Annotations:—**Distd.** Bird *v.* Holbrook (1828), 4 Bing. 628. **Consd.** Lynch *v.* Nurdin (1841), 1 Q. B. 29; Clark *v.* Chambers (1878), 3 Q. B. D. 327. **Refd.** R. *v.* Mountford (1835), 1 Mood. C. C. 441; Jordin *v.* Crump (1841), 8 M. & W. 782; Brown *v.* Mallett (1848), 5 C. B. 599; Degg *v.* Mid. Ry. (1857), 1 H. & N. 773.

629. ——.]—Deft. set a spring-gun in his garden, which was at some distance from his dwelling, of which fact he gave no notice. Pltf. entered the garden in pursuit of a strayed fowl, &, coming in contact with one of the wires, was wounded by the discharge of the gun:—*Held:*

PART X. SECT. 1, SUB-SECT. 2.—A.

622 i. *General rule.*]—*Held:* as pltf.'s knowledge of the risk was equal to if not greater than that of deft., the latter was not liable; & pltf., having obeyed the order to go to sea, which he was not bound to do, had voluntarily encountered the risk, & therefore, in accordance with the maxim *volenti non fit injuria*, could not recover.—SIMAT *v.* SILVA (1887), 8 N. S. W. L. R. 415; 4 N. S. W. W. N. 109.—**AUS.**

622 ii. ——.]—BURNS *v.* TORONTO CITY (1878), 42 U. C. R. 560.—**CAN.**

622 iii. ——.]—ROY *v.* HENDERSON (1908), 18 Man. L. R. 234; 8 W. L. R. 187; 9 W. L. R. 545.—**CAN.**

622 iv. ——.]—BECK *v.* GUTHRIE (1913), 26 W. L. R. 11; 4 W. W. R. 139; 11 D. L. R. 453; 18 B. C. R. 482.—**CAN.**

622 v. ——.]—MEAGHER *v.* GRANBY CONSOLIDATED (1915), 32 W. L. R. 334; 9 W. W. R. 37; 24 D. L. R. 892.—**CAN.**

622 vi. ——.]—WESTENFELDER *v.* HOBBS MANUFACTURING CO., LTD. (1925), 57 O. L. R. 31.—**CAN.**

622 vii. ——.]—In Canada, as in England, the maxim *volenti non fit injuria* affords no defence to an action for damages for personal injuries due to the dangerous condition of premises to which pltf. has been invited on an errand of business, unless it is found as a fact that he freely & voluntarily, with full knowledge of the nature & extent of the risk he ran, expressly or impliedly agreed to incur it.—LETANG *v.* OTTAWA ELECTRIC RY. CO., [1926] A. C. 725, P. C.—**CAN.**

622 viii. ——.]—HARRINGTON *v.* WELLINGTON HARBOUR BOARD (1895), N. Z. L. R. 347.—**N.Z.**

pltf. was entitled to recover damages for the injury, in an action on the case.

Where spring-guns, or other instruments of a like nature, are set in gardens or inclosed grounds a notice is necessary to be given, according to the common understanding of mankind (BURROUGH, J.).—BIRD *v.* HOLBROOK (1828), 4 Bing. 628; 1 Moo. & P. 607; 2 Man. & Ry. M. C. 198; 6 L. J. O. S. C. P. 146; 130 E. R. 911.

Annotations:—**Consd.** Jordin *v.* Crump (1841), 8 M. & W. 782. **Refd.** Lynch *v.* Nurdin (1841), 1 Q. B. 29; Barnes *v.* Ward (1850), 9 C. B. 392; M. S. & L. Ry. *v.* Wallis (1854), 14 C. B. 213; Degg *v.* Mid. Ry. (1857), 1 H. & N. 773; Clark *v.* Chambers (1878), 3 Q. B. D. 327; Ponting *v.* Noakes, [1894] 2 Q. B. 281; Lowery *v.* Walker, [1910] 1 K. B. 173; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Ruoff *v.* Long (1915), 114 L. T. 186. **Mentd.** Bowman *v.* Secular Soc., [1917] A. C. 406.

630. Whether mere knowledge sufficient — Plaintiff acting on orders of employer.]—In an action for damage occasioned by deft.'s negligence, a material question is, whether or not pltf. might have escaped the damage by ordinary care on his own part. But deft. is not excused merely because pltf. knew that some danger existed through deft.'s neglect, & voluntarily incurred such danger. The amount of danger, & the circumstances which led pltf. to incur it, are for the consideration of the jury. Therefore, where comrs. of sewers had made a dangerous trench in the only outlet from a news, putting up no fence, & leaving only a narrow passage on which they heaped rubbish; & a cabman, in the exercise of his calling, attempted to lead his horse out over the rubbish, & the horse fell & was killed, for which loss he brought an action:—*Held:* pltf. was not disentitled to recover because he had at some hazard, created by defts., brought his horse out of the stable; & the case was properly left to the jury on the question whether or not pltf. had persisted, contrary to express warning at the time, as to which there was contradictory evidence, in running upon a great & obvious danger.—CLAYARDS *v.* DETHICK & DAVIS (1848), 12 Q. B. 439; 116 E. R. 932.

Annotations:—**Consd.** Lax *v.* Darlington Corpn. (1879), 5 Ex. D. 28. **Refd.** Thompson *v.* N. E. Ry. (1862), 2 B. & S. 119; Wyatt *v.* G. W. Ry. (1865), 6 B. & S. 709; McMahon *v.* Field (1881), 7 Q. B. D. 591; Thomas *v.* Quartermaine (1886), 17 Q. B. D. 414; Brackley *v.* Mid. Ry. (1916), 114 L. T. 1150.

631. ——.]—Pltf. was a workman who was directed by his employer to work in a particular place. Defts. were contractors engaged in work above the place where pltf. was working. Defts.' work was of such nature as to be dangerous to persons working below, unless proper precautions were taken for their safety. Pltf. was aware of the danger. Pltf. while working where he was directed by his employer was injured by a piece of iron dropped by defts.' workmen & brought an action to recover damages for the injury. The jury found that defts. had been guilty of negligence in not taking proper precautions for those below, that there was no contributory negligence on the part of pltf. & that pltf. did not voluntarily incur the risk:—*Held:* the case was rightly left to the jury, although pltf. was aware of the danger, yet as he was compelled by the orders of his employer to work where he was working when the accident happened, the maxim "*volenti non fit injuria*" did not apply & he was entitled to recover.—THRUSSELL *v.* HANDYSIDE (1888), 20 Q. B. D. 359; 57 L. J. Q. B. 347; 58 L. T. 344; 52 J. P. 279; 4 T. L. R. 266, D. C.

632. ——.]—It seems to me that the law is now settled that the mere fact of a workman undertaking that which he knows to be dangerous is not of itself conclusive proof that he has brought himself within the doctrine of *volenti non fit injuria*. It must depend in each case upon the nature of the risk to the workman in connection with it, as well as upon considerations which must vary according to the circumstances of each case (A. L. SMITH, J.).—GREENHALGH *v.* CWMAMAN COAL CO. (1891), 8 T. L. R. 31, D. C.

Annotation:—**Refd.** Goddard *v.* Mid. Ry. (1899), 80 L. T. 624.

633. ——.]—When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control, the danger being created or enhanced by the negligence of the employer, the mere fact that he undertakes or continues in such employment with full knowledge & understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the maxim *volenti non fit iniuria* applicable in case of injury. The question whether he has so undertaken the risk is one of fact & not of law; & this is so both at common law & in cases arising under Employers Liability Act, 1880 (c. 42).

Pltf. was employed by railway contractors to drill holes in a rock cutting near a crane worked by men in the employ of the contractors. The crane lifted stones & at times swung them over pltf.'s head without warning. Pltf. was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, & had been thus employed for months. A stone having fallen from the crane & injured pltf., he sued his employers in the county ct. under Employers Liability Act, 1880 (c. 42). The jury found (*a*) that the machinery for lifting the stone, taken as a whole, was not reasonably fit for the purpose for which it was applied; (*b*) that the omission to supply special means of warning was a defect in the ways, works, machinery & plant; (*c*) that the employers, or some person engaged by them to look after the condition of the works, etc., were guilty of negligence in not remedying the defect; (*d*) that pltf. was not guilty of contributory negligence; (*e*) that he did not voluntarily undertake a risky employment with a knowledge of its risks; & returned a verdict for pltf. for damages. Application having been made to enter judgment for defts. on the ground that the case ought not to have gone to the jury, pltf. having admitted that he knew of the risk & voluntarily incurred it:—*Held:* the mere fact that pltf. undertook & continued in the employment with full knowledge & understanding of the danger arising from the systematic neglect to give warning did not preclude him from recovering; the evidence would justify a finding that pltf. did not voluntarily undertake the risk of injury; the maxim "*volenti non fit injuria*" did not apply; & the action was maintainable.—SMITH *v.* BAKER & SONS, [1891] A. C. 325; 60 L. J. Q. B. 683;

631 i. *Whether mere knowledge sufficient.*]—JAMSETJI BURJORJI BAHADURJI *v.* EBRAHIM VYDINA (1888), I. L. R. 13 Bom. 183.—**IND.**

h. *Plaintiff exercising reasonable care.*]—Deft. built its transmission line on which it carried high tension wires, along the same route as a line already existing of the provincial telephone system & for about a quarter of a mile its wires were directly above the telephone wires, being on higher poles, the clearance between the two sets of wires being on the average about seven feet, but at one point only 39 inches:—*Held:* deft. was negligent in not providing a clearance of absolute safety between the two sets of wires; the fact that pltf. undertook the work knowing of the danger did not

Sect. 1.—*Consent—Volenti non fit injuria: Sub-sect.* 2, *A., B. & C.; sub-sect.* 3.]

65 L. T. 467; 55 J. P. 660; 40 W. R. 392; 7 T. L. R. 679, H. L.

Annotations:—**Apld.** Williams *v.* Birmingham Battery & Metal Co., [1899] 2 Q. B. 338; Hase *v.* London General Omnibus Co. (1907), 23 T. L. R. 616. **Consd.** Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871; Abbott *v.* Isham (1920), 90 L. J. K. B. 309; Baker *v.* James, [1921] 2 K. B. 674; Nimmo *v.* Connell, [1924] A. C. 595. **Refd.** Greenhalgh *v.* Cwmaman Coal Co. (1891), 8 T. L. R. 31; Wild *v.* Waygood (1892), 66 L. T. 309; Willetts *v* Watt (1892), 61 L. J. Q. B. 540; Stanton *v.* Scrutton (1893), 62 L. J. Q. B. 405; Thomas *v.* Great Western Colliery Co. (1894), 10 T. L. R. 244; Pyner *v.* Bullard, King (1897), 14 T. L. R. 57; Lloyd *v.* Woolland (1902), 19 T. L. R. 32; Smerkinich *v.* Newport Corpn. (1912), 76 J. P. 454; Norman *v.* G. W. Ry., [1914] 2 K. B. 153; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523; Monaghan *v.* Rhodes, [1920] 1 K. B. 487. **Mentd.** Brannigan *v.* Robinson, [1892] 1 Q. B. 344; Ultzen *v.* Nicol (1893), 63 L. J. Q. B. 289; Neptune Steam Navigation Co. *v.* Sclater & Procter, The Delano (1894), 71 L. T. 544; L. & N. W. Ry. *v.* Donellan, Same *v.* Billington (1898), 78 L. T. 575; Wohlgemuthe *v.* Coste, [1899] 1 Q. B. 501; Darlow *v.* Shuttleworth, [1902] 1 K. B. 721; Stephen *v.* International Sleeping Car Co. (1903), 47 Sol. Jo. 692; Nathan *v.* Rouse (1904), 2 L. G. R. 1304; Cresswell *v.* Jones & Andrews, Johnson *v.* Refuge Assce. (1912), 1 L. J. C. C. 28; Barry *v.* Minturn, [1913] A. C. 584; Taylor *v.* National Amalgamated Approved Soc., [1914] 2 K. B. 352; Sales Agency *v.* Elite Theatres, [1917] 2 K. B. 164; Gonsky *v.* Durrell, [1918] 2 K. B. 71; Smith *v.* G. W. Ry. (1920), 37 T. L. R. 117; Kimpson *v.* Markham, [1921] 2 K. B. 157; Moriarty *v.* Regent's Garage Co., [1921] 2 K. B. 766; Waller *v.* Thomas, [1921] 1 K. B. 541; Nelson, Murdock *v.* Wood (1922), 126 L. T. 745; Ward *v.* Sneiman (1925), 133 L. T. 560.

634. What amounts to knowledge — Means of knowledge.]—Declaration that deft. was possessed of a granary & ladder leading up to it; that the ladder was wholly unfit & unsafe for use; that pltf. was a servant for hire of deft.; that deft. knowing the premises wrongfully & deceitfully ordered pltf. to carry corn up the ladder into the granary; that pltf. believing the ladder to be fit for use, & not knowing the contrary, did carry corn up the ladder to the granary, & by reason of the ladder being unsafe pltf. fell from it:—*Held:* the declaration was sufficient; *semble:* if pltf. had the means of knowing that the ladder was unsafe it would have been a defence, but the defendant should have pleaded it.—WILLIAMS *v.* CLOUGH (1858), 3 H. & N. 258; 27 L. J. Ex. 325; 31 L. T. O. S. 89; 157 E. R. 468.

Annotations:—**Refd.** Davies *v.* England & Curtis (1864), 33 L. J. Q. B. 321; Fowler *v.* Lock (1872), L. R. 7 C. P. 272; Griffiths *v.* London & St. Katharine Docks Co. (1884), 13 Q. B. D. 259; Baker *v.* James, [1921] 2 K. B. 674.

635. —— ——.]—In an action by the widow of a labouring man, who had been employed, with others, by deft., to shore up an arch, which had sunk, & was killed by its falling upon him:—*Held:* the question was not as to the original construction of the arch, but as to the knowledge of the danger at the time of the accident, & whether deft. had any better means of knowing of it than deceased; & if not, then the jury should find for deft.; if the contractor, whether or not he had anything to do with the foundations, knew of the danger, & knowing it, put a man who did not know of it upon the work of shoring up, the contractor was responsible; but if he did not know of the danger, or if the man did not know of it, he was not liable.—OGDEN *v.* RUMMENS (1863), 3 F. & F. 751.

636. —— ——.]—Pltf. sued defts. for damages for the loss of a horse alleged to have been killed by the negligence of defts. The horse in question was in the shafts of a wagon, & with another horse, a leader, was drawing a load of three tons of manure along a lane in defts.' district. When the wagon had gone some distance along the lane it came to a stretch of road, where, for about 130 feet, 5 inches of granite stones had been laid down by defts. over the whole width of the road. On part of this stretch of road the stones had been rolled in by a steam roller then at work; another part had been partially rolled in; & a third part had not been rolled at all. Pltf.'s wagoner did not ask for help from the men with the steam roller, but put his horses to the task & they had succeeded in drawing the wagon clear of the stones when the horse in the shafts fell down & died from a ruptured blood-vessel. The wagon could not have been turned in the lane & there was no warning notice put up by defts. at the commencement of the lane. At the trial the jury found that there was negligence on the part of defts.' servants; that the driver could not by taking reasonable care have avoided the consequences of defts.' negligence; & that the death of pltf.'s horse was the natural & necessary consequence of defts.' negligence:—*Held:* there was some evidence to justify the finding of the jury that there was negligence on the part of defts., but having regard to the fact that when the driver came to the part of the road where the granite had been laid down he had an opportunity of seeing & appreciating the risk of danger to the horses, it must be taken that he elected to run the risk, & therefore pltf. was not entitled to claim damages from defts.—TORRANCE *v.* ILFORD URBAN DISTRICT COUNCIL (1909), 73 J. P. 225; 25 T. L. R. 355; 53 Sol. Jo. 301; 7 L. G. R. 554, C. A.

637. —— **Knowledge of ship's pilot.**]—THOMPSON *v.* NORTH EASTERN RY. CO., No. 787, *post.*

Under Employer's Liability Act.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 233, 234, Nos. 1983–1987

B. Comprehension.

638. General rule.] — THOMAS *v.* QUARTERMAINE, No. 10, *ante.*

639. ——.]—To bring pltf. within the maxim *volenti non fit injuria* they must have something more than the fact that he had gone on with his work; something which would show that he was perfectly contented to go on with his work, that he made no complaint, but understood & acquiesced in the danger (MATHEW, J.).—BACON *v.* DAWES (1887), 3 T. L. R. 557, D. C.

640. ——.]—YARMOUTH *v.* FRANCE, No. 548, *ante.*

641. ——.]—Pltf. was injured by falling on steps leading to defts.' railway station, which defts. had allowed to be slippery & dangerous. There was no contributory negligence on the part of pltf., but there were other steps which he might have used, & he admitted that he knew that the steps were dangerous, & went down carefully holding the handrail:—*Held:* defts. had not shown that pltf. with a full knowledge of the nature & extent of the danger had voluntarily agreed to incur it, so as to make the maxim "*volenti non fit*

disentitle him to recover damages providing he was careful, as the ct. found he was.—DUNN *v.* CALGARY POWER CO., LTD. (Alta.), [1920] 1 W. W. R. 997.—**CAN.**

PART X. SECT. 1, SUB-SECT. 2.—B.

638 i. *General rule.*]—LLOYD *v.* SMITH BROTHERS & WILSON (Sask.) (1911), 21 W. L. R. 298; 4 D. L. R. 143.—**CAN.**

638 ii. ——.]—VALCI *v.* SMALL (1913), 24 O. W. R. 529; 4 O. W. N. 1238; 11 D. L. R. 433.—**CAN.**

638 iii. ——.]—The maxim *volenti non fit injuria* has no application where there is not a full appreciation of the risk.—MAHONEY *v.* CITY OF GUELPH (1918), 43 O. L. R. 313; 43 D. L. R. 490.—**CAN.**

638 iv. ——.]—WELLINGTON & MANAWATU RY. CO., LTD. *v.* MCLEOD (1900), 19 N. Z. L. R. 257.—**N.Z.**

injuria" applicable, & therefore he was entitled to recover.

Where the existence of negligence on the part of defts. & the absence of contributory negligence on the part of the pltf. are specifically found as matters of fact, if defts. desire to succeed on the ground that the maxim "*volenti non fit injuria*" is applicable, they must obtain a finding of fact "that pltf. freely & voluntarily, with full knowledge of the nature & extent of the risk he ran, impliedly, agreed to incur it" (WILLS, J.).—OSBORNE *v.* LONDON & NORTH WESTERN RY. CO. (1888), 21 Q. B. D. 220; 57 L. J. Q. B. 618; 59 L. T. 227; 52 J. P. 806; 36 W. R. 809; 4 T. L. R. 591, D. C.

Annotations:—**Distd.** Brackley *v.* Mid. Ry. (1916), 85 L. J. K. B. 1596. **Apld.** Letang *v.* Ottawa Elec. Ry., [1926] A. C. 725. **Refd.** Torrance *v.* Ilford U. D. C. (1909), 7 L. G. R. 554.

642. ——.]—B., a workman whose duty it was to attend to & work at a machine which was defective, & of which defect he had knowledge, continued to work at the machine, notwithstanding the master's refusal to repair it when the defect was brought to his notice by the workman.

In consequence of the defect B. was obliged to step upon the "bed" or plate of the machine, to adjust part of it, & whilst doing so, received injuries.

In an action to recover compensation for such injuries the county ct. judge nonsuited pltf. because he continued to work a machine which he knew to be in a defective condition:—*Held:* pltf.'s knowledge of the defect did not amount to that thorough comprehension of the risk incurred which alone would have justified the withdrawal of the case from the jury.—BROOKE *v.* RAMSDEN (1890), 63 L. T. 287; 55 J. P. 262, D. C.

C. Complaint as to Existence of Danger.

643. Effect of.]—Pltf., who was in the employment of defts., a railway co., his duty being to attach the carriages of the luggage trains to the locomotive engine, was thrown under the carriages, & severely injured. There was evidence that the co.'s staff for the performance of this work was not sufficient, but pltf. had been employed in this particular service for several months prior to the accident, & had not made any complaint on the subject to the co.:—*Held:* the co. was not liable.—SKIPP *v.* EASTERN COUNTIES RY. CO. (1853), 9 Exch. 223; 2 C. L. R. 185; 23 L. J. Ex. 23; 156 E. R. 95; *sub nom.* SKEIPP *v.* EASTERN COUNTIES RY. CO., 22 L. T. O. S. 123.

Annotations:—**Apld.** Saxton *v.* Hawksworth (1872), 26 L. T. 851. **Refd.** Bartonshill Coal Co. *v.* Reid (1858), 31 L. T. O. S. 255. **Mentd.** Vose *v.* L. & Y. Ry. (1858), 27 L. J. Ex. 249; Feltham *v.* England (1866), L. R. 2 Q. B. 33.

644. ——.]—Declaration against a master alleging that he knowingly, carelessly & negligently erected a hoarding in a street & left a certain machine in a position in which it was likely to cause danger to the workmen, & that a cart accidentally ran against the hoarding & knocked down the machine against pltf. It appeared that a hoarding had been erected by deft., a builder, which projected too far into the street; but sufficient room was left for carts to pass; a heavy machine was placed inside the hoarding & close to it. A cart in passing struck against the hoarding & knocked down the machine against pltf., a workman employed by deft. Pltf. had previously made some complaint of the position of the machine to his master, but voluntarily continued to work though the machine was not moved:—*Held:* there was no evidence to go to the jury of the master's liability.—ASSOP *v.* YATES (1858), 2 H. & N. 768; 30 L. T. O. S. 290; 157 E. R. 317; *sub nom.* ALSOP *v.* YATES, 27 L. J. Ex. 156.

Annotation:—**Mentd.** Giblin *v.* McMullen (1868), L. R. 2 P. C. 317.

645. ——.]—SANDERS *v.* BARKER & SON (1890), 6 T. L. R. 324, D. C.

646. ——.]—ABBOTT *v.* ISHAM, No. 620, *ante*.

647. ——.]—Pltf., a commercial traveller, was employed by defts., who were wholesale grocers. His duties were to travel round the district, show samples, take orders & deliver goods, & for that purpose he was supplied by defts. with a motor-car, the starting gear of which was defective. He complained of this on several occasions to defts., who admitted that it was defective, but failed to remedy the defect. While pltf. was upon one of his journeys the car stopped, & in trying to restart it, he was severely injured. In an action brought by pltf. to recover damages in respect of personal injury resulting from the negligence of defts.:—*Held:* pltf., notwithstanding his knowledge of the defect in the starting gear, had never undertaken or consented to take upon himself the risks arising from continuing to use the car, he had sustained the injury owing to the personal negligence of defts., &, not having been guilty of contributory negligence, he was entitled to recover.—BAKER *v.* JAMES, [1921] 2 K. B. 674; 90 L. J. K. B. 1190; 125 L. T. 414; 37 T. L. R. 591; 19 L. G. R. 551.

648. —— **Defective machinery complained of—Reasonable expectation of remedy.**]—Where a servant, knowing of a defect in machinery he has to work in his master's employ, complains of it to him, but continues in the use of it, in the reasonable expectation of its being repaired, & an accident happens through its defective condition, he is not precluded from recovering against his master for negligence. *Semble:* if knowledge may mean belief on sufficient grounds, as pltf. had his master's assurance that the defect should be remedied, he might well be said to have had no knowledge at the time of the accident that the defect existed.—HOLMES *v.* WORTHINGTON (1861), 2 F. & F. 533.

649. —— —— ——.]—CLARKE *v.* HOLMES, No. 650, *post*.

SUB-SECT. 3.—APPLICATION TO BREACH OF STATUTORY DUTY.

650. Maxim not applicable—Duty to fence machinery.]—Pltf., an adult male, entered the service of deft. at a time when machinery, by the Factory Acts required to be fenced, & which it was pltf.'s duty to oil, was fenced. The fencing became broken, & he complained of the want of repair to deft.'s manager, who promised that it should be repaired, but it was not, & pltf., knowing

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PART X. SECT. 1, SUB-SECT. 2.—C.

643 i. *Effect of.*]—*Held:* pursuer's averments showed that he knew the horse's unfitness, & the danger of continuing to work with it, & therefore he had no claim against his masters for the injury alleged.—CRICHTON *v.* KEIR & CRICHTON (1863), 1 Macph. (Ct. of Sess.) 407; 35 Sc. Jur. 247.—SCOT.

643 ii. ——.]—The tenant of a house raised an action against the landlord to recover damages for injuries sustained by slipping upon an outside stair leading to the house. The action was dismissed as irrelevant, in respect that pursuer's averments showed that knowing the danger she had for ten months continued to occupy the house & to use the steps.—WEBSTER *v.* BROWN (1892), 19 R. (Ct. of Sess.) 765; 29 Sc. L. R. 631.—SCOT.

PART X. SECT. 1, SUB-SECT. 3.

k. *Maxim not applicable.*]—The defence arising from the maxim *volenti non fit injuria* is not applicable where the injury arises from a breach of a statutory duty.—LOVE *v.* NEW

Sect. 1.—*Consent—Volenti non fit injuria: Sub-sect.* 3. *Sects.* 2, 3, 4 & 5.]

of the want of repair, continued to perform his duty of oiling as before, &, in so doing, was injured. In an action for negligence, the jury found that the injury was caused by the want of proper caution on the part of deft., & pltf. had used proper care :—*Held :* pltf. was entitled to recover ; his knowledge at the time when he was injured that the machinery was not fenced was not, in point of law, a defence to the action.—CLARKE *v.* HOLMES (1862), 7 H. & N. 937 ; 31 L. J. Ex. 356 ; 9 L. T. 178 ; 8 Jur. N. S. 992 ; 158 E. R. 751 ; *sub nom.* HOLMES *v.* CLARK, 10 W. R. 405, Ex. Ch.

Annotations :—**Consd.** Hoey *v.* Dublin & Belfast Ry. (1870), 18 W. R. 930. **Apld.** Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685. **Refd.** Waller *v.* S. E. Ry. (1863), 2 H. & C. 102 ; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669 ; Murphy *v.* Smith (1865), 19 C. B. N. S. 361 ; Feltham *v.* England (1866), 7 B. & S. 676 ; Indermaur *v.* Dames (1866), L. R. 1 C. P. 274 ; Smith *v.* Howard (1870), 22 L. T. 130 ; Butler *v.* Birnbaum (1871), 7 T. L. R. 287 ; Britton *v.* Great Western Cotton Co. (1872), L. R. 7 Exch. 130 ; Weblin *v.* Ballard (1886), 17 Q. B. D. 122 ; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523.

651. —— Duty to fence wheel-race.] — Defts. were bound under 7 & 8 Vict. c. 15, s. 21, to fence the place where B. had to stand, it being the edge of a wheel-race not otherwise secured ; &, the dangerous character of the employment was not so obvious as that he must necessarily be taken to have known it ; or even assuming he did know it, that circumstance alone was not enough to constitute him a " volunteer " in such a sense as to exonerate defts. from liability for the consequences of their breach of their statutory duty.—BRITTON *v.* GREAT WESTERN COTTON CO. (1872), L. R. 7 Exch. 130 ; 41 L. J. Ex. 99 ; 27 L. T. 125 ; 20 W. R. 525.

Annotations :—**Apld.** Groves *v.* Wimborne, [1898] 2 Q. B. 402. **Refd.** Chapman *v.* Nitro Phosphate Co. (1885), 1 T. L. R. 493 ; Thomas *v.* Quartermaine (1887), 56 L. J. Q. B. 340.

652. —— Duty to have banksman at pit's mouth.]—At a coal mine in which B., a collier, worked, there was no banksman at the pit's mouth at certain hours, contrary to 43 & 44 Vict. c. 42, s. 1. B., who knew of this, nevertheless ascended the shaft & met with a fatal accident. The widow sued the owner of the mine :—*Held :* the master was liable, because, having contravened the statute, he could not set up as a defence the workman's knowledge of such contravention.—BADDELEY *v.* GRANVILLE (EARL) (1887), 19 Q. B. D. 423 ; 56 L. J. Q. B. 501 ; 57 L. T. 268 ; 51 J. P. 822 ; 36 W. R. 63 ; 3 T. L. R. 759.

Annotation :—**Apld.** Davies *v.* Owen, [1919] 2 K. B. 39.

653. —— Defective winding engine in mine.]—The manager of resp. colliery increased from twenty to twenty-six the number of men authorised to be lowered or raised in a cage at a time. The brake power on the winding engine was adequate for twenty, but not for twenty-six men. Applt.'s husband was killed in consequence of the break-down of the winding engine by the snapping of the spanner bar, which was defective, & the insufficiency of the brake, with the result that a cage fell :—*Held :* resps. had been guilty of a breach of an absolute statutory obligation imposed by sect. 16, for which they were liable, & no question of negligence or of the doctrine of common employment was relevant.—WATKINS *v.* NAVAL COLLIERY CO., [1912] A. C. 693 ; 81 L. J. K. B. 1056 ; 107 L. T. 321 ; 28 T. L. R. 569 ; 56 Sol. Jo. 719, H. L.

Annotations :—**Apld.** Pursell *v.* Clement Talbot (1914), 111 L. T. 827. **Mentd.** Lennard's Carrying Co. *v.* Asiatic Petroleum Co. (1915), 84 L. J. K. B. 1281 ; Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1920] 3 K. B. 131.

SECT. 2.—CONTRIBUTORY NEGLIGENCE.

See Part XI., *post.*

SECT. 3.—DEFECTIVE INTELLIGENCE.

See, generally, LUNATICS, Vol. XXXIII., p. 141, No. 186 ; TORT.

SECT. 4.—IMMINENT RISK.

654. Defendant faced with two risks—Choice of lesser risk.]—Defts., being about to launch a steamship which they had built in their shipbuilding yard on the Mersey, arranged with the owners of a buoy which was thought to be in the line of the launch for its removal. The buoy was removed, but its mooring chains were left unmarked at the bottom of the river. Pltfs.' ketch, which was sailing up the river on the flood tide on the morning of the intended launch, finding the wind falling light, let go her starboard anchor & drifted up the river dragging her anchor, which fouled the mooring chains. The master being unable to free the anchor, defts. sent messages to him warning him that his ketch was in a dangerous position & advising him to slip his anchor & clear away, but the master refused to slip unless defts. would make themselves answerable for the anchor. Defts., deeming it dangerous to life & property to postpone the launch & believing the risk of a collision with the ketch to be slight, launched the steamship, & a collision occurred. In an action of damage by collision brought by the owners of the ketch :—*Held :* the ketch acted unreasonably in refusing to slip her anchor & was alone to blame, inasmuch as defts., in the dilemma in which they were placed by the action of the ketch, rightly chose the lesser of two risks.—KETCH FRANCES (OWNERS) *v.* HIGHLAND LOCH (OWNERS), THE HIGHLAND LOCH, [1912] A. C. 312 ; 81 L. J. P. 30 ; 106 L. T. 81 ; 28 T. L. R. 213 ; 12 Asp. M. L. C. 106, H. L.

Duty to take care—Imminence of risk.] —*See* Part I., Sect. 2, sub-sect. 3, C., *ante.*

Contributory negligence — Plaintiff's acts in emergency.]—*See* Part XI., Sect. 4, *post.*

SECT. 5.—INDEPENDENT CONTRACTOR.

655. Liability of principal — Work involving breach of duty.]—Though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, & is liable to third persons who sustain damage from the doing of that wrong.—ELLIS *v.* SHEFFIELD GAS CONSUMERS CO. (1853), 2 E. & B. 767 ; 2 C. L. R. 249 ; 23 L. J. Q. B. 42 ; 22 L. T.

FAIRVIEW CORPN., LTD. (1904), 24 C. L. T. 259 ; 10 B. C. R. 330.—**CAN.**

l. ——.]—DANIS *v.* HUDSON BAY MINES (1915), 7 O. W. N. 365 32 O. L. R. 335 ; 23 D. L. R. 455.—**CAN.**

m. ——.]—KAYE *v.* WESTPORT HARBOUR BOARD, [1916] N. Z. L. R. 1082.—**N.Z.**

PART X. SECT. 5.

655 l. *Liability of principal—Work involving breach of duty.*]—CRAWFORD *v.* PEEL & CARMICHAEL (1887), 20 L. R. Ir. 332.—**IR.**

O. S. 84; 17 J. P. 823; 18 Jur. 146; 2 W. R. 19; 118 E. R. 955.

Annotations:—**Distd.** Sadler *v.* Henlock (1855), 4 E. & B. 570. **Folld.** Hole *v.* Sittingbourne & Sheerness Ry. (1861), 6 H. & N. 488. **Distd.** Butler *v.* Hunter (1862), 7 H. & N. 826. **Consd.** Crawford *v.* Consett L. B. (1891), 55 J. P. Jo. 218. **Refd.** Pickard *v.* Smith (1861), 10 C. B. N. S. 470; Blake *v.* Thirst (1863), 2 H. & C. 20; Gray *v.* Pullen (1864), 5 B. & S. 970; Sérandat *v.* Salsse (1866), L. R. 1 P. C. 152; Bower *v.* Peate (1876), 1 Q. B. D. 321; Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487. **Mentd.** R. *v.* Longton Gas Co. (1860), 6 Jur. N. S. 601.

656. —— ——.]—If I agree with a builder to build me a house according to a certain plan, he would be an independent contractor & I should not be liable to strangers for any wrongful act unnecessarily done by him in the performance of his work; but clearly I would be jointly liable with him for a trespass on the land, if it turned out that I had no right to build upon it (WILLES, J.).—UPTON *v.* TOWNEND, UPTON *v.* GREENLEES (1855), 17 C. B. 30; 25 L. J. C. P. 44; 26 L. T. O. S. 76; 19 J. P. 775; 1 Jur. N. S. 1089; 4 W. R. 56; 139 E. R. 976.

Annotations:—**Mentd.** Williams *v.* Hayward (1859), 1 E. & E. 1040; Matthey *v.* Curling, [1922] 2 A. C. 180.

657. —— **Work necessarily dangerous.**]—Deft. was the occupier of a close adjoining a close occupied by pltf. Deft.'s close was woodland, & he sold the fallage of the timber to H., continuing himself to occupy the close. H. felled a tree in a negligent manner, so that it fell over the fence between the two closes, & made a gap in it. Two cows of pltf. soon afterwards got from pltf.'s close through the gap into deft.'s close, & fed on the leaves of a yew tree which had been felled there by H., & died in consequence. Deft. had had no notice of the fence having been broken down before the escape of pltf.'s cows. There was evidence that deft. & his predecessors had for more than forty years repaired the fence, which was on his land, between the two closes whenever repairs were necessary; & for the last nineteen years the fence had been repaired by deft. & his predecessors upon notice by the occupier for the time being of pltf.'s close. Whenever the fence was so repaired it was for the purpose of preventing cattle on pltf.'s close from escaping into deft.'s close:—*Held:* the evidence showed a prescriptive obligation on the part of deft. to maintain the fence so as to keep in the cattle in pltf.'s close; the obligation was absolute to keep up a sufficient fence at all times, the act of God or *vis major* only excepted, without any notice of want of repair; the damage was not too remote; & deft. was therefore liable to pltf. for the loss of the cows.—LAWRENCE *v.* JENKINS (1873), L. R. 8 Q. B. 274; 42 L. J. Q. B. 147; 37 J. P. 357; 21 W. R. 577; *sub nom.* LAURENCE *v.* JENKINS, 28 L. T. 406.

Annotations:—**Expld.** Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5; Corry *v.* G. W. Ry. (1881), 29 W. R. 623. **Refd.** Snecsby *v.* L. & Y. Ry. (1874), L. R. 9 Q. B. 263; Halestrap *v.* Gregory (1895), 43 W. R. 507; Coaker *v.* Willcocks, [1911] 2 K. B. 124.

658. —— ——.]—A man, who orders a work to be executed on his own premises, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief.—BOWER *v.* PEATE (1876), 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321; 40 J. P. 789.

Annotations:—**Apprvd.** Dalton *v.* Angus (1881), 6 App. Cas. 740. **Apld.** Lemaitre *v.* Davis (1881), 51 L. J. Ch. 173. **Consd.** Hughes *v.* Percival (1883), 8 App. Cas. 443; Crawford *v.* Consett L. B. (1891), 55 J. P. Jo. 218. **Apld.** Odell *v.* Cleveland House (1910), 102 L. T. 602. **Refd.** Birmingham Corpn. *v.* Allen (1877), 6 Ch. D. 284; Whiteley *v.* Pepper (1877), 46 L. J. Q. B. 436; Burt *v.* Victoria Graving Dock Co. & London & St. Katherine's Dock Co. (1882), 47 L. T. 378; Barham *v.* Ipswich Dock Comrs. (1885), 54 L. T. 23; Jolliffe *v.* Woodhouse (1894), 10 T. L. R. 553; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Penny *v.* Wimbledon U. C. (1899), 68 L. J. Q. B. 704; Cribb *v.* Kynoch, [1907] 2 K. B. 548; Cox *v.* Coulson, [1916] 2 K. B. 177; Selby *v.* Whitbread, [1917] 1 K. B. 736.

659. —— —— **Defective stand for public.**]—The members of the committee of a football club, who had employed an incompetent person to repair a stand for the accommodation of visitors to the football ground, held personally liable for injuries to one of the public caused by the collapse of the stand.—BROWN *v.* LEWIS (1896), 12 T. L. R. 455.

660. —— —— **Building near highway.**]—By an agreement between a railway co. & a firm of contractors the latter were to build a superstructure over the railway co.'s station, & were to have a ninety-nine years' lease of same. The new building, which adjoined a public street, required scaffolding & hoardings, which the contractors were to erect in such a way as should be reasonably approved by the railway co. A gantry was also necessary by means of which building materials might be raised to the top of the existing building, & this gantry could only be erected in a particular manner as provided by the agreement. During the progress of the building operations pltf., while walking on the pavement outside the station, was injured by some timber falling on her from the building, & in respect of her injuries she sued both the railway co. & the contractors. Neither of defts. called any evidence as to how the timber fell. The jury found that the accident was caused by negligence, as there was not sufficient protection to the public on the footpath, & the judge gave judgment against both defts.:—*Held:* the agreement created no relationship of principal & agent, the railway co. were mere reversioners, the fact of their having a right to approve plans did not make them responsible for the gantry being defective, & therefore they were not liable for damages.—HURLSTONE *v.* LONDON ELECTRIC RY. CO. (1914), 30 T. L. R. 398, C. A.

Repair of party wall.] —*See* BOUNDARIES, Vol. VII., pp. 309, 310, Nos. 309–312.

661. —— **Stevedore employed to unload vessel.**]—WALLIS *v.* HINE BROTHERS (1888), 4 T. L. R. 472, C. A.

662. —— ——.]—WHITEWOOD *v.* ANDORSEN, BECKER & Co. (1894), 11 T. L. R. 47.

663. —— **Indemnity from contractor.**]—APPERLEY *v.* PATRICK (MARK) & SON (1902), Emden's B. C., 4th ed. 669.

657 i. —— *Work necessarily dangerous.*]—In a public & busy street of a city a horse became frightened by a steam roller engaged in repairing an intersecting street, & swerving suddenly upon pltf., who was passing on a bicycle, injured him. The roller was the property of the city corporation, & was being used by paving contractors under a provision in the contract:—*Held:* the place where the work was to be done & the means by & the manner in which it was to be performed made it incumbent on the city corpn., if they had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller; & the corpn. could not rid themselves of this obligation by intrusting the work to a contractor.—KIRK *v.* TORONTO CITY (1904), 25 C. L. T. 29; 8 O. L. R. 730; 4 O. W. R. 496.—**CAN.**

n. ——.]—CAMPBELL *v.* MORRISON (1891), 19 R. (Ct. of Sess.) 282; 29 Sc. L. R. 251.—**SCOT.**

o. *Employer not liable.*]—HARLEY *v.* SARGENT (1907), 7 S. R. N. S. W. 741.—**AUS.**

p. ——.]—PAYNE *v.* FREDERICTON RY. CO. (1871), N. B. Dig. 753.—**CAN.**

.]—COCKSHUTT PLOW Co. *v.* MCDONALD (1912), 22 W. L. R. 768; 3 W. W. R. 488; 8 D. L. R. 112; 5 Alta. L. R. 184.—**CAN.**

Sect. 5.—*Independent contractor.* *Sect.* 6 : *Sub-sect.* 1.]

664. —— ——.]—Under a contract with a district council a contractor undertook to execute certain sewage works & to lay certain sewers, & "to save the district council harmless & indemnified from all claims & actions for or in respect of any damage or injury to persons or property arising from or occasioned by the neglect, default, or misconduct of the contractor or of any person employed by the contractor, or otherwise howsoever from or by the execution of the works." In laying down one of the sewers in a highway, the contractor at three different places came across the gas main, the property of the gas co. The sewer trench was dug to a lower depth. The contractor was directed by the engineers of the district council to support the gas main by nine-inch brick piers in places where the gas main was met with. This was done. Subsequently, the gas main was found fractured at two of the places where it was met with. The gas co. sued the district council for negligence & obtained a verdict. The district council claimed to be indemnified under their contract with the contractor. In the issue between the distric council & the contractor, the jury found in favour of the contractor that the damage was not due to the mode in which the work was done :—*Held :* the third party was not liable to indemnify the district council.—ILFORD GAS CO. *v.* ILFORD URBAN DISTRICT COUNCIL (1903), 67 J. P. 365, C. A.

665. —— ——.]—The corpn. of a borough were the owners of a tramway in the borough, & they granted a lease of the tramways, of which lease pltfs. were the assignees. Under the lease the repairs necessary to keep the tramway in working order were to be executed by the corpn. at the cost of pltfs. During the currency of the lease the tramway required to be relaid at a certain place & an agreement was entered into between the corpn. & pltfs. which after reciting that the corpn. at the request & with the consent of pltfs. had agreed to relay the tramway, provided that the corpn. would relay the tramway, & would during the execution of the work provide where necessary a temporary track for the purpose of enabling pltfs., as far as possible, to maintain their service of trams, & the agreement further provided that nothing therein contained should render the corpn. liable in the event of any accident, injury, or damage being occasioned by or sustained by pltfs., their servants or passengers or their rolling stock through or arising out of the execution by the corpn. of the work, but that the corpn. would insert in the contract to be entered into by them a provision imposing upon the contractor full responsibility for all claims & demands resulting from any such accident, injury or damage. The corpn. thereupon made a contract with deft., to which pltfs. were not parties, which recited the lease & that the corpn. had at the request & with the consent of pltfs. subject to certain conditions, agreed to relay the tramway, & by which deft. agreed to execute the work of relaying the tramway, & to indemnify the corpn. against all actions & claims for compensation to workmen & passengers carried on the tramway arising out of the execution of the work, & that deft. should during the execution of the work, be responsible for all accidents. During the execution of the work the tramcars continued to run & a car which was carrying passengers was derailed & overturned owing to the negligent manner in which certain of the work was being carried out at the place where the accident happened, & the passengers & driver were injured & the tramcar was damaged. Pltfs. paid compensation to the passengers & driver, & claimed to recover from deft. the amounts so paid & the cost of repairing the tramcar :—*Held :* though pltfs. were not parties to the contract between the corpn. & deft. yet inasmuch as pltfs.' proprietary right as lessees of the tramway & their right of passage on the highway had been injuriously affected by the act of deft., the latter was liable in damages to pltfs. ; & as the work of relaying the tramway while the tramcars were running involved risk of danger to the passengers in the tramcars, pltfs. were liable to their passengers & were entitled to recover from deft. the sum properly paid as compensation to the passengers who were injured as well as the sum paid as compensation to the driver & the cost of repairing the tramcar.—BIRMINGHAM TRAMWAYS CO., LTD. *v.* LAW, [1910] 2 K. B. 975 ; 80 L. J. K. B. 80 ; 103 L. T. 44 ; 74 J. P. 355 ; 8 L. G. R. 667.

666. —— ——.]—A contractor was employed by a district council to do certain work which involved an excavation by the side of a road. A person having fallen into this excavation & sustained injuries from which he died, his widow & daughter sued the contractor & district council under Lord Campbell's Act, 1846 (c. 93), claiming damages. The jury returned a verdict for pltfs. The district council thereupon claimed that under the terms of the contract between them & the contractor, they were entitled to an indemnity from him :—*Held :* it was not against public policy that the district council should take an indemnity from the contractor & be allowed to enforce it against him, & therefore a declaration should be made that they were entitled to such indemnity, which should include the costs of the action.—NEWCOMBE *v.* YEWEN & CROYDON RURAL DISTRICT COUNCIL (1913), 29 T. L. R. 299.

667. —— **Controlling or interfering with work.**]—Where the owner of a vehicle, being himself in possession & occupation of it, requests or allows another person to drive, this will not of itself exclude his right & duty of control ; & therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving.—SAMSON *v.* AITCHISON, [1912] A. C. 844 ; 82 L. J. P. C. 1 ; 107 L. T. 106 ; 28 T. L. R. 559, P. C.

Annotations :—**Distd.** Ricketts *v.* Tilling, [1915] 1 K. B. 644. **Apld.** Pratt *v.* Patrick, [1924] 1 K. B. 488 ; Parker *v.* Miller (1926), 42 T. L. R. 408.

668. —— ——.]—REICHARDT *v.* SHARD, No. 400, *ante.*

669. —— ——.]—PRATT *v.* PATRICK, No. 399, *ante.*

—— **For acts of contractors & their servants.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 22–27, 155–167, Nos. 23–58, 1216–1296.

—— **Doctrine of common employment.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 207 *et seq.*

—— **Under Employers' Liability Act.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 220 *et seq.*

SECT. 6.—INEVITABLE ACCIDENT—ACT OF GOD.

SUB-SECT. 1.—DEFINITIONS AND CHARACTERISTICS.

670. Act of God—Must be immediate.]—SMITH *v.* SHEPHERD (1796), Abbott's Merchant Shipping, 14th ed. 578, n.

Annotations :—**Refd.** Richardson *v.* Sewell (1805), 2 Smith, K. B. 205. **Mentd.** Johnston *v.* Benson (1819), 1 Brod. & Bing. 454 ; Akt. General Gordon *v.* Cape Copper Co. (1921), 26 Com. Cas. 289.

671. —— No reasonable expectation of occurrence.]—In order that an extraordinary natural event, such as a very high tide, should be, in the legal sense of the words, an act of God, it is not necessary that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected. If such an event has happened once, but there is nothing to lead to the inference that it is likely to recur, it does not, if it happens a second time, cease to be an act of God.

Where deft. charged with negligence has been guilty of a breach of duty, sufficient to produce the damage complained of, he cannot escape liability by showing that the same damage would have arisen from some other cause beyond his control if he had done his duty. But if he can show that some of the damage which actually happened arose from a cause beyond his control, the liability for damage will be apportioned.—NITRO-PHOSPHATE & ODAM'S CHEMICAL MANURE CO. *v.* LONDON & ST. KATHARINE DOCKS CO. (1878), 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267, C. A.

Annotations:—**Apld.** Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418. **Consd.** Burt *v.* Victoria Graving Dock Co. & London & St. Katherine's Dock Co. (1882), 47 L. T. 378. **Apld.** Baldwin's *v.* Halifax Corpn. (1916), 85 L. J. K. B. 1769.

672. —— ——.]—Defts., the Corpn. of Halifax, had under statutory powers constructed a road on the slope of a hill which acted as a "catchwater" for rain-water & loose shale from the upper slopes. To provide for the rain-water & shale from above, which would be intercepted by the new road, a channel with large gullies or catchpits, which would hold shale & allow water to escape, was formed. On July 1, 1914, a phenomenal storm of rain, or cloud-burst, descended upon the hill & road, & thence in a torrent of water & shale into the valley beneath, where pltfs.' wool spinning mill was situated, & damaged their goods. In an action they claimed damages for defts.' negligence in the construction of the works & their maintenance. They complained that there was insufficient provision of gullies or catchpits for water in the channel & that the sewers with which it was connected were of insufficient capacity to carry off storm-water:—*Held:* the natural & obvious effect of making such a road was that it acted as a "catchwater" defts. did not act reasonably & take proper care in exercising their statutory powers in constructing it; they were guilty of negligence & the doctrine of non-liability for nonfeasance had no application; where liability arose from negligence only it became unnecessary to consider whether it was subject to an exception in respect of damage caused by the act of God: the rainfall, though so heavy & unusual, fell short of amounting to an act of God, ordinarily defined as such an operation of the forces of nature as reasonable foresight could not provide against.—BALDWIN'S LTD. *v.* HALIFAX CORPN. (1916), 85 L. J. K. B. 1769; 80 J. P. 357; 14 L. G. R. 787.

·]—*See* CARRIERS, Vol. VIII., p. 21, Nos. 107–113.

673. Inevitable accident—Impossibility of prevention—By exercise of ordinary care & skill.]—A vessel doing damage cannot plead "inevitable accident" if, in a dark or hazy night, she carries much sail, & goes at great speed, neglecting measures of precaution that would have rendered the accident less probable.

An inevitable accident is this: that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, & maritime skill. It is not inevitable accident if a vessel is going eight or nine miles an hour when she ought to be sailing three or four, & say: "I could not prevent the accident at the moment it occurred" (DR. LUSHINGTON).—THE VIRGIL (1843), 2 Wm. Rob. 201; 2 Notes of Cases, 499; 5 L. T. 122; 7 Jur. 1174; 166 E. R. 730.

Annotations:—**Apld.** Londonderry (Owners) *v.* Dolbadarn Castle (Owners) (1845), 4 Notes of Cases Supp. 31; The Marpesia (1872), L. R. 4 P. C. 212. **Consd.** The Secret (1872), 26 L. T. 670. **Apld.** The Pladda (1876), 2 P. D. 34. **Refd.** The Schwann, The Albano, [1892] P. 419.

674. —— —— ——.]—Where the place was one in which there was a chance of meeting with other ships, the weather was thick & the night dark, with snow falling, the master of one of the vessels which came in contact having left the deck at the moment to two seamen; such vessel held to be responsible for the collision, on the ground of want of a sufficient look-out, there being a possibility, had a better look-out been kept, that the collision might have been prevented. A party, in such a case, cannot plead inevitable accident, but is liable for the consequences which, by possibility, he might have prevented. Inevitable accident is that which no skill & no vigilance could possibly have avoided.—THE MELLONA (1847), 3 Wm. Rob. 7; 5 Notes of Cases, 450; 9 L. T. O. S. 474; 11 Jur. 783; 166 E. R. 865.

Annotations:—**Refd.** The San Onofre, [1922] P. 243; The Paludina, [1925] P. 40.

675. —— —— ——.]—The import of words "inevitable accident," in my view, is this: where a man is pursuing his lawful avocation in a lawful manner, & something occurs which no ordinary skill or caution could prevent, &, as the consequence of that occurrence, an accident takes place (DR. LUSHINGTON).—THE EUROPA (1850), 14 Jur. 627.

Annotations:—**Consd.** The Uhla (1868), 19 L. T. 89; The Secret (1872), 26 L. T. 670. **Mentd.** The Campania (1901), 70 L. J. P. 101.

676. —— —— ——.]—In order to constitute an inevitable accident it is necessary that the accident should not have been capable of being

PART X. SECT. 6, SUB-SECT. 1.

671 i. *Act of God—No reasonable expectation of occurrence.*]—An extraordinary rainfall may properly be treated as an act of God, in the technical meaning of that term, though it is not of unprecedented severity, if there is nothing in previous experience to point to a probability of recurrence.—GARLAND *v.* TORONTO CORPN. (1896), 23 A. R. 128.—**CAN.**

673 i. *Inevitable accident—Impossibility of prevention—By exercise of ordinary care & skill.*]—Inevitable accident is where the collision could not have been prevented by proper care & seamanship in the particular circumstances of the case. Deft., in order to support a defence of inevitable accident, is bound to show that everything was done which could & ought to have been done to avoid a collision.—THE SECRET (1872), 26 L. T. 670.—**IR.**

673 ii. —— —— ——.]—JONES *v.* TOWN OF SWIFT CURRENT (1915), 31 W. L. R. 899; 23 D. L. R. 11; 8 Sask. L. R. 310.—**CAN.**

673 iii. —— —— ——.]—STEVES *v.* KINNIE (B. C.), [1917] 1 W. W. R. 1250; 33 D. L. R. 776.—**CAN.**

673 iv. —— —— ——.]—Deft., driving his automobile along a city street, was taken suddenly ill, &, without any preliminary symptoms or warning, became unconscious, & fell back in his car. No one else was in the car, which, thus left without any guidance, ran upon the side walk, &, coming in contact with a boy, so injured him that he died. The boy's father brought an action under Fatal Accidents Act:—*Held:* deft. was not liable.—SLATTERY *v.* HALEY, [1923] 3 D. L. R. 156; 52 O. L. R. 95.—**CAN.**

673 v. —— —— ——.]—BURNS *v.* CORK & BRANDON RY. CO. (1863), 13 I. C. L. R. 543.—**IR.**

673 vi. —— —— ——.]—AUSTEN BROTHERS *v.* STANDARD D. M. CO., LTD. (1883), 1 H. C. 363.—**S. AF.**

r. —— *Question of fact.*]—NIEL *v.* DAY (Y. T.) (1911), 19 W. L. R. 227.—**CAN.**

t. —— ——.]—PLAYFAIR *v.* MEAFORD ELEVATOR CO., MEAFORD

Sect. 6.—*Inevitable accident—Act of God: Sub-sects.*

prevented
degree of
be found in persons who properly discharge their duty.—THE THOMAS POWELL *v.* THE CUBA (1865), 14 L. T. 603; 2 Mar. L. C. 344.

677. —— —— ——.]—Inevitable accident is where the collision could not possibly have been prevented by proper care & seamanship under the particular circumstances of the case.

Where the defence of inevitable accident is set up on behalf of a vessel *primâ facie* to blame for a collision, the defence, to succeed, must be supported by proof that everything was done which could & ought to have been done to avoid the collision; & this, though the vessel be in some degree disabled, & so less manageable than she would otherwise have been.—THE CALCUTTA (OWNERS) *v.* THE EMMA (OWNERS), THE CALCUTTA (1869), 21 L. T. 768; 3 Mar. L. C. 336, P. C.

678. —— —— ——.]—Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, & maritime skill.

Two sailing vessels approaching stem on in such a manner as that, under the Sailing Rules, each would be bound to port, being in a dense fog, only sighted each other at a distance of about 200 yards. Defts.' vessel, having been close hauled on the port tack, was then preparing to go about, & had eased off her head sheets. Both vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting & the collision. Pltfs.' petition alleged, that defts.' vessel neglected to port, & it was stated, in answer to a question by the judge of the Admlty. Ct., that the head sheets of defts.' vessel were not again hauled aft. On this evidence that vessel was held to blame by the Admlty. Ct., on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel:—*Held:* the collision was the result of an inevitable accident, defts.' vessel having done all that could be effected by ordinary care, caution, or maritime skill in the short space of time that elapsed.—THE MARPESIA (1872), L. R. 4 P. C. 212; 8 Moo. P. C. C. N. S. 468; 26 L. T. 333; 1 Asp. M. L. C. 261; 17 E. R. 387, P. C.

Annotations:—**Consd.** The Merchant Prince, [1892] P. 179. **Apld.** The Schwann, The Albano, [1892] P. 419. **Refd.** The Pladda (1876), 2 P. D. 34; The Calderon (1912), *Times*, Mar. 26. **Mentd.** The Abraham (1873), 28 L. T. 775; The Benmore (1873), L. R. 4 A. & E. 132; The Otter (1874), L. R. 4 A. & E. 203.

679. —— —— ——.]—During a very violent gale a brig adrift in the Tyne drove down on a steamer which was lying properly moored to mooring buoys placed there by the harbour authorities. On the brig striking the steamer the ring of one of the buoys carried away, & the steamer got adrift, & drove down the river, & ultimately came in contact with & did damage to a barque, whose owners instituted a cause of damage against the steamer in the county ct. of Northumberland, to recover for the damage done to their vessel by the steamer.

At the hearing it was proved that the chain cables of the steamer had been unbent at the time she got adrift, & that no look-out had previously been kept on deck, though it was known that the weather was getting worse:—*Held:* a defence of inevitable accident, set up by the owners of the steamer, was not sustained, & the steamer was

Had an anchor been let go, the collision would probably have been averted, at all events, the master would have done all that was possible in the circumstances, & have rendered the accident, to use the words of DR. LUSHINGTON, "less probable" (SIR ROBERT PHILLIMORE).—THE PLADDA (1876), 2 P. D. 34; 46 L. J. P. 61.

680. —— —— ——.]—Inevitable accident is that which the party sought to be charged could not possibly prevent by the exercise of ordinary care, caution, & maritime skill.

A person relying on inevitable accident must show that something happened over which he had no control, & the effect of which he could not have avoided by the exercise of the greatest care & skill. It is not sufficient for him merely to show that he was not negligent (LORD ESHER, M.R.).—THE SCHWAN, THE ALBANO, [1892] P. 419; 69 L. T. 34; 8 T. L. R. 425; 7 Asp. M. L. C. 347, C. A.

Annotations:—**Refd.** The Merchant Prince (1892), 8 T. L. R. 430; The Benue, [1916] P. 88.

681. —— —— ——.]—In an action of damage by collision, it appeared that pltfs.' vessel was at anchor in the Mersey when defts.' steamer ran into her in broad daylight. The defence was that the steam steering gear of defts.' vessel failed to act in consequence of some latent defect, or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of defts., & that the collision & damage were caused by inevitable accident. The steam steering gear in question was good of its kind; it had never previously failed to act, & the cause of the defect in the machine, or of the obstruction in the working, could not be discovered by competent persons. Part of the gear, including some portion of the chain, running between the wheel & the rudder, had been recently renewed, & it was admitted that new chain is liable to stretch, but it was proved that before the vessel left her anchorage to proceed on her voyage, the whole of the gear had been tested & found in good order, & that the chain had been tightened up as occasion seemed to require:—*Held:* defts. were liable, as they had not satisfied the burden of proof, for, in order to support the defence of inevitable accident, & disprove the *primâ facie* evidence of negligence, it was necessary for them to show that the cause of the accident was one not produced by them, & the result of which they could not avoid, but defts. knew of the tendency of new chain to stretch, & therefore that an accumulation of links at the leading wheels might possibly cause jamming, &, considering the crowded condition of the river where the accident occurred, the use, or readiness for immediate use, of hand, instead of steam, steering gear, was a means by which the result could have been avoided.

Defts. had failed to sustain the plea of inevitable accident, as it was necessary for them either to show what was the cause of the accident, & that though exercising ordinary care, caution & maritime skill, the result of that cause was unavoidable, or to enumerate all the possible causes, one or other of which might have produced the effect, & show with regard to every one, that the

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ELEVATOR CO. *v.* MONTREAL TRANSPORTATION CO. (1913), 24 O. W. R. 946; 13 D. L. R. 763.—**CAN.**

a. Unusual fall of rain.]—TENNANT *v.* HALL (1888), 27 N. B. R. 499.—**CAN.**

b. ——.]—JUDGE *v.* LIVERPOOL CORPN. (1918), 57 S. C. R. 609.—**CAN.**

c. Flood.]—MATHIESON *v.* MURPHY (Sask.) (1908), 7 W. L. R. 479.—**CAN.**

result was unavoidable (FRY, L.J.).—THE MERCHANT PRINCE, [1892] P. 179; 67 L. T. 251; 8 T. L. R. 420; 7 Asp. M. L. C. 208, C. A.

Annotations:—**Apld.** The Calderon (1912), *Times*, Mar. 26. **Consd.** The Olympic & H.M.S. Hawke, [1913] P. 214. **Mentd.** The Turret Court (1900), 69 L. J. P. 117.

682. —— —— ——.]—The best test of what is an inevitable accident is that given by DR. LUSHINGTON, who said: "In my opinion, an inevitable accident in point of law is that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, & skill" (LOPES, L.J.).—FAWKES *v.* POULSON & SON (1892), 8 T. L. R. 725, C. A.

683. —— **Necessity to know the cause of accident.**]—THE CALDERON (1912), *Times*, Mar. 26.

See, further, SHIPPING.

SUB-SECT. 2.—APPLICATION TO DUTIES CREATED BY COMMON LAW.

684. When defence available—In absence of defendant's negligence.]—If one is bound by prescription to repair a wall, etc., against the flowing of the sea, & there is no default in him, but by reason of the sudden & unusual increase of water the wall is broken, the comrs. of sewers ought to tax all who hold lands or tenements, or common of pasture, etc., or have or may have any loss, damage, etc., according to the quantity of their lands. If any fault is in him, & the danger is not inevitable, but he may well repair it, the comrs. may charge him only to repair it. If through his fault the danger becomes inevitable, or he cannot repair it, by which all are charged, etc., every one charged may have an action on the case against him.—KEIGHLEY'S CASE (1609), 10 Co. Rep. 139a; 77 E. R. 1136.

Annotations:—**Consd.** Hudson *v.* Tabor (1877), 2 Q. B. D. 290. **Apld.** Nitro-Phosphate & Odam's Chemical Manure Co. *v.* London & St. Katharine Docks Co. (1878), 9 Ch. D. 503. **Consd.** Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449. **Mentd.** R. *v.* Hampden (1637), 3 State Tr. 826; Soady *v.* Wilson (1835), 3 Ad. & El. 248; R. *v.* Leigh (1840), 10 Ad. & El. 398; Ryder *v.* Ryder (1861), 30 L. J. P. M. & A. 44.

685. —— ——.]—An action of the case lies for negligently keeping his fire in his [deft.'s] close, by which pltf. was damaged.

The only question is whether pltf. ought not to have shown a special negligence in deft. (HOLT, C.J.).

The action is as well for a fire kindled in the fields of deft. as in his house, for it is deft.'s fire & kindled in his ground, & he ought to have the same care of a fire which he kindles in his field as of that which is made in his house, for the duty to take care of both is founded on this maxim, *sic utere tuo ut non lædas alienum*; but if the fire of deft. by inevitable accident, by impetuous & sudden winds, & without the negligence of deft. or his servants, for whom he ought to be answerable, did set fire to the clothes of pltf. in his ground adjoining; deft. shall have the advantage of this in evidence, & ought to be found not guilty. But here the verdict hath found negligence in deft. Therefore judgment for pltf. (*per* CUR.).—TURBERVILLE *v.* STAMP (1697), 1 Com. 32; Carth. 425; Comb. 459; Holt, K. B. 9; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; Skin. 681; 92 E. R. 944.

Annotations:—**Apld.** Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468. **Consd.** Canterbury *v.* A.-G. (1843), 1 Ph. 306. **Expld.** Jones *v.* Festiniog Ry. (1868), L. R. 3 Q. B. 733. **Reld.** Brucker *v.* Fromont (1796), 6 Term Rep. 659; M'Manus *v.* Crickett (1800), 1 East, 106; Filliter *v.* Phippard (1847), 11 Q. B. 347; Smith *v.* Kenrick (1849), 7 C. B. 515; Vaughan *v.* Taff Vale Ry. (1860), 2 L. T. 394; Williams *v.* Jones (1865), 13 L. T. 300; Burns *v.* Poulson (1873), 29 L. T. 329; Musgrove *v.* Pandelis, [1919] 2 K. B. 43. **Mentd.** Huzzey *v.* Field (1835), 2 Cr. M. & R. 432; Lyons *v.* Martin (1838), 1 Will. Woll. & H. 500; Patten *v.* Rea (1857), 2 C. B. N. S. 606; Limpus *v.* London General Omnibus Co. (1862), 1 H. & C. 526; R. *v.* Stephens (1866), 7 B. & S. 710; Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489.

686. —— ——.]—DAVIS *v.* SAUNDERS, No. 19, *ante*.

687. —— ——.]—A common carrier between A. & B. employed to carry goods from A. to B. to be forwarded to C. carried them to B., there put them in his warehouse, in which they were destroyed by an accidental fire before he had an opportunity of forwarding them; & held not answerable for the loss.—GARSIDE *v.* TRENT & MERSEY NAVIGATION PROPRIETORS (1792), 4 Term Rep. 581; 100 E. R. 1187.

Annotations:—**Consd.** *Re* Webb (1818), 2 Moore, C. P. 500; Richards *v.* L. B. & S. C. Ry. (1849), 7 C. B. 839; Chapman *v.* G. W. Ry. (1880), 5 Q. B. D. 278. **Mentd.** Cairns *v.* Robins (1841), 8 M. & W. 258.

688. —— ——.]—WAKEMAN *v.* ROBINSON, No. 554, *ante*.

689. —— ——.]—Where damage was done to a cargo by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by frost:—*Held:* this was not an act of God, but negligence in the captain, in filling his boiler before the time for heating it, although it was the practice to fill overnight when the vessel started in the morning.—SIORDET *v.* HALL (1828), 4 Bing. 607; 1 Moo. & P. 561; 6 L. J. O. S. C. P. 137; 130 E. R. 902.

Annotations:—**Consd.** Fenton *v.* Thorley, [1903] A. C. 443. **Reld.** The Norway (1864), Brown. & Lush. 377.

690. —— ——.]—In an action of trespass for injury done to a horse by a pony & chaise running against it, it was sworn, on the part of deft., that his wife was holding the pony by the bridle, & a showman came by & frightened the pony, who ran off with the chaise:—*Held:* if true, this was a good defence on a plea of not guilty.—GOODMAN *v.* TAYLOR (1832), 5 C. & P. 410, N. P.

691. —— ——.]—BLYTH *v.* BIRMINGHAM WATERWORKS CO., No. 1, *ante*.

692. —— ——.]—BROWN *v.* SARGENT, No. 329, *ante*.

693. —— ——.]—Pltf. occupied for business purposes the ground floor & defts. the second floor of the same house, respectively, as tenants from year to year. There was a water-closet on defts.' premises to & of which they alone had access & use. After their respective premises had been closed on a Saturday evening, water percolated from the water-closet through the first floor to pltf.'s premises & caused damage to his stock in trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order & failed to close, & the waste pipe choked with paper. The defects could not be detected without examination, & defts. did not know of them, & were guilty of no negligence:—*Held:* there was no obligation on defts. to keep in the water at their peril; & they were not liable to pltf. for the damage.—Ross *v.* FEDDEN (1872), L. R. 7 Q. B. 661; 41 L. J. Q. B. 270; 26 L. T. 966; 36 J .P. 791.

Annotations:—**Distd.** Humphries *v.* Cousins (1877), 2 C. P. D. 239. **Apld.** Blake *v.* Land & House Property

PART X. SECT. 6, SUB-SECT. 2.

684 i. *When defence available—In absence of defendant's negligence.*]—BROWN *v.* CUNARD (1856), 8 N. B. R. (3 All.) 316.—CAN.

684 ii. —— ——.]—BAILEY *v.* CATES (1904), 35 S. C. R. 293.—CAN.

684 iii. —— ——.]—PARKINSON *v.* DOLSEN (B. C.) (1911), 16 W. L. R. 383.—CAN.

Sect. 6.—*Inevitable accident—Act of God: Sub-sects.* 2 & 3.]

Corpn. (1887), 3 T. L. R. 667. **Distd.** Abelson *v.* Brockman (1889), 54 J. P. 119. **Apld.** Gill *v.* Edouin (1894), 39 Sol. Jo. 98. **Apprvd.** Rickards *v.* Lothian, [1913] A. C. 263. **Consd.** Cockburn *v.* Smith, [1924] 2 K. B. 119. **Refd.** Box *v.* Jubb (1879), 27 W. R. 415; Blake *v.* Woolf, [1898] 2 Q. B. 426.

694. —— ——.] —RIVER WEAR COMRS. *v.* ADAMSON, No. 705, *post.*

695. —— ——.] —Deft. was the owner of a series of artificial lakes, which had existed for a long time without causing damage. Upon a most unusual rainfall occurring, the bank at the end of the higher lake gave way & the water rushing with great violence into the lakes below caused their banks also to give way, & the aggregate volume of water from the lakes rushing down the valley, caused damage to certain county bridges lower down the stream. On the trial of an action by pltf., the surveyor of the county, against deft. to recover for the damage done to the bridges, the jury found that there had been no negligence in the construction or the maintenance of the lakes, but that if the flood had been anticipated, the effect might have been prevented:—*Held:* the rainfall being so unusual as to amount to "*vis major*" or the act of God, deft. was not liable.—NICHOLS *v.* MARSLAND (1876), 2 Ex. D. 1; 46 L. J. Q. B. 174; 35 L. T. 725; 41 J. P. 500; 25 W. R. 173, C. A.

Annotations:—**Distd.** Nitro-Phosphate & Odam's Chemical Manure Co. *v.* London & St. Katharine Docks Co. (1878), 9 Ch. D. 503. **Apld.** Box *v.* Jubb (1879), 4 Ex. D. 76. **Consd.** Thomas *v.* Birmingham Canal Co. (1879), 49 L. J. Q. B. 851; Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418; Baker *v.* Snell, [1908] 2 K. B. 825. **Apld.** Rickards *v.* Lothian, [1913] A. C. 263. **Distd.** Greenock Corpn. *v.* Cale. Ry., Greenock Corpn. *v.* G. & S. W. Ry., [1917] A. C. 556. **Refd.** Sauer *v.* Bilton (1878), 7 Ch. D. 815; Barker *v.* Herbert, [1911] 2 K. B. 633; Clinton *v.* Lyons, [1912] 3 K. B. 198; Charing Cross Electricity Supply Co. *v.* Hydraulic Power Co., [1914] 3 K. B. 772; A.-G. *v.* Cory, Kennard *v.* Same (1919), 88 L. J. Ch. 410; Quebec Ry. Light, Heat & Power Co. *v.* Vandry, [1920] A. C. 662; Job Edwards *v.* Birmingham Navigations Co. of Proprietors, [1924] 1 K. B. 341; Ilford U. C. *v.* Beal, [1925] 1 K. B. 671; Noble *v.* Harrison, [1926] 2 K. B. 332; Smith *v.* G. W. Ry. (1926), 135 L. T. 112.

696. —— ——.]—It was stated for the opinion of the ct. by an official referee that upon the occasion of an universal rainfall, unprecedented in duration & quantity for many years in the district, there was imminent peril of defts.' canal bursting; & defts., in order to prevent it, raised a sluice by which a large quantity of water escaped into a neighbouring brook, & thence into a colliery. The water, having filled up this colliery, flowed into some collieries of pltfs. & destroyed their works. It was found that, if relief had not been afforded to the canal banks at this time, an inundation must have very shortly ensued, which would have equally destroyed pltfs.' works & also caused far greater devastation to property & probably loss of life throughout a very wide area; that the course adopted by defts. was prudent & proper, & the only effectual measure which was possible in the emergency. Pltfs. claimed in this action alternatively damage for defts.' wrongful acts, or compensation under defts.' Acts of Parliament which provided for satisfaction to be made for injury or damage alleged to be sustained by reason of carrying into effect any of the provisions of that Act:—*Held:* pltfs.' injury was by the finding due not to defts.' wrongful acts nor to the effect of any of the provisions of defts.' Acts of Parliament, but to *vis major* or an act of God, &, as in any event pltfs.' works would have been equally destroyed, the immediate damage caused by defts.' own act in raising the sluice was *injuria absque damno* & irrecoverable.—THOMAS *v.* BIRMINGHAM CANAL CO. (1879), 49 L. J. Q. B. 851; 43 L. T. 435; 45 J. P. 21, D. C.

697. —— ——.]—The Victoria Dock co., a co. incorporated by Act of Parliament, in pursuance of their powers, in 1858 demised a portion of their dock wall, or bank, to the Thames Graving Dock co., the lessees covenanting to construct a graving dock on land of their own, & make & at all times maintain a channel through the demised part of the wall into such graving dock. The Graving Dock co. constructed their dock & the channel in accordance with the covenants in the lease. The undertaking of the Thames Graving Dock co. was afterwards acquired by the Victoria Graving Dock co. The Victoria Docks co. was afterwards amalgamated with the London & St. Katherine's Dock co. On Jan. 18, 1881, there was an unusually high tide & a strong gale, which was at its height at the highest point of the tide. The high tide & gale combined forced the water in the graving dock, which had entered it through the channel demised by the said lease, over the banks & flooded pltf.'s land. Pltf. sued both cos. for damages. The ct. came to the conclusion, upon the evidence, that the banks of the graving dock had not been properly maintained at the height required by the Dagenham comrs. who are the comrs. of sewers for the district:—*Held:* neither the height of the tide nor the force of the wind, nor the coincidence of their happening together, could be considered as the act of God in the sense which would discharge the Graving Dock co. from liability; the St. Katherine's Dock co., being under a liability to maintain their own wall, & having leased it with a covenant which bound the lessees to make an opening in it, were in the same position as if it had been cut by a contractor employed by them, & were liable for any damage resulting from their lessees' neglect in taking proper precautions against the natural results of such opening.

I have come to the conclusion that there was in every way want of care which destroys any protection or excuse by the act of God, & a want of care which at common law would certainly render the Graving Dock co. liable. I think the St. Katherine's Dock co. are liable, because they had the duty imposed upon them of maintaining the wall round the entrance to the lift cut, & if they cut away that wall they were bound to substitute another (FIELD, J.).—BURT *v.* VICTORIA GRAVING DOCK CO., LTD. & LONDON & ST. KATHERINE'S DOCK CO. (1882), 47 L. T. 378.

698. —— ——.] —A trespass to the person is not actionable if it be neither intentional nor the result of negligence.

Deft., who was one of a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree & accidentally wounded pltf., who was engaged in carrying cartridges & game for the party. The jury found that deft. was not guilty of any negligence in firing as he did:—*Held:* deft. was not liable.—STANLEY *v.* POWELL, [1891] 1 Q. B. 86; 60 L. J. Q. B. 52; 63 L. T. 809; 55 J. P. 327; 39 W. R. 76; 7 T. L. R. 25.

Annotation:—**Refd.** Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

699. —— ——.] —BALDWIN'S, LTD. *v.* HALIFAX CORPN., No. 672, *ante.*

700. —— ——.] —It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary

rainfall, & if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.

A municipal authority, in laying out a park, constructed a concrete paddling pond for children in the bed of a stream & altered the course of the stream & obstructed the natural flow of water therefrom. Owing to a rainfall of extraordinary violence the stream overflowed at the pond, &, as the result of the operations of the authority, a great volume of water, which would have been carried off by the stream in its natural course without mischief, poured down a public street into the town & damaged the property of two railway companies:—*Held:* the extraordinary rainfall was not a *damnum fatale* which absolved the authority from responsibility, & they were liable in damages to the railway cos.—GREENOCK CORPN. *v.* CALEDONIAN RY. CO., GREENOCK CORPN. *v.* GLASGOW & SOUTH WESTERN RY. CO., [1917] A. C. 556; 86 L. J. P. C. 185; 117 L. T. 483; 81 J. P. 269; 33 T. L. R. 531; 62 Sol. Jo. 8; 15 L. G. R. 749, H. L.

Annotations:—**Apld.** A.-G. *v.* Cory, Kennard *v.* Cory, [1921] 1 A. C. 521. **Consd.** City of Montreal *v.* Watt & Scott, [1922] 2 A. C. 555.

also, CARRIERS, Vol. VIII., pp. 71–73, 88, Nos. 479–490, 601–603; MASTER & SERVANT, Vol. XXXIV., p. 133, Nos. 1020, 1021.

701. —— Where injury would have been caused by ordinary occurrences.]—Pltf.'s premises were flooded by an escape of water laterally from one of deft.'s pipes, arising from the starting of a fire-plug, in consequence of a severe frost. By reason of an accumulation of frozen mud on the top of the plug, the water was unable to force the plug out & thus escape, in which case no damage would have resulted. Evidence was given that the plugs were known to start occasionally under such circumstances, & that the lateral escape of water might be prevented at a moderate expense: —*Held:* there was evidence to go to the jury of negligence on the part of defts.—STEGGLES *v.* NEW RIVER CO. (1863), 1 New Rep. 236; 11 W. R. 234; *affd.* (1865), 13 W. R. 413, Ex. Ch.

702. —— ——.]—NITRO-PHOSPHATE & ODAM'S CHEMICAL MANURE CO. *v.* LONDON & ST. KATHARINE DOCKS CO., No. 671, *ante*.

SUB-SECT. 3.—APPLICATION TO DUTIES IMPOSED BY STATUTE.

703. Whether defence available.]—Under Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), s. 74, the owner of a vessel doing damage to the piers or works of a harbour is liable to make good the damage although the accident be the result of inevitable accident from stress of weather without any default from those in charge.—DENNIS *v.* TOVELL (1872), L. R. 8 Q. B. 10; 42 L. J. M. C. 33; 27 L. T. 482; 37 J. P. 263; 21 W. R. 170; 2 Asp. M. L. C. 402, n.

Annotations:—**Folld.** The Merle (1874), 31 L. T. 447. **Consd.** River Wear Comrs. *v.* Adamson (1877), 2 App. Cas. 743; The Mostyn (1926), 135 L. T. 693.

704. ——.]—The owners of a pier, who are undertakers within Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), acquire, under sect. 74 of that Act, a maritime lien in respect of any damage done to their pier by a ship, & may proceed *in rem* to recover that damage in the High Ct. of Admlty., & the shipowners are debarred by sect. 74, from setting up the defence of inevitable accident.—THE MERLE (1874), 31 L. T. 447; 2 Asp. M. L. C. 402.

Annotations:—**Refd.** River Wear Comrs. *v.* Adamson (1877), 26 W. R. 217; The Mostyn (1926), 135 L. T. 693. **Mentd.** The Veritas, [1901] P. 304.

705. ——.]—If a duty is cast upon an individual by common law. the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods entrusted to his care; but if in carrying them with proper care they are destroyed by lightning or swept away by a flood. he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God. There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do, namely, to be liable for the damages (LORD CAIRNS, C.).—RIVER WEAR COMRS. *v.* ADAMSON (1877), 2 App. Cas. 743; 47 L. J. Q. B. 193; 37 L. T. 543; 42 J. P. 244; 26 W. R. 217; 3 Asp. M. L. C. 521, H. L.; *affg.* (1876), 1 Q. B. D. 546, C. A.; *& revsg.* (1873), 29 L. T. 530.

Folld. The Merle (1874), 31 L. T. 447. **Consd.** Postmaster-General *v.* Beck & Pollitzer, [1924] 2 K. B. 308. **Apld.** The Mostyn (1926), 135 L. T. 693. **Refd.** Eglinton *v.* Norman (1877), 46 L. J. Q. B. 557; Arrow Shipping Co. *v.* Tyne Improvement Comrs., The Crystal, [1894] A. C. 508; Gayler & Pope *v.* Davies, [1921] 2 K. B. 75; British-American Tobacco Co. *v.* Jones (1925), 134 L. T. 405; The St. Nicolai (1925), 133 L. T. 640. **Mentd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876; Western Counties Ry. *v.* Windsor & Annapolis Ry. (1882), 7 App. Cas. 178; Eastman Photographic Materials Co. *v.* Comptroller-General of Patents, Designs & Trade Mks., [1898] A. C. 571; A.-G. *v.* Gas Light & Coke Co. (1902), 18 T. L. R. 517; Metropolitan Water Board *v.* New River Co. (1904), 20 T. L. R. 687; Badische Anilin und Soda Fabrik *v.* Hickson, [1906] A. C. 419; *Re* Gibbs, Martin *v.* Harding, [1907] 1 Ch. 465; G. N., Picc. & Brompton Ry. *v.* A.-G. (1908), 98 L. T. 731; Jackson *v.* S.S. Blanche, [1908] A. C. 126; Jones *v.* Hulton, [1909] 2 K. B. 444; Butterley Co. *v.* New Hucknall Colliery Co., [1910] A. C. 381; Hollinshead *v.* Hazleton, [1916] 1 A. C. 428; O'Grady *v.* Wilmot, [1916] 2 A. C. 231; Broken Hill Proprietary Co. *v.* Peninsular & Oriental Steam Navigation Co., [1917] 1 K. B. 688; Davies *v.* Powell, Duffryn Steam Coal Co., [1917] 1 Ch. 488; G. W. Ry. & Mid. Ry. *v.* Bristol Corpn. (1918), 87 L. J. Ch. 414; Valentine *v.* Hyde, [1919] 2 Ch. 129; Hudson's Bay Co. *v.* Maclay (1920), 36 T. L. R. 469; Nicolle *v.* Nicolle, [1922] 1 A. C. 284; Rhondda's Claim, [1922] 2 A. C. 339; *Re* Burnyeat, Burnyeat *v.* Ward, [1923] 2 Ch. 52; Abraham *v.* Mac Fisheries, [1925] 2 K. B. 18.

706. ——.]—Resps.' steam vessel in entering applts.' docks, dragged the anchor, & in consequence the anchor became engaged with an electrical cable laid at the bottom of the dock entrance, doing damage to the electrical works on shore with which the cable was connected. There was no negligence on the part of those in charge of the vessel, nor on the part of any other person:

PART X. SECT. 6, SUB-SECT. 3.

703 f. *Whether defence available.*]—*Held:* although the rainfall was unprecedented in the district the corpn. having constructed an *opus manufactum* in the bed of a stream were liable for damage resulting to property situated at a lower level which would not have occurred had the stream remained unaltered; the rainfall on the day in question was not a *damnum fatale* which could relieve them from liability, & accordingly the corpn. were liable for the damage sustained by the railway cos.

Opinion that the corpn. would have been liable even if the rainfall had been a *damnum fatale*.—CALEDONIAN RY. CO. *v.* GREENOCK CORPN., GLASGOW & SOUTH WESTERN RY. CO. *v.* GREENOCK CORPN., [1917] S. C. (H. L.) 56; 54 Sc. L. R. 600.—**SCOT.**

Sect. 6.—*Inevitable accident—Act of God: Sub-sects.* 3 & 4. *Sects.* 7 & 8.]

applts. were not entitled to recover damages under Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), s. 74, upon the authority of *Wear River Comrs.* v. *Adamson*, No. 705, *ante*.—THE MOSTYN, [1927] P. 25; 96 L. J. P. 1; 135 L. T. 693; 42 T. L. R. 710, C. A.

SUB-SECT. 4.—PLEADING AND PRACTICE.

707. Necessity for special plea.]—In trespass for driving deft.'s cart against pltf., throwing him down & wounding him, deft. cannot show, under not guilty, that there was no negligence on his part, but that pltf. accidentally slipped from the pavement, & deft. unintentionally drove over him. Inevitable accident, arising from superior agency, would have been a defence admissible under that issue.—HALL *v.* FEARNLEY (1842), 3 Q. B. 919; 3 Gal. & Dav. 10; 12 L. J. Q. B. 22; 7 Jur. 61; 114 E. R. 761.

Annotation:—**Refd.** Stanley *v.* Powell, [1891] 1 Q. B. 86.

708. —— Amendment of defence.]—At the trial of an action for negligence deft. sought to raise a defence that the alleged injuries & damage were due to an inevitable accident, which was not pleaded specifically in his defence:—*Held:* the evidence as to the accident being inevitable was inadmissible.—WINCHILSEA (DOWAGER COUNTESS) *v.* BECKLY (1886), 2 T. L. R. 300.

Annotation:—**Overd.** Rumbold *v.* L. C. C. (1909), 25 T. L. R. 541.

709. —— Defence a denial of liability.]—Where in an action claiming damages for negligence deft. by his statement of defence denies negligence he may give evidence that the accident upon which the claim is based was an inevitable accident. In such a case the defence of inevitable accident need not be specifically pleaded.—RUMBOLD *v.* LONDON COUNTY COUNCIL (1909), 25 T. L. R. 541; 53 Sol. Jo. 502, C. A.

710. Burden of proof—Right to begin.]—In a cause of damage defts., by their pleadings, made no charge against pltfs., but only denied generally the averments in the petition, & pleaded inevitable accident:—*Held:* defts. ought to begin.—THE THOMAS LEA (1868), 38 L. J. Adm. 37; 20 L. T. 1017: 3 Mar. L. C. 261.

Annotation:—**N.F.** The Abraham (1873), 28 L. T. 775.

-.]—In a cause of collision, where defts. plead inevitable accident alone, it lies upon pltf. to show a *primâ facie* case of negligence against defts., & pltfs. must therefore begin.—THE ABRAHAM (1873), 28 L. T. 775; 2 Asp. M. L. C. 34.

Annotation:—**Apld.** The Otter (1874), L. R. 4 A. & E. 203.

712. —— ——.]—By a cause of damage defts., by their pleading, made no charge of negligence against pltfs., but denied generally the averments in the petition, & pleaded inevitable accident:—*Held:* pltfs. ought to begin.—THE BENMORE (1873), L. R. 4 A. & E. 132; 43 L. J. Adm. 5; 22 W. R. 190.

Annotation:—**Apld.** The Otter (1874), L. R. 4 A. & E. 203.

713. —— ——.]—In all causes of damage, the burden being upon pltf. to establish negligence against deft., pltf. must begin; & this rule applies to cases where the only defence is inevitable accident & pltf.'s vessel is at anchor, contrary to the former practice of the Admlty. Ct.—THE OTTER (1874), L. R. 4 A. & E. 203; 30 L. T. 43; 22 W. R. 557; 2 Asp. M. L. C. 208.

Annotation:—**Mentd.** The Bluebell, [1895] P. 242.

714. Costs.]—Where the defence of inevitable accident is sustained, pltf. will not be ordered to pay the costs, unless he might have known that there was, apart from the merits, a good legal defence.—THE VIRGO (1876), 35 L. T. 519; 25 W. R. 397; 3 Asp. M. L. C. 285.

—— In collision cases.]—*See* ADMIRALTY, Vol. I., pp. 207–209, Nos. 1279–1282, 1300–1307.

SECT. 7.—**INFANCY.**

See INFANTS, Vol. XXVIII., pp. 178 *et seq.*, & Part VII., *ante*.

SECT. 8.—**RELIANCE ON OTHERS.**

715. Work entrusted to competent persons—General rule.]—DANIEL *v.* METROPOLITAN RY. CO., No. 183, *ante*.

716. —— Professional assistance called in—Farrier—To attend injured animal.]—If upon a hired horse being taken ill, the hirer calls in a farrier, he is not answerable for any mistakes which the latter may commit in the treatment of the horse; but if instead of that he prescribes for the horse himself, & from unskilfulness gives him a medicine which causes his death, although acting *bonâ fide*, he is liable to the owner of the horse as for gross negligence.—DEAN *v.* KEATE (1811), 3 Camp. 4; 170 E. R. 1286, N. P.

717. —— —— Representation by contractor.]—Pltf., a workman, among others in defts.' employ, was injured by the fall of a wall. The foreman of the works had observed that the wall was unsafe, &, having placed the workmen out of danger, ordered a contractor employed in repairing the buildings at the time to bring his whole staff of workmen & shore up the wall. This was done, & the foreman, having been assured by the contractor that the wall was safe, sent the workmen back to their work. Shortly afterwards the wall fell. The foreman trusted to the assurance of the builder that the wall was safe, & did not personally inspect its condition after it had been shored up:—*Held:* there was no evidence of negligence on the part of defts. or of their foreman.—MOORE *v.* GIMSON (1889), 58 L. J. Q. B. 169; *sub nom.* MOORE *v.* GIMSON, NEWCOMBE *v.* SAME, TETSALL *v.* SAME, 5 T. L. R. 177, D. C.

718. —— —— Association supplying nurses.]—Defts. were an assocn. whose object was to provide for the supply of duly qualified nurses to attend on the sick in a certain neighbourhood. The assocn. for that purpose appointed & paid salaries to

PART X. SECT. 8.

715 i. *Work entrusted to competent persons—General rule.*]—DALZIEL *v.* OSBORNE (1857), 20 Dunl. (Ct. of Sess.) 55; 30 Sc. Jur. 32.—**SCOT.**

715 ii. —— ——.]—GORDON *v.* M'HARDY (1903), 6 F. (Ct. of Sess.) 210; 41 Sc. L. R. 129; 11 S. L. T.

715 iii. —— ——.]—A labourer employed by the contractor for the brickwork in an unfinished house, was injured by the breaking of a step while carrying a load of bricks up the stair of the house:—*Held:* no negligence had been proved on the part of defender, he being entitled to rely on the fact that the stair was constructed by a competent tradesman, & was the permanent stair of the house.—M'INULTY *v.* PRIMROSE (1897), 24 R. (Ct. of Sess.) 442; 34 Sc. L. R. 334; 4 S. L. T. 286.—**SCOT.**

715 iv. —— ——.]—WOOD & CO. *v.* MACKAY (1906), 8 F. (Ct. of Sess.) 625; 43 Sc. L. R. 458; 13 S. L. T. 963.—**SCOT.**

nurses, for whose services they made charges to persons on whose application the nurses were supplied. The assocn. issued printed rules & regulations with regard to the duties of their nurses & other matters with a view as well to the protection of the nurses as to ensuring their efficiency while engaged in nursing. These regulations provided for the exercise of certain supervision over the nurses by a superintendent appointed by the assocn.; but, with regard to the work of a nurse while engaged in nursing a patient, it was provided (*inter alia*) that, while so engaged, she should not absent herself from duty without the permission of the patient's friends, & that she should implicitly follow the instructions of the patient's medical man. A form, which was sent out by the assocn. upon supplying nurses, indicated to the person applying for the nurse that, while engaged in nursing the patient, the nurse was to be regarded as employed by that person. Two nurses were supplied by the assocn. for the purpose of nursing the female pltf. through an operation which was about to be performed upon her by a medical man in attendance upon her. An injury was occasioned to the female pltf., through the negligence of the nurses, or one of them, while engaged in nursing her:—*Held:* upon the true construction of the documents in relation to the supply of the nurses, the contract of the assocn. was, not to nurse the female pltf. through the agency of the nurses as their servants, but merely to procure for her duly qualified nurses, & that the nurses were not, in nursing the female pltf., acting as the servants of the assocn.; & therefore defts. were not liable in respect of negligence of the nurses supplied by them.—HALL *v.* LEES, [1904] 2 K. B. 602; 73 L. J. K. B. 819; 91 L. T. 20; 53 W. R. 17; 20 T. L. R. 678; 48 Sol. Jo. 638, C. A.

Annotations:—**Refd.** Norris *v.* Wolseley Tool & Motor Cab Co. (1907), 52 Sol. Jo. 116; Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820; Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53; Cox *v.* Coulson, [1916] 2 K. B. 177.

719. —— —— Local authority providing medical attention.]—Defts. a local authority, acting under the provisions of the Public Health Act, 1875 (c. 55), provided for the use of the inhabitants of their district a hospital for the reception of persons suffering from infectious diseases. A visiting physician, who was a competent medical practitioner, was appointed to the hospital, & acted under the general directions of the hospitals committee of defts., the rules providing (*inter alia*) that he should be responsible for "the treatment of the patients from the beginning to the end of their stay, & also for their freedom from infection when discharged." A son of pltf. was treated in the hospital while suffering from a mild attack of scarlet fever, & was ultimately discharged by the visiting physician while still in an infectious condition, & under circumstances which a jury found to amount to a want of reasonable skill & care on his part in & about the discharge; after the boy had returned home, he communicated the disease to three other children of pltf. Pltf. then sued defts. to recover the expense to which he had been put in regard to the illness of his other children owing to the premature discharge of his son from the hospital by the visiting physician:—*Held:* pltf. was not entitled to recover, for the legal obligation of defts. extended only to the provision of reasonably skilled & competent medical attendance for the patients, which they had discharged & there was no absolute undertaking or obligation on their part that no patient should be discharged by the visiting physician while still in a condition which might cause infection.—EVANS *v.* LIVERPOOL CORPN., [1906] 1 K. B. 160; 74 L. J. K. B. 742; 69 J. P. 263; 21 T. L. R. 558; 3 L. G. R. 868.

Annotations:—**Apprvd.** Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820. **Refd.** Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775. **Mentd.** University of London Press *v.* University Tutorial Press, [1916] 2 Ch. 601.

720. —— —— ——.]—The only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care & skill in selecting their medical staff. The relationship of master & servant does not exist between the governors & the physicians & surgeons who give their services at the hospital & the nurses & other attendants assisting at an operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that period from the operating surgeon alone & not from the hospital authorities. Pltf. brought an action against the governors of a hospital for damages for injuries alleged to have been caused to him during an operation by the negligence of some members of the hospital staff:—*Held:* the action was not maintainable.—HILLYER *v.* ST. BARTHOLOMEW'S HOSPITAL (GOVERNORS), [1909] 2 K. B. 820; 78 L. J. K. B. 958; 25 T. L. R. 762; 53 Sol. Jo. 714; *sub nom.* HILLYER *v.* LONDON CORPN. (ST. BARTHOLOMEW'S HOSPITAL, GOVERNORS), 101 L. T. 368; 73 J. P. 501, C. A.

Annotations:—**Refd.** Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775. **Mentd.** Scottish Insce. Comrs. *v.* Royal Infirmary of Edinburgh (1913), 6 B. W. C. C. N. 120.

721. —— —— ——.]—Where an education authority under the Education Acts, 1907 (c. 43), & 1909 (c. 29), enters into an agreement with a medical assocn. in regard to the performance of operations on schoolchildren, the education authority are not liable for the negligence, if any, of the persons performing the operation, provided that they engage competent professional persons to perform it.—DAVIS *v.* LONDON COUNTY COUNCIL (1914), 30 T. L. R. 275; 78 J. P. Jo. 64.

722. Exceptions to rule — Implied representation by person employing contractor.] — Defts., wharfingers, for good consideration agreed to allow the pltf., a shipowner, to discharge his ship at their wharf. To do this it was necessary that the ship should be moored alongside defts.' jetty, which extended into the river Thames, where the ship must necessarily ground at low water. The bed of the river adjoining the jetty was under the control of the Thames Conservators, & defts. had no control over it, but they took no care to ascertain whether it was in a safe condition, so as not to endanger a vessel taking the ground there. Pltf.'s ship, as the tide ebbed, settled down & suffered damage from the uneven nature of the ground:—*Held:* defts. were liable, for under the circumstances they must be taken to have represented that they had taken reasonable care to ascertain that the bottom of the river at the jetty was in such a condition as not to endanger a vessel using the premises in the ordinary way.—THE MOORCOCK (1889), 14 P. D. 64; 58 L. J. P. 73; 60 L. T. 654; 37 W. R. 439; 5 T. L. R. 316; 6 Asp. M. L. C. 373, C. A.

Annotations:—**Distd.** Tredegar Iron & Coal Co. *v.* S.S. Calliope, The Calliope, [1891] A. C. 11. **Consd.** Parker *v.* Plomesgate R. C. (1903), 9 Com. Cas. 107. **Apld.** The Beam, [1906] P. 48. **Distd.** The Empress, [1923] P. 96. **Consd.** Great Lakes S.S. Co. *v.* Maple Leaf Milling Co. (1924), 41 T. L. R. 21; The Grit, [1924] P. 246. **Refd.**

Sect. 8.—*Reliance on others.* *Part XI.* *Sect.* 1: *Sub-sect.* 1.]

Re Shell Transport & Trading Co. & Consolidated Petroleum Co. (1904), 20 T. L. R. 517; Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310; Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381; Scrutton *v.* A.-G. for Trinidad (1920), 90 L. J. P. C. 30; British Petroleum Co. *v.* A.-G. for Ceylon, [1926] A. C. 147. **Mentd.** Hamlyn *v.* Wood, [1891] 2 Q. B. 488; Mitchell *v.* Foster (1897), 41 Sol. Jo. 226; White *v.* Turnbull, Martin (1898), 78 L. T. 726; Lohne, etc. (Owners of Barque Ydun) & Skibs Assco. Forening Protector *v.* Preston Corpn., The Ydun (1899), 81 L. T. 10; Krell *v.* Henry, [1903] 2 K. B. 740; Nitrate Producers S.S. Co. *v.* Wills (1903), 19 T. L. R. 626; Ogdens *v.* Nelson, Same *v.* Telford, [1903] 2 K. B. 287; Devonald *v.* Rosser, [1906] 2 K. B. 728; Young *v.* Hoffman Manufacturing Co., [1907] 2 K. B. 646; City of Dublin Steam Packet Co. *v.* R. (1908), 24 T. L. R. 798; Ellis *v.* Glover & Hobson, [1908] 1 K. B. 388; Butterley Co. *v.* New Hucknall Colliery Co., [1909] 1 Ch. 37; Consolidated Goldfields of South Africa *v.* Spiegel (1909), 100 L. T. 351; Biddell *v.* Horst Co., [1911] 1 K. B. 934; Easton *v.* Hitchcock, [1912] 1 K. B. 535; Lazarus *v.* Cairn Line of Steamships (1912), 106 L. T. 378; The Devonshire & St. Winifred, [1913] P. 13; Lloyds Bank *v.* Swiss Bankverein, Union of London & Smiths Bank *v.* Swiss Bankverein (1913), 108 L. T. 143; Nelson *v.* Nelson, [1913] 2 K. B. 471; Orient Co. *v.* Brekke & Howlid (1913), 82 L. J. K. B. 427; Merryweather *v.* Pearson, [1914] 3 K. B. 587; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428; *Re* Newman, Raphael's Claim, [1916] 2 Ch. 309; *Re* Anglo-Russian Merchant Traders & Batt (London), [1917] 2 K. B. 679; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1; Sharpe *v.* Nosawa, [1917] 2 K. B. 814; Barnes *v.* City of London Real Property Co., [1918] 2 Ch. 18; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623; Kensington & Knightsbridge Electric Lighting Co. *v.* Notting Hill Electric Lighting Co. (1918), 87 L. J. K. B. 565; *Re* Nott & Cardiff Corpn., [1918] 2 K. B. 146; Turpin *v.* Victoria Palace, [1918] 2 K. B. 539; Akt. Olivebank *v.* Dansk Svovlsyre Fabrik, [1919] 2 K. B. 162; *Re* Comptoir Commercial Anversois *v.* Power, [1920] 1 K. B. 868; Armour *v.* Leopold Walford (London), [1921] 3 K. B. 473; Moriarty *v.* Regent's Garage Co., [1921] 2 K. B. 766; Cockburn *v.* Smith (1923), 40 T. L. R. 113; Kelantan Government *v.* Duff Development Co., [1923] A. C. 395; Larrinaga *v.* Soc. Franco-Americaine Des Phosphates De Medulla (1923), 92 L. J. K. B. 455; United States Shipping Board *v.* Durrell, [1923] 2 K. B. 739; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522; United States Shipping Board *v.* Strick, [1926] A. C. 545.

723. —— Reliance on person insufficiently authorised—Architect relying upon clerk of works.]—LEE *v.* BATEMAN (1893), *Times*, Oct. 31.

724. —— ——.]—The harbour at S. saw vested in trustees who own & have the control & management of the harbour & berths therein, one of which is alongside a wharf known as the K. wharf.

The trustees invite vessels to use the harbour & levy tolls on vessels doing so. The K. wharf is owned, controlled, & managed by the L. B. & S. C. Ry. Co., who collect dues on all goods loaded or discharged at the wharf. Vessels loading or discharging at the wharf have to take the ground at low water at the berth alongside the wharf. The Trinity House Pilots licenced to pilot vessels into & out of the harbour at S. from time to time take soundings in the harbour for the purpose of being able to perform their duty to the ships who employ them, & in pursuance of the directions given them by the pilotage authority.

The *B.*, a French steamship, was employed to bring a consignment of flour to R. & A., merchants at S., who owned a warehouse on the K. wharf built on land leased from the railway co. The flour which was carried under bills of lading was to be stored in the warehouse, & the railway co. received from R. & A., the consignees of the flour, fees & dues for permission to receive the flour at the wharf. The ship's brokers, who held both the ship's & consignees' bills of lading, expecting the arrival of the *B.* sent a postcard to the pilots at S. directing them to berth the *B.* on her arrival at the K. wharf, & this was done. At low water the *B.* took ground & was injured by grounding on a heap of rubbish lying in the harbour alongside the wharf. Neither the trustees nor the railway co. as wharfingers had ever sounded the berth, each thinking it was the duty of the other to do so, & also because both relied on the soundings made by the pilots whom they thought would tell them if anything was wrong. The owners of the *B.* sued the trustees & the wharfingers, the railway co., for the damages sustained by them by reason of the defective condition of the berth:—*Held:* the trustees were liable for the damage caused by the defective berth as they had been guilty of a breach of their statutory duty to remove obstructions for the purpose of preserving the navigation & use of the harbour, & the railway co., as wharfingers, were liable, for there was at least a duty on them to take reasonable care to find out whether the berth was safe, &, in the event of the state of the berth being unknown to them, there was a duty on them to warn the *B.* that they did not know what condition the berth was in.—THE BEARN, [1906] P. 48; 75 L. J. P. 9; 94 L. T. 265; 22 T. L. R. 165; 10 Asp. M. L. C. 208, C. A.

Annotations:—**Distd.** The Empress, [1923] P. 96. **Consd.** Great Lakes S.S. Co. *v.* Maple Leaf Milling Co. (1924), 41 T. L. R. 21; The Grit, [1924] P. 246. **Refd.** Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310; Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381.

725. —— Defendant under duty not to rely on judgment of others.]—LEAVER *v.* PONTYPRIDD URBAN DISTRICT COUNCIL, No. 379, *ante*.

Obligations of wharfinger.]—*See* WATERS & WATERCOURSES.

725 i. *Exceptions to rule—Defendant under duty not to rely on judgment of others.*]—Where a man owes a duty to another, he cannot delegate that duty & evade the responsibility of seeing that the duty is adequately performed. If the duty has not been performed, it is no excuse for the person who should have performed it to show that he had upon whose skill he relied.—MCNERNEY *v.* FORRESTER (1912), 19 W. L. R. 32; 20 W. L. R. 732; 1 W. W. R. 1235; 22 Man. L. R. 220; 2 D. L. R. 718.—**CAN.**

725 ii. —— ——.]—SPROWL *v.* STANDARD CONSTRUCTION CO. (N. S.), [1923] 4 D. L. R. 739.—**CAN.**

725 iii. —— ——.]—Where a person is under a duty to perform certain work with due care & diligence he cannot delegate the performance of such work to another so as to relieve the latter from liability for performing without due care. If a third party sustain injuries through a contractor performing such work negligently he may recover damages from the contractor.—ATKINS *v.* CAMPS BAY TRAMWAY CO. (1903), 18 S. C. 245.—**S. AF.**

Part XI.—Contributory Negligence.

SECT. 1.—WHAT MUST BE PROVED.

SUB-SECT. 1.—PLAINTIFF'S NEGLIGENCE MUST BE PROXIMATE CAUSE OF INJURY.

726. General rule.]—In an action to recover damages for an injury occasioned by a collision between two vessels:—*Held:* the proper question for the jury was whether the damage was occasioned entirely by the negligence or improper conduct of deft. or whether pltf. himself so far contributed to the misfortune by his own negligence or want of ordinary & common care & caution, that, but for such negligence or want of ordinary care & caution on his part, the misfortune would not have happened; in the first case, pltf. would be entitled to recover, in the latter not, as, but for his own fault, the misfortune could not have happened. Negligence or want of ordinary care or caution will not, however, disentitle pltf. to recover, unless it be such, that, but for that negligence or want of ordinary care & caution the misfortune could not have happened; nor if deft. might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of pltf.—TUFF *v.* WARMAN (1858), 5 C. B. N. S. 573; 27 L. J. C. P. 322; 5 Jur. N. S. 222; 6 W. R. 693; 141 E. R. 231, Ex. Ch.

Annotations:—**Apld.** Witherley *v.* Regent's Canal Co. (1862), 12 C. B. N. S. 2. **Consd.** L. B. & S. C. Ry. *v.* Walton (1866), 14 L. T. 253; The Vera Cruz (No. 1) (1884), 9 P. D. 88. **Apld.** The Hero, [1911] P. 128; The Highland Loch, [1911] P. 261; British Columbia Elec. Ry. Co. *v.* Loach, [1916] 1 A. C. 719; Paul *v.* G. E. Ry. (1920), 36 T. L. R. 344. **Refd.** Fordham *v.* L. B. & S. C. Ry. (1868), L. R. 3 C. P. 368; Doyle *v.* Kinahan (1869), 17 W. R. 679; Radley *v.* L. & N. W. Ry. (1876), 1 App. Cas. 754; Brown *v.* G. W. Ry. (1885), 52 L. T. 622; The Bernina (1887), 12 P. D. 58; British Columbia Elec. Ry. *v.* Loach (1915), 113 L. T. 946; Canadian Pacific Ry. *v.* Frechette, [1915] A. C. 871; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Mentd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876.

727. ——.]—Contributory negligence is no answer to an action grounded on negligence unless it was the proximate cause of the injury.—BROWNLOW *v.* METROPOLITAN BOARD OF WORKS & AIRD (1861), 2 F. & F. 604; *on appeal* (1863), 13 C. B. N. S. 768.

Annotations:—**Mentd.** Coe *v.* Wise (1864), 5 B. & S. 440; Mersey Dock Trustees *v.* Gibbs, Mersey Dock Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93; L. C. C. *v.* Port of London Authority, [1914] 2 Ch. 362.

728. ——.]—Resp.'s horse & cart was standing unattended in front of his shop, & appcts.' servant having occasion to go to the shop, drew up a horse & van of appcts. immediately behind resp.'s cart, which he also left unattended. Shortly afterwards resp.'s horse broke through the shop window, & there was evidence that appcts.' horse had moved on & forced it to do so. In an action by resp. against appcts., the judge directed the jury that the question for them was whether defts.' van occasioned the accident, & whether the same was brought about by the negligence of defts.' servant, & that there was no evidence of contributory negligence on the part of pltf.:—*Held:* this direction was wrong; there was clear evidence of negligence on the part of pltf., & the judge ought to have left it to the jury to say whether such negligence proximately contributed to the accident; the proper question for a jury in such a case is that stated in the judgment of WIGHTMAN, J., in *Tuff* v. *Warman*, No. 726, *ante*.—LONDON, BRIGHTON & SOUTH COAST RY. CO. *v.* WALTON (1866), 14 L. T. 253; *sub nom.* WALTON *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., Har. & Ruth. 424; 14 W. R. 395.

729. ——.]—Though pltf. may have been guilty of negligence, & although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet, if deft. could, in the result, by the exercise of ordinary care & diligence, have avoided the mischief which happened, pltf.'s negligence will not excuse him.

A railway co. was in the habit of taking full trucks from the siding of a colliery owner, &

PART XI. SECT. 1, SUB-SECT. 1.

726 i. *General rule.*]—A traveller on approaching a railway crossing is bound to use such faculties of sight & hearing as he may be possessed of, & when he knows he is approaching a crossing & the line is in view, & there is nothing to prevent him from seeing & hearing a train if he looks for it, he ought not to cross the track in front of it, without looking, merely because the warning required by law has not been given.—WEIR *v.* CANADIAN PACIFIC RY. CO. (1888), 16 A. R. 100. —**CAN.**

726 ii. ——.]—Where the question was whether the proximate cause of an accident was the wrongful act of deft. co. in placing a telephone pole where it was placed, or the failure on the part of pltf. in the circumstances, to exercise the care which a reasonably prudent person would have exercised:—*Held:* pltf. did not exercise such reasonable care, & the accident was caused by his failure to exercise such reasonable care.—DALE *v.* BRITISH COLUMBIA TELEPHONE CO. (1906), 3 W. L. R. 292.—**CAN.**

726 iii. ——.]—A person does not exercise reasonable care when he attempts to pass through a very powerful current of water, &, therefore, is guilty of contributory negligence.—HUDSON *v.* NAPANEE RIVER IMPROVEMENT CO. (1914), 6 O. W. N. 11; 31 O. L. R. 47.—**CAN.**

726 iv. ——.]—No man has a right to cross a railway track in front of an approaching train in full view, & when he suffers damage, complain that a bell or whistle was not sounded.—BARTLETT *v.* WINNIPEG ELECTRIC RY. CO. & CANADIAN NORTHERN RY. CO. (1916), 34 W. L. R. 325; 10 W. W. R. 300.—**CAN.**

726 v. ——.]—Pltf. held disentitled to recover for injury through collision between his automobile which he was driving & deft.'s tram car because the accident occurred at a dangerous point, where pltf. should have looked to see if a car were coming, & if he looked he would have seen it, & either the failure to look, or, if he looked, the crossing in front of the car, was reckless conduct constituting contributory negligence on his part, which was the *causa causans* of the accident.—FRASER *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (B. C.), [1919] 2 W. W. R. 513.—**CAN.**

726 vi. ——.]—A motor driver is not liable for damages caused by his collision with another car having the right of way at a street intersection if the accident was owing to the carelessness & excessive rate of speed of the driver of the other car, & where the driver of the first car on approaching the street intersection looked but saw no car & knew that no vehicle driven at a reasonable rate of speed would reach the intersection before he could cross it.—WALLACE *v.* VIERGUTZ, [1920] 2 W. W. R. 333; 52 D. L. R. 703; 13 Sask. L. R. 251.—**CAN.**

726 vii. ——.]—If one driving a motor car is forced by the negligence of one driving past him to swerve his car & through his own lack of ordinary care & skill suffers an accident in getting on to the roadway again he cannot recover damages from the other, as his lack of ordinary skill & care was the ultimate cause of the accident; his excitement may not excuse him, for in driving a dangerous engine such as a motor car, one must expect emergencies & be prepared for them & competent to reasonably control his car therein.—MCGINITIE *v.* GOUDREAU (Alta.), [1921] 3 W. W. R. 250; 59 D. L .R. 552.—**CAN.**

726 viii. ——.]—Whether there is a bye-law or there is not a bye-law to that effect, the fact remains that if a passenger chooses to attempt to enter or leave a moving car, he does so at his own risk. It is not what a prudent or a reasonable man should or would do, & if he does it & sustains injury while in the act of so doing, it would be an accident or a misfortune for which deft. co. would in no way be liable.—TEMULJI JAMSETJI *v.* BOMBAY ELECTRIC SUPPLY & TRAMWAYS CO., LTD. (1911), I. L. R. 35 Bom. 478.—**IND.**

Sect. 1.—*What must be proved: Sub-sect.* 1.]

returning the empty trucks there. Over this siding was a bridge eight feet high from the ground. On a Saturday afternoon, when all the colliery men had left work, the servants of the railway ran some trucks on the siding. All but one were empty, & that one contained another truck, & their joint height amounted to eleven feet. On the Sunday evening the railway servants brought on the siding many other empty trucks, & pushed forward all those previously left on the siding. Some resistance was felt, the power of the engine pushing the trucks was increased, & the two trucks, the joint height of which amounted to eleven feet, struck the bridge & broke it down. In an action to recover damages for the injury, the defence of contributory negligence was set up. The judge at the trial told the jurors that pltfs. must satisfy them that the accident happened solely through the negligence of defts.' servants, for that if both sides were negligent, so as to contribute to the accident, pltfs. could not recover:—*Held:* a misdirection, & a new trial ordered.

Pltf. in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, & it is a qualification upon the first, namely, that though pltf. may have been guilty of negligence, & although that negligence may in fact, have contributed to the accident, yet if deft. could in the result by exercise of ordinary care & diligence, have avoided the mischief which happened, pltf.'s negligence will not excuse him (LORD PENZANCE).—RADLEY *v.* LONDON & NORTH WESTERN RY. Co. (1876), 1 App. Cas. 754; 46 L. J. Q. B. 573; 35 L. T. 637; 41 J. P. 484; 25 W. R. 147, H. L.

Annotations:—**Consd.** The Vera Cruz (1884), 53 L. J. P. **Apld.** H.M.S. Sans Pareil, [1900] P. 267; The Highland Loch, [1911] P. 261; Grayson *v.* Ellerman Line, [1920] A. C. 466; Sales *v.* British Petroleum Co. & G. W. Ry. (1920), 90 L. J. K. B. 1289. **Reld.** Armstrong *v.* L. & Y. Ry. (1875), 44 L. J. Ex. 89; The Bernina (1887), 12 P. D. 58; White *v.* Victoria Lumber & Manufacturing Co., [1910] A. C. 606; Canadian Pacific Ry. *v.* Frechette, [1915] A. C. 871; S.S. Alexander Shukoff *v.* S.S. Gothland, S.S. Larenberg *v.* S.S. Gothland, [1921] 1 A. C. 216; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation, [1924] A. C. 406.

730. ——.]—THOMAS *v.* QUARTERMAINE, No. 10, *ante*.

731. ——.]—That there was negligence by pltf. there can be, to my mind, no doubt. . . . But, according to the rule laid down in *Radley* v. *London & North Western Ry. Co.*, No. 729, *ante*, that is not sufficient: you must show that the negligence was of such a character that deft. could not with ordinary skill & care have avoided the accident (VAUGHAN WILLIAMS, L.J.).—H.M.S. SANS PAREIL [1900] P. 267; 69 L. J. P. 127; 82 L. T. 606; 16 T. L. R. 390; 9 Asp. M. L. C. 78, C. A.

Annotations:—**Apld.** The Sutlej (1904), 20 T. L. R. 509; The Hero, [1911] P. 128. **Reld.** The Etna, [1908] P. 269; H.M.S. King Alfred, [1914] P. 84; S.S. Alexander Shukoff *v.* S.S. Gothland, S.S. Larenberg *v.* S.S. Gothland, [1921] 1 A. C. 216; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Mentd.** The Anselm, [1907] P. 151; The Olympic & H.M.S. Hawke, [1913] P. 214.

732. Negligence must contribute to immediate cause of accident.]—In an action for an injury to pltf.'s premises, in consequence of the pulling down of deft.'s house adjoining, pltf. may recover damages for any injury actually caused by the negligence of deft., although he has not himself

732 i. *Negligence must contribute to immediate cause of accident.*]—THOMPSON *v.* GRAND TRUNK RY. Co. (1859), 18 U. C. R. 92.—**CAN.**

732 ii. ——.]—JOHNSTON *v.* NORTHERN RY. Co. (1874), 34 U. C. R. 432.—**CAN.**

732 iii. ——.]—BOGGS *v.* GREAT WESTERN RY. Co. (1874), 23 C. P. 573.—**CAN.**

732 iv. ——.]—MCDOUGALL *v.* MCDONALD (1878), 3 R. & C. 219.—**CAN.**

732 v. ——.]—HALDAN *v.* GREAT WESTERN RY. Co. (1879), 30 C. P. 89.—**CAN.**

732 vi. ——.]—CASEY *v.* CANADIAN PACIFIC RY. Co. (1888), 15 O. R. 574.—**CAN.**

732 vii. ——.]—BADGEROW *v.* GRAND TRUNK RY. Co. (1890), 19 O. R. 191.—**CAN.**

732 viii. ——.]—HAMILTON STREET RY. Co. *v.* MORAN (1895), 24 S. C. R. 717.—**CAN.**

732 ix. ——.]—KENNEDY *v.* ISBESTER & REID (1896), 40 N. S. R. 116.—**CAN.**

732 x. ——.]—ROBERTS *v.* HAWKINS (1898), 29 S. C. R. 218.—**CAN.**

732 xi. ——.]—BURLAND *v.* LEE (1898), 28 S. C. R. 348.—**CAN.**

732 xii. ——.]—PHILLIPS *v.* GRAND TRUNK RY. Co. (1901), 21 C. L. T. 161; 1 O. L. R. 28.—**CAN.**

732 xiii. ——.]—LONDON STREET RY. Co. *v.* BROWN (1901), 31 S. C. R. 642.—**CAN.**

732 xiv. ——.]—O'HEARN *v.* PORT ARTHUR CORPN. (1902), 22 C. L. T. 255; 4 O. L. R. 209; 1 O. W. R. 373.—**CAN.**

732 xv. ——.]—BOYCE *v.* NOVA SCOTIA STEEL Co. (1905), 40 N. S. R. 558.—**CAN.**

732 xvi. ——.]—LIVINGSTONE *v.* SYDNEY & GLACE BAY RY. Co. (1905), 37 N. S. R. 336.—**CAN.**

732 xvii. ——.]—SHORT *v.* CANADIAN PACIFIC RY. Co. (N. W. T.) (1906), 3 W. L. R. 326.—**CAN.**

732 xviii. ——.]—HALIFAX & SOUTH WESTERN RY. Co. *v.* SHEA (1906), Cout. 418.—**CAN.**

732 xix. ——.]—DAY *v.* MILES (1906), 2 E. L. R. 254.—**CAN.**

732 xx. ——.]—STONOR *v.* LAMB (Y. T.) (1906), 4 W. L. R. 26.—**CAN.**

732 xxi. ——.]—CAIRNS *v.* CANADIAN NORTHERN RY. Co. (1909), 2 Sask. L. R. 19; 9 Can. Ry. Cas. 306; 10 W. L. R. 39.—**CAN.**

732 xxii. ——.]—COREA *v.* MCCLARY (1912), 21 O. W. R. 909; 3 O. W. N. 1071; 3 D. L. R. 323.—**CAN.**

732 xxiii. ——.]—CARLETON *v.* REGINA CITY (1912), 20 W. L. R. 395; 1 W. W. R. 953; 5 Sask. L. R. 90; 1 D. L. R. 778.—**CAN.**

732 xxiv. ——.]—HARNOVIS & HERCOVISH *v.* CALGARY (CORPN.) (1913), 23 W. L. R. 847; 11 D. L. R. 3; 4 W. W. R. 263; 6 Alta. L. R. 1.—**CAN.**

732 xxv. ——.]—MONRUFET *v.* BRITISH COLUMBIA ELECTRIC RY. Co. (1913), 23 W. L. R. 17; 3 W. W. R. 733; 9 D. L. R. 569; 18 B. C. R. 91.—**CAN.**

732 xxvi. ——.]—LINAZUK *v.* CANADIAN NORTHERN COAL & ORE DOCK Co. (1914), 26 O. W. R. 390; 6 O. W. N. 150; 16 D. L. R. 869.—**CAN.**

732 xxvii. ——.]—Boarding a moving street car bearing in large letters on the side of the car at the entrance, the warning "You must not get on this car while it is moving":—*Held:* to be contributory negligence.—BLACK *v.* CITY OF CALGARY (1915), 31 W. L. R. 191; 8 W. W. R. 646.—**CAN.**

732 xxviii. ——.]—The driver of a heavily loaded vehicle proceeding up a steep hill has no right to assume that an approaching tram car will stop & allow him to cross the track in front of it. Such driver is bound to use ordinary care & is not justified in blindly crossing the tram car line. Where the evidence showed that the driver knew that the tram car was coming, & was in a position to have stopped instantly, & drove in front of the car:—*Held:* the case was a conclusive one of contributory negligence, & this was the efficient cause of the accident.—DAVIE *v.* NOVA SCOTIA TRAMWAYS & POWER Co., LTD. (1918), 52 N. S. R. 316.—**CAN.**

732 xxix. ——.]—BROOKS *v.* BRITISH COLUMBIA ELECTRIC RY. Co. (B.C.), [1919] 3 W. W. R. 109; 48 D. L. R. 90.—**CAN.**

732 xxx. ——.]—JACKSON *v.* HATELL (Alta.), [1919] 3 W. W. R. 66.—**CAN.**

732 xxxi. ——.]—BILLARD *v.* R. (1920), 20 Exch. C. R. 165.—**CAN.**

732 xxxii. ——.]—FLEMING *v.* R. (1920), 20 Exch. C. R. 169.—**CAN.**

732 xxxiii. ——.]—MUIR *v.* CANADIAN PACIFIC RY. Co. (Alta.), [1921] 1 W. W. R. 867; 57 D. L. R. 699.—**CAN.**

732 xxxiv. ——.]—Negligence, however gross, of a person killed in an accident, which negligence is not contributory to the accident or his death, cannot be pleaded to defeat an action on behalf of his dependants for damages by reason of such accident.—CALPER *v.* EDMONTON DUNVEGAN & BRITISH COLUMBIA RY. Co. (Alta.) (1922), 70 D. L. R. 540; [1922] 3 W. W. R. 849.—**CAN.**

732 xxxv. ——.]—SHAW *v.* WESTMINSTER THOROUGHBRED ASSOCN., LTD. (1923), 33 B. C. R. 361.—**CAN.**

732 xxxvi. ——.]—Deft.'s car, carrying a red light, was brought to a standstill & was run into by pltf.'s car,

used those precautions which it was his duty to adopt against such injury.—WALTERS *v.* PFEIL (1829), Mood. & M. 362, N. P.
Annotation :—**Mentd.** Angus *v.* Dalton (1877), 3 Q. B. D. 85.

733. ——.]—GREENLAND *v.* CHAPLIN, No. 123, *ante*.

734. Contribution must be to occurrence of injury—Not to amount of damage.]—The question in what is called a running down case, is, whether pltf., by his negligence or improper conduct, substantially contributed to the occurrence of the injury of which he complains ; not to the amount of it, but to its occurrence.

Where a brig was carrying the anchor in a position contrary to the bye-laws of the River Thames, at the time when she came in collision with a barge :—*Held :* the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of.—SILLS *v.* BROWN (1840), 9 C. & P. 601, N. P.
Annotation :—**Refd.** The Margaret (1881), 29 W. R. 533.

735. Wilful act by plaintiff—Contrary to command of defendants.]—To an action for bodily injury caused to pltf. through a breach of duty on the part of deft., it is a good defence that, although deft. was guilty of such breach of duty, pltf., wilfully & contrary to the command of deft., committed the act which was the direct cause of the injury.

Action by pltf., employed in a factory, against defts., the occupiers, for not sufficiently fencing a shaft while in motion, as required by 7 & 8 Vict. c. 15, s. 21, whereby pltf. got entangled with it & injured. Plea, admitting that shaft was not sufficiently fenced, but alleging that pltf., contrary to the express command of defts., & knowing that it was dangerous to meddle with the shaft took hold of it & set it in motion ; whereby, & not by reason of the negligence of defts., pltf. was injured. On demurrer :—*Held :* a good plea.—CASWELL *v.* WORTH (1856), 5 E. & B. 849 ; 26 L. T. O. S. 216 ; 20 J. P. 54 ; 2 Jur. N. S. 116 ; 4 W. R. 231 ; 119 E. R. 697 ; *sub nom.* CASSWELL *v.* WORTH, 25 L. J. Q. B. 121.
Annotations :—**Refd.** Britton *v.* Great Western Cotton Co. (1872), L. R. 7 Exch. 130. **Mentd.** Holmes *v.* Clarke (1861), 6 H. & N. 349.

736. Admission by plaintiff — Negative verdict by jury.]—BYTHESEA *v.* PALACE & BURLINGTON HOTELS CO., LTD. (1892), 8 T. L. R. 710, C. A.

737. Plaintiff disentitled to recover if guilty of any degree of negligence—Former law.]—If an injury be occasioned partly by the negligence of pltf., & partly by that of deft., pltf. cannot maintain any action.—WILLIAMS *v.* HOLLAND (1833), 10 Bing. 112 ; 6 C. & P. 23 ; 3 Moo. & S. 540 ; 2 L. J. C. P. 190 ; 131 E. R. 848, N. P.
Annotation :—**Mentd.** Wells *v.* Ody (1836), 1 M. & W. 452.

738. —— ——.] — In an action against the captain of a steam vessel for swamping a loaded wherry on the river by a swell produced by a too rapid rate of passage, the jury, to find for pltf., must be satisfied that the mischief was occasioned by the swell alone ; & if they think it doubtful whether it was or not, or think that pltf. contributed to the injury he sustained by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for deft.—LUXFORD *v.* LARGE (1832), 5 C. & P. 421, N. P.

739. —— ——.] — HAWKINS *v.* COOPER, No. 402, *ante*.

740. ——.]—If, in an action for the negligent

732 xxxvii. ——.] — TURPIE *v.* OLIVER, [1925] 4 D. L. R. 1023 ; [1925] 3 W. W. R. 687.—**CAN.**

732 xxxviii. ——.]—In an action for damages for personal injuries caused by being knocked down by a motor car : — *Held :* the sudden stepping of pltf. into a zone of danger without taking the precautions which the circumstances demanded was the proximate cause of the accident.—VANCE *v.* DREW (B.C.), [1925] 3 W. W. R. 740.—**CAN.**

732 xxxix. ——.]—In an action for damages for injuries sustained by a passenger in jumping off a moving train in the dark held that even if the brakesman (as pltf. alleged, & the jury must have believed) had raised the trap in the vestibule, opened the door & said to pltf., " Hurry up, Pete, you can make it," it was not those acts of the brakesman but the fact that pltf. jumped from the train that was the proximate cause of the accident. The raising of the trap & the opening of the door could be negligence causing the accident only in case pltf. understood such acts as an invitation to alight & accepted the invitation without being aware of his danger.—ROGERS *v.* CANADIAN PACIFIC RY. CO., [1926] 3 D. L. R. 992 ; [1926] 2 W. W. R. 588, 20 Sask. L. R. 592.—**CAN.**

732 xl. ——.]—ENGEL *v.* TORONTO TRANSPORTATION COMMISSION, [1926] 4 D. L. R. 986 ; 59 O. L. R. 514.—**CAN.**

732 xli. ——.]—FALKINER *v.* GREAT SOUTHERN & WESTERN RY. CO. OF IRELAND (1871), I. R. 5 C. L. 213.—**IR.**

732 xlii. ——.]—CURTIN *v.* GREAT SOUTHERN & WESTERN RY. CO. OF IRELAND (1887), 22 L. R. Ir. 219.—**IR.**

732 xliii. ——.] — O'SULLIVAN *v.* O'CONNOR & SON (1887), 22 L. R. Ir. 467.—**IR.**

732 xliv. ——.] — M'DONNELL *v.* GREAT SOUTHERN & WESTERN RY. CO. OF IRELAND (1888), 24 L. R. Ir. 369.—**IR.**

732 xlv. ——.] — BUTTERLY *v.* DROGHEDA CORPN., [1907] 2 I. R. 134.—**IR.**

732 xlvi. ——.]—NEENAN *v.* HOSFORD, [1920] 2 I. R. 258.—**IR.**

732 xlvii. ——.]—BIGGS *v.* LAMB, O. B. & F. 179.—**N.Z.**

732 xlviii. ——.]—SARGOOD *v.* DUNEDIN CITY CORPN. (1888), 6 N. Z. L. R. 489.—**N.Z.**

732 xlix. ——.]—BARRON *v.* CITY & SUBURBAN TRAMWAY CO., LTD. (1890), 8 N. Z. L. R. 393.—**N.Z.**

732 l. ——.]—Where a person is negligently crossing a tram-line in front of an approaching car & is injured, he cannot recover even if the motorman is negligently driving at an excessive speed.—SHEARER *v.* DUNEDIN CITY CORPN. (1904), 24 N. Z. L. R. 192.—**N.Z.**

732 li. ——.]—GEORGE *v.* MILLS, [1918] N. Z. L. R. 1007.—**N.Z.**

732 lii. ——.]—O'NEILL *v.* WILSON (1858), 20 Dunl. (Ct of Sess.) 427.—**SCOT.**

732 liii. ——.] — BOWMAN (OR M'NAUGHTON) *v.* CALEDONIAN RY. CO. (1858), 21 Dunl. (Ct. of Sess.) 160 ; 31 Sc. Jur. 94.—**SCOT.**

732 liv. ——.]—RAMSAY *v.* THOMSON & SONS (1881), 9 R. (Ct. of Sess.) 140 ; 19 Sc. L. R. 125.—**SCOT.**

732 lv. ——.] — THOMPSON *v.* NORTH BRITISH RY. CO. (1882), 9 R. (Ct. of Sess.) 1101 ; 19 Sc. L. R. 817.—**SCOT.**

732 lvi. ——.]—ROONEY *v.* ALLANS (1883), 10 R. (Ct. of Sess.) 1224 ; 20 Sc. L. R. 812.—**SCOT.**

732 lvii. ——.] — COOK *v.* STARK (1886), 14 R. (Ct. of Sess.) 1 ; 24 Sc. L. R. 5.—**SCOT.**

732 lviii. ——.]—DRISCOLL *v.* PARTICK BURGH COMRS. (1900), 2 F. (Ct. of Sess.) 368.—**SCOT.**

732 lix. ——.]—LOUGHNEY *v.* CALEDONIAN RY. CO. (1902), 4 F (Ct. of Sess.) 401 ; 39 Sc. L. R. 289 ; 9 S. L. T. 378.—**SCOT.**

732 lx. ——.]—MACLEOD *v.* EDINBURGH & DISTRICT TRAMWAYS CO., LTD., [1913] S. C. 624 ; 50 Sc. L. R. 418.—**SCOT.**

732 lxi. ——.]—GIBB *v.* EDINBURGH & DISTRICT TRAMWAYS CO., LTD. (1913), 50 Sc. L. R. 347.—**SCOT.**

732 lxii. ——.]—WALLACE *v.* BERGIUS, [1915] S. C. 205.—**SCOT.**

732 lxiii. ——.]—ABBOT *v.* NORTH BRITISH RY. CO., [1916] S. C. 306.—**SCOT.**

732 lxiv. ——.]—M'SHERRY *v.* GLASGOW CORPN., [1917] S. C. 156.—**SCOT.**

732 lxv. ——.] — M'ALLESTER *v.* GLASGOW CORPN., [1917] S. C. 430.—**SCOT.**

732 lxvi. ——.]—M'LEAN *v.* GLASGOW CORPN. (1918), 55 Sc. L. R. 619.—**SCOT.**

732 lxvii. ——.]—BAIKIE *v.* GLASGOW CORPN., [1919] S. C. (H. L.) 13.—**SCOT.**

driving of deft.'s servant, it appears that pltf., by his own negligence & want of care, contributed to the accident, he cannot recover in the action, even though the jury should think that deft.'s servant was guilty of negligence as well as pltf.—WOOLF *v.* BEARD (1838), 8 C. & P. 373, N. P.

Annotation :—**Mentd.** Dunford *v.* Trattles (1844), 12 M. & W. 529.

741. —— ——.]—In an action on the case for negligent driving of a stage coach by reason whereof pltf., who was sitting outside, came in contact with a building, pltf. can only recover if he has been himself free from blame, & not a party contributing to the injury by sitting or leaning too far over the coach.—JONES *v.* SMITH (1848), 11 L. T. O. S. 356.

742. —— ——.]—WILLIAMS *v.* RICHARDS, No. 403. *ante.*

743. —— ——.]—The owners of a vessel on whose part there has been fault in not exhibiting for a sufficient time the lights required by the Admlty. regulations under 14 & 15 Vict. c. 79, s. 26, cannot, by virtue of sect. 28 of the same statute, recover for any damage sustained to which such fault has been contributory, although there may have been a preponderance of blame on the part of deft.

According to the rule which prevails in the Ct. of Admlty. in case of a collision, if both vessels are in fault, the loss is equally divided; but in a ct. of common law pltf. has no remedy if his negligence in any degree contributed to the accident (LORD CAMPBELL, C.J.).—DOWELL *v.* GENERAL STEAM NAVIGATION CO. (1855), 5 E. & B. 195; 3 C. L. R. 1221; 26 L. J. Q. B. 59; 25 L. T. O. S. 158; 1 Jur. N. S. 800; 3 W. R. 492; 119 E. R. 454.

Annotations :—**Apld.** Witherley *v.* Regent's Canal Co. (1862), 12 C. B. N. S. 2. **Refd.** The James Lawson *v.* Carr (1856), 27 L. T. O. S. 1; Tuff *v.* Warman (1858), 5 C. B. N. S. 573; The Vera Cruz (No. 1) (1884), 9 P. D. 88; The Bernina (1887), 12 P. D. 58; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129.

——.]—*See, now,* Nos. 720–731, *ante.*

Failure of plaintiff to avoid accident.]—*See* Sub-sect. 2, A., *post.*

SUB-SECT. 2.—AVOIDANCE OF ACCIDENT.

A. By Plaintiff.

744. Avoidance by exercise of ordinary care.]—CRUDEN *v.* FENTHAM (1798), 2 Esp. 685; 170 E. R. 496, N. P.

745. ——.]—One who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence & want of ordinary care, without which he might have seen & avoided the obstruction.

One person being in fault will not dispense with another's using ordinary care for himself.

Two things must concur to support this action, an obstruction in the road by the fault of deft., & no want of ordinary care to avoid it on the part of pltf. (LORD ELLENBOROUGH, C.J.).—BUTTERFIELD *v.* FORRESTER (1809), 11 East, 60; 1 Man. & G. 571, n.; 103 E. R. 926.

Annotations :—**Consd.** Deane *v.* Clayton (1817), 7 Taunt. 489. **Distd.** Bridge *v.* Grand Junction Ry. (1838), 3 M. & W. 244. **Consd.** Marriott *v.* Stanley (1840), 1 Man. & G. 568. **Expld.** Lynch *v.* Nurdin (1841), 1 Q. B. 29. **Apld.** Caswell *v.* Worth (1856), 5 E. & B. 849. **Consd.** Tuff *v.* Warman (1858), 5 C. B. N. S. 573. **Refd.** Davies *v.* Mann (1842), 10 M. & W. 546; General Steam Navigation Co. *v.* Tonkin (1844), 4 Moo. P. C. C. 314; Holden *v.* Liverpool New Gas & Coke Co. (1846), 3 C. B. 1; Thorogood *v.* Bryan, Cattlin *v.* Hills (1849), 8 C. B. 115; Clarke *v.* Holmes (1862), 8 Jur. N. S. 992; Holmes *v.* Clark (1862), 10 W. R. 405; Witherley *v.* Regent's Canal Co. (1862), 12 C. B. N. S. 2; The Thuringia (1872), 41 L. J. Adm. 44; Dublin, Wicklow & Wexford Ry. *v.* Slattery (1878), 39 L. T. 365; The Vera Cruz (No. 1) (1884), 9 P. D. 88; The Bernina (1887), 12 P. D. 58; White *v.* Victoria Lumber & Manufacturing Co., [1910] A. C. 606; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514.

746. ——.]—Though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided, yet in cases where parties meet on the sudden, & an injury results, the party [illegible] on the wrong side should be held answerable,

PART IX. SECT. 1, SUB-SECT. 2.—A.

744 i. *Avoidance by exercise of ordinary care.*]—SYMONS *v.* STACEY (1922), 30 C. L. R. 169.—**AUS.**

744 ii. ——.]—CONLON *v.* CONNOLLY (1875), 1 R. & C. 95.—**CAN.**

744 iii. ——.]—HUTCHINSON *v.* CANADIAN PACIFIC RY. CO. (1888), 17 O. R. 347.—**CAN.**

744 iv. ——.]—FERGUSON *v.* TOWNSHIP OF SOUTHWOLD (1895), 27 O. R. 66.—**CAN.**

744 v. ——.]—TORONTO RY. CO. *v.* GOSNELL (1895), 24 S. C. R. 582.—**CAN.**

744 vi. ——.]—MCCORMACK *v.* SYDNEY & GLACE BAY RY. CO. (1904), 37 N. S. R. 254.—**CAN.**

744 vii. ——.]—GRAND TRUNK RY. CO. *v.* SIMS (1907), 8 Can. Ry. Cas. 61.—**CAN.**

744 viii. ——.]—SHEA *v.* HALIFAX & S. W. RY. CO. (1906), 3 E. L. R. 431.—**CAN.**

744 ix. ——.]—KIMBALL *v.* BUTLER (1909), 14 O. R. 360.—**CAN.**

744 x. ——.]—MCDOWELL *v.* WENTWORTH GYPSUM CO., LTD. (1910), 9 E. L. R. 245.—**CAN.**

744 xi. ——.]—GUTHRIE *v.* W. F. HUNTTING LUMBER CO., LTD. (1910), 15 B. C. R. 471.—**CAN.**

744 xii. ——.]—CUNNINGHAM *v.* MICHIGAN CENTRAL RY. CO. (1912), 22 O. W. R. 481; 3 O. W. N. 1395; 4 D. L. R. 221.—**CAN.**

744 xiii. ——.]—CLAREY *v.* OTTAWA ELECTRIC RY. CO. (1916), 38 O. L. R. 308; 33 D. L. R. 586.—**CAN.**

744 xiv. ——.]—TAIT *v.* B. C. ELECTRIC RY. (1916), 34 W. L. R. 684; 10 W. W. R. 523.—**CAN**

744 xv. ——.]—DIXON *v.* GRAND TRUNK RY. CO. (1920), 47 O. L. R. 115; 51 D. L. R. 576; 17 O. W. N. 468.—**CAN.**

744 xvi. ——.]—In an action by an employee of deft. for damages for injuries from accident, where there is negligence on the part of deft., & there is a subsequent negligence on the part of pltf. consisting of a breach of a regulation of deft. of which pltf. was fully aware, & by the observance of which the accident could have been avoided, then pltf. cannot succeed.—CAMPBELL *v.* CANADIAN PACIFIC RY. CO. (Sask.), [1920] 3 W. W. R. 182.—**CAN.**

744 xvii. ——.]—SMITH *v.* CANADIAN PACIFIC RY. CO. (Sask.), [1920] 3 W. W. R. 1028.—**CAN.**

744 xviii. ——.]—HARRIS *v.* R. (1921), 21 Exch. C. R. 195.—**CAN.**

744 xix. ——.]—MILLIGAN *v.* BRITISH COLUMBIA ELECTRIC RY. CO., [1923] 1 W. W. R. 1373; [1923] 4 D. L. R. 637; 32 B. C. R. 161.—**CAN.**

744 xx. ——.]—BLAIR *v.* GRAND TRUNK RY. CO., [1924] 1 D. L. R. 353; 29 Can. Ry. Cas. 26; 53 O. L. R. 405.—**CAN.**

744 xxi. ——.]—KIRK *v.* DELOREY (1924), 56 N. S. R. 555.—**CAN.**

744 xxii. ——.]—REID *v.* GRAND TRUNK PACIFIC RY. CO., [1925] 4 D. L. R. 658; [1925] 3 W. W. R. 427; 35 Man. L. R. 239.—**CAN.**

744 xxiii. ——.]—COYLE *v.* GREAT NORTHERN RY. CO. OF IRELAND (1887), 20 L. R. Ir. 409.—**IR.**

744 xxiv. ——.]—MCCALL *v.* STEVENSON, [1920] N. Z. L. R. 900.—**N.Z.**

744 xxv. ——.]—A passenger who had alighted from a tramway car & was crossing from the car to the pavement on the left, was knocked down by a van going in the same direction as the car & passing it on the left-hand side. In an action of damages brought against the van owners for injuries thereby received the ct. assoilzied defenders holding that fault had not been proved on the part of the van driver, while there had been carelessness on the part of pursuer in not looking to his own safety.—JARDINE *v.* STONEFIELD LAUNDRY CO. (1887), 14 R. (Ct. of Sess.) 839; 24 Sc. L. R. 599.—**SCOT.**

744 xxvi. ——.]—SMITH *v.* HIGHLAND RY. CO. (1888), 16 R. (Ct. of Sess.) 57.—**SCOT.**

744 xxvii. ——.]—GREER *v.* TURNBULL & CO. (1891), 19 R. (Ct. of Sess.) 21; 29 Sc. L. R. 38.—**SCOT.**

744 xxviii. ——.]—FLEMING *v.* EADIE & SON (1898), 25 R. (Ct. of Sess.) 500; 35 Sc. L. R. 422.—**SCOT.**

744 xxix. ——.]—MACKIE *v.* MACMILIAN (1898), 36 Sc. L. R. 137.—**SCOT.**

744 xxx. ——.]—BURNS *v.* HENDERSON (1905), 7 F. (Ct. of Sess.) 697.—**SCOT.**

744 xxxi. ——.]—CAMPBELL & COWAN & CO. *v.* TRAIN (1910), 47 Sc. L. R. 475.—**SCOT.**

unless it appear clearly that the party on the right had ample means & opportunity to prevent it.—CHAPLIN *v.* HAWES (1828), 3 C. & P. 554, N. P.

747. ——.]—LACK *v.* SEWARD, No. 771, *post.*

748. ——.]—The rule of the road as to keeping the proper side, applies to saddle horses as well as carriages; & if a carriage & a horse are to pass, the carriage must keep its proper side, & so must the horse.

If the driver of a carriage is on his proper side, & sees a horse coming furiously on its wrong side of the road, it is the duty of the driver of the carriage to give way & avoid an accident, although, in so doing, he does go a little on what would otherwise be his wrong side of the road.—TURLEY *v.* THOMAS (1837), 8 C. & P. 103, N. P.

749. ——.] — BRIDGE *v.* GRAND JUNCTION RY. CO., No. 803, *post.*

750. ——.] — In an action on the case for an injury which pltf. had sustained from being thrown down upon iron instruments placed by deft. in the highway, contrary to the common law, & to the provisions of a local Act of Parliament, the defence set up was, negligence on the part of pltf., of which negligence no distinct evidence was given. The judge left it to the jury to say whether pltf. had been so deficient in reasonable & ordinary care that he had brought the accident upon himself.—MARRIOTT *v.* STANLEY (1840), 1 Man. & G. 568; Drinkwater, 47; 1 Scott, N. R. 392; 4 Jur. 320; 133 E. R. 458.

751. ——.] —The general rule of law respecting negligence is, that although there may have been negligence on the part of pltf. yet unless he might by the exercise of ordinary care have avoided the consequences of deft.'s negligence, he is entitled to recover. Therefore, where deft. negligently drove his horses & waggon against & killed an ass, which had been left in the highway fettered in the forefeet, & thus unable to get out of the way of deft.'s waggon, which was going at a smartish pace along the road, it was held, that the jury were properly directed, that although it was an illegal act on the part of pltf. so to put the animal on the highway, pltf. was entitled to recover.—DAVIES *v.* MANN (1842), 10 M. & W. 546; 12 L. J. Ex. 10; 7 J. P. 53; 6 Jur. 954; 152 E. R. 588.

Annotations:—**Consd.** Dowell *v.* General Steam Navigation Co. (1855), 5 E. & B. 195; Tuff *v.* Warman (1858), 5 C. B. N. S. 573; The Un ted States (1865), 12 L. T. 33; Armstrong *v.* L. & Y. Ry. (1875), L. R. 10 Exch. 47. **Apprvd.** Radley *v.* L. & N. W. Ry. (1876), 1 App. Cas. 754. **Consd.** Swainson *v.* N. E. Ry. (1877), 37 L. T. 102; The Vera Cruz (1884), 53 L. J. P. 33. **Distd.** The Altair, [1897] P. 105. **Apld.** Burley *v.* Hibell (1916), 5 L. J. C. C. 53. **Consd.** Paul *v.* G. E. Ry. (1920), 36 T. L. R. 344. **Apld.** Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Refd.** General Steam Navigation Co. *v.* Tonkin (1844), 4 Moo. P. C. C. 314; Colchester Corpn. *v.* Brooke (1845), 7 Q. B. 339; Dimes *v.* Petley (1850), 15 Q. B. 276; G. N. Ry. *v.* Harrison (1854), 2 C. L. R. 1136; North *v.* Smith (1861), 10 C. B. N. S. 572; Witherley *v.* Regent's Canal Co. (1862), 12 C. B. N. S. 2; Peek *v.* North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Fordham *v.* L. B. & S. C. Ry. (1869), L. R. 4 C. P. 619; Dublin, Wicklow & Wexford Ry. *v.* Slattery (1878), 39 L. T. 365; Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; The Bernina (1887), 12 P. D. 58; Lee *v.* Nixey (1890), 63 L. T. 285; The River Derwent (1891), 64 L. T. 509; The Hornet, [1892] P. 361; The Monte Rosa, [1893] P. 23; Barnes U. D. C. *v.* London General Omnibus Co. (1908), 7 L. G. R. 359; The Highland Loch, [1911] P. 261; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514; Sales *v.* British Petroleum Co. & G. W. Ry. (1920), 90 L. J. K. B. 1289; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129; The Manorbier Castle (1922), 129 L. T. 31. **Mentd.** R. *v.* Waters (1849), 13 J. P. 69; Evison *v.* Marshall (1868), 32 J. P. 691; Heath's Garage *v.* Hodges, [1916] 2 K. B. 370.

752. ——.] — A gas co. incorporated by Act of Parliament, with the usual powers to take up pavements, etc., for the purpose of laying down & repairing mains, pipes, etc., had for some years supplied gas to a house belonging to pltf.; the only means of shutting it off being by a stop cock within the house, the key of which was kept by the occupier. The last tenant, on quitting, gave notice to the co. that he should not require any further supply; & one of their workmen, at his request, removed a chandelier from one of the rooms, leaving the end of the pipe properly secured. The internal fittings were the property of pltf. Whilst the house remained untenanted, the gas by some unexplained means escaped & an explosion took place, by which the house was considerably damaged. In case against the co., alleging a breach of duty on their part in not taking proper means to prevent the influx of gas into the house, the judge having, upon the above facts, directed a non-suit, the ct. declined to interfere.

We think pltf. was himself wanting in ordinary care (TINDAL, C.J.). — HOLDEN *v.* LIVERPOOL NEW GAS & COKE CO. (1846), 3 C. B. 1; 15 L. J. C. P. 301; 7 L. T. O. S. 208; 10 Jur. 883; 136 E. R. 1.

Annotation:—**Refd.** Ellis *v.* L. & S. W. Ry. (1857), 2 H. & N. 424.

753. ——.]—REED *v.* TATE (1846), Oliphant's Law of Horses, 6th ed. 342, n.

754. ——.] — ARMSWORTH *v.* SOUTH-EASTERN RY. CO., No. 941, *post.*

755. ——.]—TUFF *v.* WARMAN, No. 726, *ante.*

756. ——.] — No action will lie for the consequences of a negligent act, where the party complaining has by his own want of due care & caution been in any degree contributory to the misfortune. A swing-bridge over a canal crossing a public highway, when turned back for the passage of a barge along the canal, left a gap on the side of the road without any fence towards the water. A., being upon the bridge whilst it was in this state, & the spot being dark, incautiously stepped back & fell into the water & was drowned. In an action by his widow & administratrix against the canal co., under Lord Campbell's Act, 1846 (c. 93), the jury were told that, if they thought there had been negligence on the part of the co., & no want of proper care & caution on the part of deceased, pltf. was entitled to a verdict; but that, if they thought that deceased had by his own negligence contributed to the accident, they must find for defts.:—*Held:* a proper direction, & upon the facts, the jury were warranted in finding for defts., although they were of opinion that the bridge was not secured as it should have been.

Assuming that the co. were in some degree censurable, the negligence of deceased was the cause, without which the accident would never have happened (ERLE, C.J.).—WITHERLEY *v.* REGENT'S CANAL CO. (1862), 12 C. B. N. S. 2; 142 E. R. 1041.

Annotations:—**Refd.** Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669; Nunan *v.* Southern Ry. (1923), 130 L. T. 131.

757. ——.]—WALTON *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., No. 556, *ante.*

758. ——.]—To make a defence on this ground [if ground of contributory negligence] it must be shown that the injured party . . . might, by proper care, subsequently exerted, have avoided the consequences of defts. want of proper care (LORD BLACKBURN).—SPAIGHT *v.* TEDCASTLE (1881), 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761; 4 Asp. M. L. C. 406, H. L.

Annotations:—**Consd.** The Adam W. Spies (1901), 70 L. J. P. 25. **Refd.** Cayzer *v.* Carron Co. (1884), 9 App. Cas. 873; The Bernina (1887), 12 P. D. 58; The Niobe (1888), 13 P. D. 55; The Altair, [1897] P. 105; Admiralty Comrs. *v.*

Sect. 1.—*What must be proved: Sub-sect.* 2, *A. & B.*]

S.S. Volute, [1922] 1 A. C. 129; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406.

759. ——.] — Defts.' railway crossed a public footway on the level. About half-past four o'clock in the afternoon of Mar. 29 pltf., a foot passenger, while crossing from the down side to the up side of the railway, was knocked down & injured at the crossing by a train of defts. on the up line. Owing to the position of certain buildings which stood by the line it was impossible for anyone crossing from the down side to see a train coming until he got within a step or two from the down line, but a person standing on the down line or the six-foot had a clear & uninterrupted view up & down the line for several hundred yards. Pltf., who lived near & was well acquainted with the crossing, stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, & that if he had looked he must have seen the train coming. The engine-driver did not whistle. There was a servant of defts. employed as a gatekeeper at the crossing, whose duty it was to open the carriage gates there when carriages could safely be admitted, & to close them at other times. He was standing at the time on the opposite side of the crossing talking to two boys, with a furled flag in his hand; but he gave no warning to pltf. that a train was coming. Pltf. having brought an action against defts. to recover compensation for his injuries, was nonsuited on the above facts being proved at the trial:—*Held:* the nonsuit was right as, although there was evidence of negligence on the part of defts., yet according to the undisputed facts of the case pltf. had shown that the accident was solely caused by his omission to use the care which any reasonable man would have used.

It is for pltf. to show that the accident which happened to him was caused by a negligent act of defts., or of those for whose negligent acts defts. are liable & that that accident was produced as between him & defts. solely by defts.' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident (BRETT, M.R.).—DAVEY *v.* LONDON & SOUTH WESTERN RY. CO. (1883), 12 Q. B. D. 70; 53 L. J. Q. B. 58; 49 L. T. 739; 48 J. P. 279, C. A.

Annotations:—**Apld.** Martin *v.* Connah's Quay Alkali Co. (1884), 33 W. R. 216. **Expld.** Wakelin *v.* L. & S. W. Ry. (1884), [1896] 1 Q. B. 189, n.; Brown *v.* G. W. Ry. (1885), 1 T. L. R. 614. **Consd.** Bettany *v.* Waine (1885), 1 T. L. R. 588. **Apld.** Sayer *v.* Hatton (1885), Cab. & El. 492. **Distd. & Dbtd.** Wright *v.* Mid. Ry. (1885), 1 T. L. R. 406, n. **Apld.** Bentley *v.* L. & Y. Ry. (1886), 3 T. L. R. 196. **Dbtd.** Holland *v.* North Metropolitan Tram. Co. (1886), 3 T. L. R. 245; Murgatroyd *v.* Blackburn & Over Darwen Tram. Co. (1886), 3 T. L. R. 180; White *v.* Barry Ry. (1899), 15 T. L. R. 474. **Distd.** Cutsforth *v.* Johnson (1913), 108 L. T. 138. **Reid.** Yarmouth *v.* France (1887), 19 Q. B. D. 647; Grand Trunk Ry. *v.* McAlpine, [1913] A. C. 838; Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871; Blake *v.* Ramsay (1917), 10 B. W. C. C. 500; Mercer *v.* S. E. & C. Ry.'s Managing Committee, [1922] 2 K. B. 549. **Mentd.** Pearce *v.* Lansdowne (1893), 62 L. J. Q. B. 441.

760. ——.]—DE TEYRON *v.* WARING, No. 314, *ante*.

761. ——.]—If they think that, with due care, deceased could have avoided the risk, or if, seeing the risk, he chanced it, in either case they ought to find for defts. (MATTHEW, J.).—BEDMAN *v.* TOTTENHAM LOCAL BOARD OF HEALTH (1887), 4 T. L. R. 22.

762. ——.] —CANAWAY *v.* METROPOLITAN BOARD OF WORKS (1888), 4 T. L. R. 325, C. A.

763. ——.] — A barque, with a cargo of wheat from San Francisco, put into Falmouth for orders & left that port for Hull in tow under a contract to pay the tug a fixed sum. The tug set the courses without interference from the tow, but the latter regularly took soundings. When nearing the entrance to the Humber the weather became thick &, a sounding indicating shallower water, the master of the barque was about to signal to the tug, when his vessel took the ground, the wind at the time being light & the sea smooth. A second tug then came up, &, as her master would not take less, the master of the barque agreed to pay £500 if she would assist the first tug in an endeavour to tow the vessel off that tide. The efforts of the two tugs proved unsuccessful, & the second tug, having been sent to Grimsby for more tugs, returned with two others, whilst men from the shore assisted the crew in jettisoning some of the cargo. The four tugs then took hold of the vessel & she came off, & was subsequently safely docked at Hull. The owners, masters, & crews of all four tugs claimed salvage. Defts., the owners of ship, cargo, & freight, alleged that the stranding was due to the negligence of the first tug, & counter-claimed against her for the loss of cargo & for any salvage they might have to pay the other salvors. They further submitted that the agreement with the second tug should be set aside as unreasonable & made under duress:—*Held:* (1) the first tug was responsible for the direction of the course, &, having been negligent in respect of it & in not taking soundings, her claim for salvage must be dismissed; (2) the counterclaim of defts. must also be dismissed, as their master was guilty of contributory negligence in allowing the tug to run on instead of ordering her to haul off when approaching a difficult port in foggy weather.—THE ALTAIR, [1897] P. 105; 66 L. J. P. 42; 76 L. T. 263; 45 W. R. 622; 13 T. L. R. 286; 8 Asp. M. L. C. 224.

Annotations:—*As to* (1) **Folld.** The Harvest Home [1904] P. 409. **Reid.** The Duc d'Aumale, [1904] P. 60. *As to* (2) **Reid.** The Forfarshire (1908), 78 L. J. P. 44.

764. ——.]—While a sailing ship in tow of two tugs was proceeding with a pilot cutter waiting to take off the pilot lashed alongside, a collision occurred with a schooner, whereby the cutter was sunk. If those in charge of the cutter had seen the side-light of the schooner as soon as they ought to have done, there would have been time to have slipped the rope attaching the cutter to the ship & that would have been a reasonable course:—*Held:* those on board the cutter were not emancipated from the duty of keeping a good look-out & taking all reasonable & proper steps to avoid a collision & therefore the cutter was also to blame.—THE HARVEST HOME, [1905] P. 177; 74 L. J. P. 65; 93 L. T. 395; 10 Asp. M. L. C. 118, C. A.

Annotations:—**Reid.** The Devonshire (1911), 106 L. T. 241; The Seacombe, The Devonshire, [1912] P. 21.

765. ——.]—BRITTAN *v.* POPLAR METROPOLITAN BOROUGH (1904), 68 J. P. Jo. 631.

766. ——.]—A purchaser buying goods from a firm of good reputation is justified in trusting to the label as to quantity appearing upon the package when received, & is not bound to make inquiry as to its accuracy.

Applts. purchased from resp. a quantity of arsenite of soda to make "dip" for cattle. The soda was delivered in eleven drums, each containing 56 lbs.; but they were erroneously labelled by a clerk of resps. as containing 8½ lbs. only, & instructions were given as to the amount of water to be used. In consequence the servant of the applts. following the instructions given, made the "dip" much too strong, & the cattle were injured. In an action against resps. to recover

damages :—*Held :* there was no evidence of contributory negligence on the part of the servant of applts. in not detecting the mistake & asking for an explanation.—BRITISH SOUTH AFRICA CO. *v.* LENNON, LTD. (1915), 85 L. J. P. C. 111 ; 113 L. T. 935 ; 31 T. L. R. 585, P. C.

767. ——.]—JONES *v.* WESTMINSTER CITY COUNCIL (1915), 79 J. P. Jo. 112.

.]—The *Bogota*, a steamer 415 feet in length, was being towed stern first by a tug out of a graving dock on the Clyde, at a point where the river is barely 500 feet broad, preparatory to proceeding up stream. She had steam in her boilers, but was not using it. When she was two-thirds of her length out of the dock & slanting across & down the river the *Bogota* sighted, some three-quarters of a mile away, the steamship *Alconda* coming up the river under her own steam with two tugs attached. The *Bogota* & her tug gave four short blasts, which were repeated, as a warning that the river was blocked, & continued their manœuvre. The *Alconda*, however, held on her course, & in attempting to pass between the *Bogota's* tug & the bank, struck the tug while the latter was still about 100 feet from the bank, with the result that the tug was forced back on the *Bogota*, & all three vessels were damaged :—*Held :* the *Alconda* was solely to blame for the collision, first, because in the circumstances the *Bogota* was not contravening Clyde Navigation Bye-laws, r. XIX ; secondly, because, assuming that the *Bogota* had contravened the rule, the collision was caused by the subsequent & independent fault of the *Alconda* in holding on her course & attempting to pass the *Bogota* after she had been warned that the river was blocked.—ANGLO-NEWFOUNDLAND DEVELOPMENT CO., LTD. *v.* PACIFIC STEAM NAVIGATION CO., [1924] A. C. 406 ; 93 L. J. P. C. 182 ; 131 L. T. 258 ; 16 Asp. M. L. C. 385, H. L.

769. —— Commensurate with plaintiff's position —Plaintiff a young child.]—LYNCH *v.* NURDIN, No. 118, *ante*.

770. —— Whether applicable to actions of tort arising out of contract.]—MARTIN *v.* GREAT NORTHERN RY. CO., No. 560, *ante*.

Plaintiff's knowledge of danger.]—*See* Sect. 3, *post*.

B. By Defendant.

771. Avoidance by exercise of ordinary care.]—If, in an action for the negligence of deft.'s servants in managing a barge, so that pltf.'s barge was run down, it appear that the accident happened from circumstances which persons of competent skill could not guard against, pltf. will not be

PART XI. SECT. 1, SUB-SECT. 2.—B.

771 i. *Avoidance by exercise of ordinary care.*]—WHITCHURCH *v.* RAILWAYS COMR. (1901), 4 W. A. L. R. 53.—**AUS.**

771 ii. ——.]—In an action for negligence, if it appears on pltf.'s case that he has been guilty of contributory negligence the ct. should grant a nonsuit of direct judgment for deft., unless there is also evidence fit for the jury that, notwithstanding pltf.'s contributory negligence, deft. by the exercise of reasonable care, could have averted the injury.—LEAHY *v.* RAILWAYS COMR. (1904), 2 C. L. R. 54.—**AUS.**

771 iii. ——.]—MUNICIPAL TRAMWAYS TRUST *v.* BUCKLEY (1912), 14 C. L. R. 731.—**AUS.**

771 iv. ——.]—Contributory negligence of pltf. is no answer to a claim for damages if deft. by the exercise of care might have avoided the result of that negligence.—ANDREWS *v.* BRUTON (1919), 21 W. A. L. R. 33.—**AUS.**

771 v. ——.]—When a waggon is left standing in the high way, the owner cannot exempt himself from liability by showing that the person injured thereby was drunk at the time of the accident.—RIDLEY *v.* LAMB (1853), 10 U. C. R. 354.—**CAN.**

771 vi. ——.]—WATSON *v.* NORTHERN RY. CO. (1864), 24 U. C. R. 98.—**CAN.**

771 vii. ——.]—MCLAREN *v.* CANADA CENTRAL RY. CO. (1882), 32 C. P. 324 ; *affd.*, 8 A. R. 564.—**CAN.**

771 viii. ——.]—WEST *v.* BOUTILIER 1884), 6 R. & G. 297 ; 6 C. L. T. 441. **CAN.**

771 ix. ——.]—FORWOOD *v.* CITY OF TORONTO (1892), 22 O. R. 351.—**CAN.**

771 x. ——.]—ROWAN *v.* TORONTO RY. CO. (1899), 29 S. C. R. 717.—**CAN.**

771 xi. ——.]—HALIFAX ELECTRIC TRAMWAY CO. *v.* INGLIS (1900), 30 S. C. R. 256.—**CAN.**

771 xii. ——.]—DAYE *v.* MCNEILL CO. (1904), 6 Torr. L. R. 23.—**CAN.**

771 xiii. ——.]—LELACHEUR *v.* MANUEL (1908), 5 E. L. R. 150.—**CAN.**

771 xiv. ——.]—Though pltf. may have been guilty of negligence, & though that negligence may have contributed to the accident, yet if deft. could in the result, by exercise of ordinary care & diligence, have avoided the mischief which happened pltf.'s negligence will not excuse deft.—JONES *v.* TORONTO & YORK RADIAL RY. CO. (1911), 20 O. W. R. 460 ; 3 O. W. N. 269 ; 25 O. L. R. 158.—**CAN.**

771 xv. ——.]—WILLIAMS *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1913), 18 B. C. R. 295.—**CAN.**

771 xvi. ——.]—HINRICH *v.* CANADIAN PACIFIC RY. CO. (1913), 18 B. C. R. 518 ; 48 S. C. R. 557.—**CAN.**

771 xvii. ——.]—THOMAS *v.* WARD (1913), 24 W. L. R. 250 ; 4 W. W. R. 31 ; 11 D. L. R. 231 ; 7 Alta. L. R. 79. —**CAN.**

771 xviii. ——.]—RYDER *v.* ST. JOHN RY. CO. (1913), 13 E. L. R. 81 ; 13 D. L. R. 11 ; 42 N. B. R. 89.—**CAN.**

771 xix. ——.]—CAMPBELL *v.* CANADIAN NORTHERN RY. CO. (1913), 24 W. L. R. 447 ; 4 W. W. R. 914 ; 12 D. L. R. 272 ; 23 Man. L. R. 285 ; 15 Can. Ry. Cas. 357.—**CAN.**

771 xx. ——.]—The carelessness of pltfs. in driving across the tracks of defts.' street railway was held to be excused by the reckless conduct of defts.' motorman in failing to use proper precautions to avoid the consequences of their negligence after he had become aware of it.—CALGARY, CITY OF *v.* HARNOVIS & HERCOVISH (1913), 26 W. L. R. 565 ; 5 W. W. R. 869 ; 15 D. L. R. 411 ; 48 S. C. R. 494.—**CAN.**

771 xxi. ——.]—JEFFARES *v.* WOLFENDEN (1915), 31 W. L. R. 428.—**CAN.**

771 xxii. ——.]—BARTLETT *v.* WINNIPEG ELECTRIC RY. CO. & CANADIAN NORTHERN RY. CO. (1916), 34 W. L. R. 325 ; 10 W. W. R. 300.—**CAN.**

771 xxiii. ——.]—Pedestrian crossing a street, not at a crossing, & not looking, & therefore, being very careless, would be entitled to damages from an automobile driver who with no obstructed view could have seen the pedestrian at a sufficient distance to avoid him, but who did not keep a look-out to see that he did not run into any one.—WHITE *v.* HEGLER (1916), 34 W. L. R. 1061 ; 10 W. W. R. 1150.—**CAN.**

771 xxiv. ——.]—BAIN *v.* FULLER (1917), 31 N. S. R. 55.—**CAN.**

771 xxv. ——.]—The repetition or continuance of the primary negligent act constitutes an answer to contributory negligence only when it is the reason why deft. does not avoid the consequences of pltf.'s negligence at & after the time when the duty to do so arises. That duty arises when pltf.'s danger is or should be known to deft.—SMITH *v.* R. (Sask.), [1917] 1 W. W. R. 1444.—**CAN.**

771 xxvi. ——.]—MOORE *v.* BRITISH COLUMBIA ELECTRIC RY. CO., (B. C.) [1917] 2 W. W. R. 729 ; 35 D. L. R. 771 ; 34 W. L. R. 469.—**CAN.**

771 xxvii. ——.]—The practice of leaving to the jury the question whether, if both parties were guilty of negligence, deft. could have done anything which would have prevented the accident, should be followed in every instance where contributory negligence is alleged, unless the facts clearly exclude any inference of ultimate negligence.—ONTARIO HUGHES-OWENS, LTD. *v.* OTTAWA ELECTRIC RY. CO. (1917), 40 O. L. R. 614 ; 13 O. W. N. 156 ; 39 D. L. R. 49.—**CAN.**

771 xxviii. ——.]—The principle, that the contributory negligence of pltf. will not disentitle him to recover damages, if defts., by the exercise of care, might have avoided the result of that negligence, applies where deft., although not committing any negligent act subsequently to pltf.'s negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the pltf.'s negligence. —COLUMBIA BITHULITHIC, LTD. *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1917), 55 S. C. R. 1.—**CAN.**

771 xxix. ——.]—SMITH *v.* REGINA CORPN., [1918] 2 W. W. R. 1010 ; 11 Sask. L. R. 291 ; 42 D. L. R. 647.—**CAN.**

771 xxx. ——.]—PARSONS *v.* TORONTO RY. CO. (1919), 45 O. L. R. 627 ; 48 D. L. R. 678 ; 16 O. W. N. 281.—**CAN.**

771 xxxi. ——.]—GOODFELLOW *v.* O'BRIEN, LTD. (1921), 48 N. B. R. 227 ; 57 D. L. R. 432.—**CAN.**

771 xxxii. ——.]—DELANEY *v.* TORONTO CITY (1921), 64 D. L. R. 122 ; 49 O. L. R. 245.—**CAN.**

771 xxxiii. ——.]—SMITH *v.* WELLAND CORPN. (1921), 64 D. L. R. 349 ; 50 O. L. R. 252.—**CAN.**

Sect. 1.—*What must be proved: Sub-sect.* 2, *B. Sects.* 2 & 3.]

entitled to recover; nor will he, if his men had put his barge in such a place that persons using ordinary care would run against it; nor, if the accident could have been avoided, but for the negligence of pltf.'s own men in not being on board his barge at a time when it was lying in a dangerous place.—LACK *v.* SEWARD (1829), 4 C. & P. 106, N. P.

772. ——.]—BRIDGE *v.* GRAND JUNCTION RY. CO., No. 803, *post.*

773. ——.]—TUFF *v.* WARMAN, No. 726, *ante.*

774. ——.]—SPRINGETT *v.* BALL, No. 372, *ante.*

775. ——.]—RADLEY *v.* LONDON & NORTH WESTERN RY. CO., No. 729, *ante.*

776. ——.]—DOWSETT *v.* LONDON, TILBURY & SOUTHEND RY. CO. (1885), 1 T. L. R. 326, C. A.

777. ——.]—H.M.S. SANS PAREIL, No. 731, *ante.*

778. ——.]—Where a collision has occurred between two motor-cars driving in the same direction through the breakdown of the car in front, the driver of that car is entitled to damages, even though he may have acted negligently, if the driver of the other car by the exercise of reasonable care could have avoided the accident.—BURLEY *v.* HIBELL (1916), 5 L. J. C. C. 53, D. C.

779. ——.]—Pltfs. claimed an indemnity against defts. under Workmen's Compensation Act, 1906 (c. 58), s. 6, for the compensation which pltfs. had had to pay to the dependants of a workman who had been killed by the negligence of defts.' servants during shunting operations. Defts. set up the plea of contributory negligence on the part of the deceased workman, & also on the part of pltfs., who had employed the deceased workman on defts.' lines during the shunting although he was stone deaf:—*Held:* the true proposition in regard to contributory negligence was that "if a person, while taking no active steps in regard to a collision, is injured without knowing that he was in imminent danger of being run over, although he could have known it, & could have protected himself but for his own carelessness, & if the person who ran over him saw that he did not know it, but, having time to stop, negligently drove on & ran over him, the person who so caused the injury is liable, & the plea of contributory negligence fails."—PAUL (R. & W.), LTD. *v.* GREAT EASTERN RY. CO. (1920), 36 T. L. R. 344.

780. ——.]—A firm of ship repairers were riveting cleats to the weather deck of a steamer which, under the authority of the Admlty., they were fitting with apparatus for protection against mines. The rivets were heated in a furnace on the weather deck, & lowered in a bucket through an open hatchway to the 'tween decks, where a riveter drove them into holes bored in the under side of the weather deck to receive them. The steamer was discharging from a hold below the 'tween decks, & a 'tween deck hatchway was open directly below the open hatchway on the weather deck, so that a cargo of jute in the lower hold lay exposed. A boy carrying a red-hot rivet in a pair of tongs to the bucket close by the weather deck hatchway slipped on the deck, & the rivet shot over the coamings & through both the open hatchways on to the cargo of jute & set it on fire. In an action by the owners of the steamer against the ship repairers for damage to the ship & cargo:—*Held:* the damage was caused by the negligence of the ship repairers in doing the work as they did while the jute was exposed, & the shipowners were not guilty of any negligence.—GRAYSON (H. & C.) *v.* ELLERMAN LINE, LTD., [1920] A. C. 466; 89 L. J. K. B. 924; 123 L. T. 65; 36 T. L. R. 295; 14 Asp. M. L. C. 605; 25 Com. Cas. 190, H. L.; *affg.* S. C. *sub nom.* ELLERMAN LINES, LTD. *v.* GRAYSON (H. & G.), LTD., [1919] 2 K. B. 514, C. A.

Annotation:—**Refd.** The City of Edinburgh (1921), 125 L. T. 375.

771 xxxiv. ——.]—MCCARTHY *v.* R. (1921), 61 D. L. R. 170.—**CAN.**

771 xxxv. ——.]—If a motorman of a street car going at nine miles an hour sees a wagon crossing a track about 60 feet away he should apply his emergency brake at once instead of first trying to stop by using the hand brake; & his failure to do so constitutes negligence for which the street railway co. is responsible in case of resulting damage, even if the wagon driver was guilty of the initial negligence.—ROUSE *v.* MOOSE JAW ELECTRIC RY. CO., LTD. (Sask.), [1921] 2 W. W. R. 762.—**CAN.**

771 xxxvi. ——.]—SCOTT *v.* PHILP (1922), 52 O. L. R. 513.—**CAN.**

771 xxxvii. ——.]—CLARKE *v.* GAUVIN (1922), 50 N. B. R. 94.—**CAN.**

771 xxxviii. ——.]—A pedestrian is not confined to the crossing in passing over a public street or highway. He is entitled to cross at any point. If he goes out into the traffic he must be allowed to extricate himself in safety. A driver of a motor vehicle is not entitled merely to sound his horn & expect pedestrians to evade him. He must be careful to evade the pedestrians.—RAINEY *v.* KELLY (B. C.), [1922] 3 W. W. R. 346; 69 D. L. R. 534.—**CAN.**

771 xxxix. ——.]—CLARK *v.* CANADIAN NORTHERN RYS. (Sask.), [1922] 2 W. W. R. 1123; 67 D. L. R. 674.—**CAN.**

771 xl. ——.]—YOUNG & YOUNG *v.* DEGON (Alta.), [1923] 3 D. L. R. 606; [1923] 2 W. W. R. 982.—**CAN.**

771 xli. ——.]—LUDLOW *v.* INTERNATIONAL PROVISION CO., [1924] 1 D. L. R. 324; 56 N. S. R. 395.—**CAN.**

771 xlii. ——.]—Pltfs., one of whom was the driver & the other a passenger in a waggon, brought separate actions for damages for personal injuries & loss resulting from a collision between the waggon & a street car:—*Held:* the motorman had been negligent, & although the driver of the waggon had also been negligent, the motorman's negligence was the cause of the accident.—BUXMAN *v.* WINNIPEG ELECTRIC CO., MEYER *v.* WINNIPEG ELECTRIC CO., [1925] 3 D. L. R. 635; [1925] 2 W. W. R. 566; 35 Man. L. R. 175.—**CAN.**

771 xliii. ——.]—ZELLINSKY *v.* RANT, [1926] 2 D. L. R. 327; [1926] 2 W. W. R. 474; 37 B. C. R. 119.—**CAN.**

771 xliv. ——.]—NIAGARA, ST. CATHARINES & TORONTO RY. CO. *v.* LAKES & ST. LAWRENCE TRANSIT CO., [1926] 1 D. L. R. 897.—**CAN.**

771 xlv. ——.]—As in the case of contributory negligence, so an act of one party can only be contributory to the injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury.—MADHAVA RAU *v.* FERNANDES (1894), I. L. R. 17 Mad. 368.—**IND.**

771 xlvi. ——.]—DOYLE *v.* KINAHAN (1869), 17 W. R. 679.—**IR.**

771 xlvii. ——.]—GAFFNEY *v.* DUBLIN UNITED TRAMWAYS CO., LTD., [1916] 2 I. R. 472.—**IR.**

771 xlviii. ——.]—BALLOCH BROTHERS *v.* JOPP BROTHERS (No. 1) (1904), 23 N. Z. L. R. 819.—**N.Z.**

771 xlix. ——.]—In an action for injuries from negligence, if negligence on deft.'s part is proved & contributory negligence by pltf. is at best only a matter of doubt, deft. is liable.—COLMORE-WILLIAMS *v.* WEIR, [1918] N. Z. L. R. 1003.—**N.Z.**

771 l. ——.]—GRANT *v.* DRYSDALE (1883), 10 R. (Ct. of Sess.) 1159; 20 Sc. L. R. 774.—**SCOT.**

771 li. ——.]—MITCHELL *v.* M'HARG & SON, [1923] S. C. 657.—**SCOT.**

771 lii. ——.]—In an action for damages caused by the negligence of a cab-driver in running over pltf. it was found that pltf. had been guilty of some negligence, but that the driver could, with ordinary care, have avoided the accident:—*Held:* as there was an immediate connection between the driver's negligence & the damage, pltf. was not debarred by his own negligence which, in a remoter degree, contributed to the accident, from recovering for the damage.—PRIESTLY *v.* DUMEYER (1898), 15 S. C. 394.—**S. AF.**

771 liii. ——.]—If a man negligently places himself or his property in a position which renders its subsequent injury possible another person is not justified in inflicting such injury when by the exercise of reasonable care he can avoid doing so.—JOHANNESBURG MUNICIPALITY *v.* SHEPHERD & BARKER, [1906] T. S. 975.—**S. AF.**

771 liv. ——.]—If at the moment of an accident both pltf. & deft. have been negligent but deft. could still avoid the accident by the exercise of reasonable care pltf. can recover because the proximate cause of the accident is not the negligence of pltf. but the negligence of deft. in not using that due care which could have avoided the injury.—HOUSTON *v.* CAINE (1917), 38 N. L. R. 50.—**S. AF.**

—— **Negligence previous to that of plaintiff cause of incapacity.**]—The principle that the contributory negligence of pltf. will not disentitle him to recover damages, if deft., by the exercise of care, might have avoided the result of that negligence, applies where deft., although not committing any negligent act subsequently to pltf.'s negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of pltf.'s negligence.—BRITISH COLUMBIA ELECTRIC RY. CO., LTD. *v.* LOACH, [1916] 1 A. C. 719; 85 L. J. P. C. 23; 113 L. T. 946, P. C.

Annotation:—**Refd.** Singleton Abbey (Owners) *v.* Paludina (Owners), The Paludina (1926), 95 L. J. P. 135.

SECT. 2.—PROXIMATE CAUSE OF INJURY ATTRIBUTABLE TO BOTH PARTIES.

782. Plaintiff cannot recover.]—When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, . . . the rule of common law says, as each occasioned the accident neither shall recover at all in it, shall be just like an inevitable accident; the loss shall lie where it falls (LORD BLACKBURN).—CAYZER, IRVINE & CO. *v.* CARRON CO. (1884), 9 App. Cas. 873; 54 L. J. P. 18; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. L. C. 371, H. L.; *revsg.* S. C. *sub nom.* THE MARGARET, 9 P. D. 47, C. A.

Annotations:—**Consd.** H.M.S. Sans Pareil, [1900] P. 267; The Hero, [1911] P. 128; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129. **Refd.** The Morgengry & The Blackcock, [1900] P. 1; The Ovingdean Grange, [1901] P. 127; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406; The Modica, [1926] P. 72. **Mentd.** Hontestroom (Owners) *v.* Sagaporack (Owners), Hontestroom (Owners) *v.* Durham Castle (Owners) (1926), 95 L. J. P. 153.

783. ——.]—If the proximate cause of the injury is the negligence of pltf. as well as that of deft. pltf. cannot recover anything (LINDLEY, L.J.).—THE BERNINA (2) (1887), 12 P. D. 58; 56 L. J. P. 17; 56 L. T. 258; 35 W. R. 314; 6 Asp. M. L. C. 75, C. A.; *affd. sub nom.* MILLS *v.* ARMSTRONG, THE BERNINA (1888), 13 App. Cas. 1, H. L.

Annotations:—**Consd.** Page *v.* Met. Ry., Heard *v.* Same (1887), 4 T. L. R. 103. **Apld.** Reynolds *v.* Tilling (1903), 19 T. L. R. 539. **Consd.** Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514. **Refd.** Mathews *v.* London Street Tram. Co. (1888), 58 L. J. Q. B. 12; The Englishman & The Australia, [1894] P. 239; The Frankland, [1901] P. 161; The Duc d'Aumale (No. 2), [1904] P. 60; The Harvest Home, [1904] P. 409; The Circe, [1906] P. 1; The Hero, [1911] P. 128; S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272; Weld-Blundell *v.* Stephens, [1920] A. C. 956; Anchor Line (Henderson) *v.* Dundee Harbour Trustees, Ellerman Lines *v.* Same, Thomson, Shepherd *v.* Same (1922), 38 T. L. R. 299; The Koursk, [1924] P. 140. **Mentd.** The Sara (1887), 12 P. D. 158; The Orwell (1888), 13 P. D. 80; Secretary of State for India *v.* Hewett (1888), 5 T. L. R. 152; *Re* Palmer, Palmer *v.* Answorth (1893), 62 L. J. Ch. 988; Davidsson *v.* Hill, [1901] 2 K. B. 606; The General Havelock, [1906] P. 3, n.; S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38; The Molière, [1925] P. 27.

784. ——.]—If . . . the accident was caused directly or proximately not only by the negligence of the driver of the omnibus but also by the contributory negligence of pltf. then judgment should be entered for defts. (WALTON, J.).—REYNOLDS *v.* TILLING (THOMAS), LTD. (1903), 19 T. L. R. 539; *subsequent proceedings*, 20 T. L. R. 57, C. A.

SECT. 3.—PLAINTIFF'S KNOWLEDGE OF DANGER.

785. Whether mere knowledge & voluntary acceptance of risk sufficient defence.]—BEDMAN *v.*

PART XI. SECT. 2.

782 i. *Plaintiff cannot*
BURROWS *v.* ANTOME (1921), 23 W. A. L. R. 94.—**AUS.**

782 ii. ——.]—Where in a railway level crossing accident case pltf.'s evidence shows that deceased's death was attributable to his own negligence, or at least that it was as consistent with the view that it was so caused as with the view that it was caused by deft.'s negligence, pltf. fails.—CAREY *v.* VICTORIAN RAILWAYS COMRS., [1922] V. L. R. 759.—**AUS.**

782 iii. ——.]—HARRIGAN *v.* GRANBY CONSOLIDATED MINING, SMELTING & POWER CO. (1908), 14 B. C. R. 89; 9 W. L. R. 486.—**CAN.**

782 iv. ——.]—BERRY *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1913), 18 B. C. R. 175.—**CAN.**

782 v. ——.]—JACKSON *v.* BRITISH COLUMBIA ELECTRIC RY. CO., [1917] 3 W. W. R. 1046; 24 B. C. R. 484; 38 D. L. R. 145.—**CAN.**

782 vi. ——.]—In an action for damages for negligence in the driving of a vehicle where it is found that pltf. was himself negligent & the negligence was concurrent with the negligence of deft. which, *e.g.* excessive speed, was both primary & ultimate, pltf. cannot recover.—UNITED MOTOR CO. *v.* REGINA CORPN., [1917] 3 W. W. R. 509; 10 Sask. L. R. 373.—**CAN.**

782 vii. ——.]—JUDSON *v.* HAINES (1918), 42 O. L. R. 629; 14 O. W. N. 131; 43 D. L. R. 227.—**CAN.**

782 viii. ——.]—GUNDERSON *v.* DUNCAN (Sask.), [1919] 1 W. W. R. 99.—**CAN.**

782 ix. ——.]—EDWARDS *v.* CENTRAL DRAY CO., LTD., [1922] 2 W. W. R. 758; 68 D. L. R. 462; 32 Man. L. R. 193.—**CAN.**

782 x. ——.]—DOANE *v.* THOMAS (B. C.) (1922), 69 D. L. R. 476.—**CAN.**

782 xi. ——.]—A judgment to pltf. for damages caused by an automobile collision was reversed by the Ct. of Appeal, on the ground that, on all the evidence, oral & physical, it appeared both drivers were negligent, & one was not to blame more than the other.—WINCH *v.* BOWELL (B. C.), [1922] 2 W. W. R. 1031; 67 D. L. R. 471.—**CAN.**

782 xii. ——.]—HAGGERTY *v.* MCKAY (Sask.), [1923] 4 D. L. R. 1211; [1923] 3 W. W. R. 1288.—**CAN.**

782 xiii. ——.]—KIRK *v.* READE (Man.), [1923] 1 W. W. R. 1355.—**CAN**

782 xiv. ——.]—When the negligence of pltf. or that of deft. is the sole cause of an accident the matter is free from doubt. But difficulty may arise when an accident is caused partly by the negligence of pltf. & partly by that of deft. In such circumstances it becomes the duty of the ct. to endeavour to ascertain whether the negligent act or omission of pltf. or that of deft. was the cause of the accident. If the ct. finds itself unable to discover to what extent the negligence of pltf. or that of deft. contributed to bring about the accident, deft. is entitled to succeed, for *in pari delicto potior est conditio defendentis*.—NANI BALA SEN *v.* AUCKLAND TUBE CO., LTD. (1925), I. L. R. 52 Calc. 602.—**IND.**

782 xv. ——.]—A collision at a street crossing between an electric tram & a motor car was due to the excessive speed at which both vehicles were running & to the failure to keep a proper lookout & give due warning of approach by both drivers. Neither party could by due care at the moment the danger was realised have avoided the collision:—*Held:* an action for damages by the owner of the motor car must fail.—JOHANNESBURG MUNICIPAL COUNCIL *v.* DARBYSHIRE, [1910] T. S. 386.—**S. AF.**

d. *Contributory Negligence Act*, 1924 *—Application of.*]—This was a case in which "a plea of contributory fault or negligence" had been "found to have been established," within sect. 3 of the above Act. Pltf. could not before the statute have recovered; &, the jury having assessed a sum for damages, & found that the relative degrees of fault were equal, pltf. should have judgment for one-half of the sum assessed, with costs.—WALKER *v.* FORBES, [1925] 2 D. L. R. 725; 56 O. L. R. 532.—**CAN.**

e. —— ——.]—The above Act was held not applicable to a case in which the negligence of pltf., as found by the jury, was not the *causa causans* of the injury sustained by pltf. from a street car; & pltf. was held entitled to recover the full amount of damages awarded by the jury against deft.—FARBER *v.* TORONTO TRANSPORTATION COMMISSION, [1925] 2 D. L. R. 729; 56 O. L. R. 537.—**CAN.**

f. —— ——.]—MONDOR *v.* LUCHINI, [1925] 2 D. L. R. 746; 56 O. L. R. 576.—**CAN.**

g. —— ——.]—RODGER *v.* FLINTON (B. C.), [1926] 3 W. W. R. 773.—**CAN.**

h. —— ——.]—MCKITTRICK *v.* BYERS, [1926] 1 D. L. R. 342; 58 O. L. R. 158.—**CAN.**

PART XI. SECT. 3.

k. *General rule.*]—To support the defence of contributory negligence, it is necessary that there should be a direct & positive finding that pltf. voluntarily incurred the risk.—SCOTT *v.* BRITISH COLUMBIA MILLING CO. (1895), 3 B. C. R. 221; 24 S. C. R. 702.—**CAN.**

785 i. *Whether mere knowledge & voluntary acceptance of risk su[illegible] defence.*]—*Held:* pltf. was in a position to see, or ought to have seen, that

Sect. 3.—*Plaintiff's knowledge of danger.* *Sect.* 4.]

TOTTENHAM LOCAL BOARD OF HEALTH, No. 761, *ante*.

786. —— Question for jury.]—CLAYARDS *v.* DETHICK & DAVIS, No. 630, *ante*.

787. —— ——.]—Defts. were proprietors of a dock & tidal basin, made under the powers given by an Act of Parliament, & for the use of which they were entitled to receive tolls. In an action by pltfs. to recover compensation for the loss of their ship in passing from the dock, it appeared that the dock & basin were opened on Mar. 3, the channel from the dock to the river T., through the basin, was intended to be 120 feet wide; but at the time of the accident, on Mar. 19, the channel had only been excavated to the width of seventy feet, leaving a bank on either side, which was in course of removal by dredging. At the time when the ship went out of the dock the depth of water indicated on the sill was 24 feet 6 inches; the channel was rather shallower, & the bank on each side rose about 3 feet 6 inches; the ship grounded on one of these. No notice had been publicly given of the state of the bottom of the basin, nor was the channel marked by buoys or otherwise. On Mar. 8, a larger vessel, with the same pilot, had got safely out, & he knew the condition of the basin:—*Held:* it was the duty of defts. to take reasonable care that their dock & basin were kept so free from obstruction as that those who used them might do so without danger to their lives & property; defts. were guilty of negligence; &, assuming the knowledge of the pilot to be the knowledge of pltfs., pltfs. were entitled to recover, inasmuch as, the obstruction having been caused by the wrongful act of defts., pltfs. were not precluded from recovering for the injury resulting from the negligence of defts., unless the pilot, in attempting to take the ship out of dock, was guilty of a want of common prudence.

Clayards v. *Dethick & Davis*, No. 630, *ante*, is a direct authority, that where danger has been created by the wrongful or negligent act of another, if a man, in the performance of a lawful act, voluntarily exposes himself to that danger, he is not precluded from recovering for injury resulting from it, unless the circumstances are such that the jury are of opinion that the exposing himself to that danger was a want of common or ordinary prudence on his part (COCKBURN, C.J.).—THOMPSON *v.* NORTH EASTERN RY. CO. (1862), 2 B. & S. 119; 31 L. J. Q. B. 194; 6 L. T. 127; 8 Jur. N. S. 991; 10 W. R. 404; 1 Mar. L. C. 207; 121 E. R. 1012, Ex. Ch.

Annotations:—**Refd.** Wyatt *v.* G. W. Ry. (1865), 6 B. & S. 709; The Excelsior (1868), L. R. 2 A. & E. 268; Lax *v.* Darlington Corpn. (1879), 5 Ex. D. 28.

788. —— Entering vehicle when driver perceptibly drunk.]—There is no contributory negligence on the part of anyone in merely getting into a vehicle & allowing himself to be driven, although the driver be perceptibly drunk.—R. *v.* JONES (1870), 22 L. T. 217; 11 Cox, C. C. 544.

Annotation:—**Refd.** Pratt *v.* Patrick, [1924] 1 K. B. 488.

789. Effect of warning of danger.]—A person who keeps an animal accustomed to attack & bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked & injured by such animal, without any averment in the declaration of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. *Qu.:* whether, to an action on the case for injury caused as above stated, it would be a defence that the injury was occasioned solely by the wilfulness of pltf., after warning.—MAY *v.* BURDETT (1846), 9 Q. B. 101; 16 L. J. Q. B. 64; 7 L. T. O. S. 253; 10 Jur. 692; 115 E. R. 1213.

Annotations:—**Apld.** Jackson *v.* Smithson (1846), 15 M. & W. 563. **Consd.** Card *v.* Case (1848), 5 C. B. 622. **Distd.** Filburn *v.* People's Palace & Aquarium Co. (1890), 25 Q. B. D. 258. **Consd.** Marlor *v.* Ball (1900), 16 T. L. R. 239; Baker *v.* Snell, [1908] 2 K. B. 825. **Refd.** Cooke *v.* Waring (1863), 2 H. & C. 332; Smith *v.* Cook (1875), 1 Q. B. D. 79; Jones *v.* Lee (1911), 106 L. T. 123. **Mentd.** Hill *v.* Balls (1857), 2 H. & N. 299; Vaughan *v.* Taff Vale Ry. (1860), 6 Jur. N. S. 899; Fletcher *v.* Rylands (1866), L. R. 1 Exch. 265; Charing Cross, West End & City Electricity Supply Co. *v.* London Hydraulic Power Co. (1914), 83 L. J. K. B. 1352.

790. —— Warning from defendant—Circumstances amounting to warning.]—Where a person who is charged with negligence seeks to discharge himself by showing that there was negligence in pltf., inasmuch as he had warning of the danger, deft. must show that such warning came either from himself, or under circumstances which rendered it the duty of pltf. to act upon it.

Accordingly, in an action for injury done to pltf.'s vessel by the anchor of deft.'s vessel striking her, it appeared that one of the crew of pltf.'s vessel had been informed by one of a third vessel that his, the informant's, vessel was about to leave her then station, because there was an anchor somewhere near her &, this being relied upon to charge pltf.'s party with negligence in not avoiding the danger:—*Held:* to be no answer to the action.—VENUS *v.* PEARSON (1830), L. & Welsb. 160; 8 L. J. O. S. K. B. 263.

Danger relating to carriage of persons.]—*See* CARRIERS, Vol. VIII., pp. 71 *et seq.*

Effect of servant's knowledge of danger—On liability of master.]—*See* Part X., Sect. 1, sub-sects. 2, 4, *ante*.

On liability of third party—Servant's position no better than that of master.]—*See* MASTER & SERVANT, Vol. XXXIV., p. 143, Nos. 1575, 1576.

—— **Knowledge of pilot.**]—*See* SHIPPING.

Compare Part I., Sect. 2, sub-sect. 3, D., *ante*.

SECT. 4.—PLAINTIFF'S ACTS IN EMERGENCY.

791. General rule.]—A ship has no right, by its own misconduct, to put another ship into a situation of extreme peril, & then charge that other ship with misconduct. My opinion is that if, in that moment of extreme peril & difficulty, such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, & promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men (JAMES, L.J.).

both gates were open, & that being so, he should, if he elected to remain on the platform, have used extra precaution to ensure his own safety, & not having done so, he was guilty of contributory negligence, which was the direct cause of the accident.—O'LEARY *v.* RAILWAYS COMR. (1902), 4 W. A. L. R. 136.—**AUS.**

785 ii. ——.]—HUMPHREY *v.* WAIT (1874), 22 C. P. 580.—**CAN.**

785 iii. ——.]—HARRIS *v.* LONDON STREET RY. CO. (1907), 39 S. C. R. 398.—**CAN.**

785 iv. ——.]—DESPOINTES *v.* ALMOND (1913), 18 B. C. R. 578.—**CAN.**

785 v. ——.] — SMITH *v.* MARYCULTER SCHOOL BOARD (1898), 1 F. (Ct. of Sess.) 5; 36 Sc. L. R. 8; 6 S. L. T. 152.—**SCOT.**

785 vi. ——.]—M'MANUS *v.* ARMOUR (1901), 3 F. (Ct. of Sess.) 1078; 38 Sc. L. R. 791; 9 S. L. T. 139.—**SCOT.**

786 i. —— *Question for jury.*]—PORTLAND CORPN. *v.* GRIFFITHS (1885), 11 S. C. R. 333.—**CAN.**

—THE BYWELL CASTLE (1879), 4 P. D. 219; 41 L. T. 747; 28 W. R. 293; 4 Asp. M. L. C. 207, C. A.

Annotations:—**Consd.** Woodley *v.* Michell (1883), 11 Q. B. D. 47. **Apprvd.** Tasmania (Owners & Owners of Freight) *v.* Smith & City of Corinth (Owners), The Tasmania (1890), 15 App. Cas. 223; S.S. Utopia *v.* S.S. Primula, The Utopia, [1893] A. C. 492. **Consd.** Dulieu *v.* White, [1901] 2 K. B. 669. **Apld.** The Koning Willem II, [1908] P. 125. **Consd.** S.S. Orduna *v.* Shipping Controller, [1921] 1 A. C. 250. **Apld.** United States Shipping Board *v.* Laird Line, [1924] A. C. 286. **Refd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876; The Frankfort (1909), 101 L. T. 664; The Hero, [1911] P. 128; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129; S.S. Singleton Abbey *v.* S.S. Paludina, [1927] A. C. 16. **Mentd.** The Harton (1884), 50 L. T. 370.

792. ——.]—The colliding ship having been navigated in circumstances of instant peril with reasonable care & skill:—*Held:* it was not answerable for the collision.—UTOPIA (OWNERS) *v.* PRIMULA (OWNERS & MASTER), THE UTOPIA, [1893] A. C. 492; 62 L. J. P. C. 118; 70 L. T. 47; 9 T. L. R. 542; 7 Asp. M. L. C. 408; 1 R. 394, P. C.

Annotations:—**Refd.** The Snark, [1900] P. 105; The Manorbier Castle (1923), 129 L. T. 31. **Mentd.** Arrow Shipping Co. *v.* Tyne Improvement Comrs., The Crystal, [1894] A. C. 508; The Ripon City, [1897] P. 226; The Tervacte, [1922] P. 259; The Sylvan Arrow, [1923] P. 220.

793. ——.]—While pltfs., husband & wife, were in a shop as customers a skylight in the roof of the shop was broken, owing to the negligence of contractors engaged in repairing the roof, & a portion of the glass fell & struck the husband, causing him a severe shock. His wife, who was standing close to him at the time, was not touched by the falling glass, but, reasonably believing her husband to be in danger, she instinctively clutched his arm, & tried to pull him from the spot. In doing this she strained her leg in such a way as to bring about a recurrence of thrombosis. In an action to recover damages from the contractors:—*Held:* the husband was entitled to damages, & the wife was also entitled to damages, inasmuch as what she did was, in the circumstances, a natural & proper thing to do.

If a person is not to be held guilty of contributory negligence because he, acting instinctively for his own preservation does that which a reasonable man under those conditions would do I cannot see why he should be any more held to be guilty of contributory negligence if he does his instinctive act for the preservation of his wife or child, or even of a friend or stranger (SWIFT, J.).—BRANDON *v.* OSBORNE, GARRETT & CO., [1924] 1 K. B. 548; 93 L. J. K. B. 304; 130 L. T. 670; 40 T. L. R. 235; 68 Sol. Jo. 460.

794. Choosing between two risks.]—JONES *v.* BOYCE, No. 79, *ante*.

795. ——.]—Where by the negligence of deft. pltf. is placed in a position of danger, & to escape from it must run the risk of an alternative danger, & he does so attempt to escape, deft. is liable for the consequences of such alternative danger. *Aliter* if pltf.'s position be one of inconvenience only; though a position of great inconvenience may justify running the risk of a slight danger. Therefore, where the door of a railway carriage flies open & exposes a passenger to inconvenience only, he cannot make the railway co. liable for an accident caused by his falling out in trying to shut it.—ADAMS *v.* LANCASHIRE & YORKSHIRE RY. CO. (1869), L. R. 4 C. P. 739; 38 L. J. C. P. 277; 20 L. T. 850; 17 W. R. 884.

Annotations:—**Consd.** The George & Richard (1871), [illegible] 3 A. & E. 466. **Distd.** Gee *v.* Met. Ry. (1873), L. R. 8 Q. B. 161. **Apld.** Robson *v.* N. E. Ry. (1875), L. R. 10 Q. B. 271; Lee *v.* Nixey (1890), 63 L. T. 285. **Expld.** S.S. Singleton Abbey *v.* S.S. Paludina, [1927] A. C. 16. **Refd.** Dulieu *v.* White, [1901] 2 K. B. 669; Janvier *v.* Sweeney, [1919] 2 K. B. 316.

796. ——.]—A wooden apparatus, technically called a "slide," & used for lowering casks & other heavy & bulky goods from vans in the street into defts.' blacklead warehouse, was placed across the pavement or footway of the street from the end of their van to the opening into the cellar of their warehouse, during the hours prohibited by the Metropolitan Police & Metropolitan Streets Acts, for using the same for that purpose, thus blocking the footway so that foot passengers were obliged either to get over the slide or to go round by the horses' heads in the roadway, or to wait until the obstruction was removed.

The "slide" was very slippery from blacklead, & in his attempt to get over it a foot passenger slipped, lost his footing, & fell, receiving serious injuries; & in an action against defts. for negligence the Lord Chief Justice directed the jury that defts., being admittedly guilty of an illegal act, were bound to guard the public against injury ensuing therefrom. The jury found that pltf. had only acted reasonably & prudently in what he did, & gave him a verdict for £300 damages:—*Held:* the judgment entered for pltf. was right, as it was for the jury to decide what was the proper course for him to adopt in all the circumstances, & to say whether or not his attempt to get over the "slide" was the act of a reasonable & prudent man.

The opinion expressed by LORD ESHER, M.R., when he was BRETT, J., in *Adams* v. *Lancashire & Yorkshire Ry. Co.*, No. 795, *ante*, that "if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, & executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience," approved of & acted on.—LEE *v.* NIXEY (1890), 63 L. T. 285; 54 J. P. 807, D. C.

797. ——.]—Defts., owners of a shipbuilding yard on the Mersey, being about to launch a vessel, gave the usual notices, & arranged with the owners of some moorings nearly opposite to pay half the cost of removing the buoy marking their position. Pltfs.' ketch, which was coming up the river on the morning of the intended launch, finding the wind falling light, & with a view to bringing up, let her anchor drag, &, fouling the moorings, the vessel remained fast. Messages were sent by defts. to the master of the ketch to move her, &, finally, a tug, whilst offering to tow the ketch away, delivered a letter advising her master to slip, & stating that defts. would not be responsible for any damage to the ketch or for any accident to any person on board. The master of the ketch, however, thinking his vessel was out of the zone of danger, refused to slip without an undertaking from defts. that they would be answerable for the cost of the anchor if lost. Defts., not deeming it prudent to incur the risk of further delay, launched the vessel, which struck the ketch. In an action of damage by collision, brought by the owners of the ketch, the President found that the master of the ketch had no right to make it a condition before moving that defts. should give an undertaking to replace the anchor, & that he was at fault for not slipping his chain & removing to a place of safety, but that defts. were alone to blame as they had, for their own purposes, & to pltfs.' injury, launched the vessel without regard to the possible consequences to pltfs.' ketch & her crew. Pltfs.' negligence, therefore, did not excuse defts., because they might, by the exercise of care, have avoided the mischief which their deliberate action caused:—*Held:* pltfs.' ketch was alone to blame,

Sect. 4.—Plaintiff's acts in emergency. Sect. 5.]

for defts. reasonably chose that which they believed to be the lesser of two evils, & risked the slight chance of injuring the ketch in order to avoid the serious risk to life & property which would result from postponing the launch.—THE HIGHLAND LOCH, [1911] P. 261; 80 L. J. P. 121; 105 L. T. 764; 27 T. L. R. 510; 12 Asp. M. L. C. 68, C. A.; *affd. sub nom.* KETCH FRANCES (OWNERS) *v.* HIGHLAND LOCH (OWNERS), THE HIGHLAND LOCH, [1912] A. C. 312.

·]—*See, further*, SHIPPING.

798. —— Applicable only to personal danger.]—The proposition laid down in *Adams* v. *Lancashire & Yorkshire Ry. Co.*, No. 795, *ante*, that if a person is put by the negligence of another person in a situation of "alternative danger," that is to say that he will be in danger if he remains still & in danger if he attempts to escape, any injury which he may sustain in attempting to escape is a consequence of the original negligence, applies to personal danger only & does not extend to danger to property.—S.S. SINGLETON ABBEY *v.* S.S. PALUDINA, [1927] A. C. 16; 95 L. J. P. 135; *sub nom.* THE PALUDINA, 135 L. T. 707, H. L.

799. Third party in peril through negligence of defendant—Plaintiff injured in attempted rescue.]—R., an under-viewer at one part of a coal mine, having reason to suppose that the life of H., a fellow workman in another part of the mine, was in danger, lost his own life in the attempt to save that of H. R. did not at the time of going to the place where H. had been at work know that there was a poisonous gas there, but he was seriously affected by it on his way to rescue H. R. had, nevertheless, proceeded to where H. was lying, & on returning with H.'s body had himself been killed by the gas. R. had gone on the occasion in question to a part of the mine where he had not been sent by any superior servant of his employer: —*Held:* the fact that R., after he had been affected by the gas, had persisted in his attempt to rescue H. was no evidence of his having been guilty of contributory negligence.—ROEBUCK *v.* NORWEGIAN TITANIC CO. (1884), 1 T. L. R. 117, D. C.

800. —— ——.]—BRANDON *v.* OSBORNE, GARRETT & CO., No. 793, *ante*.

801. Plaintiff in position of inconvenience only.]—ADAMS *v.* LANCASHIRE & YORKSHIRE RY. CO., No. 795, *ante*.

802. Reasonableness of plaintiff's conduct—Question for jury.]—Where a party, by his own negligent or wrongful act, deprives another of sufficient presence of mind to take advantage of a warning given to avoid any danger or accident that may happen to him from that act, such warning will not discharge the wrongdoer from liability.

Whether pltf. was deprived of his presence of mind by the act of deft. was a question for the jury (BAYLEY, J.).—WOOLLEY *v.* SCOVELL (1828), 3 Man. & Ry. K. B. 105; 7 L. J. O. S. K. B. 41.

Compare Part I., Sect. 2, sub-sect. 3, C., *ante*.

SECT. 5.—DOCTRINE OF IDENTIFICATION.

803. Identification of passenger with driver of vehicle—Driver guilty of contributory negligence—Whether passenger disentitled to relief.]—Case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of which pltf. was riding, & injured him. Plea, that the parties having the management of the train in which pltf. was, managed it so negligently & improperly, that, in part by their negligence, as well as in part by deft.'s negligence, deft.'s train ran against the other, & caused the injuries to pltf.:—*Held:* (1) the plea was bad in substance for not showing that the parties under whose management pltf. was were guilty of negligence.

PART XI. SECT. 4.

799 i. *Third party in peril through negligence of defendant—Plaintiff injured in attempted rescue.*]—A statement of claim alleging, in effect, that a child about two years of age had fallen on the track of defts.' street railway on a public street in the city; that one of defts.' cars was approaching the child at a high rate of speed, & that owing to the negligence of the motorman in charge of the car in not stopping it, the child's life was endangered without negligence on her part; that pltf., observing this, necessarily rushed in front of the car in an attempt to save the child, & that, owing to the motorman's negligence in not stopping the car or reducing its speed, he was struck & injured by the car, discloses a good cause of action.—SEYMOUR *v.* WINNIPEG ELECTRIC RY. CO. (1910), 19 Man. L. R. 412.—**CAN.**

l. —— *Plaintiff killed in rescue.*]—A woman was walking down the wharf on the outside of the western track, & on meeting some men coming up, she, apparently to avoid them, stepped across on to the centre track, not observing a gravel train backing down along it. Just as the train was upon her one of these men, observing her danger, jumped on to the track & pushed her off, but for some reason hesitating for a moment was himself struck by the train & killed. In an action by the administratrix of deceased the jury found that defts. were guilty of negligence, & that neither the woman nor deceased was guilty of contributory negligence, & that she would have been killed had not deceased pushed her off, which was the only means of saving her:—*Held:* the administratrix could not recover, for deceased was guilty of contributory negligence, his own direct & wilful act, however praiseworthy, being the cause of the accident.—ANDERSON *v.* NORTHERN RY. CO. (1875), 25 C. P. 301.—**CAN.**

m. *Reasonableness of plaintiff's conduct.*]—TREE *v.* CRENIN (1913), 15 W. A. L. R. 47.—**AUS.**

n. ——.]—Where a man, acting as a reasonable man would ordinarily do under the circumstances, voluntarily places himself in a position of danger in the hope of saving his property from probable injury to the life or property of others, & sustains hurt, the person whose negligent act has brought about the dangerous situation is responsible in damages.—CONNELL *v.* PRESCOTT TOWN (1892), 20 A. R. 49; *affd.* (1893), 22 S. C. R. 147.—**CAN.**

o. ——.]—Pltf. having the right to be where he was, & the whole event, from the moment he discovered his danger to the time he was struck, having happened in the course of a few seconds, he was not to be held to the obligation of selecting the best possible means of escape.—RICKETTS *v.* SYDNEY & GLACE BAY RY. CO. (1905), 37 N. S. R. 270.—**CAN.**

p. ——.]—HAIGH *v.* GRAND TRUNK PACIFIC RY. CO. (1914), 30 W. L. R. [illegible] 7 W. W. R. 806; 8 Alta. L. R. 153.—**CAN.**

·]—Where a person is placed in a dangerous position through the negligence of another, & in attempting to avert danger impending thereby is injured, he will not be without remedy against such other person for damages suffered, if in making the attempt he did what a reasonably prudent man, impelled by the instinct of self preservation would have done. In such circumstances the ct. will not imply contributory negligence merely on the ground that a hasty attempt to avert a suddenly impending danger was ill judged.—NEWMAN *v.* EAST LONDON TOWN COUNCIL (1895), 12 S. C. 62.—**S. AF.**

r. ——.]—BOUGHEY *v.* BREDELL, [1904] T. S. 394.—**S. AF.**

t. ——.]—OGDEN *v.* JACKSON (1910), 31 N. L. R. 143.—**S. AF.**

a. *Deliberate acceptance of danger by plaintiff.*]—Where by deft.'s negligence his four horse team ran away & pltf. ran out to stop them & received injuries:—*Held:* pltf. could not recover damages as he failed to show that any person was in danger when he tried to stop the horses.—MCDONALD *v.* BURR (Sask.), [1919] 3 W. W. R. 825.—**CAN.**

PART XI. SECT. 5.

803 i. *Identification of passenger with driver of vehicle—Driver guilty of contributory negligence—Whether passenger disentitled to relief.*]—Pltf., being in a cab, approached a railway crossing, where a train could be seen at a distance of three quarters of a mile. The driver did not see the train, which was a very long one, until the horses'

(2) The rule of law is . . . that although there may have been negligence on the part of pltf. yet unless he might . . . have avoided the consequences of deft.'s negligence, he is entitled to recover; if by ordinary care he might have avoided them he is the author of his own wrong (PARKE, B.).—BRIDGE *v.* GRAND JUNCTION RY. CO. (1838), 3 M. & W. 244; 1 Horn & H. 26; 150 E. R. 1134; *sub nom.* ARMITAGE *v.* GRAND JUNCTION RY. CO., 6 Dowl. 340.

Annotations:—As to (2) **Consd.** Davies *v.* Mann (1842), 10 M. & W. 546. **Apprvd.** General Steam Navigation Co. *v.* Tonkin (1844), 4 Moo. P. C. C. 314. **Reld.** Holden *v.* Liverpool New Gas & Coke Co. (1846), 3 C. B. 1; Thorogood *v.* Bryan, Cattlin *v.* Hills (1849), 8 C. B. 115; Dimes *v.* Petley (1850), 15 Q. B. 276; Dowell *v.* General Steam Navigation Co. (1855), 5 E. & B. 195; Caswell *v.* Worth (1856), 5 E. & B. 849; Tuff *v.* Warman (1858), 5 C. B. N. S. 573; Witherley *v.* Regent's Canal Co. (1862), 12 C. B. N. S. 2; The Thuringia (1872), 41 L. J. Adm. 44; Armstrong *v.* L. & Y. Ry. (1875), L. R. 10 Exch. 47; The Vera Cruz (No. 1) (1884), 9 P. D. 88; Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514. *Generally*, **Mentd.** R. *v.* Waters (1848), 1 Den. 356; Evison *v.* Marshall (1868), 32 J. P. 691.

804. ——— ——— ———.]—THOROGOOD *v.* BRYAN, CATTLIN *v.* HILLS (1849), 8 C. B. 115; 18 L. J. C. P. 336; 13 L. T. O. S. 284; 137 E. R. 452.

Annotations:—**N.F.** The Milan (1861), Lush. 388. **Folld.** Armstrong *v.* L. & Y. Ry. (1875), L. R. 10 Exch. 47. **Overd.** Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1. **N.F.** S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16. **Consd.** S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Reld.** Hutchinson *v.* York, Newcastle & Berwick Ry. (1850), 5 Exch. 343; Tuff *v.* Warman (1857), 2 C. B. N. S. 740; The George & Richard (1871), 24 L. T. 717; Smith *v.* Brown (1871), 24 L. T. 808; Child *v.* Hearn (1874), L. R. 9 Exch. 176; The City of Manchester (1879), 40 L. T. 591; Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; The Vera Cruz (1884), 53 L. J. P. 33; The Sara (1887), 12 P. D. 158; Mathews *v.* London Street Tram. Co. (1888), 58 L. J. Q. B. 12; Cory *v.* France, Fenwick, [1911] 1 K. B. 114; The Seacombe, The Devonshire, [1912] P. 21; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Mentd.** *Re* Palmer, Palmer *v.* Answorth (1893), 62 L. J. Ch. 988.

805. ——— ——— ———.]—RIGBY *v.* HEWITT, No. 119, *ante*.

806. ——— ——— ———.]—Pltf., one of the travelling inspectors of the carriage & waggon department of the L. & N. W. Ry. Co., was travelling under a pass from them, in one of their carriages, on a journey from Leeds to Manchester. Near C. station, & on the line of defts., over which the L. & N. W. Ry. had running powers, the train in which pltf. was travelling came into collision with a number of loaded waggons, which were being shunted from a siding by defts., & he was injured. There was evidence of negligence on the part of the driver of pltf.'s train in travelling at too great a speed, so as to be unable to stop when he came in sight of the danger signal, which had been hoisted by defts. The jury found that the accident was caused by the joint negligence of defts. & the L. & N. W. Ry. Co.:—*Held:* pltf. was so far identified with the L. & N. W. Ry. Co. that he could not recover.—ARMSTRONG *v.* LANCASHIRE & YORKSHIRE RY. CO. (1875), L. R. 10 Exch. 47; 44 L. J. Ex. 89; 33 L. T. 228; 39 J. P. 136; 23 W. R. 295.

Annotations:—**Reld.** Hall *v.* N. E. Ry. (1875), 33 L. T. 306; The City of Manchester (1879), 40 L. T. 591; Chartered Mercantile Bank of India *v.* Netherlands Steam Navigation Co. (1883), 10 Q. B. D. 521; Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1; S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16; The Koursk, [1924] P. 140.

807. ——— ——— ———.]—A collision having occurred between the steamships *Bushire* & *Bernina* through the fault or default of the masters & crews of both, two persons on board the *Bushire*, one of the crew & a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased having brought in the Admlty. Div. actions *in personam* against the owners of the *Bernina* for negligence under Lord Campbell's Act, 1846 (c. 93):—*Held:* (1) deceased persons were not identified in respect of the negligence with those navigating the *Bushire*; (2) their representatives could maintain the actions; & could recover the whole of the damages, the Admlty. rule as to half damages not being applicable to actions under Lord Campbell's Act. *Thorogood* v. *Bryan*, No. 804, *ante*, & *Armstrong* v. *Lancashire & Yorkshire Ry. Co.*, No. 806, *ante*, overd.—MILLS *v.* ARMSTRONG, THE BERNINA (1888), 13 App. Cas. 1; 57 L. J. P. 65; 58 L. T. 423; 52 J. P. 212; 36 W. R. 870; 4 T. L. R. 360; 6 Asp. M. L. C. 257, H. L.; *affg.* THE BERNINA (2) (1887), 12 P. D. 58, C. A.

Annotations:—As to (1) **Apld.** Mathews *v.* London Street Tram. Co. (1888), 58 L. J. Q. B. 12. **Consd.** S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16. **Reld.** Secretary of State for India *v.* Hewett (1888), 5 T. L. R. 152; The Frankland, [1901] P. 161; The Duc d'Aumale (No. 2), [1904] P. 60; The Harvest Home, [1904] P. 409; The General Havelock, [1906] P. 3, n.; S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272; The Koursk, [1924] P. 140. *As to* (2) **Consd.** The Circe, [1906] P. 1. **Reld.** The Orwell (1888), 13 P. D. 80; The Englishman & The Australia, [1894] P. 239; S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634; The Molière, [1925] P. 27. *Generally*, **Reld.** Page *v.* Met. Ry., Heard *v.* Same (1887), 4 T. L. R. 103; Reynolds *v.* Tilling (1903), 19 T. L. R. 539; The Hero, [1911] P. 128; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514. **Mentd.** The Sara (1887), 12 P. D. 158; *Re* Palmer, Palmer *v.* Answorth (1893), 62 L. J. Ch. 988; Davidson *v.* Hill, [1901] 2 K. B. 606; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38; Weld-Blundell *v.* Stephens, [1920] A. C. 956; Anchor Line (Henderson) *v.* Dundee Harbour Trustees, Ellerman Lines *v.* Same, Thomson, Shepherd *v.* Same (1922), 38 T. L. R. 299.

808. ——— ——— ———.]—In an action by a passenger on an omnibus, against the owners of a tramway car, for compensation for injuries sustained in a collision, the direction of the jury since the decision of the House of Lords in *Mills* v. *Armstrong, The Bernina*, No. 807, *ante*, should be, "Was there negligence on the part of the tramway car driver which caused the accident? if so, it is no answer to say that there was negligence on the part of the omnibus driver": pltf. in such a case not being disentitled to recover by reason of the negligence of the driver of the omnibus on which he was a passenger.—MATHEWS *v.* LONDON STREET TRAMWAYS CO. (1888), 58 L. J. Q. B. 12; 60 L. T. 47; 52 J. P. 774; 5 T. L. R. 3, D. C.

809. ——— ——— ———.]—PIKE *v.* LONDON GENERAL OMNIBUS CO. (1891), 8 T. L. R. 164, D. C.

Identification of cargo with ship.]—*See* SHIPPING.

Plaintiff a young infant—Contributory negligence of party having charge of infant.]—*See* No. 471, *ante*.

feet were on the rails, & it was within seventy feet, & he then tried to cross in front of it, but the cab was struck & overturned:—*Held:* the driver's negligence was so far the cause of the accident that pltf. could not recover, notwithstanding defts.' neglect of their statutory obligation to have a fence & gate at the crossing, with an attendant to watch it.—NICHOLLS *v.* GREAT WESTERN RY. CO. (1868), 27 U. C. R. 382.—**CAN.**

803 ii. ——— ——— ———.]—RASTRICK *v.* GREAT WESTERN RY. CO. (1868), 27 U. C. R. 396.—**CAN.**

803 iii. ——— ——— ———.]—LOACH *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1914), 19 B. C. R. 177.—**CAN.**

b. *Identification of soldier with commanding officer.*]—BLACKLER *v.* MCELHOUE (1913), 13 S. R. N. S. W. 487; 30 N. S. W. W. N. 126.—**AUS.**

c. *Identification of bailor & bailee.*]—The doctrine of identification of bailor & bailee is not applicable in relation to liability for negligence.—WELLWOOD *v.* KING (ALEXANDER), LTD., [1921] 2 I. R. 274.—**IR.**

SECT. 6.—IN ACTIONS UNDER LORD CAMPBELL'S ACT.

See Part XIII., Sect. 2, sub-sect. 7, B., *post*.

SECT. 7.—BY CHILDREN.

See Part VII., Sect. 4, *ante*.

SECT. 8.—PARTICULAR INSTANCES.

Agent—Plea in action for account by principal.]—*See* AGENCY, Vol. I., p. 431, Nos. 1230, 1231.

Animals.]—*See* ANIMALS, Vol. II., pp. 239, 240, Nos. 247–252.

Carriers.]—*See* CARRIERS, Vol. VIII., pp. 71 *et seq.*; RAILWAYS, TRAMWAYS & LIGHT RAILWAYS.

Criminal cases.]—*See* CRIMINAL LAW, Vol. XV., p. 802, Nos. 8694–8700.

Factories.]—*See* FACTORIES, Vol. XXIV., pp. 908–911, Nos. 62–81.

Fires caused by locomotives.]—*See* RAILWAYS.

Gas companies.]—*See* GAS, Vol. XXV., p. 484, Nos. 81–84.

Highways.]—*See* HIGHWAYS, Vol. XXVI., pp. 446–448, Nos. 1634–1638.

Inns.]—*See* INNS & INNKEEPERS, Vol. XXIX., pp. 13–15, Nos. 170–198.

Party walls.]—*See* BOUNDARIES, Vol. VII., p. 300, No. 237.

Railways.]—*See* CARRIERS, Vol. VIII., pp. 5 *et seq.*; RAILWAYS.

Shipping.]—*See* SHIPPING.

Employers Liability Act.]—*See* MASTER & SERVANT, Vol. XXXIV., p. 232.

Part XII.—Damages.

SECT. 1.—NECESSITY FOR PROOF OF DAMAGE.

See, generally, ACTION, Vol. I., pp. 26–29, Nos. 216–232; DAMAGES, Vol. XVII., pp. 84–87, Nos. 36–58.

810. General rule—Damage essential.]—The gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says PARKE, B., in *Embrey* v. *Owen* (1851), 6 Ex. 353, at p. 368 "is not indispensable, as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage." But this principle is not as a rule applicable to actions for negligence; which are not brought to establish a bare right, but to recover compensation for substantial injury (BOWEN, L.J.).—BRUNSDEN *v.* HUMPHREY (1884), 14 Q. B. D. 141; 53 L. J. Q. B. 476; 51 L. T. 529; 49 J. P. 4; 32 W. R. 944, C. A.

Annotations:—**Reld.** Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127; Lendon *v.* London Road Car Co. (1888), 4 T. L. R. 448; Wilson *v.* United Counties Bank, [1920] A. C. 102; The Koursk, [1924] P. 140. **Mentd.** Edmonds *v.* Robinson (1885), 29 Ch. D. 170; Serrao *v.* Noel (1885), 15 Q. B. D. 549; Macdougall *v.* Knight (1890), 25 Q. B. D. 1; Mid. Ry. *v.* Martin (1893), 62 L. J. Q. B. 517; James *v.* Evans (1897), 77 L. T. 78; Rose *v.* Buckett (1901), 84 L. T. 670; Furness, Withy *v.* Hall (1909), 25 T. L. R. 233; Isaacs *v.* Salbstein, [1916] 2 K. B. 139; Goldrei, Foucard *v.* Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180; Ord *v.* Ord, [1923] 2 K. B. 432; Debenhams *v.* Perkins (1925), 133 L. T. 252.

811. —— ——.]—REMORQUAGE À HÉLICE ANONYME DE) *v.* BENNETTS, No. 827, *post*.

812. —— ——.]—In an action in the county ct. for negligence defts. paid £40 into ct. with a notice stating that, whilst admitting negligence, they denied the alleged damage, & said that the sum paid in was sufficient to satisfy pltfs.' claim. Pltfs. recovered exactly the amount paid into ct. & judgment was entered for them with costs on the ground that the notice was invalid, as it contained both an admission & a denial of liability:—*Held:* the notice was valid, inasmuch as in an action for negligence damage was an essential element of the action, & a denial of damage was a denial of liability.—MUNDAY (J. R.), LTD. *v.* LONDON COUNTY COUNCIL, [1916] 2 K. B. 331; 85 L. J. K. B. 1509; 115 L. T. 99; 80 J. P. 403; 32 T. L. R. 559; 60 Sol. Jo. 587; 14 L. G. R. 1055, C. A.

Annotation:—**Follid.** Davies *v.* Scott-Lewis, [1918] W. N. 166.

813. —— ——.]—DAVIES *v.* SCOTT-LEWIS, [1918] W. N. 166, C. A.

See, also, SHIPPING.

Necessity for proof of special damage.]—*See, generally*, DAMAGES, Vol. XVII., pp. 155, 156, Nos. 559–566.

When nominal damages recoverable.]—*See* Nos. 836, 837, *post*.

SECT. 2.—REMOTENESS OF DAMAGE.

SUB-SECT. 1.—IN GENERAL.

See, generally, DAMAGES, Vol. XVII., pp. 93–120, Nos. 101–289.

814. Damage must be proximate & direct consequence of negligence.]—As was pointed out by COLERIDGE, J. in *Lumley* v. *Gye* (1853), 2 E. & B. 252, cts. of justice should not "allow themselves . . . to transgress the bounds which our law . . .

PART XII. SECT. 1.

810 i. *General rule—Damage essential.*]—COX *v.* MCKENZIE (1890), 22 N. S. R. 226.—**CAN.**

810 ii. —— ——.]—ANUNDO LALL DASS *v.* BOYCAUNT RAM ROY (1887), I. L. R. 5 Calc. 283; 4 C. L. R. 473.—**IND.**

810 iii. —— ——.]—MEARA *v.* DALY (1914), 48 I. L. T. 223.—**IR.**

PART XII. SECT. 2, SUB-SECT. 1.

814 i. *Damage must be proximate & direct consequence of negligence.*]—EDWARDS *v.* MELBOURNE & METROPOLITAN BOARD OF WORKS (1893), 19 V. L. R. 432.—**AUS.**

814 ii. ——.]—REA *v.* BALMAIN NEW FERRY CO. (1896), 17 N. S. W. L. R. 92; 12 N. S. W. W. N. 65.—**AUS.**

814 iii. ——.]—DALY *v.* RAILWAYS COMR. (1906), 8 W. A. L. R. 125.—**AUS.**

814 iv. ——.]—ENGLEY *v.* MCILREITH (1875), 9 N. S. R. 511.—**CAN.**

814 v. ——.]—Pltf. was driving a horse & sleigh along a highway belonging to a city corpn. when the runner of the sleigh came in contact with a large boulder, whereby both horse & sleigh were overturned. In endeavouring to raise his horse pltf. sustained a bodily injury, on account of which he sued the corpn. for damages alleging that his injury was due to their negligence:—*Held:* the damages were not too remote.—MCKELVIN *v.* CITY OF LONDON (1892), 22 O. R. 70.—**CAN.**

814 vi. ——.]—ZUMSTEIN *v.* SHRUMM (1895), 22 A. R. 263.—**CAN.**

814 vii. ——.]—TORONTO RY. CO. *v.* GRINSTED (1895), 24 S. C. R. 570.—**CAN.**

814 viii. ——.]—TORONTO RY. CO. *v.* TOMS (1911), 44 S. C. R. 268.—**CAN.**

has imposed on itself of redressing only the proximate & direct consequences of wrongful acts" (*per* CUR.).—CATTLE *v.* STOCKTON WATERWORKS CO. (1875), L. R. 10 Q. B. 453; 44 L. J. Q. B. 139; 33 L. T. 475; 39 J. P. Jo. 791.

Annotations:—**Apld.** Remorquage à Hélice (Soc. Anon.) *v.* Bennetts, [1911] 1 K. B. 243. **Distd.** The Zelo, [1922] P. 9. **Refd.** McColl *v.* Canadian Pacific Ry., [1923] A. C. 126. **Mentd.** Allen *v.* Flood, [1898] A. C. 1; The Amerika, [1914] P. 167; Elliott Steam Tug. Co. *v.* Shipping Controller, [1922] 1 K. B. 127; Federated Coal & Shipping Co. *v.* R., [1922] 2 K. B. 42.

815. ——.]—DULIEU *v.* WHITE & SONS, No. 822, *post*.

Remoteness a question for the court.]—*See* DAMAGES, Vol. XVII., p. 95, Nos. 106, 107.

Loss of services of servant.]—*See* DAMAGES, Vol. XVII., pp. 99, 100, Nos. 143, 144; MASTER & SERVANT, Vol. XXXIV., pp. 182, 183, Nos. 1485–1490.

Injury to property.]—*See* DAMAGES, Vol. XVII., pp. 101, 102, Nos. 162–165.

Damage done to or by animals.]—*See* ANIMALS, Vol. II., pp. 217–221, 226, 228, 229, 234, 253, Nos. 126–142, 180, 194, 195, 224, 346.

Costs & expenses.]—*See* DAMAGES, Vol. XVII., pp. 106–117, Nos. 196–266.

Loss by death of third person.]—*See* ACTION, Vol. I., pp. 34, 35, Nos. 262–267.

SUB-SECT. 2.—DAMAGE CAUSED BY FRIGHT.

See, generally, DAMAGES, Vol. XVII., p. 100, Nos. 146–152.

816. Fear of personal injury—Passenger leaping from coach.]—JONES *v.* BOYCE, No. 79, *ante*.

817. —— Injury whilst escaping from fire.]—The fire commenced at about the fourth floor. Before it effectively reached pltf.'s corridor it had been subdued by the fire brigade. Had pltf. remained in her room she would not in fact have been injured. Her injuries resulted from her endeavour to escape by means of an improvised rope to the ground floor. But the jury have expressly found that pltf. acted reasonably in the circumstances of the case. I agree with this finding; it was fully justified by the evidence. . . . The conduct of pltf. cannot be effectively tested by the light of facts subsequently & precisely ascertained; it is necessary to regard the circumstances as they appeared to her at the time (MCCARDIE, J.).—MACLENAN *v.* SEGAR, [1917] 2 K. B. 325; 86 L. J. K. B. 1113; 117 L. T. 376; 33 T. L. R. 351.

Annotations:—**Apld.** Brannigen *v.* Harrington (1921), 37 T. L. R. 349. **Refd.** Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381.

818. —— Impending collision.]—Damages in a case of negligent collision must be the natural & reasonable result of deft.'s act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote.

Where the gate keeper of a railway co. had negligently invited pltfs. to drive over a level crossing when it was dangerous to do so, & the jury, although an actual collision with a train was avoided, nevertheless assessed damages for physical & mental injuries occasioned by the fright:—*Held:* the verdict could not be sustained, & judgment must be entered for defts.—VICTORIAN RAILWAYS COMRS. *v.* COULTAS (1888), 13 App. Cas. 222; 57 L. J. P. C. 69; 58 L. T. 390; 52 J. P. 500; 37 W. R. 129; 4 T. L. R. 286, P. C.

Annotations:—**Consd.** Wilkinson *v.* Downton, [1897] 2 Q. B. 57. **N.F.** Dulieu *v.* White, [1901] 2 K. B. 669. **Consd.** Coyle (or Brown) *v.* Watson, [1915] A. C. 1; Janvier *v.* Sweeney, [1919] 2 K. B. 316; Hambrook *v.* Stokes, [1925] 1 K. B. 141. **Refd.** Pugh *v.* L., B. & S. C. Ry., [1896] 2 Q. B. 248; Yates *v.* South Kirkby, Featherstone & Hemsworth Collieries (1910), 103 L. T. 170. **Mentd.** Venn *v.* Tedesco, [1926] 2 K. B. 227.

819. —— Death from nervous shock—Runaway motor lorry.]—Defts.' servant left a motor lorry at the top of a steep & narrow street unattended, with the engine running, & without having taken proper precautions to secure it. The lorry started off by itself & ran violently down the incline. Pltf.'s wife, who had been walking up the street with her children, had just parted with them a little below a point where the street makes a bend, when she saw the lorry rushing round the bend towards her. She became frightened for the safety of her children, who by that time were out of sight round the bend, & who she knew must have met the lorry in its course. She was almost immediately afterwards informed by bystanders that a child answering the description of one of hers had been injured. In consequence of her fright & anxiety she suffered a nervous shock which eventually caused her death, whereby her husband lost the benefit of her services. In an action by the husband under Fatal Accidents Act, 1846 (c. 93):—*Held:* on the assumption that the shock was caused by what the woman saw with her own eyes as distinguished from what she was told by bystanders, pltf. was entitled to

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814 ix. ——.]—In an action for damages for physical injuries, a claim for damages for the partial destruction of pltf.'s crop owing to his inability to cut it was dismissed, the damages being held to be too remote.—PRICE *v.* INTERNATIONAL HARVESTER CO. (1915), 31 W. L. R. 216; 8 W. W. R. 712.—**CAN.**

814 x. ——.]—BARTLETT *v.* WINNIPEG ELECTRIC RY. CO. & CANADIAN NORTHERN RY. CO. (Man.), [1920] 1 W. W. R. 95; 50 D. L. R. 194; 59 S. C. R. 352.—**CAN.**

814 xi. ——.]—LAPOINTE *v.* CHAMPAGNE (1921), 64 D. L. R. 520; 50 O. L. R. 477.—**CAN.**

814 xii. ——.]—WELCH *v.* DOMINION TRANSPORT CO. (1922), 69 D. L. R. 588; 51 O. L. R. 549.—**CAN.**

814 xiii. ——.]—LAURENT *v.* LORD ADVOCATE (1869), 7 Macph. (Ct. of Sess.) 607.—**SCOT.**

814 xiv. ——.]—SCOTT'S TRUSTEES *v.* MOSS (1889), 17 R. (Ct. of Sess.) 32; 27 Sc. L. R. 30.—**SCOT.**

814 xv. ——.]—MACDONALD *v.* MACBRAYNE (DAVID), LTD., [1915] S. C. 716.—**SCOT.**

814 xvi. ——.]—ROSS *v.* GLASGOW CORPN., [1919] S. C. 174.—**SCOT.**

PART XII. SECT. 2, SUB-SECT. 2.

d. *General rule — Damage natural result of accident—Actual impact unnecessary.*]—A railway co. is liable, in an action by one injured in an accident while a passenger in the co.'s train, for damages & pecuniary loss consequent upon a fright resulting in a shock to the nervous system causing physical injury, if the fright was the result of the accident, & was reasonable & natural.—KIRKPATRICK *v.* CANADIAN PACIFIC RY. CO. (1902), 35 N. B. R. 598.—**CAN.**

e. —— —— ——.]—TAYLOR *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1911), 16 B. C. R. 109.—**CAN.**

f. —— —— ——.]—HAM *v.* CANADIAN NORTHERN RY. CO. (1912), 20 W. L. R. 359: 1 W. W. R. 897; *varied* by disallowing claim for interest, 22 Man. L. R. 480; 2 W. W. R. 1105.—**CAN.**

g. —— —— ——.]—BYRNE *v.* GREAT SOUTHERN & WESTERN RY. CO. OF IRELAND (1884), cited in 26 L. R. Ir. 428.—**IR.**

h. —— —— ——.]—BELL *v.* GREAT NORTHERN RY. CO. OF IRELAND (1890), 26 L. R. Ir. 428.—**IR.**

k. —— —— ——.]—COOPER *v.* CALEDONIAN RY. CO. (1902), 4 F. (Ct. of Sess.) 880; 39 Sc. L. R. 660.—**SCOT.**

l. —— —— ——.]—FOWLER *v.* NORTH BRITISH RY. CO., [1914] S. C. 866.—**SCOT.**

m. —— —— ——.]—In an action of damages against the Corpn. of Glasgow as owners of the tramway system, based on the negligence of one of their drivers, the pursuer averred that, while walking on the footpath, she observed a tramway car approaching down an incline at an excessive speed & out of control; that between her & the car was a dangerous turn where, to her knowledge, an accident had previously occurred; that as the speed increased she was thrown into a state of terror lest the car should leave the rails & run her down; & that, in consequence, she sustained

Sect. 2.—*Remoteness of damage: Sub-sects.* 2, 3 & 4. *Sect.* 3: *Sub-sect.* 1.]

recover, notwithstanding that the shock was brought about by fear for her children's safety & not by fear for her own.—HAMBROOK *v.* STOKES BROTHERS, [1925] 1 K. B. 141; 94 L. J. K. B. 435; 132 L. T. 707; 41 T. L. R. 125, C. A.

820. Fear of injury to third person—Death from nervous shock.]—Where a man was killed in the sight of pltf. by deft.'s negligence & pltf. became ill, not from the shock from fear of harm to himself, but from the shock of seeing another person killed. In an action for damages:—*Held:* this harm was too remote a consequence of the negligence. —SMITH *v.* JOHNSON & CO. (1897), cited in, [1897] 2 Q. B. p. 61; 66 L. J. Q. B. p. 496; 76 L. T. p. 494; 45 W. R. p. 526; 13 T. L. R. p. 390; 41 Sol. Jo. 493, D. C.

Annotations:—**Distd.** Wilkinson *v.* Downton, [1897] 2 Q. B. 57. **Consd.** Dulieu *v.* White, [1901] 2 K. B. 669. **Distd.** Hambrook *v.* Stokes, [1925] 1 K. B. 141.

821. —— —— Mother & child.]—HAMBROOK *v.* STOKES BROTHERS, No. 819, *ante*.

822. ——.]—(1) The shock where it operates through the mind must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A. has I conceive no legal duty not to shock B.'s nerves by the exhibition of negligence towards C. or towards the property of B. or C. (KENNEDY, J.).

(2) Remoteness as a legal ground for the exclusion of damage in an action of tort means, not severance in point of time, but the absence of direct & natural causal sequence, the inability to trace in regard to the damage the *propter hoc* in a necessary or natural descent from the wrongful act (KENNEDY, J.).—DULIEU *v.* WHITE & SONS, [1901] 2 K. B. 669; 70 L. J. K. B. 837; 85 L. T. 126; 50 W. R. 76; 17 T. L. R. 555; 45 Sol. Jo. 578.

Annotations:—*As to* (1) **Dbtd.** Hambrook *v.* Stokes, [1925] 1 K. B. 141. **Refd.** The Rigel, [1912] P. 99; Brown *v.* Watson (1914), 111 L. T. 347; Janvier *v.* Sweeney, [1919] 2 K. B. 316; Marriott *v.* Maltby Main Colliery Co. (1920), 90 L. J. K. B. 349. *Generally*, **Refd.** Willoughby *v.* G. W. Ry. (1904), 6 W. C. C. 28; Yates *v.* South Kirkby, Featherstone & Hemsworth Collieries (1910), 103 L. T. 170; Coyle (or Brown) *v.* Watson, [1915] A. C. 1. **Mentd.** Diamond Alkali Export Corpn. *v.* Bourgeois, [1921] 3 K. B. 443; Venn *v.* Tedesco, [1926] 2 K. B. 227.

823. Fright of horse—Causing damage to carriage—Collision.]—GILBERTSON *v.* RICHARDSON, No. 155, *ante*.

824. —— —— Water spouting in highway.]—HILL *v.* NEW RIVER CO., No. 156, *ante*.

SUB-SECT. 3.—LOSS OF BUSINESS OR PROFIT.

825. Loss of profits depending on contingency—Competition for prize—Loss by delay in delivery of competitor's model.]—A prize had been offered for the best plan & model of a machine for loading colliers from barges, & plans & models intended for the competition were to be sent by a certain day; pltf. sent a plan & model accordingly by a railway, but through negligence it did not arrive at its destination until after the appointed day: *semble:* the proper measure of damages in such case is the value of the labour & materials expended in making the plan & model, & not the chance of obtaining the prize, as the latter is too remote a ground for damages.—WATSON *v.* AMBERGATE, NOTTINGHAM, ETC. RY. CO. (1851), Cox, M. & H. 495; 17 L. T. O. S. 125; 15 Jur. 448.

Annotations:—**Consd.** Chaplin *v.* Hicks, [1911] 2 K. B. 786. **Refd.** Simpson *v.* L. & N. W. Ry. (1876), 1 Q. B. D. 274; Sapwell *v.* Bass, [1910] 2 K. B. 486. **Mentd.** Wilby *v.* West Cornwall Ry. (1858), 4 Jur. N. S. 284.

.]—*See* DAMAGES, Vol. XVII., p. 99, No. 140.

826. Loss of trade—Caused by damage to goods stored.]—The evidence showed that defts. knew the object for which the room was taken & the character of the business carried on by pltf. & the nature of the goods stored. There was evidence of damage to the interest of pltf. in the goods. It was a loss of the value which the goods represented to pltf. at the time of the accident, of which he was deprived by the wrongful act of the servants of defts., & therefore he ought to recover £10, which the jury found in his favour (KENNEDY, J.).—BROWN *v.* HAND-IN-HAND FIRE INSURANCE SOCIETY (1895), 11 T. L. R. 538; 39 Sol. Jo. 672.

827. Loss of towage contract—Caused by collision.]—A steam tug belonging to pltfs. was engaged under a towage contract in towing a ship when a steamship belonging to deft., by the negligence of deft.'s servants, came into collision with & sank the tow. No damage was caused to the tug or her equipment by the collision.

In an action brought by pltfs. to recover from deft. as damages the amount of towage remuneration which they would have earned if they had completed the towage contract:—*Held:* pltfs. had no cause of action, for, although there was negligence on the part of deft.'s servants, the loss of towage remuneration was not damage to pltfs. which was the direct consequence of the negligence so as to be recoverable in law.—REMORQUAGE À HÉLICE (SOCIÉTÉ ANONYME DE) *v.* BENNETTS, [1911] 1 K. B. 243; 80 L. J. K. B. 228; 27 T. L. R. 77; 16 Com. Cas. 24.

Annotations:—**Refd.** Elliott Steam Tug Co. *v.* Shipping Controller, [1922] 1 K. B. 127; The Zelo, [1922] P. 9.

828. Loss of professional income.]—In an action against a railway co. for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain & suffering of pltf. & the expense incurred by him for medical & other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice.—PHILLIPS *v.* LONDON & SOUTH WESTERN RY. CO. (1879), 5 C. P. D. 280; 49 L. J. Q. B. 233; 42 L. T. 6; 44 J. P. 217, C. A.

See, further, DAMAGES, Vol. XVII., pp. 97–104, 106, Nos. 123, 124, 132, 133, 138–141, 153–161, 166, 173–180, 194; CARRIERS, Vol. VIII., pp. 138–143, Nos. 907–939, 945.

a nervous shock resulting in a miscarriage, & followed by serious injury to her health:—*Held:* the averments set forth a relevant ground of action; & an issue allowed.—BROWN *v.* GLASGOW CORPN., [1922] S. C. 527.—**SCOT.**

n. *Fright of horse.*]—The statutory warning required to be given where a line of railway crosses a highway on the level is for the benefit, not only of persons crossing the line of railway, but also of persons lawfully using the highway & approaching the line of railway. Where, therefore, owing to the failure of defts. to give the statutory warning, or any equivalent warning, pltf. drove close to their line of railway & his horses were frightened by a passing engine & injury resulted, he was entitled to recover.—HENDERSON *v.* CANADA ATLANTIC RY. CO. (1898), 25 A. R. 437.—**CAN.**

o. ——.]—GRAINGER *v.* CULLEN (1909), 43 I. L. T. 132.—**IR.**

p. *Premature birth.*]—FITZPATRICK *v.* GREAT WESTERN RY. CO. (1855), 12 U. C. R. 645.—**CAN.**

PART XII. SECT. 2, SUB-SECT. 3.

q. *Loss of time by doctor.*]—Pltf., a medical doctor whose time was of pecuniary value, was, while driving along a public highway, detained for twenty minutes at a level crossing by the unreasonable & negligent delay of defts.' servants in opening the gates at the crossing:—*Held:* defts. liable in damages for such delay.—BOYD *v.* GREAT NORTHERN RY. CO., [1895] 2 I. R. 555.—**IR.**

SUB-SECT. 4.—INTERVENING CAUSE.

See, generally, DAMAGES, Vol. XVII., pp. 117–120, Nos. 267–289, & Part I., Sect. 4, *ante*.

829. Act of third party—Injury to infant in dangerous machine.]—Deft. was the owner of a machine for crushing oilcake, which, with other articles belonging to him, was standing unattended by any person, in the part of the public street or market area at L. where, on market days, deft. usually displayed his goods for exhibition or sale. Pltf., a child of four years old, was in the street under the charge of his brother, a boy of seven years of age, & they stopped with other lads at deft.'s machine, & whilst one of the other boys turned the handle which set the cogwheels in motion, pltf., at the bidding of his brother, put his fingers in between the wheels & was injured :—*Held :* there was no negligence on the part of deft. rendering him liable to an action by pltf., & the act of the boy who turned the handle was the direct cause of the accident, & the damage therefore was too remote.—MANGAN *v.* ATTERTON (1866), L. R. 1 Exch. 239 ; 4 H. & C. 388 ; 35 L. J. Ex. 161 ; *sub nom.* ATTERTON *v.* MANGAN, 14 L. T. 411 ; 30 J. P. 360 ; 14 W. R. 771.

Annotation :—**Consd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327.

830. Act of God—Fire spread by high wind—Damage to cottage.]—SMITH *v.* LONDON & SOUTH WESTERN RY. Co., No. 150, *ante*.

SECT. 3.—**MEASURE OF DAMAGES.**

SUB-SECT. 1.—IN GENERAL.

See, generally, DAMAGES, Vol. XVII., pp. 130–136, Nos. 380–421.

831. Amount proportionate to loss actually suffered.]—Two persons having adjacent lands, the one builds a house at the extremity of his land ; the other afterwards excavates his own soil near to, but without touching the ground so built upon : *qu. :* whether the party making such excavation is bound to see that his neighbour's foundations be not thereby weakened ; & whether if they be so he is guilty of an actionable negligence in having so used his own soil without protecting that of his neighbour, although no negligence be shown in the mode of carrying on the work. Supposing him not liable in the case of a newly built house : *qu. :* whether he would be so if the house had stood twenty years before the excavation was made. But where it is alleged & proved that deft. so negligently, unskilfully, & improperly dug his own soil that pltf.'s house was thereby injured, an action lies ; & although it be shown that the house was infirm & could at all events have stood only a few months still pltf. may recover in proportion to the loss actually suffered, if the jury find that the injury to the house was the consequence of deft.'s negligence ; & in determining the question of negligence the jury ought to consider the state of pltf.'s house.—DODD *v.* HOLME (1834), 1 Ad. & El. 493 ; 3 Nev. & M. K. B. 739 ; 110 E. R. 1296.

Annotations :—**Refd.** Bradbee *v.* Christ's Hospital (1842), 2 Dowl. N. S. 164 ; Richards *v.* Jenkins (1868), 18 L. T. 437. **Mentd.** Smith *v.* Kenrick (1849), 7 C. B. 515 ; Humphries *v.* Brogden (1850), 12 Q. B. 739 ; Gayford *v.* Nicholls (1854), 9 Exch. 702 ; Bibby *v.* Carter (1859), 4 H. & N. 153 ; Submarine Telegraph Co. *v.* Dickson (1864), 33 L. J. C. P. 139 ; Woodall *v.* Hingley (1866), 14 L. T. 167 ; Dalton *v.* Angus (1881), 6 App. Cas. 740 ; Selby *v.* Whitbread, [1917] 1 K. B. 736.

832. —— Not cost of re-instatement.]—If by the negligence of A. in building his house adjoining to that of B., the house of B. is thrown down, A. is liable only to such sum in damages as was the value of the old house, & not the whole expense of building a new one.—LUKIN *v.* GODSALL (1795), Peake, Add. Cas. 15, N. P.

833. Liability for consequential damage—Not damage avoidable by ordinary skill.]—In a cause of damage deft. will not be liable for any consequential damage, which pltf. might have averted by the exercise of ordinary skill & courage.—THE THURINGIA (1872), 41 L. J. Adm. 44 ; 26 L. T. 446 ; 1 Asp. M. L. C. 283.

Annotation :—**Refd.** The Kingsway, [1918] P. 344.

-.]—*See* Sect. 2, *ante*.

834. What should be taken into consideration—General rule.]—When a jury are called upon to assess damages for personal injuries occasioned by negligence, they should take into consideration

PART XII. SECT. 2, SUB-SECT. 4.

r. *General rule.*]—Although it is a general principle that a negligent act would not be treated as the proximate cause of damage if the damage would not have happened but for the intervention of other circumstances not attributable to the negligent person, yet, if the circumstances which intervened were such as would probably occur, the person guilty of the negligence would be responsible.—MCBRIDE *v.* BROGDEN (1876), 3 C. A. 271 ; 2 J. R. N. S. 14.—**N.Z.**

t. *Act of God—Fire spread by high wind.*]—If a fire was started through deft.'s negligence, but, while spread over a large area, has as yet done no damage & is in a quiescent state, when a wind stronger than any previously experienced in the district springs up & freshens & carries the fire so as to cause damage, deft. cannot plead the wind as an act of God relieving him from liability, a person is not relieved from the consequences of his negligence by the fact that an act of God has intervened.—MCINTYRE *v.* COMOX LOGGING & RY. CO. (1924), 33 B. C. R. 504 ; [1924] 2 W. W. R. 118.—**CAN.**

PART XII. SECT. 3, SUB-SECT. 1.

831 i. *Amount proportionate to loss actually suffered.*]—M. claimed damages against C. for personal injuries. The magistrate disallowed any damages under the head of "loss of earnings," as she was a civil servant & received pay as sick leave under the regulations of the Education Department :—*Held :* applt. had exhausted her right to future sick leave & thereby suffered pecuniary loss & was entitled to damages.—MCINNES *v.* CROWE (1925), 27 W. A. L. R. 102.—**AUS.**

831 ii. ——.]—BRANNIGAN *v.* CONRAD (1926), 26 S. R. N. S. W. 124 ; 43 N. S. W. W. N. 30.—**AUS.**

831 iii. ——.]—WALKER *v.* MCMILLAN (1882), 6 S. C. R. 241.—**CAN.**

831 iv. ——.]—YORK *v.* CANADA ATLANTIC S.S. CO. (1893), 22 S. C. R. 167.—**CAN.**

831 v. ——.] — FARQUHARSON *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1910), 15 B. C. R. 280.—**CAN.**

831 vi. ——.]—CARTY *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1911), 19 W. L. R. 905 ; 2 D. L. R. 276 ; 1 W. W. R. 523.—**CAN.**

831 vii. ——.]—Defts., who hired a team of horses from pltf., & drove them for about 71 miles, were held responsible for the death of one of them, found to have died from exhaustion, the result of negligence & want of care of defts., & for the loss to pltf. of the services of the other for a period of time during which it suffered from exhaustion by reason of the distance travelled & lack of proper care.—BEATTY *v.* HODSON (1912), 19 W. L. R. 823 ; 7 D. L. R. 821.—**CAN.**

831 viii. ——.]—JACKSON *v.* CANADIAN PACIFIC RY. CO. (1915), 21 W. L. R. 726 ; 8 W. W. R. 1043.—**CAN.**

831 ix. ——.] — HYDE *v.* GRAND TRUNK PACIFIC RY. CO. (1916), 34 W. L. R. 176 ; 10 W. W. R. 377.—**CAN.**

831 x. ——.]—STADNICK *v.* BIFROST (Man.), [1926] 3 D. L. R. 295 ; [1926] 2 W. W. R. 324.—**CAN.**

831 xi. ——.]—Where land is injured & cultivated crops destroyed by flooding for which deft. is liable the measure of damages is the loss of the crops & the depreciation in the value of the land.—MEIER *v.* FRANKLIN, LIMPRECHT *v.* FRANKLIN, STREICH *v.* FRANKLIN (Man.), [1926] 3 D. L. R. 433 ; [1926] 2 W. W. R. 330.—**CAN.**

831 xii. ——.]—KLINGMAN *v.* LOWELL, [1913] W. L. D. 186.—**S. AF.**

a. —— *Pain & suffering.*]—Pain, suffering & inconvenience, both past & to come, during remainder of pltf.'s life, & which are not merely physical, cannot be considered trivial & there is no measure by which they can be ascertained but by the common sense of reasonable men. "Perfect compensation for pain & suffering is hardly possible & would be unjust."—JACKSON *v.* CANADIAN PACIFIC RY. CO. (1915), 31 W. L. R. 726 ; 8 W. W. R. 1043.—**CAN.**

834 i. *What should be taken into consideration—General rule.*]—In an action for injuries caused by the negligence of defts., pltf. is entitled to

Sect. 3.—*Measure of damages: Sub-sects.* 1 & 2. *Sects.* 4, 5 & 6. *Part XIII. Sect.* 1: *Sub-sect.* 1.]

two things, first, the pecuniary loss occasioned by the accident; secondly, the injury the party sustains in his person, or in his physical capacity of enjoying life, &, as regards the first, they should take into account, not only his present loss, but his incapacity to earn a future improved income.—FAIR *v.* LONDON & NORTH-WESTERN RY. CO. (1869), 21 L. T. 326; 18 W. R. 66.

Annotation:—**Reld.** Cockburn *v.* Edwards (1880), 16 Ch. D. 393.

835. —— Prospective earnings.]—FAIR *v.* LONDON & NORTH-WESTERN RY. CO., No. 834, *ante*.

836. When nominal damages given—No loss consequent on negligence.]—Pltfs. employed deft. to prepare plans for a building to be erected on a site belonging to them. Deft. neglected to measure the site, & acting on information which was unauthorised by pltfs., prepared plans on the asumption that the site was smaller than it was in fact. Pltfs., having paid deft., for the plans, were unable to raise funds to build on the site, & ultimately parted with it, & then discovered the error in the plans. In an action to recover the money paid for the plans on the ground of a total failure of consideration, or in the alternative, for damages for negligence:—*Held:* there had not been a total failure of consideration, but as deft. had been negligent pltfs. were entitled to damages although, as they had sustained no loss from his negligence, those damages would be only nominal.—COLUMBUS CO. *v.* CLOWES, [1903] 1 K. B. 244; 72 L. J. K. B. 330; 51 W. R. 366.

837. —— ——.]—Pltf. employed deft., a chartered accountant, to investigate the affairs of a co. in which he was interested. In a letter of instructions to deft. pltf. inserted libellous statements concerning two officials of the co. Deft. handed the letter to his partner, who negligently left it at the co.'s office. The manager found it, read it, & communicated its contents to the two persons defamed, each of whom sued pltf. for libel & obtained judgment against him for damages & costs. Pltf. then sought to recover from deft. the amount which he had paid for damages & costs in the libel actions as damages for breach of an implied duty to keep secret the letter of instructions. The jury found that it was the duty of deft. to keep the letter secret, that he had neglected that duty, & that the actions for libel & the damages recovered therein were the natural & probable consequence of deft.'s negligence, & they awarded pltf. substantial damages:—*Held:* pltf.'s liability for damages in the libel actions did not result from deft.'s breach of duty, & deft. was liable for nominal damages only.—WELD-BLUNDELL *v.* STEPHENS, [1920] A. C. 956; 89 L. J. K. B. 705; 123 L. T. 593; 36 T. L. R. 640; 64 Sol. Jo. 529, H. L.

Annotations:—**Consd.** *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560; A. & B. Taxis *v.* Secretary of State for Air, [1922] 2 K. B. 328; Harnett *v.* Bond, [1924] 2 K. B. 517. **Reld.** Elliott Steam Tug Co. *v.* Shipping Controller, [1922] 1 K. B. 127; The San Onofre, [1922] P. 243; Adelaide S.S. Co. *v.* R., [1923] 1 K. B. 59; Hambrook *v.* Stokes, [1925] 1 K. B. 141; Britannia Hygienic Laundry Co. *v.* Thornycroft (1926), 135 L. T. 83; Singleton Abbey (Owners) *v.* Paludina (Owners), The Paludina (1926), 95 L. J. P. 135. **Mentd.** Proops *v.* Chaplin (1920), 37 T. L. R. 112; Tournier *v.* National Provincial & Union Bank of England, [1924] 1 K. B. 461.

838. Exemplary damages — Contempt of plaintiff's rights.]—In an action for wilful negligence, the jury may take into consideration the motives of deft., & if the negligence is accompanied with a contempt of the pltf.'s rights & convenience, the jury may give exemplary damages.—EMBLEN *v.* MYERS (1860), 6 H. & N. 54; 30 L. J. Ex. 71; 8 W. R. 665; 158 E. R. 23; *sub nom.* EMBLIN *v.* MEYERS, 2 L. T. 774.

Annotations:—**Apld.** Thompson *v.* Hill (1870), L. R. 5 C. P. 564. **Reld.** Bell *v.* Mid. Ry. (1861), 10 C. B. N. S. 287.

SUB-SECT. 2.—PARTICULAR INSTANCES.

Animals.]—*See* ANIMALS, Vol. II., pp. 217–221, 226, 234, 253, Nos. 126–142, 180, 224, 346.

receive full compensation for all pecuniary loss, past & future, but the jury should be directed, in assessing the damages in respect of future pecuniary loss to take into consideration all the contingencies connected with the probable duration of pltf.'s injuries & all the uncertainties which attach to & are involved in the chances & accidents of his future life, & as to future loss that the compensation is to be a present equivalent.—MCDADE *v.* HOSKINS (1892), 18 V. L. R. 417.—**AUS.**

834 ii. —— ——.]—RITCHIE *v.* VICTORIAN RAILWAYS COMRS. (1899), 25 V. L. R. 272.—**AUS.**

834 iii. —— ——.]—SCHWARTZ *v.* WINNIPEG ELECTRIC RY. CO. (Man.) (1913), 24 W. L. R. 5; 4 W. W. R. 319; 12 D. L. R. 56.—**CAN.**

834 iv. —— ——.]—Pltf. in an action for personal injuries is entitled to the expense reasonably incurred in consequence of the injury sustained, the value of his time in whole or in part up to the time of his trial, a fair compensation for the reduction of his probable future earnings, having regard to his health, habits, occupation, to the fact that they will not be as great in later years, to the fact that he may voluntarily retire from his profession, or may be overtaken by sickness or other inevitable accident, & a reasonable sum by way of compensation for his bodily or mental sufferings.—MORGAN *v.* EDMONTON CORPN. (Alta.), [1917] 2 W. W. R. 591.—**CAN.**

834 v. —— ——.]—NANI BALA SEN *v.* AUCKLAND TUBE CO., LTD. (1925), I. L. R. 52 Cal. 602.—**IND.**

834 vi. —— ——.]—M'LAURIN *v.* NORTH BRITISH RY. CO. (1892), 19 R. (Ct. of Sess.) 346.—**SCOT.**

835 i. —— *Prospective earnings.*]—BRADENBURG *v.* OTTAWA ELECTRIC RY. CO. (1909), 14 O. W. R. 318; 19 O. L. R. 34.—**CAN.**

835 ii. —— ——.]—In fixing the amount of compensation for injuries resulting from negligence, pltf. should be allowed a fair amount for being deprived of the reasonable prospects of improving his condition in life, &, accordingly, the fact that pltf. might have been receiving larger wages if he had not been injured should be taken into consideration.—ANDERSON *v.* FORRESTER (1914), 30 W. L. R. 378; 7 W. W. R. 1039.—**CAN.**

835 iii. —— ——.]—HULLEY *v.* COX, [1923] App. D. 234.—**S. AF.**

b. —— *Accumulated wealth.*]—New trial granted for excessive damages, deceased having been a blacksmith, thirty-five years of age, the patentee of an invention for an improved plough, & of careful, industrious habits, & having lost his life in an accident. Deft. allowed judgment to go by default & damages were assessed at £5,000. It was sworn that deceased had during the few years preceding his death sold about 500 ploughs, & in the opinion of witnesses he was likely to have accumulated wealth.—MORLEY *v.* GREAT WESTERN RY. CO. (1858), 16 U. C. R. 504.—**CAN.**

c. —— *Prospects of matrimony.*]—In an action for negligence, impairment of the prospects of matrimony, in the case of a young woman, by reason of physical injuries, may be taken into consideration by the jury in estimating the damages.—MORIN *v.* OTTAWA ELECTRIC RY. CO. (1909), 18 O. L. R. 209; 13 O. W. R. 850.—**CAN.**

d. —— *Unpaid medical services.*]—A person injured through the negligence of another cannot recover as damages the value of nursing & medical services rendered to him by members of his family whom he has not paid therefor, even though they were members of the nursing & medical professions, &, had they not looked after him, he would have had to employ some one else.—GREENAWAY *v.* CANADIAN PACIFIC RY. CO., [1925] 1 D. L. R. 992; [1925] 1 W. W. R. 667; 21 Alta. L. R. 231.—**CAN.**

e. *Power of court to reduce amount.*]—In actions under 10 & 11 Vict. c. 6 (C. S. C. c. 78), the ct. will interfere if the damages are clearly excessive.—SECORD *v.* GREAT WESTERN RY. CO. (1858), 15 U. C. R. 631.—**CAN.**

f. ——.]—Where further evidence given before the Ct. of Appeal showed that the evidence of pltf.'s earning power had been exaggerated at the trial, the damages awarded should be reduced.—SHEAHEN *v.* TORONTO RY. CO. (1911), 20 O. W. R. 816; 3 O. W. N. 455; 25 O. L. R. 310.—**CAN.**

g. ——.]—JOHNSTONE *v.* MEDICINE HAT (Alta.), [1917] 1 W. W. R. 1068; 11 Alta. L. R. 22.—**CAN.**

h. ——.]—LONG *v.* MCLAUGHLIN (N. B.), [1926] 3 D. L. R. 918.—**CAN.**

Bailees—Action by or against.]—*See* BAILMENT, Vol. III., pp. 99, 113, 114, Nos. 274, 370–375.

Carriers—Action against.]—*See* CARRIERS, Vol. VIII., pp. 106–108, 137–143, Nos. 708–727, 901–946.

Insurance agents — Action against.] — *See* INSURANCE, Vol. XXIX., p. 81, Nos. 401, 402.

Master & servant—Actions by & against third persons.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 137–147, 176, 177, 182, 183, Nos. 1063–1152, 1401–1417, 1485–1490.

Principal & agent — Actions between.] — *See* AGENCY, Vol. I., pp. 486–488, Nos. 1648–1663.

Sale of goods.]—*See* SALE OF GOODS.

Shipping.]—*See* ADMIRALTY, Vol. I., pp. 145, 146, Nos. 519–523; SHIPPING.

Solicitors—Action against.]—*See* SOLICITORS.

SECT. 4.—AGGRAVATION AND MITIGATION.

839. Mitigation — Payment under accident insurance policy.]—In an action against a railway co. for personal injuries, the fact that in respect of the same accident pltf. has received money from an assurance co. under a policy of insurance should not be taken into consideration in assessing the damages.—BRADBURN *v.* GREAT WESTERN RY. Co. (1874), L. R. 10 Exch. 1; 44 L. J. Ex. 9; 31 L. T. 464; 23 W. R. 48.

Annotations:—**Refd.** Jobson *v.* East & West India Dock Co. (1875), L. R. 10 C. P. 300; The Marpessa, [1891] P. 403; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38; Baker *v.* Dalgleish S.S. Co., [1921] 3 K. B. 481. **Mentd.** The Mediana (1899), 68 L. J. P. 26; British Westinghouse Electric & Manufacturing Co. *v.* Underground Elec. Ry. of London, [1912] A. C. 673; Jamal *v.* Moolla Dawood, [1916] 1 A. C. 175; Hill *v.* Showell (1918), 87 L. J. K. B. 1106.

—— —— **Under Lord Campbell's Act, 1846 (c. 93).**]—*See* Part XIII., Sect. 2, sub-sect. 8, E., *post*.

See DAMAGES, Vol. XVII., pp. 120–129, Nos. 290–371.

SECT. 5.—EFFECT OF SATISFACTION.

Whether bar to claim for further payments.]—*See, generally*, CONTRACT, Vol. XII., pp. 447, 496, Nos. 3617, 4049–4059; DAMAGES, Vol. XVII., pp. 87–91, Nos. 59–91; GAS, Vol. XXV., p. 481, No. 65.

840. —— Action by husband for injury to wife.]—BAINES *v.* METROPOLITAN RY. CO. (1871), 35 J. P. Jo. 724.

SECT. 6.—PRACTICE AND PROCEDURE.

841. Order for particulars of specific loss—After delivery of defence.]—In an action for personal injuries, where the accident out of which the action arose occurred in 1880 & the statement of claim was delivered in 1886, claiming (*inter alia*) £4,000 for loss of business:—*Held:* defts. were entitled to particulars of the loss of business, notwithstanding that their defence had already been delivered.—WATSON *v.* NORTH METROPOLITAN TRAMWAYS Co. (1886), 3 T. L. R. 273, D. C.

842. Defendant insured against liability — Whether jury informed thereof.] — On the trial by a judge & jury of an action for damages for personal injuries alleged to have been caused by negligence, the practice is, where deft. is insured against liability, not to inform the jury of that fact.—ASKEW *v.* GRIMMER (1927), 43 T. L. R. 354.

Amendment of claim to include larger award.]—*See* DAMAGES, Vol. XVII., p. 154, No. 555.

Discovery by interrogatories.]—*See* DISCOVERY, Vol. XVIII., p. 203, No. 1506.

Review of assessment.]—*See* DAMAGES, Vol. XVII., pp. 169, 170, 172, 173, 176–178, Nos. 707, 731–741, 784–820.

Costs.]—*See* PRACTICE.

Part XIII.—Negligence causing Death.

SECT. 1.—LIABILITY AT COMMON LAW.

SUB-SECT. 1.—CAUSE OF ACTION ARISING OUT OF TORT.

843. Whether liability incurred—Death of wife.]—(1) In an action for negligence, whereby pltf.'s wife was killed, he is not entitled to any damages for the loss of her society, or for his mental sufferings on her account, after the moment of her death.

(2) In a civil ct. the death of a human being could not be complained of as an injury (*per* CUR.).—BAKER *v.* BOLTON (1808), 1 Camp. 493, N. P.

Annotations:—*As to* (1) **Consd.** Osborn *v.* Gillett (1873), L. R. 8 Exch. 88; Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648. **Distd.** Jackson *v.* Watson, [1909] 2 K. B. 193. **Refd.** Kent *v.* Atkinson, [1923] P. 142; The Molière, [1925] P. 27. *As to* (2) **Consd.** Ward *v.* London & Blackwall Ry. (1845), 6 L. T. O. S. 125. **Apld.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Refd.** Osborn *v.* Gillett (1873), L. R. 8 Exch. 88; Jackson *v.* Watson, [1909] 2 K. B. 193; Berry *v.* Humm, [1915] 1 K. B. 627.

844. —— Death of servant.] — OSBORN *v.* GILLETT, No. 930, *post*.

845. —— ——.]—(1) A master cannot maintain an action for injuries which cause the immediate death of his servant.

(2) A father cannot recover, either at common law or under Fatal Accidents Act, 1846 (c. 93), the funeral expenses to which he has been put in burying an unmarried infant daughter, whose

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PART XII. SECT. 6.

k. *Appeal.*]—In an action against a contractor engaged in the erection of a building for injuries sustained by a person passing along a public street by reason of the negligence of deft. & his servants, if the trial judge errs in not awarding sufficient damages the only remedy of pltf. is to appeal.—FLINN *v.* KEEFE (1904), 37 N. S. R. 67.—**CAN.**

l. ——.]—DOAN *v.* NEFF (1916), 38 O. L. R. 216.—**CAN.**

m. *Special damages must be pleaded.*]—STAATS *v.* CANADIAN PACIFIC RY. Co. (1914), 27 W. L. R. 627; 6 W. W. R. 401; 17 D. L. R. 309; 7 Sask. L. R. 184; 17 Can. Ry. Cas. 38.—**CAN.**

n. *Power of court to remit.*]—In an action to recover damages for serious injuries alleged to have been caused by the negligence of deft., the ct. refused to remit the case to the Civil Bill Ct., inasmuch as deft. declined to waive the question of "contributory negligence"; although it did not appear that pltf. had any "visible means" of paying costs.—DOYLE *v.* RICHARDSON (1872), I. R. 6 C. L. 70.—**IR.**

PART XIII. SECT. 1, SUB-SECT. 1.

843 i. *Whether liability incurred—Death of wife.*]—A husband cannot maintain an action for injuries which cause the immediate death of his wife.—THOMAS *v.* WINNIPEG ELECTRIC RY. CO., LTD. (Man.), [1917] 1 W. W. R. 1346; 33 D. L. R. 59.—**CAN.**

o. *Defendant liable — Solatium — Whether recoverable.*]—The proprietor of lands, in which a coal pit not sufficiently fenced was situate found liable in £300 damages, & solatium to the father of an unmarried woman who accidentally fell into the pit & was

Sect. 1.—*Liability at common law: Sub-sects.* 1 & 2. *Sect.* 2: *Sub-sects.* 1 & 2.]

death was caused by reason of defts.' negligence, & who was residing with her father at the time of her death.

What is contemplated is the pecuniary loss which has been sustained by one member or the whole of the limited class by reason of a wrongful act in respect of which deceased could have brought an action had he lived. It seems to me that that reasoning excludes funeral expenses from the damages which are recoverable under Lord Campbell's Act, 1846 (c. 93), & it is therefore impossible for us to say that this particular claim ought to fall under a different category (LORD ALVERSTONE, C.J.).—CLARK *v.* LONDON GENERAL OMNIBUS CO., LTD., [1906] 2 K. B. 648; 75 L. J. K. B. 907; 95 L. T. 435; 22 T. L. R. 691; 50 Sol. Jo. 631, C. A.

Annotations:—*As to* (1) **Apld.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Refd.** Kent *v.* Atkinson, [1923] P. 142. *As to* (2) **Consd.** Jackson *v.* Watson, [1909] 2 K. B. 193. **Distd.** Berry *v.* Humm, [1915] 1 K. B. 627. **Folld.** Barnett *v.* Cohen, [1921] 2 K. B. 461.

846. —— ——.]—A submarine having been sunk through the negligent navigation of a steamship & all but one of her crew drowned, the Comrs. of the Admlty. brought an action against the steamship owners to recover the damage they had sustained. They included in their claim a number of items, one of which was a sum representing the capitalised amount of pensions & grants paid or payable by them to the relatives of the crew who were drowned. At the reference the assistant registrar disallowed this item of claim on the ground that loss or damage suffered by pltfs. due to the loss of life of the crew of the submarine was not recoverable in civil action. This decision of the assistant registrar was upheld by the President & subsequently by the Ct. of Appeal who expressed themselves bound to follow the ruling of LORD ELLENBOROUGH in *Baker* v. *Bolton*, No. 843, *ante*, that "in a civil ct. the death of a human being could not be complained of as an injury":—*Held:* whether or not the common law ought originally to have been differently interpreted than as interpreted by LORD ELLENBOROUGH in *Baker* v. *Bolton*, No. 843, *ante*, it was too late to disturb it.—ADMIRALTY COMRS. *v.* S.S. AMERIKA, [1917] A. C. 38; 86 L. J. P. 58; *sub nom.* THE AMERIKA, 116 L. T. 34; 33 T. L. R. 135; 61 Sol. Jo. 158; 13 Asp. M. L. C. 558, H. L.; *affg.*, [1914] P. 167, C. A.

Annotations:—**Refd.** Berry *v.* Humm, [1915] 1 K. B. 627; Bradford Corpn. *v.* Webster, [1920] 2 K. B. 135; Baker *v.* Dalgleish S.S. Co., [1922] 1 K. B. 361; The Molière, [1925] P. 27.

847. —— **Death of child—Cost of funeral expenses.**]—CLARK *v.* LONDON GENERAL OMNIBUS CO., LTD., No. 845, *ante*.

848. —— **From moment of death.**]—BAKER *v.* BOLTON, No. 843, *ante*.

849. —— ——.]—OSBORN *v.* GILLETT, No. *post*.

850. —— ——.]—CLARK *v.* LONDON GENERAL OMNIBUS CO., LTD., No. 845, *ante*.

851. —— ——.]—In an action to recover damages for pecuniary loss sustained by pltf. by reason of the death of his wife through eating tinned salmon supplied & sold by defts. to pltf. & his wife, the jury awarded pltf. (*inter alia*), £200:—*Held:* the rule laid down by LORD ELLENBOROUGH, C.J., in *Baker* v. *Bolton*, No. 843, *ante*, that "in a civil ct. the death of a human being could not be complained of as an injury; & the damages as to pltf.'s wife must stop with the period of her existence," was limited to actions based on the tort, which was the wrong that caused the death; but where there was also another & independent cause of action, the loss of services caused by the death of the wife was an element which might be included in the damages awarded to the husband.

I have come to the conclusion that this exception from the general principles on which damages are based, only applies to cases where the cause of action is the wrong which caused the death & does not apply to cases where there is a cause of action independently of such wrong (VAUGHAN WILLIAMS, L.J.).—JACKSON *v.* WATSON & SONS, [1909] 2 K. B. 193; 78 L. J. K. B. 587; 100 L. T. 799; 25 T. L. R. 454; 53 Sol. Jo. 447, C. A.

Annotations:—**Consd.** The Amerika, [1914] P. 167. **Refd.** Cointat *v.* Myham, [1913] 2 K. B. 220; Berry *v.* Humm, [1915] 1 K. B. 627.

Right of personal representative to bring or continue action for personal injury.]—*See* EXECUTORS, Vol. XXIII., p. 297, Nos. 3625–3628.

SUB-SECT. 2.—CAUSE OF ACTION INDEPENDENT OF TORT.

852. Cause of action on contract—Action lies.]—JACKSON *v.* WATSON & SONS, No. 851, *ante*.

—— **Right of personal representative to bring action.**]—*See* EXECUTORS, Vol. XXIII., pp. 292, 293, 297, Nos. 3580–3584, 3625–3628.

SECT. 2.—STATUTORY LIABILITY—FATAL ACCIDENTS ACTS.

SUB-SECT. 1.—NATURE OF REMEDY.

See Fatal Accidents Act, 1846 (c. 93); Fatal Accidents Act, 1864 (c. 95); Fatal Accidents (Damages) Act, 1908 (c. 7).

853. Whether injury must be such that deceased could have brought action—Fatal Accidents Act, killed.—HISLOP *v.* DURHAM (1842), 4 Dunl. (Ct. of Sess.) 1168.—**SCOT.**

p. —— —— ——.]—INNES *v.* FIFE COAL CO. (1901), 3 F. (Ct. of Sess.) 335.—**SCOT.**

q. —— —— ——.]—A workman having been injured through the fault, as he alleged, of his employers, brought an action against them for damages. While the action was pending he died, intestate & unmarried. His mother was appointed his extrix., & she raised a second & concurrent action for solatium for her son's death, & asked that the second action should be remitted to the same jury who were to try the first action:—*Held:* the second action was incompetent.—WOOD *v.* GRAY & SONS, [1892] A. C. 576.—**SCOT.**

r. —— *Actual pecuniary loss—Son supporting mother.*]—Where a mother sought reparation from a master of works for the loss of her son, he having been killed by an accident occasioned through the master's default:—*Held:* as the mother had a legal claim on her son for support, & as he actually was supporting her at the time of his death, the mother's claim was valid.—WEEMS *v.* MATHIESON (1861), 4 Macq. 215, H. L.—**SCOT.**

t. —— —— *Loss must arise from relationship—Not from loss of business.*]—QUIN *v.* GREENOCK & PORT-GLASGOW TRAMWAYS CO., [1926] S. C. 544.—**SCOT.**

a. —— *Necessity for concurrence of several parties in one action.*]—Where separate actions for damages in respect of the death of a father were brought by (a) his widow as an individual & as tutrix of his pupil children, & (b) his minor children:—*Held:* when several persons suffer loss & damage through the death of one person, separate actions of damages are improper, as, apart from specialties requiring separate actions to be raised; the pursuers should concur in one action.—STORACH *v.* KERR & CO., [1921] S. C. 285.—**SCOT.**

b. —— *Damages for mental suffering—Whether recoverable.*]—In an action by a father for damages sustained owing to the death of his child caused through deft.'s negligence:—*Held:* no damages for mental suffering could be recovered.—BERTRAM *v.* CENTRAL S. A. RYS. (1906), W. H. C. 234.—**S. AF.**

1846 (c. 93), s. 1.]—ARMSWORTH *v.* SOUTH-EASTERN RY. CO., No. 941, *post.*

854. ——— ———.]—TUCKER *v.* CHAPLIN & HORNE, No. 908, *post.*

855. ——— ———.]—(1) An action on Lord Campbell's Act, 1846 (c. 93), is maintainable in cases where none could have been maintained by the deceased if he had survived the effects of the injury: as the condition in the statute that the action could have been maintained by deceased if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, & the nature of the wrongful act, neglect, or default complained of.

If deceased had, by his own negligence materially contributed to the accident whereby he lost his life, as he, if still living, could not have maintained an action in respect of any bodily injury, notwithstanding there might have been negligence on the part of defts., the present action could not have been supported. But supposing the circumstances of the negligence to have been such that, if death had not ensued, deceased might have brought his action in respect of any injury arising to him from it, we are of opinion that his representative may maintain an action in respect of an injury arising from a pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to deceased had he lived (COCKBURN, C.J.).

(2) We are of opinion that as the benefit of education & the enjoyment of the greater comforts & conveniences of life depend on the possession of pecuniary means to procure them, the loss of these advantages is one which is capable of being estimated in money, in other words, is a pecuniary loss; & therefore the loss of such advantages arising from the death of a father whose income ceases with his life is an injury in respect of which an action can be maintained on the statute. *A fortiori*, the loss of a pecuniary provision, which fails to be made owing to the premature death of a person by whom such provision would have been made had he lived, is clearly a pecuniary loss for which compensation may be claimed (COCKBURN, C.J.).—PYM *v.* GREAT NORTHERN RY. CO. (1862), 2 B. & S. 759; 31 L. J. Q. B. 249; 6 L. T. 537; 8 Jur. N. S. 819; 10 W. R. 737; 121 E. R. 1254; *affd.* (1863), 4 B. & S. 396; *previous proceedings* (1861), 2 F. & F. 619.

Annotations:—As to (1) **Apld.** Read *v.* G. E. Ry. (1868), 9 B. & S. 714. **Refd.** Griffiths *v.* Dudley (1882), 47 L. T. 10; Soward *v.* Vera Cruz (1884), 10 App. Cas. 59. *As to* (2) **Apld.** Hetherington *v.* N. E. Ry. (1882), 51 L. J. Q. B. 495; Harrison *v.* L. & N. W. Ry. (1885), Cab. & El. 540. **Refd.** Grand Trunk Ry. of Canada *v.* Jennings (1888), 13 App. Cas. 800. *Generally*, **Refd.** Baker *v.* Dalgleish S.S. Co., [1922] 1 K. B. 361; Nunan *v.* Southern Ry., [1923] 2 K. B. 703. **Mentd.** Hebdon *v.* West (1863), 3 B. & S. 579; R. *v.* Mid. Ry. (1867), 31 J. P. 661; Readhead *v.* Mid. Ry. (1867), L. R. 2 Q. B. 412; Fair *v.* L. & N. W. Ry. (1869), 21 L. T. 326; Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648; British Columbia Elec. Ry. *v.* Gentile, [1914] A. C. 1034.

856. ——— ———.]—THE STELLA, No. 895, *post.*

857. ——— No breach of duty.]—LANKESTER *v.* MILLER, HETHERINGTON, THIRD PARTY, No. 384, *ante.*

858. ——— ———.]—MERSEY DOCKS & HARBOUR BOARD *v.* PROCTER, No. 59, *ante.*

859. Remedy given to individuals — Not to a class.]—(1) In an action under Lord Campbell's Act, 1846 (c. 93), no compensation can be given by way of *solatium* for grief or loss of society of deceased.

(2) The remedy given by this statute is to individuals, not to a class; & therefore, on the death of a person whose income arose from land & personalty independent of any exertion of his own, no portion of which was lost to his family by his death, the action is maintainable if in consequence of that death the mode of its distribution among the members is changed.—PYM *v.* GREAT NORTHERN RY. CO. (1863), 4 B. & S. 396; 2 New Rep. 455; 32 L. J. Q. B. 377; 8 L. T. 734; 10 Jur. N. S. 199; 11 W. R. 922; 122 E. R. 508, Ex. Ch.

Annotations:—As to (1) **Refd.** Griffiths *v.* Dudley (1882), 47 L. T. 10; Baker *v.* Dalgleish S.S. Co., [1922] 1 K. B. 361. *As to* (2) **Refd.** Grand Trunk Ry. of Canada *v.* Jennings (1888), 13 App. Cas. 800. *Generally*, **Mentd.** Hebdon *v.* West (1863), 3 B. & S. 579; R. *v.* Mid. Ry. (1867), 31 J. P. 661; Readhead *v.* Mid. Ry. (1867), L. R. 2 Q. B. 412; Read *v.* G. E. Ry. (1868), 9 B. & S. 714; Fair *v.* L. & N. W. Ry. (1869), 21 L. T. 326; Hetherington *v.* N. E. Ry. (1882), 51 L. J. Q. B. 495; Seward *v.* Vera Cruz (1884), 10 App. Cas. 59; Harrison *v.* L. & N. W. Ry. (1885), Cab. & El. 540; Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648; British Columbia Elec. Ry. *v.* Gentile, [1914] A. C. 1034; Nunan *v.* Southern Ry., [1923] 2 K. B. 703.

SUB-SECT. 2.—WHO MAY BRING ACTION.

860. Personal representative.]—B. took a ticket from Workington to Carlisle from the Whitehaven Junction Ry. co. In order to arrive at the platform at the station at Maryport the trains pass over the line of the Maryport & Carlisle Ry. On that line is a self-acting switch used for shunting carriages into a siding. The switch & siding were the property of the Maryport & Carlisle Ry. co., but used exclusively by the Whitehaven Junction Ry. co. The switch is about four yards from a gate which is on the line of the Whitehaven Junction Ry. co., a servant of which co. was in the habit of occasionally looking over the gate to see that the switch was in proper order. It was proved that all switches are liable to get out of order. A train of the Whitehaven Junction Ry. coming slowly up to the station, in consequence of the points

PART XIII. SECT. 2, SUB-SECT. 1.

857 i. *Whether injury must be such that deceased could have brought action—No breach of duty.*]—Deft. was engaged in cutting & removing ice from a navigable river, & two boys, skating on the river, in daylight, broke through the thin ice which had formed over an opening made by deft., & were drowned. In an action under Fatal Accidents Act:—*Held:* in entering upon the river & cutting & removing the ice deft. was doing a lawful act, & was liable to pltf. only if, in exercising that right, he unnecessarily & improperly interfered with the right of the boys to skate in safety upon the river, & their death was the result of that interference.—CASTALDI *v.* DENISON (1920), 47 O. L. R. 237; 52 D. L. R. 495; 18 O. W. N. 39.—**CAN.**

c. ———.]—If deceased could not, had he survived, have successfully maintained his action, the cause of action under the Families Compensation Act will not arise; & if he had already been compensated & had discharged all claims, or had covenanted away his rights, he would not be in a position to maintain an action, & there would be no cause of action under the Act.—BRITISH COLUMBIA ELECTRIC RY. CO. *v.* GENTILE (1914), 28 W. L. R. 795; 18 D. L. R. 264; 6 W. W. R. 1342; [1914] A. C. 1034; 111 L. T. 682.—**CAN.**

d. Applt.'s husband was killed in the course of his employment by the resps. Deceased, had he lived, & on his death his dependents, had a right to compensation out of a fund contributed to by employers; by sect. 1 (1) of Workmen's Compensation Act of British Columbia that right was in lieu of any right of action against the employer, the latter right being expressly barred:—*Held:* the action could not be maintained, because deceased could not himself have maintained an action as required by Fatal Accidents Act.—WALPOLE *v.* CANADIAN NORTHERN RY. CO., [1923] A. C. 113, P. C.—**CAN.**

e. ———.]—BIZEAU *v.* CANADIAN NATIONAL RY. CO. & AZIZ, [1926] 4 D. L. R. 1066; 59 O. L. R. 549.—**CAN.**

859 i. *Remedy given to individuals—Not to a class.*]—TRUEMAN *v.* HYDRO-ELECTRIC POWER COMN. OF ONTARIO (1923), 53 O. L. R. 434.—**CAN.**

Sect. 2.—Statutory liability—Fatal Accidents Acts: Sub-sects 2, 3 & 4.]

being turned the wrong way, ran into the siding & came in collision with some coal trucks, whereby B. was killed. The judge left it to the jury to say whether there was negligence on the part of the Whitehaven Junction Ry. co. The jury found that there was:—*Held:* the question was properly left to the jury; that there was evidence of such negligence, &, upon such finding, the Whitehaven Junction Ry. co. were liable, under Fatal Accidents Act, 1846 (c. 93), to an action by the personal representative of B.—BIRKETT *v.* WHITEHAVEN JUNCTION RY. CO. (1859), 4 H. & N. 730; 28 L. J. Ex. 348: 33 L. T. O. S. 226.

Annotation:—**Refd.** Clarke *v.* West Ham Corpn. (1909), 73 J. P. 461.

861. ——.]—MILLS *v.* ARMSTRONG, THE BERNINA, No. 807, *ante*.

862. —— **Husband of deceased.**] — A. being possessed of land abutting on a public footway, in the course of building a house on such land, excavated an area, which, by the negligence of his workpeople, was left unfenced, so that B., who was lawfully passing along the way, the night being dark, without any negligence or default of her own, fell into the area, & was killed:—*Held:* (1) A. was liable, under Lord Campbell's Act, 1846 (c. 93), to an action by the husband, as administrator, for the benefit of himself & B.'s infant children.

The declaration alleged that deft. was possessed of a messuage, with the appurtenances, near to a common & public footway, & that, in front of & before the said messuage, & parcel of the appurtenances thereof, & close to, & by the side of, the said footway, & abutting upon, & opening into, the same, there then was a large hole, vault, or area, which hole, vault, or area, deft., by reason of the possession of the said messuage, with the appurtenances, before & at the time when, etc., ought to have so sufficiently guarded & fenced as to prevent injury to persons lawfully passing in & along the said footway:—*Held:* (2) the duty of deft. to fence the area, was properly alleged; (3) the judge at the trial was justified in amending the declaration, by adding the words "with the appurtenances"; (4) the declaration need not negative the existence of any relations entitled to compensation, other than those on whose behalf the action purported to be brought.—BARNES *v.* WARD (1850), 9 C. B. 392; 19 L. J. C. P. 195; 14 Jur. 334; 137 E. R. 945.

Annotations:—*As to* (1) **Distd.** M., S. & L. Ry. *v.* Wallis (1854), 14 C. B. 213; Cornman *v.* Eastern Counties Ry. (1859), 29 L. J. Ex. 94; Hardcastle *v.* South Yorkshire Ry. & River Dun Co. (1859), 4 H. & N. 67; Hounsell *v.* Smyth (1860), 7 C. B. N. S. 731. **Consd.** Fisher *v.* Prowse, Cooper *v.* Walker (1862), 2 B. & S. 770; Witherley *v.* Regent's Canal Co. (1862), 12 C. B. N. S. 2; Hadley *v.* Taylor (1865), L. R. 1 C. P. 53. **Apld.** R. *v.* Dant (1865), Le. & Ca. 567. **Consd.** Murley *v.* Grove (1882), 46 J. P. 360; Wright *v.* Mid. Ry. (1884), 51 L. T. 539. **Apld.** Silverton *v.* Marriott (1888), 59 L. T. 61. **Distd.** Ponting *v.* Noakes, [1894] 2 Q. B. 281; Lowery *v.* Walker, [1909] 2 K. B. 433. **Refd.** Ricketts *v.* East & West India Docks & Birmingham Junction Ry. (1852), 19 L. T. O. S. 109; Cornwell *v.* Metropolitan Sewers Comrs. (1855), 10 Exch. 771; Corby *v.* Hill (1858), 4 C. B. N. S. 556; Marfell *v.* South Wales Ry. (1860), 29 L. J. C. P. 315; Binks *v.* South Yorkshire Ry. & River Dun Co. (1862), 3 B. & S. 244; Robbins *v.* Jones (1863), 15 C. B. N. S. 221; *Re* Williams *v.* Groucott (1863), 4 B. & S. 149; Ohrby *v.* Ryde Comrs. (1864), 10 Jur. N. S. 1048; Stansfeld *v.* Bolling (1870), 22 L. T. 799; Orr-Ewing *v.* Colquhoun (1877), 2 App. Cas. 839; Pearson *v.* Cox (1877), 2 C. P. D. 369; Owen *v.* De Winton (1894), 58 J. P. 833; Crane *v.* South Suburban Gas Co., [1916] 1 K. B. 33. *Generally*, **Refd.** Tarry *v.* Ashton (1876), 1 Q. B. D. 314; Bathurst Borough *v.* Macpherson (1879), 4 App. Cas. 256. **Mentd.** Arnell *v.* L. & N. W. Ry. (1852), 12 C. B. 697; A.-G. *v.* Roe, [1915] 1 Ch. 235.

863. —— **Widow of deceased.**] — SMITH *v.* STEELE, No. 247, *ante*.

—— **Right to sue separately on behalf of deceased's estate.**]—*See* EXECUTORS, Vol. XXIII., p. 292, Nos. 3080–3082.

864. Mother.] — Where a mother sought reparation from a master of works for the loss of her son, he having been killed by an accident occasioned through the master's default:—*Held:* as the mother had a legal claim on her son for support, & as he actually was supporting her at the time of his death, the mother's claim was valid.

The right of a mother to maintain such an action as this is beyond doubt (LORD CRANWORTH).

It is established, not only that in point of fact this son did maintain his mother, but that in point of law he was bound to maintain her to the extent of his ability (LORD BROUGHAM).—WEEMS *v.* MATHIESON (1861), 4 Macq. 215, H. L.

Annotations:—**Mentd.** Smith *v.* Baker, [1891] A. C. 325; Nimmo *v.* Connell, [1924] A. C. 595.

865. Child — Illegitimate.] — An illegitimate child is not a person in whose interest or for whose benefit an action can be maintained under Fatal Accidents Act, 1846 (c. 93).—DICKINSON *v.* NORTH EASTERN RY. CO. (1863), 2 H. & C. 735; 3 New Rep. 130; 33 L. J. Ex. 91; 9 L. T. 299; 12 W. R. 52; 159 E. R. 304.

866. —— **En ventre sa mère.**]—THE GEORGE & RICHARD, No. 158, *ante*.

867. Husband.] — Deft., a farmer, for his own convenience, removed an agricultural roller from his field, & left it upon the highway, on the part between the hedge & the metalled roadway, & left it there for some time. A pony drawing a carriage in which pltf.'s wife was riding, shied at the roller, upset the carriage, & pltf.'s wife was killed:—*Held:* this was an unreasonable use of the highway, & an action under Fatal Accidents Act, 1846 (c. 93), would lie at the suit of the husband for the death of his wife.—WILKINS *v.* DAY (1883), 12 Q. B. D. 110; 49 L. T. 399; 48 J. P. 6; 32 W. R. 123, D. C.

Annotations:—**Refd.** Wilkinson *v.* Downton, [1897] 2 Q. B. 57; Dulieu *v.* White, [1901] 2 K. B. 669; Heath's Garage *v.* Hodges (1915), 14 L. G. R. 195.

Alien.]—*See* ALIENS, Vol. II., p. 131, Nos. 71, 72.

PART XIII. SECT. 2, SUB-SECT. 2.

864 i. *Mother.*]—The mother of the deceased is a person for whose benefit an action can be brought under the Fatal Accidents Act, although the father is living.—RENWICK *v.* GALT, PRESTON & HESPELER STREET RY. CO. (1906), 12 O. L. R. 35; 7 O. W. R. 673.—**CAN.**

f. —— *Of illegitimate child.*]—Pltf. as administratrix, sued defts., under 44 Vict. c. 22, s. 7 (O), for the death of her illegitimate son, a brakesman on defts.' railway, who was killed by being carried against a bridge not of the height required by that Act, while on one of their trains passing underneath it:—*Held:* as the Act was intended to give no greater right to recover than Lord Campbell's Act, pltf.'s relationship to the deceased was not such as to give her a right to recover.—GIBSON *v.* MIDLAND RY. CO. (1883), 2 O. R. 658.—**CAN.**

g. *Sister.*]—A declaration by extrix. under Lord Campbell's Act, C. S. N. B. 1903, c. 79, in an action for damages for negligence causing death & for expenses incurred & pecuniary loss sustained by deceased prior to his death, & stating that the action was brought for the benefit of deceased's sisters, was held bad on demurrer, sisters not being beneficiaries under the Act.—MURRAY *v.* MIRAMICHI PULP & PAPER CO. (1908), 39 N. B. R. 44; 6 E. L. R. 247.—**CAN.**

h. *Adoptive parent.*]—The death of an adopted son, though caused by negligence, gives no right of action to the adoptive parent under Fatal Accidents Act, 1897, s. 1 (2).—BLAYBOROUGH *v.* BRANTFORD GAS CO. (1909), 13 O. L. R. 243; 13 O. W.

SUB-SECT. 3.—WITHIN WHAT TIME ACTION MUST BE BROUGHT.

See Lord Campbell's Act, 1846 (c. 93), s. 3.

868. Within twelve months of death of person injured—Substitution of administratrix for plaintiff more than twelve months after death of original plaintiff.]—4 Edw. 3, c. 7, does not apply to actions by the legal personal representatives of deceased persons in respect of injuries caused to deceased by negligence, nor in respect of injury sustained by the personal estate of deceased through meeting medical expenses. Therefore, where administratrix of pltf. in an action against a railway co. to recover damages for injuries caused by their negligence was substituted as pltf. in action more than twelve months after original pltf.'s death :—*Held :* no proceedings had been commenced by the administratrix within the twelve months required by Lord Campbell's Act, 1846 (c. 93), s. 3, & the action was therefore not supportable.—PULLING *v.* GREAT EASTERN RY. CO. (1882), 9 Q. B. D. 110 ; 51 L. J. Q. B. 453 ; 46 J. P. 617 ; 30 W. R. 798.

Annotation :—**Refd.** London *v.* London Road Car Co. (1888), 4 T. L. R. 448.

869. Actions against public authorities — Whether within six months of wrongful act—Public Authorities Protection Act, 1893 (c. 61), s. 1.]—By Lord Campbell's Act, 1846 (c. 93), s. 3, an action for the benefit of the wife, husband, parent, or child of a person whose death has been caused by the wrongful act, neglect, or default of another must be commenced within twelve calendar months of the death of the deceased.

By Public Authorities Protection Act, 1893 (c. 61), s. 1, an action against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act, must be commenced within six months next after the act, neglect, or default complained of, or, in case of continuing injury or damage, within six months next after the ceasing thereof.

An action under Lord Campbell's Act, 1846 (c. 93), was brought against defts., a statutory body formed to provide, maintain, & manage a hospital, to recover damages for the death of a patient in the hospital caused by the negligent act of a nurse in defts.' employment ; the writ was issued more than six months, but less than twelve months, after the death of deceased :—*Held :* pltfs. cause of action arose upon the death of the deceased, & that, the action not having been brought within six months after his death, defts. were entitled to the protection of Public Authorities Protection Act, 1893, & the action was not maintainable.—MARKEY *v.* TOLWORTH JOINT ISOLATION HOSPITAL DISTRICT BOARD, [1900] 2 Q. B. 454 ; 69 L. J. Q. B. 738 ; 83 L. T. 28 ; 64 J. P. 647 ; 16 T. L. R. 411, D. C.

Annotations :—**Apld.** Kent County Council *v.* Folkestone Corpn. (1904), 91 L. T. 563. **N.F.** British Columbia Elec. Ry. *v.* Gentile, [1914] A. C. 1034. **Refd.** Williams *v.* Mersey Docks & Harbour Board (1905), 92 L. T. 444 ; McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118 ; Venn *v.* Tedesco, [1926] 2 K. B. 227.

870. —— —— ——.]—An action can only be maintained by the representative of a deceased person under Lord Campbell's Act, 1846 (c. 93), where that person could, if alive, have himself maintained an action in respect of his injuries against deft.

The husband of pltf., having in 1902 sustained injuries, as it was alleged, through the negligence of defts., a public authority, ultimately died of those injuries in 1904. Pltf. having commenced an action against defts. under Lord Campbell's Act, 1846 (c. 93), to recover damages for his death :—*Held :* the action could not be maintained, inasmuch as the right of action of the deceased, if alive, would have been barred, by Public Authorities Protection Act, 1893 (c. 61), s. 1 (*a*).—WILLIAMS *v.* MERSEY DOCKS & HARBOUR BOARD, [1905] 1 K. B. 804 ; 74 L. J. K. B. 481 ; 92 L. T. 444 ; 69 J. P. 196 ; 53 W. R. 488 ; 21 T. L. R. 397 ; 49 Sol. Jo. 417 ; 3 L. G. R. 529, C. A.

Annotations :—**Apprvd.** British Columbia Elec. Ry. *v.* Gentile, [1914] A. C. 1034. **Consd.** Nunan *v.* Southern Ry., [1923] 2 K. B. 703 ; Venn *v.* Tedesco, [1926] 2 K. B. 227. **Mentd.** The Johannesburg, [1907] P. 65.

871. —— —— ——.]—In an action under Lord Campbell's Act, 1846 (c. 93), against defts. to whom the Public Authorities Protection Act, 1893 (c. 61), is otherwise applicable, the time within which the action can be brought is that limited by the former & not that limited by the latter Act.—VENN *v.* TEDESCO, [1926] 2 K. B. 227 ; 95 L. J. K. B. 866 ; 135 L. T. 108 ; 90 J. P. 185 ; 42 T. L. R. 478 ; 70 Sol. Jo. 709 ; 24 L. G. R. 496.

See, generally, PUBLIC AUTHORITIES.

SUB-SECT. 4.—IN WHAT COURTS ACTION MAY BE BROUGHT.

Court of Admiralty.]—*See* ACTION, Vol. I., pp. 34, 35, Nos. 265, 266 ; ADMIRALTY, Vol. I., pp. 144, 145, Nos. 513–518.

PART XIII. SECT. 2, SUB-SECT. 3.

k. *Within twelve months of death of person injured.*]—C. O. N. W. T. c. 55, s. 4, re-enacting parts of Lord Campbell's Act, provides that an action must be brought within twelve months after the death.—MCKERRAL *v.* CITY OF EDMONTON (Alta.) (1912), 22 W. L. R. 699 ; 3 W. W. R. 180 ; 7 D. L. R. 661.—**CAN.**

l. ——.]—Families Compensation Act of British Columbia is, save in slight & immaterial respects, in the same terms as Fatal Accidents Act, 1845, & provides that actions thereunder shall be commenced within twelve calendar months of the death of deceased. — BRITISH COLUMBIA ELECTRIC RY. CO., LTD. *v.* GENTILE, [1914] A. C. 1034, P. C.—**CAN.**

m. ——.]—SMITH *v.* SOUTH VANCOUVER CORPN. & RICHMOND CORPN. (B. C.), [1922] 2 W. W. R. 376 ; 66 D. L. R. 835.—**CAN.**

n. *Actions against public authorities.*]—An action under C. S. C. c. 78, by the representatives of a deceased person killed by the neglect of defts. to repair a highway, must, under C. S. U. C. c. 54, s. 337, be brought within three months, notwithstanding the limitation of twelve months allowed by the first mentioned statute. —TURNER *v.* BRANTFORD CORPN. (1863), 13 C. P. 109.—**CAN.**

o. ——.] — GREEN *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1906), 12 B. C. R. 199 ; 4 W. L. R. 273.—**CAN.**

p. *May be brought within six months —If no administrator appointed.*]—The widow & child of a person killed in consequence of the defts.' negligence may, when letters of administration to his estate have not been issued, bring an action under R. S. O. 1897, c. 166, without waiting six months.—CURRAN *v.* GRAND TRUNK RY. CO. (1898), 25 A. R. 407.—**CAN.**

-.]—MUMMERY *v.* GRAND TRUNK RY. CO., WHALLS *v.* GRAND TRUNK RY. CO. (1901), 21 C. L. T. 343, 1 O. L. R. 622.—**CAN.**

r. —— ——.]—An action under the 27 & 28 Vict. c. 95, amending Lord Campbell's Act, can be sustained by a relative of the deceased, though brought within six calendar months from the death, unless there be at the time an exor. or administrator of the deceased. — HOLLERAN *v.* BAGNELL (1879), 4 L. R. Ir. 740.—**IR.**

t. —— ——.]—The ct. will not, in the absence of bad faith, make an order staying an action under Lord Campbell's Act brought by one of the next of kin of the deceased within six months after the death & before administration is taken out, although administration is subsequently taken out by another of the next of kin, & a second action in respect of the death of the same deceased person is instituted by the administrator.—M'CABE *v.* GREAT NORTHERN RY. CO. OF IRELAND, [1899] 2 I. R. 123.—**IR.**

Sect. 2.—*Statutory liability—Fatal Accidents Acts: Sub-sect.* 5, *A.* (*a*) & (*b*), & *B.* (*a*) & (*b*).]

SUB-SECT. 5.—ESSENTIALS OF ACTION.

A. Actual Pecuniary Loss.

(*a*) *In General.*

872. Necessity for actual loss.]—FRANKLIN *v.* SOUTH EASTERN RY. CO., No. 889, *post.*

873. ——.]—In an action on Lord Campbell's Act, 1846 (c. 93), by a father for injury resulting from the death of his son, it appeared that the father was a working mason & that the son was a boy of fourteen years of age who had earned 4*s.* a week for about a year or two, but at the time of his death was without employment. There was no evidence of the cost of boarding & clothing the boy. The judge having left it to the jury to say whether the father had sustained any pecuniary loss by the death of his son, & the jury having found a verdict with £20 damages:—*Held:* as there was evidence for the jury, pltf. was entitled to retain the verdict for the full amount; such an action could not be maintained without some evidence of actual pecuniary damage.—DUCKWORTH *v.* JOHNSON (1859), 4 H. & N. 653; 29 L. J. Ex. 25; 33 L. T. O. S. 274; 5 Jur. N. S. 630; 7 W. R. 655; 157 E. R. 997.

Annotations:—**Folld.** Boulter *v.* Webster (1865), 5 New Rep. 238. **Expld.** Meddam *v.* Minnis (1893), 37 Sol. Jo. 253. **Consd.** Jenkins *v.* Taff Vale Ry. (1912), 106 L. T. 715; Barnett *v.* Cohen, [1921] 2 K. B. 461. **Refd.** Pym *v.* G. N. Ry. (1862), 2 B. & S. 759.

874. ——.]—The *onus* must lie on pltf. in these cases to prove that the earnings exceeded the cost of maintenance, & if pltf. failed to prove that he must go on to give affirmative evidence that that state of things would not continue. In order to maintain the action there must be made out either an actual loss or a reasonable probability of pecuniary benefit which had been destroyed by the death (*per* CUR.).—MEDDAM *v.* MINNIS (1893), 37 Sol. Jo. 253, D. C.

875. ——.]—TAFF VALE RY. CO. *v.* JENKINS, No. 885, *post.*

876. —— Grief or loss of services insufficient.]—The compensation to which the party for whose benefit an action is brought, under Lord Campbell's Act, 1846 (c. 93), by the exor. or administrator of deceased person, must be confined to the mere pecuniary loss sustained by the death of the deceased, the damages being measured by such portion of his income as claimant may be inferred to have enjoyed.

It is a pure question of pecuniary compensation, & nothing more, which is contemplated by the Act [Lord Campbell's Act, 1846 (c. 93)], no matter who or what the survivors may be. If, for instance, the wealthiest peer of England, who rolled in riches, were to marry a lady enjoying a pension during her life, & she were to be killed by the negligence of another, her husband would be entitled to bring an action under this Act, in which he might recover compensation for the deprivation of his wife's pension. On the other hand, the poorest & meanest peasant, who may lose nothing at all by the death of his wife, is not entitled to sue. The mental sufferings & deprivation of comfort inflicted on the peasant may be as great as those sustained by the peer, or greater, but still, unless he has sustained some pecuniary loss, he has no right of action. . . . It is utterly impossible for a jury to estimate any sum as a compensation for the injured feelings of the survivors; all that is left which is appreciable after the death of the party killed is the pecuniary loss sustained by his family, & this Act enables them to recover that which deceased would himself have sued for, had the accident not terminated fatally. The framers of the Act never could have meant to give compensation to the parent for the mere deprivation of his son, or the widow for that of her husband. If that were so, a man of wealth losing his only child, the heir of his honours & fortune, & the object of all his human hopes, might be entitled to claim an almost indefinite sum. Nothing on earth could compensate such a man for such a loss (POLLOCK, C.B.).—GILLARD *v.* LANCASHIRE & YORKSHIRE RY. CO. (1848), 12 L. T. O. S. 356, N. P.

Annotation:—**Refd.** Pym *v.* G. N. Ry. (1863), 4 B. & S. 396.

877. —— Merely nominal loss insufficient.]—To support an action under Lord Campbell's Act, 1846 (c. 93), for damages resulting from death by negligence such damages must be special damages, & the action cannot be supported to recover merely nominal damages.

Where, therefore, an action was brought by the father, as administrator, of a child between eight & nine years old who was killed by the negligent act of deft. & the pltf. incurred the expense of £2 for medical treatment & nursing & £5 for its burial, & the jury found negligence as against deft., & that pltf. had sustained no pecuniary damage through the death of the child, but assessed damages to the amount of £7 for the two before-mentioned items of expense:—*Held:* these items could not be recovered, & as there was no pecuniary damage deft. was entitled to the verdict.—BOULTER *v.* WEBSTER (1865), 5 New Rep. 238; 11 L. T. 598; 13 W. R. 289.

878. —— Loss must arise from relationship—Not from contract.]—In order to maintain an action under Lord Campbell's Act, 1846 (c. 93), the persons upon whose behalf it is brought must prove that during the lifetime of deceased a pecuniary advantage accrued to them owing to their relationship with him; they are not entitled to compensation under Lord Campbell's Act, 1846 (c. 93), if the only pecuniary benefit to them from his life was derived from a contract which they had entered into with him. Pltf., as administrator, sued defts. to recover damages for the death of his son, who had been killed by their negligence. Deceased was a bricklayer, & received from pltf. the wages of a skilled workman; he was of great assistance to pltf., who was also a bricklayer; owing to the loss of assistance from deceased, pltf. could not take the contracts which he had done during his son's lifetime:—*Held:* pltf. had not suffered a pecuniary loss by his son's death entitling him to sue under Lord Campbell's Act, 1846 (c. 93).—SYKES *v.* NORTH EASTERN RY. CO. (1875), 44 L. J. C. P. 191; 32 L. T. 199; 39 J. P. 280; 23 W. R. 473.

Annotations:—**Refd.** Hetherington *v.* N. E. Ry. (1882), 51 L. J. Q. B. 495; Berry *v.* Humm, [1915] 1 K. B. 627.

PART XIII. SECT. 2, SUB-SECT. 5.—A. (a).

872 i. *Necessity for actual loss.*]—A husband suing for damages for the death of his wife & child must show by actual evidence some pecuniary interest in their lives.—WALKER *v.* PORTAGE LA PRAIRIE MUNICIPALITY & CARTIER MUNICIPALITY (Man.), [1919] 2 W. W. R. 888.—**CAN.**

877 i. —— *Merely nominal loss insufficient.*]—In an action under Lord Campbell's Act, by a father for the death of his daughter, who was about the age of seven at the period of the accident, the only evidence given to show that pltf. sustained a pecuniary loss by the child's death was, that she had been in the habit of rendering trifling household services, such as her tender years permitted, but which were incapable of being estimated at any pecuniary value:—*Held:* this evidence was insufficient to sustain the action.—HOLLERAN *v.* BAGNELL (1879), 6 L. R. Ir. 333.—**IR.**

879. Proof of loss — Onus on plaintiff.]—MEDDAM *v.* MINNIS, No. 874, *ante.*

(b) What is Pecuniary Loss.

880. Death of son earning small wage—Unemployed at death.]—DUCKWORTH *v.* JOHNSON, No. 873, *ante.*

881. Loss of benefits of education & comforts of life.]—PYM *v.* GREAT NORTHERN RY. CO., No. 855, *ante.*

882. Death of son occasionally assisting father.]—In an action brought under Lord Campbell's Act, 1846 (c. 93), for the benefit of the father of deceased, evidence was given that the father, who was fifty-nine years of age, was nearly blind & injured in his leg & hands, & was not so able to work as he had been, but worked when he could; that the son used to contribute to his support; that five or six years previously, the father being out of work for six months, the son had assisted him pecuniarily out of his earnings, but had not done so since:—*Held:* there was evidence for the jury of pecuniary injury to the father from the son's death.—HETHERINGTON *v.* NORTH EASTERN RY. CO. (1882), 9 Q. B. D. 160; 51 L. J. Q. B. 495; 30 W. R. 797, D. C.

Annotation:—**Consd.** Jonkins *v.* Taff Vale Ry. (1912), 106 L. T. 715.

B. Loss of Reasonable Expectation of Pecuniary Benefit.

(a) In General.

883. Sufficient to found claim.]—DALTON *v.* SOUTH EASTERN RY. CO., No. 890, *post.*

884. ——.]—PYM *v.* GREAT NORTHERN RY. CO., No. 855, *ante.*

885. ——.]—It is not a condition precedent to the maintenance of an action under Lord Campbell's Act, 1846 (c. 93), that the deceased should have been actually earning money or money's worth or contributing to the support of pltf. at or before the date of the death, provided that pltf. had a reasonable expectation of pecuniary benefit from the continuance of the life.

Where, therefore, an action was brought by a father under the Lord Campbell's Act, 1846 (c. 93), for damages for the loss of a daughter, aged sixteen, who was killed by the negligence of defts., & it was proved that at the date of her death deceased, who lived with her parents, was nearing the completion of her apprenticeship as a dressmaker & was likely in the near future to earn a remuneration which might quickly have become substantial:—*Held:* there was evidence of damage upon which the jury could reasonably act.—TAFF VALE RY. CO. *v.* JENKINS, [1913] A. C. 1; 82 L. J. K. B. 49; 107 L. T. 564; 29 T. L. R. 19; 57 Sol. Jo. 27, H. L.; *affg.* S. C. *sub nom.* JENKINS *v.* TAFF VALE RY. CO. (1912), 106 L. T. 715, C. A.

Annotations:—**Consd.** Berry *v.* Humm, [1915] 1 K. B. 627; Barnett *v.* Cohen, [1921] 2 K. B. 461; Baker *v.* Dalgleish S.S. Co., [1922] 1 K. B. 361.

886. —— **Loss of legal right not necessary.**]—FRANKLIN *v.* SOUTH EASTERN RY. CO., No. 889, *post.*

887. —— **Mere speculative possibility insufficient.**]—In an action under Lord Campbell's Act, 1846 (c. 93), it is not sufficient for pltf. to prove that he has lost by the death of deceased a mere speculative possibility of pecuniary benefit. In order to succeed it is necessary for him to show that he has lost a reasonable probability of pecuniary advantage.—BARNETT *v.* COHEN, [1921] 2 K. B. 461; 90 L. J. K. B. 1307; 125 L. T. 733; 37 T. L. R. 629; 19 L. G. R. 623.

Annotation:—**Refd.** Baker *v.* Dalgleish S.S. Co., [1922] 1 K. B. 361.

888. Proof of loss — Onus on plaintiff.]—MEDDAM *v.* MINNIS, No. 874, *ante.*

(b) What is Reasonable Expectation.

889. Son accustomed to assist father at work.]—In an action on Fatal Accidents Act, 1846 (c. 93), for injury resulting from death, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.

In an action by a father for injury resulting from the death of his son, it appeared that the father was old & infirm, that the son, who was young & earning good wages, assisted his father in some work

879 i. *Proof of loss—Onus on plaintiff.*]—HULL *v.* GREAT NORTHERN RY. CO. OF IRELAND (1890), 26 L. R. Ir. 289.—**IR.**

879 ii. —— ——.]—WOLFE *v.* GREAT NORTHERN RY. CO. OF IRELAND (1890), 26 L. R. Ir. 548.—**IR.**

PART XIII. SECT. 2, SUB-SECT. 5.—A. (b).

a. *Death of son—Son supporting parent.*]—RUNCIMAN *v.* STAR LINE S.S. CO. (1900), 35 N. B. R. 123.—**CAN.**

b. *Death of stepmother.*]—JOHNSTON *v.* GREAT NORTHERN RY. CO. OF IRELAND (1890), 26 L. R. Ir. 691.—**IR.**

PART XIII. SECT. 2, SUB-SECT. 5.—B. (a).

883 i. *Sufficient to found claim.*]—MOFFAT *v.* RAILWAY COMRS. OF NEW SOUTH WALES (1894), 15 N. S. W. L. R. (L.) 405; 11 N. S. W. W. N. 101.—**AUS.**

883 ii. ——.]—In an action under Compensation of Relatives Act of 1897 (N. S. W.) to recover damages on behalf of a relative of a deceased person it is sufficient to prove a prospective pecuniary loss by that relative.—RAILWAYS & TRAMWAYS COMRS. (N. S. W.) *v.* BOYLSON (1915), 19 C. L. R. 505; 15 S. R. N. S. W. 281.—**AUS.**

883 iii. ——.]—In an action under Lord Campbell's Act by a parent for the death of his child by the negligence of deft., it is not necessary to show that any pecuniary benefit has been actually received; but such a reasonable & well-founded expectation of pecuniary benefit as can be estimated in money, & so become the subject of damages, is sufficient.—RICKETTS *v.* MARKDALE CORPN. (1900), 20 C. L. T. 115; 31 O. R. 610.—**CAN.**

883 iv. ——.]—ROMBOUGH *v.* BALCH, GREEN *v.* NEW YORK & OTTAWA RY. CO. (1900), 20 C. L. T. 60; 27 A. R. 32.—**CAN.**

883 v. ——.]—BLACKLEY *v.* TORONTO STREET RY. CO., 27 A. R. 44, n.—**CAN.**

883 vi. ——.]—MCKEOWN *v.* TORONTO RY. CO. (1909), 14 O. W. R. 572; 1 O. W. N. 3; 19 O. L. R. 361.—**CAN.**

883 vii. ——.]—TORONTO GENERAL TRUSTS CORPN. *v.* MUNICIPAL CONSTRUCTION CO. (Sask.) (1913), 26 W. L. R. 130; 4 W. W. R. 292; 10 D. L. R. 145.—**CAN.**

883 viii. ——.]—BEAHAN *v.* NEVIN (1913), 24 O. W. R. 712; 4 O. W. N. 1399; 11 D. L. R. 679.—**CAN.**

883 ix. ——.]—POWELL *v.* CANADIAN NORTHERN RY. CO. (1914), 28 W. L. R. 433; 7 Sask. L. R. 43; 6 W. W. R. 1085.—**CAN.**

883 x. ——.]—CLEMENT *v.* NORTHERN NAVIGATION CO., LTD. (1918), 43 O. L. R. 127; 43 D. L. R. 433.—**CAN.**

883 xi. ——.]—HOGAN *v.* CITY OF REGINA (Sask.), [1923] 3 W. W. R. 769.—**CAN.**

883 xii. ——.]—MAYER *v.* CITY OF PRINCE ALBERT (Sask.), [1926] 4 D. L. R. 1072; [1926] 3 W. W. R. 662.—**CAN.**

883 xiii. ——.]—CONDON *v.* GREAT SOUTHERN & WESTERN RY. CO. (1865), 16 I. C. L. R. 415.—**IR.**

887 i. —— *Mere speculative possibility insufficient.*]—MASON *v.* BERTRAM (1889), 18 O. R. 1.—**CAN.**

887 ii. —— ——.]—DAVIDSON *v.* STUART (1902), 22 C. L. T. 266; 14 Man. L. R. 74.—**CAN.**

887 iii. —— ——.]—PEDLAR *v.* TORONTO POWER CO. (1914), 30 O. L. R. 581; 19 D. L. R. 441; 5 O. W. N. 890.—**CAN.**

887 iv. —— ——.]—HOWARD *v.* R., [1924] Exch. C. R. 143.—**CAN.**

887 v. —— ——.]—BOURKE *v.* CORK & MACROOM RY. CO. (1879), 4 L. R. Ir. 682.—**IR.**

PART XIII. SECT. 2, SUB-SECT. 5.—B. (b).

c. *Mother keeping school.*]—An action was brought by an administrator under Compensation to Relatives Act, 1897, for the benefit of the three daughters of a deceased person, claiming damages for the loss of their mother, who was killed by the negligence of deft. The deceased mother was principal &

Sect. 2.—*Statutory liability—Fatal Accidents Acts: Sub-sect.* 5, *B.* (*b*); *sub-sects.* 6 & 7, *A.*]

for which the father was paid 3*s.* 6*d.* a week. The jury having found that the father had a reasonable expectation of benefit from the continuance of his son's life:—*Held:* the action was maintainable.

It has been held that . . . damages are not to be given as a solatium. . . . Damages are not to be given merely in reference to the loss of a legal right. Damages . . . should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life (POLLOCK, C.B.).—FRANKLIN *v.* SOUTH EASTERN RY. CO. (1858), 3 H. & N. 211; 31 L. T. O. S. 154; 4 Jur. N. S. 565; 6 W. R. 573; 157 E. R. 448.

Folld. Dalton *v.* S. E. Ry. (1858), 4 C. B. N. S. 296. **Consd.** Pym *v.* G. N. Ry. (1863), 4 B. & S. 396; Bradburn *v.* G. W. Ry. (1874), L. R. 10 Exch. 1; Taff Vale Ry. *v.* Jenkins, [1913] A. C. 1; Berry *v.* Humm, [1915] 1 K. B. 627. **Refd.** Sykes *v.* N. E. Ry. (1875), 44 L. J. C. P. 191; Hetherington *v.* N. E. Ry. (1882), 30 W. R. 797. **Mentd.** Read *v.* G. E. Ry. (1868), 9 B. & S. 714; Osborn *v.* Gillett (1873), L. R. 8 Exch. 88; Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648.

390. Son accustomed to supply parents with provisions.]—In an action founded upon Lord Campbell's Act, 1846 (c. 93), for injury resulting from death, legal liability alone is not the test of injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury; & damages may be given in respect of that expectation being disappointed, & the probable pecuniary loss thereby occasioned. Therefore, in an action by a father for injury resulting from the death of his son through the negligence of the servants of a railway co., it appeared that the son, who was twenty-seven years of age, & unmarried, but living away from his parents, had for the last seven or eight years been in the habit of visiting them once a fortnight, & of taking them on those occasions presents of tea, sugar, & other provisions, besides money, amounting in the whole to about £20 a year:—*Held:* the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from the continuance of his son's life as to entitle him to recover damages under the statute; but it was not competent to the jury to award him compensation for the expenses incurred by him for his son's funeral or for family mourning.—DALTON *v.* SOUTH EASTERN RY. CO. (1858), 4 C. B. N. S. 296; 27 L. J. C. P. 227; 31 L. T. O. S. 152; 4 Jur. N. S. 711; 6 W. R. 574; 140 E. R. 1098.

Annotations:—**Apld.** Pym *v.* G. N. Ry. (1863), 4 B. & S. 396. **Consd.** Taff Vale Ry. *v.* Jenkins, [1913] A. C. 1. **Refd.** Read *v.* G. E. Ry. (1868), 9 B. & S. 714; Osborne *v.* Gillett (1873), 28 L. T. 197; Bevan *v.* Crawshay (Cyfartha) (1901), 50 W. R. 98; Bedwell *v.* Golding (1902), 18 T. L. R. 436; Harse *v.* Pearl Life Assce. (1903), 89 L. T. 94; Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648; Barnett *v.* Cohen, [1921] 2 K. B. 461; Baker *v.* Dalgleish S.S. Co., [1922] 1 K. B. 361.

891. Wife living apart from her husband—Wife contingently entitled to considerable property.]—A husband & wife quarrelled, separated, & lived apart without communication for eight years before the wife's death, who was killed at the age of fifty-six, through the negligence of carriers. The wife, had she survived her mother who was aged eighty at the time of the wife's death, would have been absolutely entitled to the sum of £7,000:—*Held:* in an action by the husband against the carriers for damages, under Lord Campbell's Act, 1846 (c. 93), he had no reasonable prospect of pecuniary benefit if his wife's death had not occurred, & was not, therefore, entitled to damages for her death.—HARRISON *v.* LONDON & NORTH-WESTERN RY. CO. (1885), Cab. & El. 540; 1 T. L. R. 519.

Annotation:—**Refd.** Barnett *v.* Cohen, [1921] 2 K. B. 461.

892. Husband under no legal duty to support wife—Wife living in adultery.]—At the trial of an action brought by pltf., as the widow of deceased, under the provisions of Lord Campbell's Act, 1846 (c. 93), s. 2, against defts. for negligence which caused the deceased's death, it appeared that pltf. was at the time of her husband's death, & had for many years previously, been living apart from him in adultery with another man. During the time they were so living apart deceased did not support pltf., though he occasionally gave her small sums of money:—*Held:* the action was not maintainable, inasmuch as pltf. had lost her legal right to support by reason of her adultery, & had no reasonable expectation of pecuniary advantage by deceased remaining alive which could be taken into account by a jury.—STIMPSON *v.* WOOD & SON (1888), 57 L. J. Q. B. 484; 59 L. T. 218; 52 J. P. 822; 36 W. R. 734; 4 T. L. R. 589, D. C.

Annotation:—**Consd.** Barnett *v.* Cohen, [1921] 2 K. B. 461.

893. Daughter nearing completion of apprenticeship—Accustomed to assist mother in business.]—TAFF VALE RY. CO. *v.* JENKINS, No. 885, *ante.*

SUB-SECT. 6.—CONDITIONS LIMITING LIABILITY.

894. Exemption from liability.]—Personal representatives of deceased man cannot maintain an action under Lord Campbell's Act, 1846 (c. 93), where deceased if he had survived would not have been entitled to recover. Defts., a steamship co., issued a passenger's ticket, which contained, amongst others, the following condition: "The co. will not be responsible for any loss, damage, or detention of luggage under any circumstances. manager of a successful & improving school. The three daughters had their home at the school. Two of them assisted their mother, & the third was working as a governess & living away from the school. She sent her earnings to her mother & intended, when the profits made at the school were sufficient, to return to her mother. The death of the mother broke up the school:—*Held:* there was evidence to go to the jury of a prospective loss in all three cases.—BOYLSON *v.* RAILWAYS CHIEF COMRS. (1914), 14 S. R. N. S. W. 220; 32 N. S. W. W. N. 41.—**AUS.**

d. Son having expressed intention of assisting parent.]—STEPHENS *v.* TORONTO RY. CO. (1905), 11 O. L. R. 19; 6 O. W. R. 657.—**CAN.**

e. ——.]—Action to recover damages for death of M. by reason of defts.' negligence, the action being for benefit of mother of M. M. had told pltf., his brother, of his intention to send some money to his mother:—*Held:* it could not be said there was no evidence from which a jury could reasonably make the necessary inference.—MOFFITT *v.* CANADIAN PACIFIC RY. CO. (Alta.) (1909), 11 W. L. R. 608.—**CAN.**

f. Woman supporting husband.]—Where the person killed was a woman survived by a husband in delicate health, by a minor son in delicate health whose professional education was yet incomplete, & by a daughter, twenty-three years of age, who was a teacher, but who, after her mother's death, had to give up her profession in order to attend to her father's household, & where it was shown that deceased was a registered midwife who, by the practice of her profession, had materially assisted in the maintenance of her husband & the maintenance & education of her children:—*Held:* the husband & children were persons who had reasonable expectations of pecuniary benefit from the continued life of deceased.—WELLER *v.* CONKLIN & LAVERGNE (Man.), [1924] 3 W. W. R. 67.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 6.

894 i. *Exemption from liability.*]—ALEXANDER *v.* TORONTO & NIPISSING RY. CO. (1873), 33 U. C. R. 474; 34 U. C. R. 453.—**CAN.**

894 ii. ——.]—TRAWFORD *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1913), 23 W. L. R. 175; 18 B. C. R. 132; 2 W. W. R. 661; 8 D. L. R. 1026.—**CAN.**

. . . The co. will not be responsible for the maintenance of passengers, or for their loss of time or any consequence arising therefrom, . . . nor for any delay arising out of accidents; nor for any loss or damage arising from the perils of the sea, or from machinery, boilers, or steam, or from any act, neglect, or default whatsoever of the pilot, master, or mariner" :—*Held:* the words "loss or damage arising from the perils of the sea," as contained in the above conditions, exempted defts. from liability for injury or loss of life to a passenger occasioned on the voyage by the negligence of defts.' servants.—HAIGH *v.* ROYAL MAIL STEAM PACKET CO., LTD. (1883), 52 L. J. Q. B. 640; 49 L. T. 802; 48 J. P. 230; 5 Asp. M. L. C. 189, C. A.

Annotations:—**Consd.** Travers *v.* Cooper, [1915] 1 K. B. 73. **Refd.** Nunan *v.* Southern Ry., [1924] 1 K. B. 223; Fagan *v.* Green & Edwards, [1926] 1 K. B. 102. **Mentd.** Woodgate *v.* G. W. Ry. (1884), 51 L. T. 826; McCartam *v.* N. E. Ry. (1885), 54 L. J. Q. B. 441.

895. ——.] — A free pass, obtained by an official of another railway co. for himself & wife, from the London & South Western Ry. co. for the journey from London to Jersey, referred, on the face of it, to the following condition printed on the back: "that it shall be taken as evidence of an agreement that the co. are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass." Through the negligence of the servants of the railway co. & during the transit from Southampton to the Channel Islands, the steamer stranded, & the official was drowned. His own, & his wife's, luggage were also lost. The widow on behalf of herself & infant children claimed, against the fund paid by the railway co. into ct. in a limitation suit, for the loss of her husband & father of the children. The registrar disallowed the claim:—*Held:* (1) in respect of the loss of life, as the widow & children could only claim under Fatal Accidents Act, 1846 (c. 93), where, if death had not ensued, the party injured would have been entitled to maintain an action for damages, the conditions on which the free pass was granted, & which deceased must, from his official position, be taken to have known, included the sea passage as well as the land transit & barred the claim; (2) in respect of the claim by the widow, as administratrix of her husband, for the loss of his personal effects, & in her own right, for the loss of her luggage, the condition attaching to the pass equally precluded any claim.

It is conceded that the widow & children can only claim for loss, under Fatal Accidents Act, 1846 (c. 93), where the passenger himself, if alive, could claim for injury done to himself, & the question, therefore, turns on the conditions on which deceased was carried (GORELL BARNES, J.).—THE STELLA, [1900] P. 161; 69 L. J. P. 70; 82 L. T. 390; 16 T. L. R. 306; 9 Asp. M. L. C. 66.

Annotations:—*As to* (1) **Refd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788; Travers *v.* Cooper, [1915] 1 K. B. 73. *As to* (2) **Refd.** Nunan *v.* Southern Ry., [1924] 1 K. B. 223.

896. Limitation of liability to certain sum.]—Where a passenger by railway, who has agreed with the railway co. that their liability for personal injury shall not exceed a certain sum, is killed by the negligence of the co.'s servants, the damages recoverable by his dependants in an action under Lord Campbell's Act, 1846 (c. 93), are not limited to such agreed sum.—NUNAN *v.* SOUTHERN RY. CO., [1924] 1 K. B. 223; 93 L. J. K. B. 140; 130 L. T. 131; 40 T. L. R. 21; 68 Sol. Jo. 139, C. A.

Annotation:—**Mentd.** Venn *v.* Tedesco, [1926] 2 K. B. 227.

SUB-SECT. 7.—DEFENCES.

A. In General.

Defences generally, *see* Part XII., *post.*

897. Voluntary assistance.]—DEGG *v.* MIDLAND RY. CO., No. 15, *ante.*

898. Risk voluntarily incurred.] — Where an injury happens to a servant while in the actual use of an instrument, engine or machine, in the course of his employment, of the nature of which he is as much aware as his master, & the use of which is, therefore, the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Lord Campbell's Act, 1846 (c. 93), recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use.

Where a labourer was killed through the fall of a weight which he was raising by means of an engine to which he attached it by fastening on to it a clip, & the clip had slipped off it:—*Held:* there was no case to go to the jury, in an action by his representative against the master, although it appeared that another & safer mode of raising the weights was usual, & had been discarded by the orders of deft.

A servant cannot continue to use a machine he knows to be dangerous at the risk of his employer (POLLOCK, C.B.).

There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion when, as in this case, the workman has known all the facts & is as well acquainted as the master with the nature of the machinery & voluntarily uses it (BRAMWELL, B.).—DYNEN *v.* LEACH (1857), 26 L. J. Ex. 221; *sub nom.* DYMAN *v.* LEECH, 5 W. R. 490.

Annotations:—**Distd.** Mellors *v.* Shaw (1861), 1 B. & S. 437; Fowler *v.* Lock (1872), L. R. 7 C. P. 272. **Refd.** Watling *v.* Oastler (1871), 40 L. J. Ex. 43.

899. ——.] — While a workman was in the course of his employment descending from an elevated tramway belonging to his employers, his foot slipped, & he fell to the ground, receiving injuries which caused his death. The employers had provided no ladder or other safe means of ascending to & descending from the tramway. In an action brought by the widow of deceased against his employers under Lord Campbell's Act, 1846 (c. 93), to recover damages in respect of his death, the jury found (*a*) that defts. had not exercised due care to have the tramway in a safe & proper condition so as to protect their servants working upon it against unnecessary risks; (*b*) that it was dangerous to descend from the tramway without a ladder; (*c*) that deceased had the same means of knowing that it was dangerous as defts. had; & (*d*) that deceased did know that it was dangerous:—*Held:* in the absence of any finding by the jury that deceased had agreed to undertake the risk of descending from the tramway without a ladder or other safe means of descent, pltf. was entitled to judgment upon the findings of the jury.—WILLIAMS *v.* BIRMINGHAM BATTERY & METAL CO., [1899] 2 Q. B. 338; 68 L. J. Q. B.

Sect. 2.—Statutory liability—Fatal Accidents Acts: Sub-sect. 7, A. & B.]

918; 81 L. T. 62; 47 W. R. 680; 15 T. L. R. 468, C. A.

Annotations:—**Consd.** Abbott *v.* Isham (1920), 90 L. J. K. B. 309. **Apld.** Monaghan *v.* Rhodes, [1920] 1 K. B. 487. **Refd.** Cole *v.* De Trafford, [1918] 2 K. B. 523; Baker *v.* James, [1921] 2 K. B. 674.

Volenti non fit injuria.]—*See* Part X., Sect. 1, *ante*.

900. Absence of duty to deceased.]—If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance if placed upon an ancient way, as a flight of steps, or a projecting flap, no action can be maintained against the person dedicating it for an injury caused thereby. Nor will an action lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before & at the time of the dedication of the highway, & was dedicated to the public before Highway Act, 1835 (c. 50), for an injury to an individual from the giving way of the covering of the area in consequence of the wear & tear occasioned by public user. In 1830, houses were erected on land adjoining a new road constructed at a high level as an approach to a new bridge across the Thames. Between these houses & this road was a space which was covered over, as a means of access to the houses, by a flagging in which were gratings to let light & air to the lower part of the buildings, which formed separate tenements, the entrance to which was upon the lower level at the rear. The space so covered had become, by dedication prior to Highway Act, 1835 (c. 50), a part of the public footway, & was used as such by the public. In 1862, in consequence of a large number of persons congregating upon the spot, the flagging & grating in front of one of the houses, having become weakened by user, gave way, & several persons were precipitated into the area below, a depth of about thirty feet, & one of them was killed. In an action by the widow of deceased, under Fatal Accidents Act, 1846 (c. 93):—*Held:* there being under the circumstances no legal liability on the part of the lessee of the house to keep the surface of this way in repair, the action was not maintainable, the gulf at the side of the causeway being the result of the road being raised by the makers of it, not by the land at the side being excavated by the proprietors of it; & the artificial character of the flagging & grating did not make it more or less a way to be repaired by the parish.

It is for pltf. to make out that deft. has been guilty of the breach of some duty owed to deceased, & that thereby the accident was occasioned (ERLE, C.J.). — ROBBINS *v.* JONES (1863), 15 C. B. N. S. 221; 3 New Rep. 85; 33 L. J. C. P. 1; 9 L. T. 523; 12 W. R. 248; 143 E. R. 768; *sub nom.* ROBINS *v.* JONES, 10 Jur. N. S. 239.

Annotations:—**Refd.** Gautret *v.* Egerton, Jones *v.* Egerton (1867), L. R. 2 C. P. 371; Silverton *v.* Marriott (1888), 59 L. T. 61; Lane *v.* Cox (1896), 66 L. J. Q. B. 193; Cavalier *v.* Pope, [1906] A. C. 428; Ryall *v.* Kidwell, [1914] 3 K. B. 135; Dobson *v.* Horsley, [1915] 1 K. B. 634; Horridge *v.* Makinson (1915), 84 L. J. K. B. 1294; Bromley *v.* Mercer, [1922] 2 K. B. 126; Fairman *v.* Perpetual Investment Bldg. Soc., [1923] A. C. 74. **Mentd.** Hamilton *v.* St. George, Hanover Square (1873), L. R. 9 Q. B. 42.

901. ——.] — GRAY *v.* NORTH-EASTERN RY. CO. & WASHINGTON COLLIERY CO., TUCKER & CO. *v.* NORTH-EASTERN RY. CO. & WASHINGTON COLLIERY CO., No. 42, *ante*.

Necessity for duty.]—*See* Part I., Sect. 2, sub-sect. 1, *ante*.

902. Acceptance of compensation by deceased—In full satisfaction.]—Declaration by pltf. as widow of D. under Lord Campbell's Act, 1846 (c. 93), & Fatal Accidents Act, 1864 (c. 95), against a railway co. for negligence whereby D., a passenger, was injured, of which injuries he died. Plea, that in the lifetime of D., defts. paid him, & he accepted, a sum of money in full satisfaction & discharge of all the claims & causes of action he had against defts. Demurrer, on the ground that the accord & satisfaction with D. was no accord & satisfaction of the claim arising from his death:—*Held:* the cause of action was defts.' negligence, which had been satisfied in deceased's lifetime, & the death of D. did not create a fresh cause of action.—READ *v.* GREAT EASTERN RY. CO. (1868), L. R. 3 Q. B. 555; 9 B. & S. 714; 37 L. J. Q. B. 278; 18 L. T. 822; 33 J. P. 199; 16 W. R. 1040.

Annotations:—**Consd.** Williams *v.* Mersey Docks & Harbour Board, [1905] 1 K. B. 804; British Columbia Elec. Ry. *v.* Gentile, [1914] A. C. 1034; Nunan *v.* Southern Ry., [1923] 2 K. B. 703. **Refd.** Griffiths *v.* Dudley (1882), 9 Q. B. D. 357; Davidsson *v.* Hill, [1901] 2 K. B. 606.

903. Deceased contracting out of benefit.]—It is competent to a workman to contract with his employer not to claim compensation for personal injuries under Employers' Liability Act, 1880 (c. 42). A workman having contracted with his employer for himself & his representatives, & any person entitled in case of death, not to claim any compensation under Employers' Liability Act, 1800 (c. 42), for personal injury whether resulting in death or not:—*Held:* (1) Employers' Liability Act, 1800 (c. 42), s. 1, only affected the contract of service as far as to negative the implication of an agreement by the workman to bear the risks of the employment, & therefore did not render the workman's express contract not to claim compensation invalid; (2) the contract was not against public policy, & the workman's widow, suing for damages under Lord Campbell's Act, 1846 (c. 93), was bound by it.—GRIFFITHS *v.* DUDLEY (EARL) (1882), 9 Q. B. D. 357; 51 L. J. Q. B. 543; 47 L. T. 10; 46 J. P. 711; 30 W. R. 797, D. C.

Annotations:—*As to* (1) **Consd.** Williams *v.* Mersey Docks & Harbour Board (1905), 74 L. J. Q. B. 481. **Distd.** Nunan *v.* Southern Ry., [1923] 2 K. B. 703. **Refd.** Davidsson *v.* Hill, [1901] 2 K. B. 606; Miller *v.* Grand Trunk Ry. of Canada, [1906] A. C. 187; British Columbia Elec. Ry. *v.* Gentile, [1914] A. C. 1034; Haydock *v.* Goodier, [1921] 2 K. B. 384. *Generally*, **Mentd.** Russell *v.* Rudd, [1923] A. C. 309; Dewhurst *v.* Salford Grdns., [1925] Ch. 655.

Contracting out under Workmen's Compensation Acts.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 499 *et seq.*

904. Negligence by servant—Outside course of employment.]—ROHL *v.* METROPOLITAN RY. CO., LTD. (1890), 7 T. L. R. 2.

See, generally, MASTER & SERVANT, Vol. XXXIV., pp. 137 *et seq.*

905. Common employment.] — Colliery proprietors, who possessed a railway in connection with the colliery, ran a train thereon for the carriage of their colliers, free of charge, from the colliery towards their homes after the day's work. One of the colliers while being so carried met his death through an accident occasioned by the

PART XIII. SECT. 2, SUB-SECT. 7.—A.

900 i. *Absence of duty to deceased.*]—DELAHANTY *v.* MICHIGAN CENTRAL RY. CO. (1905), 6 O. W. R. 252; 10 O. L. R. 388.—**CAN.**

903 i. *Deceased contracting out of benefit.*]—A workman may so contract with his employer as to exonerate the latter from liability for negligence, & such renunciation would be an answer to an action under Lord Campbell's Act.—R. *v.* GRENIER (1899), 30 S. C. R. 42.—**CAN.**

903 ii. ——.]—KELLY *v.* REID NEWFOUNDLAND CO. (1903), 8 Nfld. L. R. 584.—**NFLD.**

negligence of servants of his employers engaged in the repair of a bridge over the railway :—*Held :* deceased must as between himself & his employers be deemed to have undertaken the risk of such an accident, & an action could not be maintained against his employers under Lord Campbell's Act, 1846 (c. 93), in respect of his death.—COLDRICK *v.* PARTRIDGE, JONES & CO., LTD., [1910] A. C. 77 ; 79 L. J. K. B. 173 ; 101 L. T. 835 ; 26 T. L. R. 164 ; 54 Sol. Jo. 132, H. L.

——.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 207 *et seq.*

906. Employers paying maximum compensation under Workmen's Compensation Act—With knowledge & consent of deceased's widow—No further liability—Workmen's Compensation Act, 1906 (c. 58), s. 1 (2) (b).]—Pltf. who was the widow of a workman killed by accident arising out of & in the course of his employment, brought an action under the Lord Campbell's Act, 1846 (c. 93), against defts., who had been his employers, charging them with negligence causing her husband's death. The statement of claim alleged that deceased workman left as dependants pltf. & six children ; that all the dependants except pltf. had claimed under above Act, against defts., & that an award had been made apportioning the total sum of £300 equally between the children. Defts. by their defence, after denying the alleged negligence, pleaded that pltf. had by letters from her solr. made a claim on them on behalf of herself & her children for compensation in respect of the death of her husband ; that defts. having by letter admitted liability under above Act, had paid into the county ct. the maximum amount payable under above Act, namely, £300 ; that the children by their next friend had applied to the county ct. for an order for the investment & allotment of the sum of £300 between the dependants, & that the county ct. judge by his award had allotted £50 to each of the children & directed that £45 out of each sum out of £50 should be invested, & out of the residue the sum of 18*s.* a week together with the interest on the invested money should be paid to pltf. for the benefit of the children ; that pltf. throughout was cognisant of the facts & approved of & concurred in the application & attended the hearing & thereat renounced her rights & interest in the sum of £300 in favour of her children, & that the award was made with her consent. The defence stated that defts. would therefore contend that this action was barred & was not maintainable by reason of above sub-sect. It appeared that in the application for allotment the next friend named pltf. as a dependant, but applied for a division among the children only & expressly stated that pltf. did not claim under above Act :—*Held :* on the facts as stated pltf. had made herself a party to the claim for compensation under above Act, & was therefore precluded by above sub-sect. from claiming damages against defts. independently of above Act.—CODLING *v.* MOWLEM (JOHN) & CO., LTD., [1914] 3 K. B. 1055 ; 83 L. J. K. B. 1727 ; 111 L. T. 1086 ; 30 T. L. R. 677 ; 58 Sol. Jo. 783 ; 7 B. W. C. C. 786, C. A.

Annotations :—**Refd.** Bennett *v.* Whitehead, [1926] 2 K. B. 380. **Mentd.** Anderson *v.* Equitable Assce. Soc. of United States (1926), 134 L. T. 557.

Workmen's compensation generally.] — *See* MASTER & SERVANT, Vol. XXXIV., pp. 238 *et seq.*

B. Contributory Negligence.

Contributory negligence generally, *see* Part XI., *ante.*

907. Whether defence to action.]—ARMSWORTH *v.* SOUTH-EASTERN RY. CO., No. 941, *post.*

908. ——.] —An action on Lord Campbell's Act, 1846 (c. 93), for compensating the families of persons killed by accidents, can only be maintained in cases where deceased could have maintained the action, is alive.

If in an action where the death is alleged to have been caused by the negligence of defts.' servants, it be shown that deceased by his own negligence or carelessness contributed to the accident, deft. would be entitled to a verdict. The rule as to this, in actions on this statute, is the same as if the injured party himself had brought the action. —TUCKER *v.* CHAPLIN & HORNE (1848), 2 Car. & Kir. 730, N. P.

909. ——.]—(1) How far the rashness of deceased is an answer to a claim of reparation on the part of his relatives where negligence is established against the master. *Qu. :* whether the English & Scotch laws do not differ on this head.

(2) In England the injury sustained by the accidental death of a relative must, in order to be compensated by the verdict of a jury, be of a pecuniary character. An English jury cannot give damages for affliction. In Scotland the jury administer a solatium to injured feelings.—PATERSON *v.* WALLACE & CO. (1854), 1 Macq. 748 ; 23 L. T. O. S. 249, H. L.

Annotations :—*As to* (1) **Consd.** Bartonshill Coal Co. *v.* Reid (1858), 31 L. T. O. S. 255. **Refd.** Dynen *v.* Leach (1857), 26 L. J. Ex. 221 ; Griffiths *v.* Gidlow (1858), 3 H. & N. 648 ; Fowler *v.* Lock (1872), L. R. 7 C. P. 272. *Generally,* **Refd.** Degg *v.* Mid. Ry. (1857), 26 L. J. Ex. 171 ; Vose *v.* L. & Y. Ry. (1858), 2 H. & N. 728 ; Clarke *v.* Holmes (1862), 7 H. & N. 937 ; Brown *v.* Accrington Co-op. Cottonspinning & Manufacturing Co. (1865), 13 L. T. 94 ; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523 ; Baker *v.* James, [1921] 2 K. B. 674. **Mentd.** Hall *v.* Johnson (1865), 13 W. R. 411.

910. ——.] — By the special rules to be observed in the management of deft.'s colliery the ropes, chains, cages, etc., were to be examined every morning, to see that they were in safe working condition ; & no person was to be allowed to descend or ascend the pit until the ropes & cages were run slowly twice up & down the pit. This precaution was systematically neglected, both to the knowledge of deft. the manager & owner of the colliery, & of S. one of the miners, of whom pltf. was the personal representative. The night before the accident, the rope by which the cage was suspended, was injured by an accidental fire. Next morning S. & other miners

PART XIII. SECT. 2, SUB-SECT. 7.—B.

907 i. *Whether defence to action.*]—RYAN *v.* CANADA SOUTHERN RY. CO. (1886), 10 O. R. 745.—**CAN.**

907 ii. ——.]—HOWIE *v.* DOMINION COAL CO. (1904), 37 N. S. R. 111.—**CAN.**

907 iii. ——.]—While deceased was bringing a bag of grain out of the mill, he passed near a moving vertical shaft in which his overcoat was caught & he was killed. The jury's findings negatived all negligence in deft. Deceased had not taken reasonable care & with proper care he could have avoided the accident. Judgment for deft.—BERTHOLOT *v.* SALESES (1909), 6 E. L. R. 462 ; 39 N. B. R. 144.—**CAN.**

907 iv. ——.]—MERCANTILE TRUST CO. *v.* CANADA STEEL CO. (1912), 22 O. W. R. 568 ; 3 O. W. N. 1467 ; 5 D. L. R. 55.—**CAN.**

907 v. ——.]—LONG *v.* TORONTO RY. CO. (1913), 24 O. W. R. 39 ; 4 O. W. N. 741 ; 10 D. L. R. 300.—**CAN.**

907 vi. ——.] — COOK *v.* GRAND TRUNK RY. CO. (1914), 25 O. W. R. 253 ; 5 O. W. N. 347 ; 31 O. L. R. 183 ; 19 D. L. R. 600 ; 6 O. W. N. 177. —**CAN.**

907 vii. ——.]—BARTLE *v.* G. T. P. R. CO. (Sask.) (1922), 63 D. L. R. 699.—**CAN.**

907 viii. ——.]—No action lies if the proximate cause of the death was deceased's own wrongful act, as he could not in that case have recovered damages if he had survived.—MCFARLAND *v.* STEWART (1900), 19 N. Z. L. R. 22.—**N.Z.**

Sect. 2.—*Statutory liability—Fatal Accidents Acts: Sub-sect.* 7, *B.; sub-sect.* 8, *A., B., C.*

were let down the shaft, without any testing of the rope & tackle. Though they were told it had been injured by fire the night before, & that they had better examine the rope before they went down, they disregarded this warning & got into the cage. The rope broke as it descended, & they were all killed. If the rope had been tested its insufficiency would have been discovered & the men would all have been saved:—*Held:* the negligence of S. materially contributed to the accident, & therefore his representative could not maintain an action under Lord Campbell's Act, 1846 (c. 93).—SENIOR *v.* WARD (1859), 1 E. & E. 385; 28 L. J. Q. B. 139; 32 L. T. O. S. 252; 5 Jur. N. S. 172; 7 W. R. 261; 120 E. R. 954.

Annotations:—**Apld.** Baker *v.* G. W. Ry. (1859), 32 L. T. O. S. 256. **Refd.** Clarke *v.* Holmes (1862), 7 H. & N. 937; Smyly *v.* Glasgow & Londonderry Steam Packet Co. (1868), 16 W. R. 483.

911. ——.]—PYM *v.* GREAT NORTHERN RY. Co., No. 855, *ante.*

912. ——.]—MALCOLM *v.* NORTH WESTERN RY. Co. (1864), 28 J. P. Jo. 724.

913. ——.]—SPRINGETT *v.* BALL, No. 372, *ante.*

914. ——.]—*Semble:* contributory negligence is a defence under Employers' Liability Act, 1880 (c. 42), as before.—STUART *v.* EVANS (1883), 49 L. T. 138; 31 W. R. 706, D. C.

Annotations:—**Apld.** Weblin *v.* Ballard (1886), 17 Q. B. D. 122. **Refd.** Thomas *v.* Quartermaine (1887), 56 L. J. Q. B. 340.

915. ——.]—A workman died from the effects of an injury received during his work. His widow took proceedings under Lord Campbell's Act, 1846 (c. 93), for damages for negligence. The jury gave a verdict in favour of the employers on the ground of contributory negligence. The widow thereupon applied for assessment of compensation under Workmen's Compensation Act, 1906 (c. 58), s. 1 (4). The employers raised the defence that the sect. did not apply to actions under Lord Campbell's Act, 1846 (c. 93):—*Held:* an action under Lord Campbell's Act, 1846 (c. 93), is an action to recover damages for injury by accident within Workmen's Compensation Act, 1906 (c. 58), s. 1 (4).—POTTER *v.* JOHN WELCH & SONS, LTD., [1914] 3 K. B. 1020; 83 L. J. K. B. 1852; 112 L. T. 7; 30 T. L. R. 644; 7 B. W. C. C. 738, C. A.

SUB-SECT. 8.—DAMAGES.

A. In General.

916. Damages not given for loss of legal right.] FRANKLIN *v.* SOUTH EASTERN RY. CO., No. 889, *ante.*

917. ——.]—DALTON *v.* SOUTH EASTERN RY. Co., No. 890, *ante.*

918. Damages for loss of education—& conveniences of life.]—PYM *v.* GREAT NORTHERN RY. Co., No. 855, *ante.*

919. Damages less than compensation recoverable under Workmen's Compensation Act, 1906 (c. 58)—Not inadequate.]—PRICE *v.* GLYNEA & CASTLE COAL & BRICK CO., No. 940, *post.*

920. Applicability of Admiralty rule as to half damages.]—MILLS *v.* ARMSTRONG, THE BERNINA, No. 807, *ante.*

B. Damages by way of Solatium.

921. Not recoverable.]—BLAKE *v.* MIDLAND RY. Co., No. 933, *post.*

922. ——.]—FRANKLIN *v.* SOUTH EASTERN RY. Co., No. 889, *ante.*

923. ——.]—PYM *v.* GREAT NORTHERN RY. Co., No. 855, *ante.*

924. ——.]—ROYAL TRUST CO. *v.* CANADIAN PACIFIC RY. CO., No. 939, *post.*

925. ——.]—PATERSON *v.* WALLACE & CO., No. 909, *ante.*

C. Medical and Funeral Expenses.

926. Whether recoverable—Mourning & funeral expenses.]—DALTON *v.* SOUTH EASTERN RY. CO., No. 890, *ante.*

927. —— ——.]—In the present case, the father, a householder, was bound to reverently bury the body of his daughter, & in my opinion the damages claimed in this respect are damages arising directly from the death of the child. I therefore think that pltf. is entitled to recover the amount awarded for funeral expenses. It is clear that he cannot recover the item in respect of travelling expenses (PHILLIMORE, J.).—BEDWELL *v.* GOLDING & SONS (1902), 18 T. L. R. 436.

Annotation:—**Refd.** Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648.

928. —— ——.]—CLARK *v.* LONDON GENERAL OMNIBUS CO., LTD., No. 845, *ante.*

929. —— **Nursing expenses.**]—BOULTER *v.* WEBSTER, No. 877, *ante.*

D. Loss of Services.

930. Whether damages recoverable.]—(1) The death of a person cannot at common law be made the subject of an action for damages; & this rule extends to the action for loss of service, where the servant is killed on the spot.

(2) *Semble:* Lord Campbell's Act, 1846 (c. 93), does not apply to the action for loss of service.

(3) The defence that the act complained of amounted to a felony does not apply to an action brought against a master for damages sustained through the wrongful act of a servant.—OSBORN

PART XIII. SECT. 2, SUB-SECT. 8.—A.

g. *Distinction between actual & pecuniary damages.*]—The word "actual" in relation to damages recoverable in an action under Fatal Injuries Act has not the same meaning as the word "pecuniary" in an action under Lord Campbell's Act.—O'HENDLEY *v.* CAPE BRETON ELECTRIC LIGHT CO., LTD. (1918), 52 N. S. R. 25; 39 D. L. R. 412.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 8.—B.

921 i. *Not recoverable.*]—On the death of a wife caused by negligence of a railway co., the husband cannot recover damages of a sentimental character.—ST. LAWRENCE & OTTAWA RY. CO. *v.* LETT (1885), 11 S. C. R. 422.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 8.—C.

926 i. *Whether recoverable—Mourning & funeral expenses.*]—MCDONALD *v.* R. (1901), 21 C. L. T. 581; 7 Exch. C. R. 216.

926 ii. —— ——.]—In an action under Fatal Accidents Act, for the death of defts.' servant by their negligence, pltf. has no right to claim for funeral expenses.—MAKARSKY *v.* CANADIAN PACIFIC RY. CO. (1904), 15 Man. L. R. 53.—**CAN.**

926 iii. —— ——.]—TORONTO RY. CO. *v.* MULVANEY (1907), 27 C. L. T. 5; 38 S. C. R. 327.—**CAN.**

926 iv. —— ——.]—ENGLAND *v.* —— (1918), 42 O. L. R. 60; 13 O. W. N. 402.—**CAN.**

926 v. —— ——.]—NARAYEN JETHA *v.* BOMBAY MUNICIPAL COMRS. (1891), I. L. R. 16 Bom. 254.—**IND.**

929 i. —— *Nursing expenses.*]—LAMB *v.* TORONTO & YORK RADIAL RY. CO. (1921), 64 D. L. R. 527; 50 O. L. R. 481.—**CAN.**

929 ii. —— ——.]—In an action under Fatal Accidents Act, 1920, doctor's fees & hospital expenses incurred on behalf of deceased are not recoverable.—MAYER *v.* CITY OF PRINCE ALBERT (Sask.), [1926] 4 D. L. R. 1072; [1926] 3 W. W. R. 662.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 8.—D.

930 i. *Whether damages recoverable.*]—The loss of household services accustomed to be performed by a wife, which would have to be replaced by hired services, is a substantial loss for

v. GILLETT (1873), L. R. 8 Exch. 88 ; 42 L. J. Ex. 53 ; 28 L. T. 197 ; 11 W. R. 409.

Annotations :—As to (1) **Consd.** Jackson *v.* Watson, [1909] 2 K. B. 193 ; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Reid.** Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648 ; Kent *v.* Atkinson, [1923] P. 142. *As to* (2) **Apld.** Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648. **Distd.** Berry *v.* Humm, [1915] 1 K. B. 627. *As to* (3) **Reid.** Smith *v.* Selwyn, [1914] 3 K. B. 98. *Generally,* **Mentd.** Appleby *v.* Franklin (1886), 17 Q. B. D. 93.

931. ——.]—BEDWELL *v.* GOLDING & SONS (1902), 18 T. L. R. 436.

v. London General Omnibus Co.,

932. ——.] —Pltf., a workman earning 38*s.* a week, sued defts. to recover damages for the death of his wife, who was knocked down by a motor taxicab belonging to defts. & instantly killed. The wife had performed the ordinary household duties of a woman in her position, & in consequence of her death pltf. had to employ a housekeeper & to incur extra expenses of management by the housekeeper instead of by his deceased wife. The jury assessed pltf.'s damages at £50 :—*Held :* under Lord Campbell's Act, 1846 (c. 93), the damages recoverable in such an action are not limited to the value of money lost, or the money value of things lost, but include the monetary loss incurred by replacing services rendered gratuitously by the deceased where there was a reasonable prospect of their being rendered freely in the future but for the death, &, therefore, pltf. was entitled to recover the damages assessed by the jury.—BERRY *v.* HUMM & Co., [1915] 1 K. B. 627 ; 84 L. J. K. B. 918 ; 31 T. L. R. 198.

E. Measure of Damages.

See Fatal Accidents Act, 1908 (c. 7), s. 1.

933. Pecuniary loss.]—In an action under Lord Campbell's Act, 1846 (c. 93), by the wife, husband, parent or child of a person killed by misfeasance, the jury in estimating damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only.—BLAKE *v.* MIDLAND RY. CO. (1852), 18 Q. B. 93 ; 21 L. J. Q. B. 233 ; 18 L. T. O. S. 330 ; 16 Jur. 562 ; 118 E. R. 35.

Annotations :—**Apld.** Franklin *v.* S. E. Ry. (1858), 3 H. & N. 211. **Consd.** Rowley *v.* L. & N. W. Ry. (1873), L. R. 8 Exch. 221. **Reid.** Hadley *v.* Baxendale (1854), 9 Exch. 341 ; Read *v.* G. E. Ry. (1868), 9 B. & S. 714 ; The George & Richard (1871), L. R. 3 A. & E. 466 ; Griffiths *v.* Dudley (1882), 47 L. T. 10 ; Day *v.* Markham (1904), 6 W. C. C. 115 ; British Columbia Elec. Ry. *v.* Gentile, [1914] A. C. 1034 ; Union S.S. Co. of New Zealand *v.* Robin, [1920] A. C. 654 ; Barnett *v.* Cohen, [1921] 2 K. B. 461. **Mentd.** Stanton *v.* Collier (1854), 3 E. & B. 274 ; Lynch *v.* Knight (1861), 5 L. T. 291 ; Hebdon *v.* West (1863), 3 B. & S. 579 ; Konrick *v.* Lawrence (1890), 25 Q. B. D. 99.

934. —— Portion of deceased's income enjoyed by claimant.]—GILLARD *v.* LANCASHIRE & YORKSHIRE RY. CO., No. 876, *ante.*

935. —— Policy of insurance on deceased's life.]—HICKS *v.* NEWPORT, ABERGAVENNY & HEREFORD RY. CO. (1857), 4 B. & S. 403,n. ; 122 E. R. 510, N. P.

Annotations :—**Apprvd.** Grand Trunk Ry. of Canada *v.* Jennings (1888), 13 App. Cas. 800. **Reid.** Bradburn *v.* G. W. Ry. (1874), L. R. 10 Exch. 1 ; Baker *v.* Dalgleish S.S. Co., [1921] 3 K. B. 481.

936. —— —— How loss estimated.] — The right conferred by Lord Campbell's Act, 1846 (c. 93), adopted by Consolidated Statutes of Ontario (c. 135), ss. 2 & 3, to recover damages in respect of death occasioned by wrongful act, neglect, or default, is restricted to the actual pecuniary loss sustained by pltf. Where the widow of deceased is pltf., & her husband had made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration. She is benefited only by the accelerated receipt of the amount of the policy, & that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of deceased.—GRAND TRUNK RY. CO. OF CANADA *v.* JENNINGS (1888), 13 App. Cas. 800 ; 58 L. J. P. C. 1 ; 59 L. T. 679 ; 37 W. R. 403 : 4 T. L. R. 752, P. C.

Annotations :—**Apld.** Baker *v.* Dalgleish S.S. Co., [1922] 1 K. B. 361. **Reid.** Royal Trust Co. *v.* Canadian Pacific Ry. (1922), 38 T. L. R. 899.

937. —— Calculated with reference to reasonable expectation of pecuniary benefit—From continuance of life of deceased.]—DALTON *v.* SOUTH EASTERN RY. CO., No. 890, *ante.*

938. —— —— ——.] —FRANKLIN *v.* SOUTH EASTERN RY. CO., No. 889, *ante.*

939. —— —— ——.] —The right to recover compensation by families of persons killed through negligence is restricted to the amount of actual pecuniary benefit which they might reasonably have expected to enjoy had the deceased not been killed. It is not competent to add a compassionate allowance.—ROYAL TRUST CO. *v.* CANADIAN PACIFIC RY. CO. (1922), 38 T. L. R. 899, P. C.

Annotation :—**Reid.** Nunan *v.* Southern Ry., [1923] 2 K. B. 703.

940. —— —— —— Expectation of life of claimant to be considered.]—Where a dependant of a workman killed by accident elects to sue for damages under the Lord Campbell's Act, 1846 (c. 93), instead of taking proceedings for com-

which damages may be recovered, as is also the loss to the children of the care & moral training of their mother.—ST. LAWRENCE & OTTAWA RY. CO. *v.* LETT (1885), 11 S. C. R. 422.—**CAN.**

930 ii. ——.]—COLLINS *v.* CITY OF ST. JOHN (1907), 2 E. L. R. 490 ; 38 N. B. R. 86.—**CAN.**

930 iii. ——.]—ANDERSON *v.* R. (N. B.) (1920), 20 Exch. C. R. 22.—**CAN.**

930 iv. ——.]—TARASOFF *v.* ZILLINSKY (Sask.), [1921] 2 W. W. R. 135.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 8—E.

933 i. *Pecuniary loss.*]—In an action under Lord Campbell's Act, whether there has been pecuniary injury or not & what is a fair compensation are distinct issues in the case of each person for whose benefit the action has been brought ; there may be pecuniary injury in one case & not in the other, & the amount of compensation must be decided as a rule on separate & distinct facts & considerations in the case of each such person.—GIDDINGS *v.* CANADIAN NORTHERN RY. CO. (No. 2), [1921] 3 W. W. R. 21 ; 14 Sask. L. R. 417.—**CAN.**

937 i. —— *Calculated with reasonable expectation of pecuniary benefit—From continuance of life of deceased.*]—Damage should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.—MCDONALD *v.* R. (1901), 21 C. L. T. 581 ; 7 Exch. C. R. 216.—**CAN.**

937 ii. —— —— ——.]—SCARLETT *v.* CANADIAN PACIFIC RY. CO. (1913), 23 O. W. R. 948 ; 4 O. W. N. 718 ; 9 D. L. R. 780.—**CAN.**

937 iii. —— —— ——.] — The amount recoverable is the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed.—ROYAL TRUST CO. *v.* CANADIAN PACIFIC RY. CO. (1922), 67 D. L. R. 518 ; [1922] 3 W. W. R. 24.—**CAN.**

937 iv. —— —— ——.]—It is not necessary to show that pecuniary benefit or other advantage was actually derived by the beneficiary of the deceased person previous to the latter's death ; it is sufficient that there is a reasonable & well-founded expectation of pecuniary benefit, such as can be estimated in money.—MAYER *v.* CITY OF PRINCE ALBERT (Sask.), [1926] 4 D. L. R. 1072 ; 3 W. W. R. 662.—**CAN.**

h. —— *Through wrongful act of third party.*]—Deceased's death was caused by a collision. In an action for pecuniary loss, a claim was included for the value of lost currency notes which deceased was carrying :—*Held :* deft. railway would not be liable for loss resulting from the wrongful act, *e.g.* theft, of a third party such as could not naturally be contemplated as likely to spring from the deft.'s

Sect. 2.—Statutory liability—Fatal Accidents Acts: Sub-sect. 8, E. & F.; sub-sect. 9.]

pensation under the Workmen's Compensation Act, 1906 (c. 58), the judge, in directing the jury on the question of damages, should not refer to the amount of compensation which, having regard to the man's earnings, might have been recovered under that Act, & it is no ground for a new trial that he did not so refer, & that the amount of damages found by the jury was in fact less than the compensation which pltf. might have recovered had she proceeded under Workmen's Compensation Act, 1906 (c. 58).

Where a claim is made for damages under Lord Campbell's Act, 1846 (c. 93), the question not only of the expectation of life of deceased man should be considered, but also the expectation of life of claimant (BANKES, L.J.).—PRICE *v.* GLYNEA & CASTLE COAL & BRICK CO. (1915), 85 L. J. K. B. 1278; 114 L. T. 264; 60 Sol. Jo. 274; 9 B. W. C. C. 188, C. A.

Annotation:—**Refd.** Barnett *v.* Cohen, [1921] 2 K. B. 461.

941. —— —— —— How value of deceased's life calculated.]—(1) In an action by an exor. or administrator under Lord Campbell's Act, 1846 (c. 93), against a party who by his wrongful act, neglect, or default has caused the death of testator or intestate, the damages are not to be estimated according to the value of deceased's life calculated by annuity tables; but the jury should give what they consider a fair compensation.

The proper question for the jury in such cases, is whether the circumstances are such that if deceased instead of meeting his death had been only wounded in consequence of the conduct of deft., he would have been entitled to damages for the injury.

(2) An action will not lie for an injury caused by the neglect of a party where the person injured might by reasonable care have avoided the mischief. —ARMSWORTH *v.* SOUTH-EASTERN RY. CO. (1847), 11 Jur. 758.

Annotations:—*As to* (1) **Apld.** Rowley *v.* L. & N. W. Ry. (1873), L. R. 8 Exch. 221. *Generally,* **Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38.

942. —— —— —— ——.]—At the trial of an action under Lord Campbell's Act, 1846 (c. 93), brought for the benefit of the mother, widow, & children of R., claiming damages from defts. for having by their negligence caused the death of R., it was proved that deceased was under a covenant to pay his mother an annuity of £200 during their joint lives. A witness was then called for pltf., who stated that he was an "accountant," & that he had personal experience as to the mode in which insurance business was conducted. He gave evidence, after referring to certain tables used by insurance offices called the "Carlisle Tables," as to the average duration of life of two persons of the ages of the mother & son respectively, & as to the price for which an annuity for the mother's life could be bought. The admissibility of this evidence was objected to by defts., & was ruled to be admissible. In summing up the judge directed the jury that they might, if they thought proper, calculate the mother's damages by ascertaining what was the sum which would purchase an annuity of £200 for a person of her age, according to the average duration of human life; & that in calculating the widow's & children's damages they might, if they thought proper, take as a guide the period of the probable duration of life of a person of the age of deceased. On the argument of a bill of exceptions tendering to the ruling of the learned judge in admitting the evidence & to his direction to the jury:—*Held:* (1) the witness was competent to give evidence as to the probable duration of life & the price of the annuity, although not an actuary; & the evidence was relevant & properly admitted; (2) the direction to the jury as to the calculation of the mother's damages was wrong; (3) the direction as to the mode of calculating the damages recoverable by the widow & children might be construed as meaning that the probable duration of life of a person of the same age, & in the same circumstance as the deceased, was an element to be taken into the calculation of the jury with the rest of the evidence, & being so construed was correct.—ROWLEY *v.* LONDON & NORTH WESTERN RY. CO. (1873), L. R. 8 Exch. 221; 42 L. J. Ex. 153; 29 L. T. 180; 21 W. R. 869, Ex. Ch.

Annotations:—*As to* (2) **Apld.** Phillips *v.* L. & S. W. Ry. (1879), 5 C. P. D. 280. *As to* (3) **Refd.** Johnston *v.* G. W. Ry., [1904] 2 K. B. 250.

943. —— Plaintiff entitled to pension—Pension from Crown.]—In assessing the damages in an action under the Lord Campbell's Act, 1846 (c. 93), the fact that pltf. is, in consequence of the death, in receipt of a pension from the Crown ought, as a general rule, to be taken into consideration, notwithstanding that the pension is dependent on the voluntary bounty of the Crown. That rule, however, is subject, in cases in which the pension is received under the Navy Pay & Pensions Order, 1920, to the necessity of also taking into consideration the probability that the Minister of Pensions will, in the exercise of the powers conferred by that Order, reduce the pension by the amount of the damages awarded in the action.—BAKER *v.* DALGLEISH S.S. CO., LTD., [1922] 1 K. B. 361; 91 L. J. K. B. 392; 38 T. L. R. 245; 66 Sol. Jo. 318, C. A.

Annotation:—**Refd.** Nunan *v.* Southern Ry., [1923] 2 K. B. 703.

conduct.—SECRETARY OF STATE *v.* GOKAL CHAND (1925), I. L. R. 6 Lah. 451.—**IND.**

k. *Power of court to interfere with jury's verdict—Where damages excessive.*]—Where there is evidence in support of a verdict, upon proper directions to the jury by the judge, a ct. of appeal ought not to interfere with the assessment of damages unless they appear to be so excessive that no reasonable men, upon such evidence, would have awarded such an amount. —GRAND TRUNK RY. CO. *v.* DEPENCIER (1905), Cout. 343.—**CAN.**

l. ——.]—HORSENELL *v.* AUCKLAND ELECTRIC TRAMWAYS CO., LTD. (1909), 29 N. Z. L. R. 389.—**N.Z.**

m. ——.]—ELLIOT *v.* GLASGOW CORPN., [1922] S. C. 146; 59 Sc. L. R. 140.—**SCOT.**

n. *What amounts to excessive damages.*]—RONSON *v.* CANADIAN PACIFIC RY. CO. (1909), 18 O. L. R. 337; 13 O. W. R. 1179.—**CAN.**

o. ——.]—DELYEA *v.* WHITE PINE LUMBER CO. (1912), 21 O. W. R. 665; 3 O. W. N. 823; 2 D. L. R. 863.—**CAN.**

p. ——.]—M'KIERMAN *v.* GLASGOW, [1919] S. C. 407; 56 Sc. L. R. 285.—**SCOT.**

q. *Provision for deceased's dependants—By person not party to action—Whether taken into account.*]—In an action under Lord Campbell's Act, a deft. cannot plead in mitigation of damages, a provision made for deceased person's dependants by deft.'s father, who was not a party to the action.—WORKMEN'S COMPENSATION BOARD *v.* RUTHERFORD, [1926] 4 D. L. R. 635; 59 O. L. R. 364.—**CAN.**

r. *Whether costs deducted from damages.*]—In a case under Fatal Accidents Act, costs as between attorney & client are allowed so that no portion of the damages awarded need be deducted for costs.—NANI BALA SEN *v.* AUCKLAND TUBE CO., LTD. (1925), I. L. R. 52 Calc. 602.—**IND.**

t. *Pecuniary benefit resulting from death—When taken into consideration.*]—In an action under Deaths by Accident Compensation Act, 1880, a pecuniary benefit to those for whom the action is brought, connected with the death in respect of which the action is brought, can only be taken into account in mitigation of damages where such benefit is in a legal sense the result of the death, as where property comes into possession of a family at the death of a parent, acquired or accruing by the death of the parent.—GREYMOUTH-POINT

944. —— —— ——.]—CARLING *v.* LEBBON, [1927] W. N. 123.

F. Apportionment of Damages.

945. Apportionment by jury.]—HICKS *v.* NEWPORT, ABERGAVENNY & HEREFORD RY. CO. (1857), 4 B. & S. 403, n.; 122 E. R. 510, N. P.

Annotations:—**Refd.** Bradburn *v.* G. W. Ry. (1874), L. R. 10 Exch. 1; Grand Trunk Ry. of Canada *v.* Jennings (1888), 13 App. Cas. 800; Baker *v.* Dalgleish S.S. Co. (1921), 126 L. T. 482.

946. ——.]—KIDD *v.* MIDLAND RY. CO. (1877), *Times*, Mar. 27.

947. Apportionment by Chancery Division — Money paid into court—By analogy to Statute of Distribution.]—The widow & administratrix of J. S., who was killed in a railway accident, brought an action against the railway co. under Lord Campbell's Act, 1846 (s. 93), & the co. paid £8,500 into ct. under the Fatal Accidents Amendment Act, 1864 (c. 95), s. 2, which the widow accepted in full. Deceased left four infant children. The widow & children had been entirely dependent for their maintenance on the professional earnings of deceased.

A special case being presented to the Ch. Div. for advice as to the proportion in which the compensation should be divided:—*Held:* by analogy to the Statute of Distributions, the widow should take one third, & the children the remaining two thirds.—SANDERSON *v.* SANDERSON (1877), 36 L. T. 847.

948. —— **Compromise of claim by executors.**]—A sum of money was received from a railway co. by way of compensation by the exors. of a person whose death had resulted from injuries received in an accident on the railway, no action having been brought under Lord Campbell's Act, 1846 (c. 93). The exors. brought an action in the Ch. Div., to which all the relatives of deceased referred to in Lord Campbell's Act, 1846 (c. 93), s. 2, were parties, asking for a declaration as to the persons entitled to the money:—*Held:* the ct. could distribute the fund amongst such of the relatives of deceased as suffered damage by reason of the death, in the same manner as a jury could have done in an action under Lord Campbell's Act, 1846 (c. 93), s. 2.—BULMER *v.* BULMER (1883), 25 Ch. D. 409; 53 L. J. Ch. 402; 32 W. R. 380.

949. Compromise of claims in dual capacity—Apportionment not enforceable.]—The declaration alleged that deft. had brought an action as administrator of pltf.'s mother, whose death was caused by the negligence of a railway co., against the railway co., for the benefit of himself & pltf., according to Lord Campbell's Act, 1846 (c. 93), that deft. under Fatal Accidents Act, 1864 (c. 95), without any apportionment by a jury of the amount of damages payable to pltf. in respect of his interest; & that deft. received the whole of the said sum, & retained it to his own use.

Deft. pleaded that he, being pltf.'s father, had sued the said railway co. in two actions, one for causing injury to himself, & the other under the statute mentioned in the declaration on behalf of himself, pltf., & another child of deft.; that judgment in both actions was obtained in default of plea, that he compromised the said actions for the amount mentioned under a judge's order, in good faith, & believing the terms of the compromise to be the best he could obtain; & that no division or apportionment of the said money was ever required or made:—*Held:* under the circumstances stated in the plea, no action was maintainable at law.—CONDLIFF *v.* CONDLIFF (1874), 29 L. T. 831; 38 J. P. 151; 22 W. R. 325.

SUB-SECT. 9.—PRACTICE AND PROCEDURE.

950. Statement of claim—Amendment by court.]—BARNES *v.* WARD, No. 862, *ante*.

951. —— **Statement as to persons entitled to compensation.**]—BARNES *v.* WARD, No. 862, *ante*.

952. —— **Necessity for allegation of pecuniary damage in claim.**]—CHAPMAN *v.* ROTHWELL, No. 263, *ante*.

953. Verdict not set aside — If evidence in support.]—Applt. recovered damage under Lord Campbell's Act, 1846 (c. 93), for the death of her husband, who was knocked down by a motor lorry belonging to resp. co. The ct. of K. B. in Ireland set aside the verdict & judgment & entered judgment for the co.:—*Held:* the judgment of the trial judge should be restored, since, there being a conflict of evidence, it was impossible to say that there was no evidence on which the jury

ELIZABETH RAILWAY & COAL CO. *v.* McIVOR (1897), 16 N. Z. L. R. 258.—**N.Z.**

a. *Maximum damages when person killed—Whether higher than where person has survived.*]—UNION S.S. CO. OF NEW ZEALAND, LTD. *v.* ROBIN, [1920] A. C. 654, P. C.—**N.Z.**

PART XIII. SECT. 2, SUB-SECT. 8.—F.

945 i. *Apportionment by jury.*]—Where damages have been paid in settlement of an action taken under Lord Campbell's Act the ct. will not, on an application by the mother of certain minors to whom the damages had been agreed to be paid, apportion such damages amongst the dependants, as the apportionment of damages is expressly reserved to a jury.—LOGAN *v.* GREAT NORTHERN RY. CO. OF IRELAND (1910), 44 I. L. T. 190.—**IR.**

b. *Apportionment by court.*]—SHALLOW *v.* VERNON (1875), I. R. 9 C. L. 150.—**IR.**

c. ——.]—DAVY *v.* GRAY (1913), 48 I. L. T. 32.—**IR.**

d. ——.]—Where money is paid into ct. under Fatal Accidents Act, 1846, & accepted in full compensation, by pltfs., one of whom is a minor, the ct. has jurisdiction to apportion the money between the adult & the minor pltf.—CLEARY *v.* LONDON & NORTH WESTERN RY. CO., [1915] 2 I. R. 210.—**IR.**

e. ——.]—As all the persons on whose behalf the action might have been brought were before the ct.:—*Held:* the ct. had an inherent jurisdiction to apportion the amount.—WILSON *v.* GEAR MEAT PRESERVING & FREEZING CO. OF NEW ZEALAND, LTD. (1909), 29 N. Z. L. R. 48.—**N.Z.**

PART XIII. SECT. 2, SUB-SECT. 9.

f. *Statement of claim—Amendment.*]—Where an action under Fatal Accidents Act was not commenced by the exor. or administrator, but by the widow, leave was given at the trial to amend by having the widow sue alternatively as administratrix on condition that deft. should be entitled to object that the action already begun by her & so continued was already barred by s. 512 of the City Act.—MACPHERSON *v.* PRINCE ALBERT (CITY) (1916), 34 W. L. R. 715.—**CAN.**

g. —— *Averment of fraud.*]—To sustain an action under Fatal Accidents Act, 1846, against vendor of machine, by personal representative of a stranger to the contract of sale killed by an accident resulting from the defective construction of the machine, an averment of a fraudulent representation made by the vendor & known & acted on by deceased is necessary.—THOMPSON *v.* LUCAS (1868), 17 W. R. 520.—**IR.**

h. *Effect of Mining Acts.*]—*Held:* the right of action under Lord Campbell's Act is distinct from the right of action arising under the provisions of Mining Act, 1898.—JOHNSON *v.* DEEP LEVEL GOLD MINES OF CHARTERS TOWERS, LTD., [1903] S. R. Q. 190.—**AUS.**

k. *Alternative remedies.*]—R. S. M. 1892, c. 26, supersedes Lord Campbell's Act in this Province, & must be read along with Workmen's Compensation for Injuries Act, 1893, & any action under it must be brought by the exor. or administrator of deceased.—PEARSON *v.* CANADIAN PACIFIC RY. CO. (1898), 12 Man. L. R. 112.—**CAN.**

l. ——.]—GRAND TRUNK RY. CO. *v.* SPEERS (1905), Cout. 347.—**CAN.**

m. ——.]—*Held:* pltf. was not bound to elect at the trial whether he would proceed under Workmen's Compensation Act or under C. S. 1903, c. 79, but the action could be brought & proceeded with under both acts & the damages could be assessed under either act as the evidence might

Sect. 2.—Statutory liability—Fatal Accidents Acts: Sub-sect. 9. Part XIV.]

could found their verdict.—CALMENSON *v.* MERCHANTS' WAREHOUSING CO., LTD. (1921), 90 L. J. P. C. 134; 125 L. T. 129; 65 Sol. Jo. 341, H. L.

Annotation:—**Refd.** Barnett *v.* Cohen, [1921] 2 K. B. 461.

Practice in Admiralty Division.]—*See* ADMIRALTY, Vol. I., pp. 158, 176, 195, 229, Nos. 670, 872, 1099, 1100, 1549–1551.

Enforcement of judgment against married woman trader.]—*See* BANKRUPTCY, Vol. IV., p. 93, No. 839.

Admissibility of statement made at inquest.]—*See* EVIDENCE, Vol. XXII., p. 79, No. 475.

Part XIV.—Criminal Negligence.

See, generally, CRIMINAL LAW, Vols. XIV. & XV.

Negligence causing death.]—*See* CRIMINAL LAW, Vol. XV., pp. 798–802, Nos. 8630–8700.

Neglect of duty causing death.]—*See* CRIMINAL LAW, Vol. XV., pp. 792–798, Nos. 8559–8629.

Contributory negligence—Whether available as defence.]—*See* CRIMINAL LAW, Vol. XV., p. 802, Nos. 8694–8700.

warrant.—WENTZELL *v.* NEW BRUNSWICK & PRINCE EDWARD ISLAND RY. CO. (1915), 43 N. B. R. 475.—**CAN.**

n. *Defence — Amendment.*] — In the statement of defence to an action under Lord Campbell's Act by pltf. to recover damages for the death of her husband, killed owing to the alleged negligence of defts., defts. in their statement of defence denied that pltf. was the widow of deceased, but at the trial moved, upon notice, to withdraw that defence:—*Held:* defts. had a right to withdraw any part of their defence upon payment of the costs thrown away by pltf. owing to that issue being raised.—GORDON *v.* VICTORIA CITY CORPN. (1898), 6 B. C. R. 129.—**CAN.**

o. *Security for costs.*]—An administrator appointed for the purpose of bringing an action for the benefit of another under Fatal Accidents Act, is not a mere nominal pltf. bringing such action for the benefit of somebody else, in the sense of the rule which entitles a deft. to security for costs upon showing that such nominal pltf. is also insolvent.—SHARP *v.* GRAND TRUNK RY. CO., 21 C. L. T. 183; 1 O. L. R. 200.—**CAN.**

p. *Effect of death of beneficiary.*]—Upon the death of the beneficiary on whose behalf an administrator is bringing an action under Fatal Accidents Act, R. S. O. 1897, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative.—MCHUGH *v.* GRAND TRUNK RY. CO. (1901), 21 C. L. T. 581; 2 O. L. R. 600.—**CAN.**

q. *Only one action under Act.*]—MORTON *v.* GRAND TRUNK RY. CO. (1904), 24 C. L. T. 351; 8 O. L. R. 372; 4 O. W. R. 126.—**CAN.**

r. *Particulars.*]—SMITH *v.* REID (1908), 12 O. W. R. 659; 17 O. L. R. 265.—**CAN.**

t. ——.]—In a claim by a parent for compensation for the death of his son, the ct. refused to order pltf., when furnishing particulars of the nature of his claim under Fatal Accidents Act, 1846, s. 4, to state the amount of contributions received from his son.—BEGLEY *v.* KEAYS (1920), 54 I. L. T. 40.—**IR.**

a. ——.]—In an action to recover damages under Fatal Accidents Act, 1846, pltfs. were ordered to give particulars to defts. setting out the nature of the injuries alleged to have caused the death of deceased.—FLANAGAN *v.* BRITISH PETROLEUM CO., LTD., [1926] I. R. 51.—**IR.**

b. *Bringing in third party.*]—PETTIGREW *v.* GRAND TRUNK RY. CO. (1910), 16 O. W. R. 989; 2 O. W. N. 57; 22 O. L. R. 57.—**CAN.**

c. *Whether trial by jury ordered.*]—Compensation to Families of Persons Killed by Accident, R. S. M. 1902, s. 3, contemplates that an action by a representative of a person killed by accident against the person charged with negligence may be tried by a jury, &, if a jury trial would have been ordered in case the person injured had brought the action, then the order should not be refused, because the person died & the personal representative brings the action.—MARION *v.* WINNIPEG ELECTRIC RY. CO. (1911), 21 Man. L. R. 757.—**CAN.**

d. *Finding of contributory negligence by jury—No evidence to support—Rejection of finding by judge.*]—PRESSICK *v.* CORDOVA MINES, LTD. (1913), 24 O. W. R. 631; 4 O. W. N. 1334; 11 D. L. R. 452.—**CAN.**

e. *No right to sue by attorney.*]—LUCIANI *v.* TORONTO CONSTRUCTION CO., LTD. (1913), 24 O. W. R. 381; 4 O. W. N. 1073; 10 D. L. R. 551.—**CAN.**

f. *Claim to share damages—Money paid into court.*]—JOHNSTON *v.* GREAT NORTHERN RY. CO. OF IRELAND (1887), 20 L. R. Ir. 4.—**IR.**

g. *Action pending.*]—In an action under Lord Campbell's Act, brought by widow, & administratrix of deceased, the father & mother of the deceased applied that they might be at liberty to appear at the trial of the action by counsel & solr., & tender evidence as to the amount of their shares of the moneys to be awarded as damages in the action, or in default thereof, that they might be made parties thereto. Order refused.—STEELE *v.* GREAT NORTHERN RY. CO. OF IRELAND (1890), 26 L. R. Ir. 96.—**IR.**

NEGOTIABLE INSTRUMENTS.

See BANKERS AND BANKING; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.

NEUTRALITY.

See CRIMINAL LAW AND PROCEDURE; PRIZE LAW AND JURISDICTION; SHIPPING AND NAVIGATION.

NEW TRIAL.

See COUNTY COURTS; DAMAGES; HUSBAND AND WIFE; MAYOR'S AND CITY OF LONDON COURT; PRACTICE AND PROCEDURE.

NEWSPAPERS.

See COPYRIGHT AND LITERARY PROPERTY; CRIMINAL LAW AND PROCEDURE; LIBEL AND SLANDER; PRESS AND PRINTING.

NEXT FRIEND.

See INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND.

NEXT OF KIN.

See DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; WILLS.

NEXT PRESENTATION.

See ECCLESIASTICAL LAW.

NIGHT.

See CRIMINAL LAW AND PROCEDURE; TIME.

NISI PRIUS.

See COURTS; PRACTICE AND PROCEDURE.

NOBILITY.

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NOMINATION.

See ECCLESIASTICAL LAW; ELECTIONS.

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See LUNATICS AND PERSONS OF UNSOUND MIND.

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Part I.—In General.

See 25 Hen. 8, c. 21; Welsh Church Act, 1914 (c. 91), s. 37; & Notary Public (Welsh Districts) Rules, 1924.

1. Notary a public officer—Sworn into office.]—A notary is a public officer, & is sworn to do his duty as a notary, & in foreign countries the acts of a notary are like the acts of a ct., although that is not so here (ABINGER, C.B.).—BRAIN *v.* PREECE (1843), 11 M. & W. 773; 152 E. R. 1016.

2. Credit of notary.]—HUTCHEON *v.* MANNINGTON, No. 70, *post.*

3. Right to sell goodwill of business.]—*Re* MANCHESTER NOTARIES, KNOTT *v.* BOUTFLOWER, [1922] W. N. 199.

Exemption from jury service.]—*See* JURIES, Vol. XXX., p. 213, No. 3.

Scriveners — Liability in bankruptcy.] — *See* BANKRUPTCY, Vol. IV., p. 18, Nos. 90–94.

PART I.

a. ***Appointment of woman.***]—There is no power to appoint a female practitioner as a notary public.—*Re* KITSON, 1920] S. A. L. R. 230.—AUS.

Part II.—Appointment and Removal.

SECT. 1.—APPOINTMENT.

SUB-SECT. 1.—GENERAL NOTARIES.

See 25 Hen. 8, c. 21, s. 2; Public Notaries Act, 1801 (c. 79), ss. 1–4, 10, 13; Public Notaries Act, 1843 (c. 90), ss. 1, 3–5, 7–9; Public Notaries (Articled Clerks) Act, 1919 (c. 25), ss. 1–4.

4. Conditions of appointment — Apprenticeship to public notary—Necessity for whole time employment.]—An Act of Parliament required, that before a person should be allowed to act as a public notary he should have been admitted & enrolled in the ct. wherein notaries had been usually admitted; & that no person should be enrolled as a public notary unless he should have been bound by contract of apprenticeship to serve for seven years to a public notary, & during that term should have continued in such service; & further, that he should during the whole time & term of service specified in such contract of apprenticeship, or during the space of seven years thereof at least, continue & be actually employed by such public notary in the proper business of a public notary:—*Held:* a party bound apprentice for the term of seven years, who during the whole of that term acted as a banker's clerk daily till five o'clock in the evening, & after that hour went to the notary & presented bills of exchange, & prepared protests, was not actually employed by the public notary during the whole period of seven years within the Act of Parliament, & consequently he was not entitled to act as a notary; & the ct. refused a *mandamus* to the Scriveners' co. to admit such a party to the freedom of the co., in order that he might be admitted to practise as a notary.

A notary in the city of London has many more duties. Almost all the charter-parties are prepared by notaries . . . There is another part of the duty of notaries, & that is, to receive the affidavits of mariners & masters of ships & then to draw up their protests. . . . Besides that, many documents pass before notaries under their notarial seal, which gives effect to them, & renders them evidence in foreign cts., though certainly not in our cts. of common law. There is a great deal, therefore, to be done by a notary perfectly independent of, & distinct from, this mere matter of presenting bills of exchange & drawing up protests (LORD TENTERDEN, C.J.).—R. *v.* SCRIVENERS' Co. (1830), 10 B. & C. 511; 5 Man. & Ry. K. B. 543; 8 L. J. O. S. K. B. 199; 109 E. R. 540.

Annotation:—**Apld.** R. *v.* Scriveners' Co. (1842), 3 Q. B. 939.

5. —— —— —— Concurrent apprenticeship to attorney.]—Public Notaries Act, 1801 (c. 79), enacts, that no person shall be admitted as a public notary unless he shall have been bound to a notary for seven years, & during the whole time & term of service shall continue & be actually employed by such notary. From 1828 to 1837, P. the elder, carried on the business of a notary, & also of an attorney & solr., in the same office, & to an equal extent. In 1828, P. the younger was bound by indenture to serve him as a notary for seven years, & in 1832 was bound to him as an articled clerk in his profession of attorney & solr. P. the younger was employed in both businesses, according to the directions of P. the elder, & served him in both from 1828 to 1837, being employed as much in one as in the other. P. the younger having obtained a *mandamus* to the Scriveners Co. to be admitted a member of that co., in order to practise as a notary, the co. returned, that P. the younger did not continue for seven years in the service of P. the elder as a notary, & that he did not continue to be, & was not, during the said term of seven years, employed by the said P. the elder in the business of a notary. Traverses having been taken on these averments:—*Held:* there was not such a continuance in the service of the notary, or actual employment by him in that capacity, during the seven years, as amounted to a compliance with the statute.—R. *v.* SCRIVENERS' CO. (1842), 3 Q. B. 939; 114 E. R. 769; *sub nom.* SCRIVENERS' CO. *v.* R., 3 Gal. & Dav. 272; 12 L. J. Ex. 492, Ex. Ch.

SUB-SECT. 2.—DISTRICT NOTARIES.

A. The Application.

6. By memorial with certificate of personal fitness.]—*Re* GREAT YARMOUTH NOTARIES, DE LA LYNDE *v.* CHAMBERLIN, [1918] W. N. 113.

7. Who may oppose—Articled clerk.] — An articled clerk who has served his articles, & is entitled to be admitted to practise as a notary, has the same right of opposition to an application for the appointment of an additional notary in a particular district as a notary who has been actually admitted.—WARWICK *v.* COCHRANE, SAME *v.* BELK (1915), 32 T. L. R. 165.

8. Costs of application.]—BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, No. 39, *post.*

9. ——.]—*Re* GREAT YARMOUTH NOTARIES, DE LA LYNDE *v.* CHAMBERLIN, [1918] W. N. 113.

B. Considerations Governing Appointment.

See Public Notaries Act, 1833 (c. 70), ss. 1, 2 & 3.

10. Public convenience — First consideration.] —The Master of the Faculties, in exercising the discretion given to him by Public Notaries Act, 1833 (c. 70), s. 2, in the appointment of notaries public, will, whilst paying due regard to vested interests above all things, consider the convenience & accommodation of the merchants, shipowners, & bankers, carrying on business in the town where it is proposed to appoint additional notaries. Increase of population alone, unless accompanied by an increase of shipping & mercantile business, is not sufficient ground for the appointment of additional notaries.—GRAHAM *v.* SMART (1863), 9 Jur. N. S. 387.

Annotation:—**Folld.** Bailleau *v.* Victorian Soc. of Notaries, [1904] P. 180.

11. —— ——.]—*Re* GREAT YARMOUTH NOTARIES, DE LA LYNDE *v.* CHAMBERLIN, [1918] W. N. 113.

12. —— Evidence of specific inconvenience.]—NORWICH NOTARIES, EATON *v.* WATSON, EATON *v.* HANSELL, [1904] W. N. 24.

13. —— ——.]—*Re* CAMBRIDGE NOTARIES, FEW *v.* KING, [1919] W. N. 249.

14. —— ——.]—*Re* MANCHESTER NOTARIES, KNOTT *v.* BOUTFLOWER, [1922] W. N. 199.

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b. *Considerations governing appointment—Personal fitness of applicant.*]—VAN HEERDEN *v.* CAPE LAW SOCIETY, [1923] P. D. 492.—S. AF

15. Personal fitness of applicant.]—*Re* BIRMINGHAM NOTARIES, *Ex p.* SMITH, DUGGAN *v.* BLAKEMORE, [1920] W. N. 125.

16. Amount of business.]—GRAHAM *v.* SMART, No. 10, *ante*.

17. ——.]—BENNETTS *v.* CHILCOTT (1906), *Times*, Oct. 27.

18. ——.]—*Re* GREAT YARMOUTH NOTARIES, DE LA LYNDE *v.* CHAMBERLIN, [1918] W. N. 113.

19. Population—Increase not in itself sufficient.]—GRAHAM *v.* SMART, No. 10, *ante*.

20. ——.]—BENNETTS *v.* CHILCOTT (1906), *Times*, Oct. 27.

21. ——.]—HALL *v.* WINDER (1906), *Times*, Oct. 27.

22. Support by business interests.]—*Re* BIRMINGHAM NOTARIES, *Ex p.* SMITH, DUGGAN *v.* BLAKEMORE, [1920] W. N. 125.

23. Interest of existing notaries—Subordinate to public interest.]—GRAHAM *v.* SMART, No. 10, *ante*.

24. —— ——.]—HALL *v.* WINDER (1906), *Times*, Oct. 27.

25. —— ——.] — BENNETTS *v.* CHILCOTT (1906), *Times*, Oct. 27.

26. ——.]—*Re* GREAT YARMOUTH NOTARIES, DE LA LYNDE *v.* CHAMBERLIN, [1918] W. N. 113.

27. —— **Support given to application.**] — *Re* MANCHESTER NOTARIES, KNOTT *v.* BOUTFLOWER, [1922] W. N. 199.

28. Number of notaries practising in district.]—HALL *v.* WINDER (1906), *Times*, Oct. 27.

29. —— **Two notaries in one firm.**] — *Re* GREAT YARMOUTH NOTARIES, DE LA LYNDE *v.* CHAMBERLIN, [1918] W. N. 113.

30. —— ——.]—*Re* CAMBRIDGE NOTARIES, FEW *v.* KING, [1919] W. N. 249.

31. —— **Vacancy in usual number.**]—BIRMINGHAM NOTARIES, TUNBRIDGE *v.* MATHEWS, COLMORE *v.* MATHEWS, CLARKE *v.* MATHEWS, [1903] W. N. 158.

32. —— **Where only one notary in practice in locality.**]—*Re* ROCHDALE NOTARIES, HUDSON *v.* BOUTFLOWER, [1910] W. N. 228.

33. —— ——.]—*Re* GATESHEAD NOTARIES, ORD *v.* DIXON, [1922] W. N. 286.

34. Purchase of notarial business immaterial.] —*Re* MANCHESTER NOTARIES, KNOTT *v.* BOUTFLOWER, [1922] W. N. 199.

35. Impending elegibility of articled clerk.]—BIRMINGHAM NOTARIES, TUNBRIDGE *v.* MATHEWS, COLMORE *v.* MATHEWS, CLARKE *v.* MATHEWS, [1903] W. N. 158.

36. ——.]—*Re* CAMBRIDGE NOTARIES, FEW *v.* KING, [1919] W. N. 249.

37. ——.]—*Re* GATESHEAD NOTARIES, ORD *v.* DIXON, [1922] W. N. 286.

SUB-SECT. 3.—ECCLESIASTICAL NOTARIES.

Hen. 8, c. 21 ; Public Notaries Act, 1801 (c. 79), s. 14 ; & Public Notaries Act, 1843 (c. 90), s. 2.

38. Who may be appointed — Registrar of ecclesiastical court—If otherwise personally fit.]—NORWICH NOTARIES, EATON *v.* WATSON, EATON *v.* HANSELL, [1904] W. N. 24.

SUB-SECT. 4.—NOTARIES PRACTISING IN BRITISH DOMINIONS.

See . 8, c. 21, s. 2 ; & Public Notaries (c. 90), s. 4.

39. Considerations governing appointment—Public convenience first consideration.]—(1) The jurisdiction of the Ct. of Faculties to appoint notaries public in the colonies is derived from 25 Hen. 8, c. 21, & neither that nor any other statutory enactment prescribes any qualifications to be possessed by appcts., who in all cases are appointed in the discretion of the Master of the Faculties.

Where a chartered accountant, holding the appointments of official assignee of insolvent estates in the State of Victoria & comr. for taking affidavits in the Supreme Cts. of several States of the Australian Commonwealth, applied to be appointed a notary public for the State of Victoria, & supported his application by an influential memorial & the usual certificate of personal fitness, the Master of the Faculties, though the more recent practice had been to appoint solrs., thought fit in the special circumstances of the case to grant appct. a faculty for his appointment as prayed.

B.'s application is opposed by the Society of Notaries of Victoria on three grounds: (*a*) that there are already enough notaries in the State of Victoria ; (*b*) that B. is not a solr. ; (*c*) that his official position would give him an opportunity of unfair competition with the existing notaries. . . . The present population of Melbourne is said to be about 500,000, & of the whole State of Victoria 1,200,000. I need not say the mercantile business of Melbourne has also vastly increased. It would seem, therefore, that the increase of the number of notaries from twenty to thirty-six is by no means in proportion to the growth of the colony in population & commerce. The question of the proper number of notaries for any particular place is always a difficult point to deal with. The first & controlling consideration must be the convenience of the public. . . . The second ground of opposition is that Mr. B. is not a solr. . . . B. is not a solr., but he holds an official position demanding from its occupant familiarity with legal documents & a certain amount of legal knowledge. He is a comr. of the Supreme Ct. for taking affidavits in four of the Australian States, &, in addition to other evidence that he fulfils the duties of those various offices efficiently, I have a certificate of HOLROYD, J., one of the judges of the Supreme Ct. of Victoria, given on the strength of long personal knowledge, that B. is a fit & proper person to be appointed a notary. . . . There remains the third objection, that B.'s official position gives him special opportunities of competition with other notaries. I think the area of this competition is narrower than was at first supposed by either side. It was suggested as one of the advantages of B.'s appointment that he would be able to notarially attest documents executed by bkpts. for the purpose of vesting their extra colonial property in their trustee in bkpcy. ; but counsel for the opponents, pointed out that in many cases of insolvency B. in his official capacity as assignee would himself be the trustee, & that it would be impossible for him to notarially attest a deed to which he was a party or under which he acquired an interest. In all such cases it is clear another notary must be employed. But whatever substance there may be in the objection, & I am not prepared to say there is none, I do not think I ought because of it to refuse to make an appointment which independently has been shown to my satisfaction to be for the public benefit. It seems to me that any danger of unfair competition, if there be any, arises from a system which the colonial authorities, I doubt not for good & sufficient reasons, have established of allowing a

Sect. 1.—*Appointment: Sub-sects.* 4 & 5. *Sects.* 2 3. *Parts III. & IV. Sects.* 1 & 2.]

gentleman holding B.'s official position to carry on his profession for his own profit at the same time. I think if there is any objection to that system it is a matter entirely for the colonial authorities or legislature, & that I should be going outside my province if I held that because the arrangement in the State of Victoria is what I have described I must refuse to appoint B. a notary (SIR LEWIS DIBDIN).

(2) 25 Hen. 8, c. 21, contains no provision as to costs, & I am informed by the registrar, who has been conversant with the practice here for the last fifty years, that orders for costs are never made in these cases as to the appointments of notaries (SIR LEWIS DIBDIN).—BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, [1904] P. 180; *sub nom. Re* BAILLEAU, 20 T. L. R. 251.

Annotation:—*As to* (1) **Refd.** Fay *v.* Victorian Soc. of Notaries, [1909] P. 15.

40. —— Number of notaries practising in district.]—BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, No. 39, *ante.*

41. —— ——.]—In considering an application by a person to be appointed a notary public in a colonial district, the Master of the Faculties attaches great weight to the views of a society of notaries practising in the district. An appointment was, however, made for Melbourne, in the State of Victoria, notwithstanding the opposition of such a society, on very strong evidence that appct. was personally suitable, & that the number of existing notaries at Melbourne was insufficient for the convenience of the public.—FAY *v.* SOCIETY OF NOTARIES FOR THE STATE OF VICTORIA, [1909] P. 15; 25 T. L. R. 92.

42. —— Qualification as solicitor immaterial.]—BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, No. 39, *ante.*

43. —— Increase of population.]—BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, No. 39, *ante.*

44. —— Increase of trade.]—BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, No. 39, *ante.*

45. —— Competition with existing notaries—Possibility of unfair advantage.]—BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, No. 39, *ante.*

46. —— —— Where public interest not involved.]—BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, No. 39, *ante.*

47. —— Views of local society of notaries.]—FAY *v.* SOCIETY OF NOTARIES FOR THE STATE OF VICTORIA, No. 41, *ante.*

48. —— Personal fitness.]—BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, No. 39, *ante.*

49. —— ——.]—FAY *v.* SOCIETY OF NOTARIES FOR THE STATE OF VICTORIA, No. 41, *ante.*

SUB-SECT. 5.—BRITISH DIPLOMATS AND CONSULS.

See Commissioner for Baths Act, 1889 (c. 10), s. 6: & Commissioner for Baths Act, 1891 (c. 50), s. 2.

Taking evidence by affidavit.]—*See* EVIDENCE, Vol. XXII., pp. 561, 562, Nos. 6086–6089, 6091, 6092, 6097, 6098, 6100, 6103, 6104.

SECT. 2.—REFUSAL TO APPOINT.

See 25 Hen. 8, c. 21, s. 11; & Public Notaries Act, 1843 (c. 90), s. 5.

50. Remedy by mandamus—When granted.]—R. *v.* SCRIVENERS' CO., No. 4, *ante.*

Mandamus generally.]—*See* CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

SECT. 3.—REMOVAL.

See Public Notaries Act, 1801 (c. 79), s. 10; & Public Notaries Act, 1843 (c. 90), s. 9.

51. Court of Faculties—Inherent jurisdiction to remove.]—The Master of the Court of Faculties has inherent jurisdiction to strike the name of any notary public off the roll of notaries public for misconduct.—*Re* CHAMPION, [1906] P. 86; 75 L. J. P. 45; *sub nom. Re* CHAMPION, *Ex p.* PROVINCIAL SOCIETY OF NOTARIES PUBLIC, 22 T. L. R. 264.

Annotation:—**Refd.** *Re* A Notary Public, *Ex p.* Incorporated Soc. of Provincial Notaries Public (1908), *Times*, Dec. 19.

52. —— By what evidence bound—Order of King's Bench striking off roll of solicitors.]—*Re* A NOTARY PUBLIC, *Ex p.* INCORPORATED SOCIETY OF PROVINCIAL NOTARIES PUBLIC (1908), *Times*, Dec. 19.

53. —— —— Report of statutory committee of Law Society—As to findings of fact.]—*Re* A NOTARY PUBLIC, *Ex p.* INCORPORATED SOCIETY OF PROVINCIAL NOTARIES PUBLIC (1908), *Times*, Dec. 19.

54. —— Right of notary to adduce fresh evidence.]—*Re* A NOTARY PUBLIC, *Ex p.* INCORPORATED SOCIETY OF PROVINCIAL NOTARIES PUBLIC (1908), *Times*, Dec. 19.

55. Grounds for removal — Misconduct.]—*Re* CHAMPION, No. 51, *ante.*

56. —— Conviction of criminal offence.]—*Re* PRIOR, *Ex p.* INCORPORATED SOCIETY OF PROVINCIAL NOTARIES PUBLIC OF ENGLAND & WALES, [1908] W. N. 193.

57. —— ——.]—*Re* TERRILL, *Ex p.* INCORPORATED SOCIETY OF PROVINCIAL NOTARIES PUBLIC OF ENGLAND & WALES, [1908] W. N. 194.

Part III.—Functions.

58. Protests—Of bills of exchange.]—R. *v.* SCRIVENERS' CO., No. 4, *ante.*

See, generally, BILLS OF EXCHANGE, Vol. VI., pp. 292 *et seq.*

59. —— Of masters & mariners.]—R. *v.* SCRIVENERS' CO., No. 4, *ante.*

60. —— Duty to make perfect.]—The protest is always an important document. It is the duty of the notary public who draws it to make it a perfect one.—THE HEDWIG (1853), 1 Ecc. & Ad. 19; 6 L. T. 615; *sub nom.* THE HÆDWIG, 17 Jur. 977.

Annotation:—**Mentd.** The Racer (1874), 30 L. T. 904.

61. Matters relating to shipping—Taking affidavits of masters & mariners.]—R. *v.* SCRIVENERS' CO., No. 4, *ante.*

62. —— Preparing & settling charterparties.]—R. *v.* SCRIVENERS' CO., No. 4, *ante.*

Protests of masters & mariners.]—*See* No. 4, *ante.*

.]—*See, further*, SHIPPING.

63. Authenticating documents — By notarial seal.]—R. *v.* SCRIVENERS' CO., No. 4, *ante*.

64. Admissibility of evidence—As to course of business in London.]—*Qu.*: whether a notary may be asked as to the general course of business among notaries in London.—LYSAGHT *v.* BRYANT (1849), 2 Car. & Kir. 1016.

—— **As to foreign law.**]—*See* EVIDENCE, Vol. XXII., p. 627, No. 6920.

Taking statutory declarations.]—*See* Statutory Declarations Act, 1835 (c. 62), ss. 15 & 18; Stamp Duties Management Act, 1891 (c. 38), s. 24; & Revenue Act, 1898 (c. 46), s. 7 (6).

British diplomats & consuls in foreign countries.]—*See* Part II., Sect. 1, sub-sect. 5, *ante*.

Part IV.—Notarial Acts.

SECT. 1.—IN GENERAL.

65. Not order of court — Acts of foreign notaries distinguished.]—BRAIN *v.* PREECE, No. 1, *ante*.

66. Necessity for seal.]—A seal is unnecessary to the validity of a notarial act.—SMYTH *v.* SMYTH (1831), 4 Hag. Ecc. 72; 162 E. R. 1374; *on appeal* (1833), 4 Hag. Ecc. 509.

67. —— Notarial act outside jurisdiction—Certificate of acknowledgment of fine.] — The notarial certificate required in the case of a fine acknowledged in a foreign country, must be under seal; a defect in this particular cannot be supplied by proof of the handwriting of the cognisors.—CRUTTENDEN *v.* BOURBELL (1808), 1 Taunt. 144; 127 E. R. 787.

68. Notarial deed on several sheets—Initials on each sheet not necessary.]—A notarial deed was written on several pieces of paper:—*Held*: each paper did not require the initials of the notary.—HAMEL *v.* PANET (1876), 2 App. Cas. 121; 46 L. J. P. C. 5; 35 L. T. 741, P. C.

69. Certificate of affidavit of commissioners—Must state affidavit to be on oath.]—In a recovery, if the acknowledgment of the vouchees is taken abroad, a notarial certificate made to authenticate the affidavit of the comrs. must distinctly state that the affidavit was sworn.—LAIDLAW *v.* COX (1809), 2 Taunt. 205; 127 E. R. 1055.

SECT. 2.—ADMISSIBILITY IN EVIDENCE.

70. General rule.]—A notary public has credit everywhere; but the certificate of a magistrate of a colony abroad requires evidence to his character.

A notary public by the law of nations has credit everywhere: the ct. therefore will give credit to him (LORD ELDON, C.).—HUTCHEON *v.* MANNINGTON (1802), 6 Ves. 823; 31 E. R. 1327, L. C.

Annotation:—**Refd.** Cole *v.* Sherard (1855), 11 Exch. 482.

71. Bill of exchange—Protest—Attestation of notary sufficient proof.]—A protest needs no other proof but the attestation of a notary public.—ANON. (1699), 12 Mod. Rep. 345; 88 E. R. 1369, N. P.

Annotation:—**Refd.** Cole *v.* Sherard (1855), 11 Exch. 482.

72. —— —— Duplicate from notary's book.]—Where a bill is paid supra protest for the honour of a party to the bill, it is not necessary that the protest shall have been formally drawn up or extended before the payment; but it is sufficient if the bill has in fact been protested, & a declaration that the payment was for honour made before a notary, & these facts recorded in the notarial registers before the payment was made.

The protest may be drawn up or extended at any time; & where protests had been formerly drawn up before payment for honour & sent to Moscow, & an action was brought by the party who had paid for honour, & it was alleged in the declaration that "the bill was duly protested for non-payment, & thereupon pltf. declared before a notary public that he would pay & did pay the said bill under the said protest, it was held, that duplicate protests, made out from the notary's book after the action was brought were primary evidence as much as the protests sent to Moscow, & sufficient to support the allegation in the declaration, it having been proved that a protest in fact took place before the payment, that a declaration that the payment was for honour had been made before a notary, & that these facts had been then recorded in the notary's book.—GERALOPULO *v.* WIELER (1851), 10 C. B. 690; 20 L. J. C. P. 105; 17 L. T. O. S. 17; 15 Jur. 316; 138 E. R. 272.

73. —— Presentment by notary—Due presentment not presumed.]—A presentment of a bill of exchange at the banking house after banking hours, when the house is shut, is not sufficient presentment to charge the drawer; & no inference is to be drawn from the circumstance of the bill being presented by a notary that it had been before

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PART III.

63 i. *Authenticating documents—By notarial seal.*]—An affidavit for use in the ct., sworn before a Notary Public in Ontario, should be authenticated, by his official seal.—BOYD *v.* SPRIGGINS (1889), 17 P. R. 331.—**CAN.**

63 ii. —— ——.]—Copies of foreign notarial acts authenticated by the attestation of the notary are admissible in evidence; the attestation of the notary proves the copies & his seal need not be proved.—FUNIEL *v.* STACKPOOLE (1829), Milw. 247.—**IR.**

c. *Proof of commission.*] — *Held*: under 34 Vict. c. 14 (O) the due taking of a commission, executed in Montreal, was sufficiently proved by an affidavit made before a notary public there, & not before the mayor or chief magistrate as required by C. S. U. C. c. 32, s. 21.—BEARD *v.* STEELE (1877), 34 U. C. R. 43.—**CAN.**

d. *Acknowledgment of deed.*]—TORRENS *v.* CURRY (1882), 22 N. B. R. 342.—**CAN.**

e. *Affidavit.*]—An affidavit sworn before a notary public in Manitoba who had been acting as agent for deft.'s solr., is insufficient under Rule 417.—MCLELLAN *v.* HARRIS (1898), 6 B. C. R. 257.—**CAN.**

f. ——.]—A notary public within the Province of British Columbia has not authority to take an affidavit in an action in the Supreme Ct.—LAITNEN *v.* TYNJALA (1909), 14 B. C. R. 246.—**CAN.**

g. *Document in favour of notary.*]—A notary is not entitled to make a notarial document in his own favour.—JOHNSON *v.* LE GRANGE, [1908] S. C. 823.—**S. AF.**

h. *Care of documents.*]—Carelessness in the custody & preservation of deeds is one of the grossest faults a notary can be guilty of.—INCORPORATED LAW SOCIETY *v.* VAN EYK, [1910] C. P. D. 254.—**S. AF.**

PART IV. SECT. 1.

66 i. *Necessity for seal.*]—When the Notary Public before whom the affidavit of attestation of the witness to a lessee's signature has been sworn has not affixed his notarial seal thereto, the affidavit is defective & useless.—*Re* LAND TITLES ACT, *Re* NORTHERN CROWN BANK (Sask.), [1918] 1 W. W. R. 421.—**CAN.**

PART IV. SECT. 2.

70 i. *General rule.*]—A notarial instrument is admissible, though the notary is not called to support it.—BALFOUR *v.* LYLE (1832), 10 Sh. (Ct. of Sess.) 853.—**SCOT.**

Sect. 2.—Admissibility in evidence. Part V.]

duly presented within banking hours.—ELFORD *v.* TEED (1813), 1 M. & S. 28; 105 E. R. 11.

Annotations:—**Mentd.** Rowe *v.* Young (1820), 2 Bli. 391; Triggs *v.* Newnham (1825), 10 Moore, C. P. 249.

74. Notarial acts outside jurisdiction—Certificate of authority of commissioner of court.]—The ct. refused to allow an affidavit, & notarial certificate of an acknowledgment to be filed, under Fines & Recoveries Act, 1833 (c. 74), s. 85, the affidavit purporting to be sworn before one "G., a comr. for taking affidavits in the ct. of Q. B., Canada West," & the notary certifying him to be a comr. of that ct., & as such, qualified to administer oaths.—*Re* STREET (1845), 2 C. B. 364; 135 E. R. 987.

75. —— Certificate as to act of foreign court—In matters of probate.]—Probate in common form of a will alleged to be valid by the law of a foreign country will be granted, on *primâ facie* proof that the foreign ct. has adopted it as a valid testament; but the certificate of a notary public, referring to some act of a foreign ct., is not sufficient.—*In the Goods of* DESHAIS, *In the Goods of* DE VIGNY (COUNTESS) (1865), 4 Sw. & Tr. 13; 34 L. J. P. M. & A. 58; 12 L. T. 54; 13 L. T. 246; 29 J. P. 233, 247; 13 W. R. 616, 640; 164 E. R. 1419.

76. —— Copy of settlement from notary's book—Certified & sealed by foreign court.]—The Evidence Act, 1898, of New South Wales, which closely follows the Evidence Act, 1851 (c. 99), by s. 21 provides: "Evidence of (*a*) any judgment, decree, rule, order, or other judicial proceeding of any ct. of justice out of New South Wales; or (*b*) any affidavit, pleading, or other legal document filed or deposited in any such ct., may be given by the production of a copy thereof . . . (*d*) sealed with the seal of such ct., . . ."

According to the law of Warsaw, a marriage settlement is always prepared by a notary, the original being contained in his books of record: upon the death of the notary his books are deposited in the Warsaw Circuit Ct. In a suit in New South Wales there were tendered as evidence of the terms of a marriage settlement made in Warsaw in 1879 two documents, namely, (*a*) a document dated in 1885 purporting to be certified by a notary as a copy of a settlement of 1879 in his record, (*b*) a document dated 1915 purporting to be a copy of the settlement from the notary's book, certified & sealed by the Circuit Ct., & stating that the notary being dead his records were kept in the Ct. The two purported copies were in identical terms:—*Held:* neither document was admissible in evidence at common law.—PERMANENT TRUSTEE CO. OF NEW SOUTH WALES *v.* FELS, [1918] A. C. 879; 87 L. J. P. C. 172; 119 L. T. 591, P. C.

77. —— Affidavits — Certifying acknowledgments.]—Affidavits of the acknowledgments of fines & recoveries taken
cated by a notary public; but if a foreign notary makes this rule an instrument of extortion to draw British property into an enemy's country, the ct. will dispense with the notarial certificate. But it must be upon affidavit of the circumstances.—RUDING *v.* MANNING (1810), 2 Taunt. 313; 127 E. R. 1098.

78. —— —— ——.]—The affidavit verifying the certificate of an acknowledgment by a married woman residing in Germany of a conveyance, under Fines & Recoveries Act, 1833 (c. 74), s. 85, may be made by notary public.—PEARSALL *v.* PEARSALL (1840), 1 Man. & G. 973; 133 E. R. 626; *sub nom. Ex p.* PEARSALL, H. & W. 61; *sub nom. Re* PEARSALL, 2 Scott, N. R. 188.

79. —— —— —— Where commissioner of court not available.]—The ct. allowed a certificate of acknowledgment under Fines & Recoveries Act, 1833 (c. 74), s. 85, to be filed under sect. 85, where the affidavit verifying the certificate was sworn before a notary public in the Hebrides, as the affidavit on which the application was made deposed that there was no comr. of the ct. in the Hebrides or nearer than the main land.—*Re* GROOM (1869), 17 W. R. 589.

80. —— —— Without proof of office of notary.]—Affidavits sworn before a public notary in America ordered to be filed without proof of the notary filling that character.—SMITH *v.* DAVIS (1868), 19 L. T. 376; 17 W. R. 69.

81. —— —— Necessity for verification of signature of notary.]—Affidavits had been sworn at a place abroad, 250 miles distant from the nearest British consul, before a notary public, whose appended signature had not been verified by a British consul. The ct. allowed them to be put on the file, on the written consent of the solr. for the other parties to the suit being given to the clerk for records & writs.—LYLE *v.* ELLWOOD, (1872), L. R. 15 Eq. 67; 42 L. J. Ch. 80; 27 L. T. 671; 21 W. R. 69.

—— ——.]—*See, further*, EVIDENCE, Vol. XXII., pp. 529, 558–562, Nos. 5659, 6046–6057, 6067, 6069, 6083, 6096, 6102–6108.

—— **Proof in bankruptcy.**]—*See* BANKRUPTCY, Vol. IV., p. 323, Nos. 3025, 3026.

—— **Copies of documents deposited with notary.**]—*See* EVIDENCE, Vol. XXII., p. 217, Nos. 1895–1899.

Jurat on affidavits.]—*See* EVIDENCE, Vol. XXII., pp 539, 540, Nos. 5799, 5815.

—— **Proof of judicial documents.**]—*See* EVIDENCE, Vol. XXII., p. 631, No. 6947.

Declarations in discharge of duty or in course of business.]—*See* EVIDENCE, Vol. XXII., pp. 110–112, Nos. 818, 822, 826, 834, 843.

Notarial seals.]—*See* EVIDENCE, Vol. XXII., p. 158, Nos. 1350–1358.

Notarial certificates.]—*See* EVIDENCE, Vol. XXII., p. 319, Nos. 3131–3134.

77 i. *Notarial acts outside jurisdiction — Affidavits — Certifying acknowledgments.*]—Affidavits sworn before a notary public in the United States, & "certified under his hand & official seal" can be used on a motion in the Ct. of Ch.—MERCHANTS' EXPRESS CO. *v.* MORTON (1868), 15 Gr. 274.—**CAN.**

77 ii. —— —— —— certificate of the acknowledgment of a deed taken before a notary public was headed "Province of New Brunswick," & stated that the notary had set his hand & affixed his seal thereto at the city of St. John, in the said province:—*Held:* the certificate was *primâ facie* evidence that the person who took the acknowledgment was a notary public at the time; & that the acknowledgment was taken in the province.—DOE d. SEELY *v.* HERRINGTON (1888), 27 N. B. R. 525.—**CAN.**

77 iii. —— —— ——.]—An affidavit sworn out of the Province of British Columbia before a notary public, & certified under his hand & official seal, is admissible.—FIRST NATIONAL BANK *v.* RAYNES (1893), 3 B. C. R. 87.—**CAN.**

k. —— *Copies of documents deposited with notary.*]—A certified copy of a power of attorney to convey lands, etc., from the deposit of notarial records in Lower Canada, under the corporate seal of the Board of Notaries of Montreal, is admissible in evidence, it being presumed that such power of attorney, though not in itself an official document, came officially into the hands of the notary among whose records it was found.—GREY *v.* MCMILLAN (1856), 5 C. P. 400.—**CAN.**

Part V.—Stamp Duties and Fees.

See Public Notaries Act, 1801 (c. 79), s. 13; Public Notaries Act, 1843 (c. 90), s. 5; Solicitors (Clerks) Act, 1844 (c. 86), s. 4; Stamp Act, 1891 (c. 39), ss. 25, 43–45, 47, 48 (b), 90, sched.; & Statutory Rules & Orders, 1923, No. 1611.

82. Notarial instrument.]—A notarial instrument in the form of Sched. H. given by 21 & 22 Vict. c. 76, s. 12, is correctly stamped with a one-shilling stamp.—EGLINTON'S (EARL) TRUSTEES *v.* INLAND REVENUE COMRS. (1865), 3 H. & C. 871; 34 L. J. Ex. 225; 12 L. T. 707; 11 Jur. N. S. 676; 13 W. R. 902; 159 E. R. 777.

NOTICE, CONSTRUCTIVE.

See AGENCY; AGRICULTURE; BANKERS AND BANKING; BANKRUPTCY AND INSOLVENCY; CHOSES IN ACTION; COMPANIES; COPYHOLDS; EQUITY; FRAUDULENT AND VOIDABLE CONVEYANCES; MISREPRESENTATION AND FRAUD; MORTGAGE; TRUSTS AND TRUSTEES.

NOTICE OF DISHONOUR.

See BANKERS AND BANKING; BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

NOTICE TO QUIT.

See AGENCY; AGRICULTURE; LANDLORD AND TENANT; MORTGAGE; REAL PROPERTY AND CHATTELS REAL; SMALL HOLDINGS AND SMALL DWELLINGS; TIME.

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Part I.—Definition, Nature and Characteristics.

SECT. 1.—IN GENERAL.

1. Definition of nuisance — Inconvenience materially interfering with ordinary comfort.] — The first point, disputed or not conceded, is the question whether, as between deft. in his character of a person owning, using, & occupying his parcel of land that has been mentioned, on the one hand, & pltfs. in their characters of owner & occupier of the house, offices, & garden occupied by pltf. P., on the other hand, P. is entitled to an untainted & unpolluted stream of air for the necessary supply & reasonable use of himself & his family there, or, in other words, to have there for the ordinary purposes of breath & life an unpolluted & untainted atmosphere; & there can, I think, be no doubt, upon the facts & law that this question must be answered in the affirmative, meaning by "untainted" & "unpolluted" not necessarily air as fresh, free, & pure as at the time of building pltfs.' house the atmosphere there was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence, a phrase to be understood of course with reference to the climate & habits of England (KNIGHT BRUCE, V.-C.).

The question then arises, whether this is or will be an inconvenience to the occupier of pltfs.' house as occupier of it, a question which must, I think, be answered in the affirmative: though, whether to the extent of being noxious to human health, to animal health, in any sense, or to vegetable health, I do not say nor deem it necessary to intimate an opinion; for it is with a private not a public nuisance that deft. is charged; & both on principle & authority the important point next for decision may properly, I conceive, be thus put; ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes & habits of living, but according to plain & sober & simple notions among the English people? (KNIGHT BRUCE, V.-C.).

It has been suggested as a ground for not interfering with deft. that, in making & burning bricks on his land he is only using his own soil, in a manner at once common & useful & the most convenient to himself. . . . The argument adopted would prove too much (KNIGHT BRUCE, V.-C.).—WALTER *v.* SELFE (1851), 4 De G. & Sm. 315; 20 L. J. Ch. 433; 17 L. T. O. S. 103; 15 Jur. 416; 64 E. R. 849; *affd.* on other grounds (1852), 19 L. T. O. S. 308, L. C.

Annotations:—**Apld.** Soltau *v.* De Held (1851), 2 Sim. N. S. 133. **Folld.** Pollock *v.* Lester (1853), 11 Hare, 266. **Distd.** Cleeve *v.* Mahany (1861), 25 J. P. 819. **Apld.** Crump *v.* Lambert (1867), L. R. 3 Eq. 409. **Distd.** Fanshawe *v.* London & Provincial Dairy Co. (1888), 4 T. L. R. 694; Ridge *v.* Mid. Ry. (1888), 53 J. P. 55. **Consd.** Tinkler *v.* Aylesbury Dairy Co. (1888), 5 T. L. R. 52; Tod-Heatley *v.* Benham (1888), 40 Ch. D. 80. **Apld.** Bellamy *v.* Wells (1890), 60 L. J. Ch. 156; Wise *v.* Metropolitan Electric Supply Co. (1894), 10 T. L. R. 446; Spruzen *v.* Dossett (1896), 12 T. L. R. 246; Bedford *v.* Leeds Corpn. (1913), 77 J. P. 430. **Consd.** Hoare *v.* McAlpine, [1923] 1 Ch. 167. **Reld.** Sheffield United Gas Co. *v.* Sheffield Gas Consumers Co., A.-G. *v.* Sheffield Gas Consumers Co. (1853), 7 Ry. & Can. Cas. 650; Bamford *v.* Turnley (1862), 3 B. & S. 66; Wanstead L. B. of Health *v.* Hill (1863), 13 C. B. N. S. 479; Clarke *v.* Clark (1865), 14 W. R. 115; Luscombe *v.* Steer (1867), 17 L. T. 29; Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109; Raskell *v.* Whitworth (1871), 19 W. R. 804; Goose *v.* Bedford (1873), 21 W. R. 449; White *v.* Jameson (1874), 22 W. R. 761; Fleming *v.* Hislop (1886), 11 App. Cas. 686; Winter *v.* Baker (1887), 3 T. L. R. 569; Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685; Grosvenor & West End Ry. & Terminus Hotel Co. *v.* Hamilton (1894), 71 L. T. 362; Motion *v.* Mills (1897), 13 T. L. R. 427; Lyons *v.* Wilkins, [1899] 1 Ch. 255; Colls *v.* Home & Colonial Stores, [1904] A. C. 179; Rushmer *v.* Polsue & Alfieri, [1906] 1 Ch. 234; Adams *v.* Ursell, [1913] 1 Ch. 269; Bainbridge *v.* Chertsey U. C. (1914), 84 L. J. Ch. 626; Bosworth-Smith *v.* Gwynnes (1919), 122 L. T. 15.

2. —— ——.]—FANSHAWE *v.* LONDON & PROVINCIAL DAIRY CO. (1888), 4 T. L. R. 694.

Annotation:—**Consd.** Tinkler *v.* Aylesbury Dairy Co. (1888), 5 T. L. R. 52.

3. —— ——.]—Defts. had brought & deposited on their land a quantity of house refuse which caused a nuisance to adjoining occupiers by offensive smells & flies, particularly in the summer time & in certain states of the atmosphere & wind. Defts.' evidence was to the effect that at other times no nuisance was occasioned. The ct. granted an injunction, restraining defts. from bringing refuse on their land, so as to occasion a nuisance, & intimated that if defts.' evidence was correct it was possible to bring the refuse on the land at certain times, but that this must be done at defts.' own responsibility, & that the injunction would not hinder them from doing this, so long as they did not occasion a nuisance.

In law, a public nuisance need not be injurious to health. It is not necessary to show that people have been made ill by what has been done. It is sufficient to show that there has been what is called injury to their comfort, a material interference with the comfort & convenience of life of the persons residing in or coming within the sphere of the influence of that which has been done by defts. on their works (JOYCE, J.).—A.-G. *v.* KEYMER BRICK & TILE CO., LTD. (1903), 67 J. P. 434; 1 L. G. R. 654.

4. —— **No legal definition possible.**] — BAMFORD *v.* TURNLEY, No. 111, *post.*

5. —— **Matters substantially offensive to senses —In addition to matters injurious to health.**]—It is an offence under Public Health Act, 1875 (c. 55), s. 47, to keep swine so as to be a "nuisance" in the common law meaning of the term. It is not necessary to such offence that there should be any injury to health.

It appears to me that the word "nuisance" here is used in the ordinary legal sense, & includes, in addition to matters injurious to health, matters substantially offensive to the senses (GROVE, J.).—BANBURY URBAN SANITARY AUTHORITY *v.* PAGE

PART I. SECT. 1.

1 i. *Definition of nuisance—Inconvenience materially interfering with ordinary comfort.*]—It is sufficient to constitute a private nuisance arising from offensive odours that material discomfort & annoyance are occasioned for the ordinary purposes of life according to the ordinary mode & custom of living in this country.—MCINTOSH *v.* CARITTE (1890), N. B. Dig. 654.—**CAN.**

1 ii. —— ——.]—A nuisance is something unwarranted by law, the effect of which is to obstruct or impede the public in the exercise of their rights; & an inconvenience which causes people to go out of their way to avoid it is a nuisance.—R. *v.* HALLETT (1911), 45 I. L. T. 84.—**IR.**

1 iii. —— ——.]—Serious or material interference with the health or even the comfort of an ordinary normal person constitutes a nuisance.—GRAHAM *v.* DITTMANN & SON, [1917] T. P. D. 288.—**S. AF.**

(1881), 8 Q. B. D. 97; 51 L. J. M. C. 21; 45 L. T. 759; 46 J. P. 184; 30 W. R. 415, D. C.

Annotation:—**Folld.** Bishop Auckland L. B. *v.* Bishop Auckland Iron & Steel Co. (1882), 10 Q. B. D. 138.

6. —— Injury to property or comfort.]—A nuisance must be something which diminishes the value of pltfs.' property or interferes with their use or enjoyment of it (GROVE, J.).—SMITH *v.* JAFFRAY (1886), 2 T. L. R. 480, D. C.

7. Whether act amounts to nuisance—Act not nuisance at time done—Whether becoming nuisance by length of time.]—That which is not a nuisance at the time it is done, cannot become so by length of time.

It was proved that two batts or heaps of stones, made use of in throwing & landing nets, had been in the Tweed a time before the memory of man; & although they were admitted to be nuisances now, yet the ct. would not presume that they were so at the time of their erection but on the contrary, intimated an opinion, that the presumption ought to be, that at first they were not nuisances.—R. *v.* BELL (1822), 1 L. J. O. S. K. B. 42.

8. Effect of negligence—Act otherwise lawful.]—*Semble:* it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine in the manner which he deems most convenient & beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as such prejudice does not arise from the negligent or malicious conduct of his neighbour.—SMITH *v.* KENRICK (1849), 7 C. B. 515; 18 L. J. C. P. 172; 12 L. T. O. S. 556; 13 Jur. 362; 137 E. R. 205.

Annotations:—**Consd.** Humphries *v.* Brogden (1850), 12 Q. B. 739; Baird *v.* Williamson (1863), 15 C. B. N. S. 376; Rylands *v.* Fletcher (1868), L. R. 3 H. L. 330. **Distd.** A.-G. *v.* Tomline (1880), 14 Ch. D. 58. **Consd.** Greyvensteyn *v.* Hattingh, [1911] A. C. 355. **Reld.** Chasemore *v.* Richards (1859), 7 H. L. Cas. 349; Scots Mines Co. *v.* Leadhills Mines Co. (1859), 34 L. T. O. S. 34; Hodgkinson *v.* Ennor (1863), 4 B. & S. 229; Crompton *v.* Lea (1874), L. R. 19 Eq. 115; Smith *v.* Fletcher (1874), L. R. 9 Exch. 64; Humphries *v.* Cousins (1877), 2 C. P. D 239; Angus *v.* Dalton (1878), 4 Q. B. D. 162; West Cumberland Iron & Steel Co. *v.* Kenyon (1879), 11 Ch. D. 782; Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Batcheller *v.* Tunbridge Wells Gas Co. (1901), 65 J. P. 680; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822; Hoare *v.* McAlpine (1922), 92 L. J. Ch. 81.

9. —— ——.]—*Held:* on the evidence the use of a house as a day-nursing charity did not by the crying of the children therein amount to an actionable nuisance. *Semble:* an action might lie if in such an institution the children were neglected by the nurse & allowed to cry as much as they liked.—MOY *v.* STOOP (1909), 25 T. L. R. 262.

10. Nuisance definable by local authority—By bye-law.]—A local authority has the power of defining what shall be deemed a nuisance under particular circumstances, & can deal with such by means of a bye-law.—GENTEL *v.* RAPPS, [1902] 1 K. B. 160; 71 L. J. K. B. 105; 85 L. T. 683; 20 Cox, C. C. 104; *sub nom.* GEUTEL *v.* RAPPS, 66 J. P. 117; 50 W. R. 216; 18 T. L. R. 72; 46 Sol. Jo. 69, D. C.

Annotations:—**Apld.** Brabham *v.* Wookey (1901), 18 T. L. R. 99. **Reld.** Moorman *v.* Tordoff (1908), 98 L. T. 416.

11. Nuisance in covenants — Conveyance.] — The purchaser of a piece of land entered into a covenant with the vendor not to do, or suffer to be done, on the land or any part thereof, anything which should be a nuisance to the owners of the adjoining property:—*Held:* the word "nuisance" must be restricted to its technical meaning, & the establishment of a national school, though it might be an annoyance, & cause a depreciation of the adjoining property, was not a legal nuisance which would be restrained by the injunction of this ct. as a breach of the covenant. The ct. in refusing to grant an injunction did so without costs, being satisfied that defts. might have obtained some other site for the schools, where they would have been a less annoyance to the neighbours.—HARRISON *v.* GOOD (1871), L. R. 11 Eq. 338; 40 L. J. Ch. 294; 24 L. T. 263; 35 J. P. 612; 19 W. R. 346.

Annotations:—**Dbtd.** Tod-Heatly *v.* Benham (1888), 40 Ch. D. 80. **Reld.** *Re* Davis & Cavey (1888), 40 Ch. D. 601; Christie *v.* Davey, [1893] 1 Ch. 316. **Mentd.** Nottingham Patent Brick & Tile Co. *v.* Butler (1886), 16 Q. B. D. 778; Sharp *v.* Harrison, [1922] 1 Ch. 502.

12. —— ——.] — When BACON, V.-C., held, as he did in *Harrison* v. *Good*, No. 11, *ante*, that the word nuisance in the covenant meant only that which would be an actionable nuisance without the covenant I doubt whether he gave sufficient weight to the consideration that the whole object of having a covenant against nuisance is to give to the covenantor some protection in addition to what he would have had without the covenant (LINDLEY, L.J.).

There [*Harrison* v. *Good*, No. 11, *ante*] the only word which BACON, V.-C., had to deal with was the word "nuisance," & he expressly decided that case upon that ground. . . . I doubt much whether the covenant here ought to be construed as if the thing to be prohibited must be a nuisance or anything that is a legal nuisance (COTTON, L.J.).—TOD-HEATLY *v.* BENHAM (1888), 40 Ch. D. 80; 58 L. J. Ch. 83; 60 L. T. 241; 37 W. R. 38; 5 T. L. R. 9, C. A.

Annotations:—**Consd.** *Re* Davis & Cavey (1888), 40 Ch. D. 601. **Reld.** Tinkler *v.* Aylesbury Dairy Co. (1888), 5 T. L. R. 52; Wiltshire *v.* Cosslett (1889), 5 T. L. R. 410; Wood *v.* Cooper, [1894] 3 Ch. 671; Our Boys Clothing Co. *v.* Holborn Viaduct Land Co. (1896), 12 T. L. R. 344; Howarth *v.* Armstrong (1897), 77 L. T. 62; Wauton *v.* Coppard, [1899] 1 Ch. 92; Errington *v.* Birt (1911), 105 L. T. 373; Adams *v.* Ursell, [1913] 1 Ch. 269. **Mentd.** Showell *v.* Winkup (1889), 60 L. T. 389.

13. —— ——.]—As a matter of construction, the deed means what it says, and the covenants cannot be held limited to trades or businesses *ejusdem generis* as those previously specially mentioned. . . . What I have to consider is, following in substance the words of COTTON, L.J., in *Tod-Heatly* v. *Benham*, No. 12, *ante*, whether I am satisfied by argument & the evidence before me, that reasonable people living near, having regard to the ordinary use of their houses for pleasurable enjoyment, could & would regard the carrying on of this school in the ordinary way on these premises as causing an injurious, offensive, or disagreeable noise or nuisance. . . . I answer this question in the affirmative (ROMER, J.).—WAUTON *v.* COPPARD, [1899] 1 Ch. 92; 68 L. J. Ch. 8; 79 L. T. 467; 47 W. R. 72; 43 Sol. Jo. 28.

14. —— ——.] — The conveyance of certain lots that formed part of a residential building estate which was subject to certain restrictive stipulations for the general benefit of the estate contained a covenant by the purchaser in accordance with those restrictive stipulations to fence off the lots from a certain road & that such fence should consist of a dwarf wall with iron palisading, & gates either of wood or iron. There was also a covenant that no bricks should be burnt upon the lots & no "building" should be erected thereon for manufacturing purposes "nor for the carrying on of any noisy, noisome, offensive or dangerous

trade or calling," nor as a public-house or retail shop, & no steam-engine should be erected thereon. The purchaser agreed to lease to a co. the exclusive right of posting bills & exhibiting advertisements upon the land originally comprised in his lots, the co. having the right to erect a billposting hoarding thereon. In pursuance of this agreement the co. erected along the boundary of the land a hoarding of a permanent nature 156 ft. long & 15 ft. high, & covered the hoarding with advertisements :—*Held :* (1) the hoarding was a fence other than of the kind required by the covenant ; (2) the carrying on upon the hoarding the trade of billposting was the use of the hoarding for an " offensive trade or calling."—NUSSEY *v.* PROVINCIAL BILL POSTING CO. & EDDISON, [1909] 1 Ch. 734 ; 78 L. J. Ch. 539 ; 100 L. T. 687 ; 25 T. L. R. 489 ; 53 Sol. Jo. 418, C. A.

Annotation :—As to (2) **Refd.** Tubbs *v.* Esser (1909), 26 T. L. R. 145.

—— **Lease.**]—A lease contained a covenant to do nothing to the annoyance or damage of the lessor or his adjoining tenants or occupiers. The lease granted a right of way over a certain passage as then used & enjoyed by the lessee. At the date of the lease the lessee used the passage for the purposes of a business carried on in the premises, & the lessor, who occupied the adjoining premises, used to lock the gate of the passage in the evening, & keep it locked until the morning. Many years afterwards the lessee's representative turned part of the business premises into a place for entertainments & claimed a right of entry to his premises at all hours. The lessor's representative filed a bill for injunction against the nuisance, & against being prevented from locking the gate at night :—*Held :* he was entitled to the injunction asked for.—COLLINS *v.* SLADE (1874), 23 W. R. 199.

Annotation :—**Distd.** Baxendale *v.* North Lambeth Liberal & Radical Club (1902), 87 L. T. 161.

—— ——.]—*See, further*, LANDLORD & TENANT, Vol. XXXI., p. 164, Nos. 2967–2972.

As to breach of covenants for quiet enjoyment generally.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 122 *et seq.*

SECT. 2.—QUESTION OF FACT.

16. General rule.]—The Crown may grant, by letters patent, to a corpn., a town & borough, being *caput portus*, as Portsmouth, & all the lands between the high & low water marks : but this subject matter of grant, as being *jus privatum* in the King, must be subject to the *jus publicum* or public right of the King & people, to the easement of passing & repassing both over the water and the land. Obstructions to such a right may be a nuisance. The question of nuisance is matter of fact.

The question whether a port is straitened by building too far into the water is *questio facti* & not *questio juris*, & it is therefore proper that it should be determined by a jury (RICHARDS, C.B.).—A.-G. *v.* BURRIDGE, PORTSMOUTH HARBOUR CASE (1822), 10 Price, 350 ; 147 E. R. 335.

Annotations :—**Mentd.** A.-G. *v.* Chambers (1854), 4 De G. M. & G. 206 ; A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377.

17. ——.]—R. *v.* SHEPARD, No. 38, *post.*

18. ——.]—By statute, reciting that the river Witham was formerly navigable for lighters, boats, etc. from Lincoln to the sea, but that, by sand & silt brought in by the tide, the outfall had been greatly obstructed, & was in a great measure stopped up, whereby trade & commerce had decayed, powers were given to comrs. for the purpose of restoring the navigation ; & they were authorised, in order for the carrying on & effecting the navigation, to make a new cut through lands adjoining the river, not vested in the comrs. ; & the navigation so made was to be open to all subjects of the realm, paying certain tolls. The comrs. were also empowered, by this & another Act, under certain regulations, to build bridges. The cut was made, & a more direct channel thereby created, through which the waters of the Witham passed to the sea. A co., in whom the powers of the comrs. afterwards became vested by statute, built a bridge, not according to the regulations, & occupying, to some extent, the bed of the new cut. On indictment against them for a nuisance to the river as a public highway, the jury found specially that the co. were guilty of building the bridge, but that it did not obstruct the navigation. On motion to enter the verdict for defts. :—*Held :* (1) the cut was a public navigable river, the obstruction of which was an indictable offence ; (2) building a bridge partly in the bed of a navigable river was not necessarily a nuisance ; (3) the question whether in fact it be so or not in a particular instance was for a jury : & the verdict here, negativing actual obstruction, was, in effect, an acquittal.—R. *v.* BETTS (1850), 16 Q. B. 1022 ; 15 L.T. O. S. 182 ; 4 Cox, C. C. 211 ; 14 J. P. Jo. 318 ; 117 E. R. 1172.

Annotations :—As to (3) **Refd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377 ; Edgware Highway Board *v.* Harrow District Gas Co. (1874), 44 L. J. Q. B. 1.

19. ——.]—The question what is a nuisance is one peculiarly fitted to the investigation of a jury ; & in ordinary cases, where the issue of a suit in equity depends upon a legal right, that right must be ascertained in an action at law before any relief can be granted by this ct.—A.-G. *v.* UNITED KINGDOM ELECTRIC TELEGRAPH CO. (1861), 30 Beav. 287 ; 31 L. J. Ch. 329 ; 5 L. T. 338 ; 8 Jur. N. S. 583 ; 10 W. R. 167 ; 54 E. R. 899.

Annotations :—**Refd.** A.-G. *v.* Cambridge Consumers Gas Co. (1868), 4 Ch. App. 71. **Mentd.** Cubitt *v.* Maxse (1873), 29 L. T. 244.

20. ——.] — BAMFORD *v.* TURNLEY, No. 111, *post.*

21. ——.] — (1) Smoke, unaccompained with noise or with noxious vapour ; noise alone ; & offensive odours alone, although not injurious to health, may severally constitute a nuisance. The material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human

PART I. SECT. 2.

16 i. *General rule.*]—The character of the neighbourhood is an important element in determining the standard of comfort which may be insisted upon. The question of nuisance or no nuisance is a question of fact.—OAKLEY *v.* WEBB (1917), 38 O. L. R. 151.—**CAN.**

16 ii. ——.]—DEWAR *v.* CITY & SUBURBAN RACECOURSE CO., [1899] 1 I. R. 345.—**IR.**

16 iii. ——.]—The question is whether noises amount to a sensible or substantial interferance with the comfort of neighbouring dwellers, according to ordinary sober commonsense standards.—NEW IMPERIAL & WINDSOR HOTEL CO., LTD. *v.* JOHNSON, [1912] 1 Ir. 327.—**IR.**

16 iv. ——.]—A brick-kiln is not necessarily a nuisance, & the question whether it is a nuisance in any given instance must depend on the special circumstances of the case.—DONALD *v.* HUMPHREY (1839), 1 Dunl. (Ct. of Sess.) 1184 ; 14 Fac. Coll. 1206.—**SCOT.**

16 v. ——.] — ROBERTSON *v.* STEWARTS & LIVINGSTONE (1872), 11 Macph. (Ct. of Sess.) 189 ; 45 Sc. Jur. 115.—**SCOT.**

existence. The Ct. of Ch. will restrain the continuance of a nuisance by injunction, wherever substantial damages might be recovered in respect of it by an action at law. An injunction granted to restrain the issuing of smoke & effluvia from a factory chimney, & the making of noise in the factory, although it was situated in a manufacturing town; it being proved that such smoke, effluvia, & noise were a material addition to previously existing nuisances.

The real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence (LORD ROMILLY, M.R.).

(2) The mere discontinuance of a nuisance after the filing of a bill for an injunction is not in itself a ground for dissolving it. Where the nuisance is of a nature to be capable of renewal, the injunction will be made perpetual.

(3) By lapse of time, if the owner of the adjoining tenement, which, in case of light or water, is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbour; but until that time had elapsed, the owner of the adjoining or neighbouring tenement, whether he has or has not previously occupied it—in other words, whether he comes to the nuisance or the nuisance comes to him—retains his right to have the air that passes over his land pure & unpolluted & the soil & produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water (LORD ROMILLY, M.R.).—CRUMP *v.* LAMBERT (1867), L. R. 3 Eq. 409; 15 L. T. 600; 31 J. P. 485; 15 W. R. 417; *affd.*, 17 L. T. 133, L. C.

Annotations:—*As to* (1) **Apld.** Rushmer *v.* Polsue & Alfieri, [1906] 1 Ch. 234. **Reld.** Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109; Roskell *v.* Whitworth (1871), 19 W. R. 804; Chibnall *v.* Paul (1881), 29 W. R. 536; Lyons *v.* Wilkins, [1899] 1 Ch. 255; Bosworth-Smith *v.* Gwynnes (1919), 122 L. T. 15. *Generally*, **Reld.** Grosvenor Hotel Co. *v.* Hamilton (1894), 9 R. 819; Colls *v.* Home & Colonial Stores, [1904] A. C. 179.

22. ——.] — Whether the holding of a market on Monday is a nuisance to a market held on Thursday is a question of fact; but it is, *primâ facie*, a nuisance & ought to be restrained.—ELWES *v.* PAYNE (1879), 12 Ch. D. 468; 41 L. T. 118; 27 W. R. 704; *on appeal*, 12 Ch. D. 475, C. A.

Annotations:—**Reld.** Morpeth Corpn. *v.* Northumberland Farmers' Auction Mart Co., [1921] 2 Ch. 154. **Mentd.** Manchester Corpn. & Citizens *v.* Lyons (1882), 47 L. T. 677; Abergavenny Improvement Comrs. *v.* Straker (1889), 42 Ch. D. 83; Hailsham Cattle Market Co. *v.* Tolman, [1915] 1 Ch. 360.

23. ——.]—An action was raised in the Sheriff Ct. for declarator that the burning of certain heaps of mineral refuse would cause serious nuisance & annoyance to the proprietors of adjacent residential houses. On appeal to the Ct. of Session, that Ct. found that the ignition of the heaps "would cause material discomfort & annoyance":—*Held:* this finding was not upon a question of law, & therefore not the subject of appeal.

It appears to me . . . to follow as a necessary inference of law from that finding of fact, that an interdict against a thing which would cause such material discomfort & annoyance is proper to be granted. The word "material" is of great importance there—it excludes any sentimental, speculative, trivial discomfort or personal annoyance of that kind, a thing which the law may be said to take no notice of & to have no care for (LORD SELBORNE).

It is clear that whether the man went to the nuisance or the nuisance came to the man the rights are the same (LORD HALSBURY, C.).—FLEMING *v.* HISLOP (1886), 11 App. Cas. 686; 2 T. L. R. 360, H. L.

Annotations:—**Reld.** Tinkler *v.* Aylesbury Dairy Co. (1888), 5 T. L. R. 52; Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685; Wise *v.* Metropolitan Electric Supply Co. (1894), 10 T. L. R. 446.

24. ——.]—A.-G. *v.* SMITH (W. H.) & SONS, No. 31, *post*.

——.]—*See, also*, EASEMENTS, Vol. XIX., pp. 134 *et seq.*; HIGHWAYS, Vol. XXVI., pp. 413, 414, 430, 432, Nos. 1331–1334, 1496, 1507.

SECT. 3.—EFFECT OF SURROUNDING CIRCUMSTANCES.

25. Whether act amounts to nuisance.]—To an action for a nuisance, arising from a candle factory, it is no defence that deft. carried on his trade there three years before pltf. became possessed of his premises.

A thing may be a nuisance or not, according to the place in which it is situated; but if any defence arise out of such a state of circumstances, it should be specially pleaded (VAUGHAN, J.).—BLISS *v.* HALL (1838), 4 Bing. N. C. 183; 1 Arn. 19; 5 Scott, 500; 7 L. J. C. P. 122; 132 E. R. 758; *sub nom.* BLISS *v.* HAY, 6 Dowl. 442; 2 Jur. 110.

26. ——.]—All these cases of nuisance or no nuisance arising from particular acts must, from the nature of things, be governed by particular circumstances. If a carriage were to drive up in Belgrave Square, & stand half the day at the door of a house waiting for some person calling there, I do not think that that could be made out to be a nuisance. It may be said to have stayed there an unreasonable time; but it would be difficult indeed to make out that that was a nuisance. Suppose, however, the same thing happened in the narrow part of the street that runs from Covent-Garden to St. Martin's Lane, I do not know that that would not be a nuisance. Each case must be governed by its particular circumstances. The particular place or object in view must be regarded. I take it that all these questions are of this nature, "Are you using that which is the subject-matter of inquiry in a reasonable way & according to the uses for which it was intended?" (LORD CRANWORTH, C.).—A.-G. *v.* SHEFFIELD GAS CONSUMERS CO. (1853), 3 De G. M. & G. 304; 22 L. J. Ch. 811; 21 L. T. O. S. 49; 17 Jur. 677; 1 W. R. 185; 43

PART I. SECT. 3.

25 i. *Whether act amounts to nuisance.*]—SMITH *v.* COUTTS MACHINERY CO., LTD. (Alta.), [1926] 3 W. W. R. 326.—**CAN.**

25 ii. ——.]—In respect of an act producing personal discomfort a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, & the trades carried on around him. A discomfort to be actionable should be substantial. It should be substantial not merely with reference to pltf., but it must be of such a degree that it would be substantial to any person occupying the premises of pltf. irrespective of his position in life, age or state of health.—BIHARI LAL *v.* MACLEAN (1924), I. L. R. 46 All. 297.—**IND.**

25 iii. ——.]—The question whether a certain thing amounts to a nuisance or not ought always to be considered with reference to the general state of circumstances in the place where the grievance complained of arose; an act might, undoubtedly, become a nuisance in one condition of society which would not be so in another.—SKINNER *v.* TARAHAN (1823), 1 Nfld. L. R. 329.—**NFLD.**

25 iv. ——.]—MAGUIRE *v.* M'NEIL (CHARLES), LTD., [1922] S. C. 174.—**SCOT.**

Sect. 3.—*Effect of surrounding circumstances. Sect.* 4: *Sub-sects.* 1 *&* 2, *A. & B.*]

E. R. 119, L. C.; *sub nom.* SHEFFIELD UNITED GAS CO. *v.* SHEFFIELD GAS CONSUMERS CO., A.-G. *v.* SHEFFIELD GAS CONSUMERS CC., 7 Ry. & Can. Cas. 650.

Annotations:—**Refd.** Ellis *v.* Sheffield Gas Consumers' Co. (1853), 22 L. T. O. S. 84; Broadbent *v.* Imperial Gas Co. (1857), 7 De G. M. & G. 436; R. *v.* Longton Gas Co. (1860), 6 Jur. N. S. 601. Biddulph *v.* St. George's Vestry (1863), 3 De G. J. & Sm. 493; Swaine *v.* G. N. Ry. (1864), 4 De G. J. & Sm. 211; A.-G. *v.* Kingston-on-Thames Corpn. (1865), 34 L. J. Ch. 481; Pentney *v.* Lynn Paving Comrs. (1865), 12 L. T. 818; Goldsmid *v.* Tunbridge Wells Improvement Comrs. (1866), 1 Ch. App. 349; Cooke *v.* Forbes (1867), L. R. 5 Eq. 166; Lillywhite *v.* Trimmer (1867), 36 L. J. Ch. 525; Luscombe *v.* Steer (1867), 17 L. T. 229; A.-G. *v.* Cambridge Consumers Gas Co. (1868), 4 Ch. App. 71; A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377: A.-G. *v.* Gee (1870), L. R. 10 Eq. 131; A.-G. & Dommes *v.* Basingstoke Corpn. (1876), 45 L. J. Ch. 726; Smith *v.* Mid. Ry. & L. & Y. Ry. (1877), 37 L. T. 224; Fritz *v.* Hobson (1880), 14 Ch. D. 542; Preston Corpn. *v.* Fullwood L. B. (1885), 53 L. T. 718; Fanshawe *v.* London & Provincial Dairy Co. (1888), 4 T. L. R. 694; Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685; A.-G. *v.* Preston Corpn. (1896), 13 T. L. R. 14; Garton *v.* Guildford Godalming & Woking Joint Hospital Board (1899), 43 Sol. Jo. 205; A.-G. *v.* Brighton & Hove Co-op. Assocn., [1900] 1 Ch. 276; A.-G. *v.* Grand Junction Canal Co., [1909] 2 Ch. 505. **Mentd.** Drake *v.* West (1853), 22 L. J. Ch. 375; Frend *v.* Dennett (1861), 5 L. T. 73; Sutton *v.* S. E. Ry. (1865), L. R. 1 Exch. 32; Pudsey Coal Gas Co. *v.* Bradford Corpn. (1873), 21 W. R. 282; St. Mary, Battersea Vestry *v.* County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31; A.-G. *v.* Wimbledon House Estate Co., [1904] 2 Ch. 34; A.-G. *v.* Scott, [1905] 2 K. B. 160.

27. ——.]—CLEEVE *v.* MAHANY, No. 663, *post.*

28. ——.]—BAMFORD *v.* TURNLEY, No. 111, *post.*

29. ——.]—ST. HELEN'S SMELTING CO. *v.* TIPPING, No. 115, *post.*

30. ——.]—User which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement. This is applicable both to affirmative & negative easements. On this principle the right to make a noise so as to annoy a neighbour cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance. In considering whether any act is a nuisance, regard must be had not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one locality might not be so in another. A confectioner had for more than twenty years used a pestle & mortar in his back premises, which abutted on the garden of a physician, & the noise & vibration were not felt as a nuisance & were not complained of. But in 1873 the physician erected a consulting room at the end of his garden, & then the noise & vibration became a nuisance to him. He accordingly brought an action for an injunction:—*Held:* deft. had not acquired a right to an easement of making a noise & vibration, & the injunction was granted.

Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances (THESIGER, L.J.).—STURGES *v.* BRIDGMAN (1879), 11 Ch. D. 852; 48 L. J. Ch. 785; 41 L. T. 219; 43 J. P. 716; 28 W. R. 200, C. A.

Annotations:—**Consd.** Rushmer *v.* Polsue & Alfieri, [1906] 1 Ch. 234. **Distd.** Wood *v.* Conway Corpn., [1914] 2 Ch. 47. **Refd.** Cooper *v.* Crabtree (1881), 19 Ch. D. 193; Dalton *v.* Angus (1881), 6 App. Cas. 740; Byass *v.* Bettam (1885), 2 T. L. R. 88; London & Brighton Ry. *v.* Truman (1885), 11 App. Cas. 45; Spruzen *v.* Dossett (1896), 12 T. L. R. 246; Owen *v.* Faversham Corpn. (1908), 72 J. P. 404; Bosworth-Smith *v.* Gwynnes (1919), 122 L. T. 15. **Mentd.** Hollins *v.* Verney (1884), 13 Q. B. D. 304; Harris *v.* De Pinna (1886), 33 Ch. D. 238; Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685; Union Lighterage Co. *v.* London Graving Dock Co., [1901] 2 Ch. 300; Foster *v.* Warblington U. C., [1906] 1 K. B. 648; Lyell *v.* Hothfield, [1914] 3 K. B. 911; Liverpool Corpn. *v.* Coghill, [1918] 1 Ch. 307.

31. ——.]—Messrs. S. & Sons, a firm of wholesale stationers, had business premises at the corner of Arundel-street, Strand. The highway authority for the city of Westminster expended £500,000, in widening the Strand at this point. Messrs. S. & Sons then allowed their vans to occupy a strip of roadway 62 feet in length in front of their premises, extending 14 feet from the kerb; these vans were there constantly throughout the day for the purpose of loading & unloading. An action was brought to restrain defts. from causing a nuisance to the public thereby. The ct. held upon the evidence that the character of defts.' user was legitimate & not excessive for the purposes of their business; & that, having regard to the width of the road at this point, there was no nuisance to the public:—*Held:* the question whether the user was reasonable or not was a question of fact & not of law; & having regard to the above findings, defts.' user was reasonable, & the action must be dismissed.—A.-G. *v.* SMITH (W. H.) & SONS (1910), 103 L. T. 96; 74 J. P. 313; 26 T. L. R. 482; 8 L. G. R. 679.

SECT. 4.—ESSENTIAL FACTORS.

SUB-SECT. 1.—INJURIA OR WRONGFUL ACT.

32. Necessity for.] — GLOUCESTER GRAMMAR SCHOOL CASE (1410), Y. B. 11 Hen. 4, fo. 47, pl. 21.

Annotations:—**Consd.** Keble *v.* Hickeringell (1707), Kel. W. 273. **Mentd.** R. *v.* Patrick (1667), 2 Keb. 164; Allen *v.* Flood, [1898] A. C. 1.

33. ——.]—FARMER & BROOKS CASE (1589), 1 Leon. 142; Owen, 67; 74 E. R. 132.

Annotations:—**Refd.** Mitchell *v.* Reynolds (1711), 1 P. Wms. 181. **Mentd.** Paine *v.* Partrich (1691), Carth. 191.

34. ——.]—Where, in case pltf. alleged in his declaration that he was possessed of a messuage & premises, & by reason thereof entitled to the use of a stream of water running through the premises for supplying the same with water; & that deft. erected a certain dam higher up the stream, & thereby prevented the water from running in its usual course, in its usual calm & smooth manner, & thereby the water ran in a different channel, & with greater violence, & injured the banks & premises of pltf.; & on issue joined on a plea of not guilty, the jury found that pltf.'s banks & premises were not injured by the dam erected by deft.; but added, that deft. had no right to stop the water in the summer time; the judge ordered the verdict to be entered for deft.:—*Held:* pltf. could not recover damages for the mere erection of a dam, but was bound to allege & prove that he had sustained an injury from the want of a sufficient quantity of water.

It is true that in trespass for a wrongful entry into the land of another, a damage is presumed to have been sustained, though no pecuniary damage be actually proved. So in the case of an action for the obstruction of a right of common, or a right of way, any obstruction of that right is a sufficient cause of action. The doing of any act calculated to injure that right is a sufficient ground of action, (LITTLEDALE, J.).—WILLIAMS *v.* MORLAND (1824), 2 B. & C. 910; 4 Dow. & Ry. K. B. 583; 2 L. J. O. S. K. B. 191; 107 E. R. 620.

Annotations:—**Consd.** Mason *v.* Hill (1833), 5 B. & Ad. 1. **Refd.** Arkwright *v.* Gell (1839), 5 M. & W. 203; Chasemore *v.* Richards (1859), 7 H. L. Cas. 349; Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566; Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141.

35. ——.]—H. demised adjoining lead mines to the S. co. & to the L. co., the latter being in a higher level. The leases were substantially the same, & the lease to the S. co. contained a clause "reserving always to H. & his tenants the L. co., or other tenants of their lands, the use of all levels in the S. grounds, with power of sinking & driving within the whole grounds in so far as the same can be done without incommoding or interrupting the S. co.'s own proper works." The L. co. having altered their mode of working within their own limits, whereby they caused an increased flow of water into the levels of the S. co. & other damage:—*Held:* the S. co. were not entitled to an injunction to restrain the L. co. from so altering their works within their own limits, for the latter co. were entitled to work in their own way, & any damage caused by the L. co. was *damnum absque injuriâ;* but if the alteration had been made by sinking & boring in the S. grounds it would have been otherwise.—SCOTS MINES CO. *v.* LEADHILLS MINES CO. (1859), L. T. O. S. 34, H. L.

36. ——.]—Deft.'s canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defts. were authorised to take land compulsorily & construct the canal, doing as little damage as might be, & to do all things necessary for making & preserving & using the canal, making satisfaction for all damages to be sustained by the owners of lands & hereditaments taken or prejudiced by the execution of the powers of the Act. Comrs. were appointed who were to determine from time to time what sum should be paid for the purchase of lands, & also to determine what other distinct sum should be paid by defts. as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals; provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months' notice to defts., who might inspect the mines & might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defts. to inspect the mines the owners were authorised to work them.

The canal having been constructed & used for many years, pltf., who was owner of coal mines under the canal, gave defts. proper notice of his intention to work them; defts. did not inspect & refused to purchase. Pltf. proceeded to work the mines, without regard to the surface, & without attempting to support it, & knowing that the effect would be to let down the surface, & probably disturb the strata, & that there was danger of the water escaping from the canal into the mines; but, except as above, pltf. did not work his mines in any negligent or unskilful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, & without doing so he could not have obtained the full benefit of his coal. The canal was in good order when pltf. commenced working his coal; & defts. did all they could to keep the canal watertight, by puddling, etc. During part of the time, while pltf.'s working was going on, they had damned back the water, & so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for pltf. to work out his coal. Defts. were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated, & the water of the canal escaped through the cracks & flooded the workings, & pltf. was obliged to abandon his coal. Pltf. thereupon brought an action, charging that defts. having brought water into the canal, so carelessly & improperly managed the canal & the water, that the water escaped & flooded pltf.'s mine. On the above facts, the ct. having power to draw inferences:—*Held:* an action of tort could not be maintained.

Semble: pltf. was entitled to compensation under the Act.—DUNN *v.* BIRMINGHAM CANAL CO. (1872), L. R. 8 Q. B. 42; 42 L. J. Q. B. 34; 27 L. T. 683; 21 W. R. 266, Ex. Ch.

Annotations:—**Consd.** Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418; Green *v.* Chelsea Waterworks Co. (1894), 70 L. T. 547. **Reld.** Evans *v.* M. S. & L. Ry. (1888), 36 W. R. 328.

37. ——.]—MAXEY DRAINAGE BOARD *v.* GREAT NORTHERN RY. CO., No. 611, *post.*

Damnum absque injuriâ.]—*See* ACTION, Vol. I., pp. 29 *et seq.*

SUB-SECT. 2.—LOSS OR DAMAGE.

A. In General.

38. Necessity for proof.]—An encroachment on the banks of a navigable river is not necessarily a nuisance; but the jury ought, on the facts of the case, to say whether the public are in any way inconvenienced; for, if they are not, then it is not a nuisance.—R. *v.* SHEPARD (1822), 1 L. J. O. S. K. B. 45.

·.]—*See, also,* Nos. 39–50, *post.*

When damage presumed.]—*See* Nos. 51–61, *post.*

B. Degree of Damage

39. Material or substantial damage.]—In an action on the case for placing lighted brimstone in a church tower, whereby pltf., who, with others, was ringing the bells, was annoyed by the fumes; deft. pleaded (*a*) the general issue; & (*b*) that pltf. was wrongfully in the church tower, making a disturbance, & that the rector requested him to depart, & that, as he would not, deft., by the command of the rector, placed & lighted the brimstone, to cause pltf. to depart:—*Held:* (1) to support the special plea, evidence must be given of the request to depart, & also of the rector's authority to deft. to put the brimstone; also (2) to entitle pltf. to a verdict on the general issue, the jury must be satisfied that pltf. sustained some substantial damage from the fumes of the brimstone.—EVANS *v.* LISLE (1836), 7 C. & P. 562.

40. ——.]—In an action on the case for disturbing pltf. in the use of a well, by putting rubbish into it, pltf. will be entitled to recover, if, by means of the rubbish, the water has been shallowed, & the well rendered less convenient for use; but if the effect only was to make the water temporarily muddy, that is too minute a damage

PART I. SECT. 4, SUB-SECT. 2.—A.

38 i. *Necessity for proof.*]—In an action concluding solely for damages & under an issue whether certain operations of defenders have been "to the nuisance of the pursuer & to his loss, injury & damage" unless he prove "damage" he is not entitled to a verdict.—COLLINS *v.* HAMILTON (1837), 15 Sh. (Ct. of Sess.) 895.—SCOT.

Sect. 4.—Essential factors: Sub-sect. 2, B. & C.]

to support the action.—TAYLOR *v.* BENNETT (1836), 7 C. & P. 329.

Annotation:—**Apld.** Burbeary *v.* Shepherd (1843), 1 L. T. O. S. 59.

41. ——.]—Defts., who were the owners of the soil adjoining a harbour, were indicted for a nuisance, in erecting planks in it; a special verdict was found, but it did not distinctly appear by the verdict whether the erection was in the harbour or not. The verdict found, that "by defts.' works, the harbour is in some extreme cases rendered less secure." Assuming the erection to have been in the harbour:—*Held:* consequences so slight, resulting from the acts of defts., did not amount to a nuisance.—R. *v.* TINDALL (1837), 6 Ad. & El. 143; 1 Nev. & P. K. B. 719; Will. Woll. & Dav. 316; 6 L. J. M. C. 97; 1 J. P. 139; 112 E. R. 55.

Annotations:—**Dbtd.** R. *v.* Russell (1854), 18 Jur. 1022. **Refd.** R. *v.* United Kingdom Electric Telegraph Co. (1862), 6 L. T. 378.

42. ——.]—SCOTT *v.* FIRTH, No. 114, *post.*

43. ——.]—A person may build a chimney in front of your drawing room, & the smoke from it may annoy you, or he may carry on a trade next door to your house the noise of which may be inconvenient; but unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is in itself a lawful act (ERLE, C.J.).—SMITH *v.* THACKERAH (1866), as reported in L. R. 1 C. P. 564.

Annotations:—**Refd.** Hall *v.* Bristol Corpn. (1867), 36 L. J. C. P. 110; Richards *v.* Jenkins (1868), 18 L. T. 437; Mitchell *v.* Darley Main Colliery Co. (1884), 14 Q. B. D. 125; A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301.

44. ——.]—Defts., in the exercise of their statutory powers, sunk a shaft in land adjacent to pltf.'s house, & for this purpose employed certain lift pumps, the noise of which seriously interfered with pltf.'s comfort. Pltf. having commenced an action for nuisance defts. substituted centrifugal pumps, which diminished the noise of the pumping. When the sinking of the shaft was commenced, it became necessary to lower & lengthen the pumps from time to time, but at the date when the centrifugal pumps were substituted, the sinking of the shaft had arrived at a point at which this operation had ceased to be necessary. Defts. might have used centrifugal pumps from the commencement, but they were less convenient on account of the difficulty of lowering & lengthening them, & on account of the increased labour attending their use, & they were not the pumps ordinarily used in sinking shafts:—*Held:* the annoyance being temporary & for a lawful object did not amount to a nuisance at law; & the authority conferred on defts. to sink the shaft included all things reasonably necessary for the execution of the work.

It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours; but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. . . . For the law in judging what constitutes a nuisance does take into consideration both the object & duration of that which is said to constitute a nuisance (VAUGHAN WILLIAMS, J.).—HARRISON *v.* SOUTHWARK & VAUXHALL WATER CO., [1891] 2 Ch. 409; 60 L. J. Ch. 630; 64 L. T. 864.

Annotations:—**Apld.** Gosnell *v.* Aerated Bread Co. (1894), 10 T. L. R. 661. **Distd.** Colwell *v.* St. Pancras B. C., [1904] 1 Ch. 707. **Apld.** Clark *v.* Lloyds Bank (1910), 79 L. J. Ch. 645; Phelps *v.* London Corpn., [1916] 2 Ch. 255. **Refd.** Knight *v.* Isle of Wight Electric Light & Power Co. (1904), 73 L. J. Ch. 299; Price Patent Candle Co. *v.* L. C. C. (1908), 7 L. G. R. 84; Odell *v.* Cleveland House (1910), 102 L. T. 602; De Keyser's Royal Hotel *v.* Spicer & Minter (1914), 30 T. L. R. 257.

45. ——.]—KINE *v.* JOLLY, No. 73, *post.*

46. ——.]—PHELPS *v.* LONDON (CITY) CORPN., No. 414, *post.*

47. —— **Action by reversioner.**]—SIMPSON *v.* SAVAGE, No. 483, *post.*

—— **As condition precedent to grant of injunction.**]—*See* Nos. 648–655, *post.*

48. Whether damage material—How determined.]—(1) Where a builder has three ways of access to a building site, & uses only one, & that principally at the busiest hours of the day, causing special or particular damage to another person, such user is not reasonable.

(2) It appears to me that nothing can be deemed to be fleeting or evanescent which results in substantial damage, & that the question, therefore, is to be answered not by time, but by the effects upon pltf. (FRY, J.).—FRITZ *v.* HOBSON (1880), 14 Ch. D. 542; 49 L. J. Ch. 321; 42 L. T. 225; 28 W. R. 459; 24 Sol. Jo. 366.

Annotations:—*As to* (1) **Distd.** Landrock *v.* Met. Dist. Ry. (1886), 2 T. L. R. 532; Lingke *v.* Christchurch Corpn. (1912), 106 L. T. 376. *Generally,* **Refd.** Martin *v.* L. C. C. (1898), 79 L. T. 170; Chaplin *v.* Westminster Corpn., [1901] 2 Ch. 329. **Mentd.** Beddall *v.* Maitland (1881), 17 Ch. D. 174; Penrice *v.* Williams (1883), 23 Ch. D. 353; Serrao *v.* Noel (1885), 15 Q. B. D. 549; Barker *v.* Purvis (1886), 56 L. T. 131; Serff *v.* Acton L. B. (1886), 55 L. J. Ch. 569; Chapman, Morsons *v.* Auckland Union Grdns. (1889), 23 Q. B. D. 294; Dreyfus *v.* Peruvian Guano Co. (1889), 43 Ch. D. 316; Milson *v.* Carter, [1893] A. C. 638; Chessum *v.* Gordon, [1901] 1 K. B. 694; Boyce *v.* Paddington B. C., [1903] 1 Ch. 109; Leeds Industrial Co-op. Soc. *v.* Slack, [1924] A. C. 851; Light *v.* West, [1926] 2 K. B. 238.

49. What constitutes material damage—Sentimental, speculative or trivial discomfort.]—FLEMING *v.* HISLOP, No. 23, *ante.*

50. —— **Personal discomfort.**]—FLEMING *v.* HISLOP, No. 23, *ante.*

Neighbouring owners.]—*See* Part III., *post.*

C. Presumption of Damage.

51. Violation of private common law right.]—BATEN'S CASE, No. 435, *post.*

52. ——.]—A declaration in case stated that deft., being possessed of a messuage adjoining a garden of pltf., erected a cornice upon his messuage, projecting over the garden, by means whereof rain water flowed from the cornice into the garden, & damaged the same, & pltf. had been incommoded in the possession & enjoyment of his garden:—*Held:* the erection of the cornice was a nuisance from which the law would infer injury to the pltf.; & he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the period of the erection of the cornice & the commencement of the action.—FAY *v.* PRENTICE (1845), 1 C. B. 828; 14 L. J. C. P. 298; 5 L. T. O. S. 216; 9 Jur. 876; 135 E. R. 769.

Annotations:—**Consd.** Lemmon *v.* Webb, [1894] 3 Ch. 1. **Refd.** Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141.

53. ——.]—Whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to show the violation of the right, & the law will presume damage.—EMBREY *v.* OWEN (1851), 6 Exch. 353; 20 L. J. Ex. 212; 17 L. T. O. S. 79; 15 Jur. 633; 155 E. R. 579.

Annotations:—**Consd.** Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141. **Refd.** Dickinson *v.* Grand Junction Canal Co. (1852), 7 Exch. 282; Northam *v.* Hurley (1853), 1 E. & B. 665; Nicklin *v.* Williams (1854), 10 Exch. 259; Sampson *v.* Hoddinott (1857), 1 C. B. N. S. 590; Chasemore *v.* Richards (1859), 7 H. L. Cas. 350; Stockport Waterworks Co. *v.* Potter (1864), 3 H. & C. 300; Nuttall *v.* Shugar (1871), 24 L. T. 402; Pennington *v.* Brinsop

Hall Coal Co. (1877), 5 Ch. D. 769; Sandwich *v.* G. N. Ry. (1878), 10 Ch. D. 707; Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566; Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155; Withers *v.* Purchase (1889), 60 L. T. 819; Sharp *v.* Wilson, Rotheray (1905), 93 L. T. 155; Neville *v.* London Express Newspaper, [1919] A. C. 368. **Mentd.** Orr Ewing *v.* Colquhoun (1877), 2 App. Cas. 839; Angus *v.* Dalton (1878), 4 Q. B. D. 162; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301.

54. ——.]—It is not necessary to show actual damage to pltf.'s reversionary interest; it is enough to show an obstruction of his right, &, such obstruction of his right being shown, the law will infer damage.—SAMPSON *v.* HODDINOTT (1857), 1 C. B. N. S. 590; 26 L. J. C. P. 148; 28 L. T. O. S. 304; 21 J. P. 375; 3 Jur. N. S. 243; 5 W. R. 230; 140 E. R. 242; *on appeal*, 3 C. B. N. S. 596, Ex. Ch.

Annotations:—**Consd.** Kensit *v.* G. E. Ry. (1884), 27 Ch. D. 122; Sharp *v.* Wilson, Rotheray (1905), 93 L. T. 155. **Refd.** Crossley *v.* Lightowler (1866), L. R. 3 Eq. 279; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301. **Mentd.** Stockport Waterworks Co. *v.* Potter (1864), 3 H. & C. 300; Roberts *v.* Richards (1881), 50 L. J. Ch. 297; Simpson *v.* Godmanchester Corpn., [1896] 1 Ch. 214.

55. ——.]—A riparian owner has a right, irrespective of any actual damage sustained by him, to complain of an obstruction to a stream.—NORBURY (EARL) *v.* KITCHIN (1866), 15 L. T. 501.

Annotation:—**Distd.** Kensit *v.* G. E. Ry. (1884), 27 Ch. D. 122.

56. ——.]—Pltfs., in common with the other inhabitants of a particular district, enjoyed a customary right at all times to have water from a certain spout in a highway in the district for domestic purposes. Deft., a riparian owner on the stream whereby the spout was supplied with water, on various occasions prevented such large quantities of water from reaching the spout as to render what remained insufficient for the needs of the inhabitants. Pltfs. had not themselves ever suffered any actual personal damage or inconvenience:—*Held:* an action for diverting the water was maintainable without proof of any actual personal damage, inasmuch as the act of deft. might, if repeated often enough without interruption, furnish evidence in derogation of pltfs.' legal rights.—HARROP *v.* HIRST (1868), L. R. 4 Exch. 43; 38 L. J. Ex. 1; 19 L. T. 426; 33 J. P. 103; 17 W. R. 164.

Annotations:—**Consd.** Bower *v.* Sandford (1889), 5 T. L. R. 570. **Refd.** George *v.* Lysaght & Meade-King (1883), 49 L. T. 49; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301. **Mentd.** Wilts & Berks Canal Navigation Co. *v.* Swindon Waterworks Co. (1873), 29 L. T. 722; Goodhart *v.* Hyett (1883), 25 Ch. D. 182; Brocklebank *v.* Thompson, [1903] 2 Ch. 344; Hammerton *v.* Dysart, [1916] 1 A. C. 57.

57. ——.]—The case of a stream affords a very clear illustration of the difference between injury & damage; for the pollution of a clear stream is to a riparian proprietor below both injury & damage, whilst the pollution of a stream already made foul & useless by other pollutions is an injury without damage, which would, however, at once become both injury & damage on the cessation of the other pollutions (FRY, J.).—PENNINGTON *v.* BRINSOP HALL COAL CO. (1877), 5 Ch. D. 769; 46 L. J. Ch. 773; 37 L. T. 149; 25 W. R. 874.

Annotations:—**Refd.** Fritz *v.* Hobson (1880), 14 Ch. D. 542; Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155; Owen *v.* Faversham Corpn. (1908), 72 J. P. 404; Stollmeyer *v.* Petroleum Development Co., [1918] A. C. 498, n.

58. Injury to public.]—When an illegal act is being committed which in its nature tends to the injury of the public, such as an interference with a public highway or a navigable stream, the A.-G. can maintain an action on behalf of the public to restrain the commission of the act without adducing any evidence of actual injury to the public, & in such a case an injunction will be granted with costs although no evidence of actual injury is given.—A.-G. *v.* SHREWSBURY (KINGSLAND) BRIDGE CO. (1882), 21 Ch. D. 752; 51 L. J. Ch. 746; 46 L. T. 687; 30 W. R. 916

Annotations:—**Apld.** A.-G. *v.* L. & N. W. Ry., [1900] 1 Q. B. 78. **Refd.** London Assocn. of Shipowners & Brokers *v.* London & India Docks Joint Committee, [1892] 3 Ch. 242; A.-G. *v.* Birmingham Tame & Rea District Drainage Board, [1910] 1 Ch. 48; A.-G. *v.* Denby, [1925] 1 Ch. 596.

59. —— **Transgression of statutory powers.**]—Upon an information filed by the A.-G. to restrain a public body from transgressing powers conferred by an Act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of; & in this respect there is no difference between an *ex officio* information & an information at the relation of a private individual.—A.-G. *v.* COCKERMOUTH LOCAL BOARD (1874), L. R. 18 Eq. 172; 38 J. P. 660; 30 L. T. 590; 22 W. R. 619; *sub nom.* WORKINGTON LOCAL BOARD *v.* COCKERMOUTH LOCAL BOARD, A.-G. *v.* COCKERMOUTH LOCAL BOARD, 44 L. J. Ch.

Annotations:—**Consd.** A.-G. *v.* Shrewsbury Bridge Co. (1882), 21 Ch. D. 752; Brooks *v.* Terry (1888), 4 T. L. R. 678; A.-G. *v.* Logan, [1891] 2 Q. B. 100. **Apld.** A.-G. *v.* L. & N. W. Ry., [1900] 1 Q. B. 78. **Refd.** A.-G. *v.* G. E. Ry. (1879), 11 Ch. D. 449; Durrant *v.* Branksome U. D. C. (1897), 76 L. T. 739; A.-G. *v.* Dorchester Corpn. (1906), 94 L. T. 682; A.-G. *v.* Birmingham Tame & Rea District Drainage Board, [1910] 1 Ch. 48.

60. ——.]—Upon an information filed by the A.-G. to restrain a public body with statutory powers from infringing a term introduced into their Act in the interests of the public as a condition of the exercise of their powers, it is not necessary to prove that injury to the public will result from the acts complained of.—A.-G. *v.* LONDON & NORTH WESTERN RY. CO., [1900] 1 Q. B. 78; 69 L. J. Q. B. 26; 81 L. T. 649; 63 J. P. 772; 16 T. L. R. 30, C. A.

Annotations:—**Refd.** Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695; A.-G. *v.* Ashborne Recreation Ground Co., [1903] 1 Ch. 101; A.-G. *v.* Dorchester Corpn. (1905), 93 L. T. 290; A.-G. *v.* Birmingham Tame & Rea District Drainage Board, [1910] 1 Ch. 48; A.-G. *v.* Long Eaton U. C., [1914] 2 Ch. 251. **Mentd.** Bickmore *v.* Dimmer, [1903] 1 Ch. 158.

61. Violation of proprietary right of local authority.]—A railway co. constructed a railway on the level across a highway in the district of which the relators were the urban sanitary authority. Subsequently defts. worked coal mines in a proper & usual manner beneath the highway, with the result that a gradual & uniform subsidence to the extent of about ten feet vertically took place of the highway, railway, & surrounding land. No actual damage was done to the highway thereby, nor was it rendered less convenient; but the railway co. placed ballast under the railway so as to maintain it at its original level, with the result that an embankment was formed obstructing the use of the highway:—*Held:* (1) in an action for damages for the obstruction to the highway, defts. were not liable; (2) assuming the highway to be repairable by the inhabitants at large, & therefore vested in the relators under Public Health Act, 1875 (c. 55), s. 149, the subsidence of the highway having been substantial, the relators, notwithstanding that they had suffered no appreciable damage by reason of such subsidence, were entitled to judgment with nominal damages for the injury to their proprietary right.—A.-G. *v.* CONDUIT COLLIERY CO., [1895] 1 Q. B. 301; 64 L. J. Q. B. 207; 71 L. T. 771; 59 J. P. 70; 43 W. R. 366; 11 T. L. R. 57; 15 R. 267, D. C.

Annotations:—*Generally*, **Mentd.** Wednesbury Corpn. *v.* Lodge Holes Colliery Co., [1905] 2 K. B. 823; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

SECT. 5.—EFFECT OF MOTIVE.

62. Act otherwise lawful.]—SMITH *v.* KENRICK, No. 8, *ante*.

63. ——.]—The venue in the margin of a declaration was "London" & the first count stated that pltf. was possessed of certain premises situate at Milton, in the county of Kent, abutting on the north on a public navigable river, to wit, the river Thames, on the east upon another part of the said river called the Blockhouse Dock, in which premises pltf. & the previous occupiers had carried on the trade of mast & block-makers for sixty years; & pltf. as such occupier ought to have the free use & navigation of the river, & of the part thereof called Blockhouse Dock, for the more convenient carrying on his said trade, & with boats, rafts, & timber to pass from the stream of the river, to the side of the premises abutting on the Blockhouse Dock, either at high or low water into the stream of the river, & to load & unload their boats, barges, & other vessels at the side of the said premises. Yet deft. wrongfully placed upon the soil of the said river & upon the soil of that part thereof called the Blockhouse Dock, divers piles, posts, & great quantities of earth, & therewith formed an embankment & obstructed the navigation of the river, & prevented pltf. having access from the stream of the river to the side of his premises, whereby pltf. sustained special damage. The second count was in trover for goods & chattels. Deft. pleaded to the whole declaration, not guilty; & to the second count, that deft. was possessed of a close, & at the time of the alleged conversion was digging upon it a sawpit, & because the goods & chattels, in the second count mentioned, were without the leave & licence of deft. placed on the close by pltf., & "were then so buried in the close, & so embedded in the earth & soil thereof," that, without a little cutting the same, deft. could not dig the sawpit, deft., in such digging necessarily & unavoidably a little cut the said goods & chattels. Replication *de injuria*. At the trial, it appeared that the premises were situate, & the obstruction took place in the county of Kent. The evidence in support of the second count was, that some timber of pltf.'s being on the close of deft. he removed it, & it having been again placed there, & become embedded in the soil, he directed his workmen to dig a sawpit at the place where the timber was, & in digging the pit, the timber was cut through, & part remained embedded in the soil, & other part was washed away by the river. The judge directed the jury to consider, whether deft. really & *bonâ fide* intended to make a sawpit, or was merely digging a hole for the purpose of cutting the timber:—*Held*: the judge misdirected the jury, in telling them to consider with what motive deft. dug the sawpit.—SIMMONS *v.* LILLYSTONE (1853), 8 Exch. 431; 22 L. J. Ex. 217; 21 L. T. O. S. 45; 1 W. R. 198; 155 E. R. 1417.

Annotation:—**Reld.** Hollins *v.* Fowler (1875), L. R. 7 H. L. 757.

64. ——.]—BAMFORD *v.* TURNLEY, No. 111, *post*.

65. ——.]—No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious.

The owner of land containing underground water, which percolates by undefined channels & flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it. His right is the same whatever his motive may be, whether *bonâ fide* to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out.—BRADFORD CORPN. *v.* PICKLES, [1895] A. C. 587; 64 L. J. Ch. 759; 73 L. T. 353; 60 J. P. 3; 44 W. R. 190; 11 T. L. R. 555; 11 R. 286, H. L.

Annotations:—**Reld.** Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Mostyn *v.* Atherton (1899), 68 L. J. Ch. 629; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822; English *v.* Metropolitan Water Board, [1907] 1 K. B. 588. **Mentd.** Cochrane *v.* Smith (1895), 12 T. L. R. 78; Bradford *v.* Eastbourne Corpn. (1896), 60 J. P. 501; Murray *v.* Epsom L. B. (1896), 45 W. R. 185; Pitts *v.* George (1896), 66 L. J. Ch. 1; Allen *v.* Flood, [1898] A. C. 1; Quinn *v.* Leathem, [1901] A. C. 495; Husey *v.* London Electric Supply Corpn., [1902] 1 Ch. 411; Fitzroy *v.* Cave, [1905] 2 K. B. 364; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40.

SECT. 6.—PUBLIC AND PRIVATE NUISANCES.

66. Public nuisance — What amounts to.] — (1) A bill may be filed to restrain a public nuisance, without making the A.-G. a party, if pltf. sustains special damage from the nuisance.

(2) I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance—an injury or a damage, to all persons who come within the sphere of its operation, though it may be so in a greater degree to some, than it is to others. . . . If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, there, I conceive, it does not come within the meaning of the term public nuisance. . . . A peal of bells may be, & no doubt is, an extreme nuisance, & perhaps an intolerable nuisance to a person who lives within a very few feet or yards of them; but, to a person who lives at a distance from them, although he is within the reach of their sound, so far from its being a nuisance or an inconvenience, it may be a positive pleasure (KINDERSLEY, V.-C.).—SOLTAU *v.* DE HELD (1851), 2 Sim. N. S. 133; 21 L. J. Ch. 153; 16 Jur. 326; 61 E. R. 291.

Annotations:—*As to* (2) **Apld.** Gort *v.* Clark (1868), 16 W. R. 569. **Consd.** Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109; Harrison *v.* Good (1871), 24 L. T. 263. **Reld.** R. *v.* Lister & Biggs (1857), Dears. & B. 209; Crump *v.* Lambert (1867), L. R. 3 Eq. 409; Walker *v.* Brewster (1867), L. R. 5 Eq. 25; A.-G. *v.* Cambridge Consumers Gas Co. (1868), 4 Ch. App. 71; Roskell *v.* Whitworth (1871), 19 W. R. 804; Gaunt *v.* Fynney (1872), 8 Ch. App. 8; Winter *v.* Baker (1887), 3 T. L. R. 569.

67. Private nuisance — What amounts to — Interference with any small number.]—An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place.—R. *v.* LLOYD (1802), 4 Esp. 200; 170 E. R. 691.

Annotations:—**Reld.** R. *v.* Webb (1848), 1 Den. 338. **Mentd.** R. *v.* Levy (1819), 2 Stark. 458.

68. —— —— ——.]—SOLTAU *v.* DE HELD, No. 66, *ante*

PART I. SECT. 6.

66 i. *Public nuisance—What amounts to.*]—Omission to fence a well on private ground within eight yards of a highway & open to it, is not punishable as a public nuisance.—R. *v.* ANTHONY UDAYAN (1883), I. L. R. 6 Mad. 280.—**IND.**

66 ii. —— ——.]—R. *v.* BYRAMJI EDALJI (1887), I. L. R. 12 Bom. 437.—**IND**

66 iii. —— ——.]—R. *v.* NISAR MUHAMMAD, KHAN, ETC. (1915), I. L. R. 6 Lah. 203.—**IND.**

69. —— —— Breach of contractual obligation.]—A railway co. running tramcars along the streets of a town under an agreement with the corpn., which contained provisions as to overcrowding, are not guilty of a common nuisance in allowing their cars to be overcrowded, their obligation being a contractual obligation to the corpn., & not a duty to the public generally.

The overcrowding was not a matter which affected the public as such, but only those members of the public who had obtained from applt.'s licences to enter the cars (*per* CUR.).—TORONTO RY. CO. *v.* R., [1917] A. C. 630; 86 L. J. P. C. 195; 117 L. T. 579; 34 T. L. R. 1, P. C.

Annotation:—**Mentd.** Nadan *v.* R., [1926] A. C. 482.

Remedies.]—*See* Part IV., *post.*

Defences.]—*See* Part IV., Sect. 2, sub-sect. 3, *post.*

SECT. 7.—NUISANCE AND TRESPASS DISTINGUISHED.

70. Nuisance consequential injury.]—In an action on the case for digging ditches & diverting a watercourse, it shall be presumed, after verdict, that the injury was consequential.—LEVERIDGE *v.* HOSKINS (1709), 11 Mod. Rep. 257; 88 E. R. 1025

Annotation:—**Refd.** Reynolds *v.* Clarke (1725), 2 Ld. Raym. 1399.

71. —— Trespass a direct wrong.]—Trespass will not lie, but case, where a nuisance is occasioned by an act in other respects lawful.

The difference between trespass & case is that in trespass pltf. complains of an immediate wrong & in case of a wrong that is the consequence of another act (FORTESCUE, J.).—REYNOLDS *v.* CLARK (1725), Fortes. Rep. 212; 2 Ld. Raym. 1399; 8 Mod. Rep. 272; 1 Stra. 634; 92 E. R. 822.

Annotations:—**Refd.** Scot *v.* Shepherd (1773), 2 Wm. Bl. 892; Day *v.* Edwards (1794), 5 Term Rep. 648. **Mentd.** Gates *v.* Bayley (1766), 2 Wils. 313; Leame *v.* Bray (1803), 3 East, 593; Hopper *v.* Reeve (1817), 1 Moore, C. P. 407.

72. —— —— User of property so as to injure neighbouring property.]—The distinction between trespass & case. . . . Immediate damage to pltf.'s property is a ground for trespass; consequential damage to it is a ground for case (*per* CUR.).—HAWARD *v.* BANKES (1760), 2 Burr. 1114; 97 E. R. 740.

Annotations:—**Distd.** Smith *v.* Kenrick (1849), 7 C. B. 515. **Refd.** Scot *v.* Shepherd (1773), 2 Wm. Bl. 892; Ogle *v.* Barnes (1799), 8 Term Rep. 188.

73. —— —— ——.]—(1) An action of nuisance is different from an action of trespass. An action of trespass is the action which was brought where the body or the land of a person had been invaded. An action of nuisance is the action which was brought where there was no invasion of the property of somebody else, but where the wrong of deft. consisted in so using his own land as to injure his neighbour's (VAUGHAN WILLIAMS, L.J.).

(2) The cts. have always been unwilling in these cases of nuisance to hold that every nuisance, apart from the rule *de minimis non curat lex*, should be a cause of action. On the contrary, in all these cases of nuisance which involve a limitation of a man's right to use his own land, the cts. will not enforce the alleged rights of pltf., unless that which has occurred is a substantial interference with his comfortable or profitable occupation of his dwelling-house, or warehouse, or house of business, as the case may be (VAUGHAN WILLIAMS, L.J.).—KINE *v.* JOLLY, [1905] 1 Ch. 480; 74 L. J. Ch. 174; 92 L. T. 209; 53 W. R. 462; 21 T. L. R. 128; 49 Sol. Jo. 164, C. A.; *affd. sub nom.* JOLLY *v.* KINE, [1907] A. C. 1, H. L.

Annotations:—*As to* (2) **Consd.** Hoare *v.* McAlpine, [1923] 1 Ch. 167. *Generally,* **Refd.** Higgins *v.* Betts, [1905] 2 Ch. 210; Paul *v.* Robson (1914), 83 L. J. P. C. 304; Davis *v.* Marrable, [1913] 2 Ch. 421.

Trespass generally.]—*See* TRESPASS.

Part II.—Nuisances in respect of Particular Matters.

SECT. 1.—ANIMALS.

See ANIMALS, Vol. II., pp. 215, 216, 223, 233, 234, 236–241, 250–252, 297, Nos. 113, 114, 154, 222–224, 238–262, 325–341, 671.

SECT. 2.—BRIDGES.

74. When indictment lies—Bridge unfit for public uses—If built for use of public.]—A bridge built in a public way without public utility is indictable as a nuisance; & so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the *onus* of rebuilding or repairing it immediately on the county.—R. *v.* WEST RIDING OF YORKSHIRE (INHABITANTS) (1802), 2 East, 342; 102 E. R. 399.

Annotations:—**Refd.** R. *v.* Southampton County (1886), 17 Q. B. D. 424; R. *v.* Southampton County (1887), 19 Q. B. D. 590. **Mentd.** R. *v.* Bucks County (1819), 12 East, 192; R. *v.* St. Benedict Cambridge (1821), 4 B. & Ald. 447; R. *v.* Oxfordshire (1825), 4 B. & C. 194; R. *v.* Derby (1832), 3 B. & Ad. 147; R. *v.* Adderbury East (1843), 13 L. J. M. C. 9; R. *v.* New Sarum (1845), 7 Q. B. 941; R. *v.* Isle of Ely (1850), 15 Q. B. 827; R. *v.* Hampshire (1887), 52 J. P. 52.

75. —— Old bridge pulled down—Before new one passable.]—The justices of Dorset having, under Bridges Act, 1803 (c. 59), contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; & having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge; this ct. refused a writ of prohibition to them, to restrain them from pulling down the old before the new bridge was passable; though there were strong affidavits of the inconvenience & loss to be sustained by the neighbourhood in being obliged to use a roundabout way in the interval; referring the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance, & seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice.—R. *v.* DORSETSHIRE JJ. (1812), 15 East, 594; 104 E. R. 967.

76. Repair & reconstruction of bridge—Right to create nuisance—Exercise of statutory duty.]—*Held:* defts. being bound to repair & reconstruct a bridge passing over a canal were liable in doing so to raise it so as to prevent it from being a nuisance & an obstruction to navigation.—NORTH STAFFORDSHIRE RY. CO. *v.* HANLEY CORPN. (1909), 73 J. P. 477; 26 T. L. R. 20; 8 L. G. R. 375, C. A.

Bridges generally.]—*See* HIGHWAYS, Vol. XXVI., pp. 571 *et seq.*

SECT. 3.—**DANGEROUS PROPERTY.**

Omission to fence dangerous places—Excavation adjoining highways.]—*See* BOUNDARIES, Vol. VII., pp. 283–286, Nos. 138–151; HIGHWAYS, Vol. XXVI., p. 441, No. 1582.

—— **Excavations not adjoining highways.**]—*See* BOUNDARIES, Vol. VII., pp. 288, 289, Nos. 164–168.

—— **Duty to fence quarries near highway.**]—*See* MINES, Vol. XXXIV., pp. 749, 750, Nos. 1228–1233.

Dedication of highway subject to obstruction.]—*See* HIGHWAYS, Vol. XXVI., p. 442, Nos. 1589, 1590.

Omission to keep premises in repair—Want of repair amounting to public nuisance.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 344–346, Nos. 4867–4891.

—— **Want of repair not amounting to public nuisance.**]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 347, 348, Nos. 4892–4905.

—— **Danger to persons on highway.**]—*See* HIGHWAYS, Vol. XXVI., p. 433, Nos. 1517–1519.

Wreck in fairway.]—*See* SHIPPING.

Dangerous articles.]—*See* NEGLIGENCE, pp. 56–58, *ante*; SALE OF GOODS.

SECT. 4.—**EASEMENTS.**

See, generally, EASEMENTS, Vol. XIX., pp. 7–209.

Right to light.]—*See* EASEMENTS, Vol. XIX., pp. 123–145, Nos. 828–994.

Right to passage of air.]—*See* EASEMENTS, Vol. XIX., pp. 174–176, Nos. 1238–1270.

Right to privacy.]—*See* EASEMENTS, Vol. XIX., p. 180, Nos. 1298–1302; COMPULSORY PURCHASE OF LAND, Vol. XI., p. 145, No. 289.

Right to prospect or view.]—*See* EASEMENTS, Vol. XIX., pp. 180, 181, Nos. 1303–1315.

SECT. 5.—**ELECTRICAL SUPPLY.**

See ELECTRIC LIGHTING, Vol. XX., pp. 209–212, Nos. 65–77.

SECT. 6.—**EXERCISE OF STATUTORY POWER.**

77. Authority permissive not imperative—Exercise without prejudice to rights of others.]—Wherever according to the sound construction of a statute, the legislature has authorised a proprietor to make a particular use of his land, & the authority given is in the strict sense of law permissive merely, & not imperative, the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others

Where the effect of British Columbian legislation was to authorise resps. to irrigate their soil by the compulsory diversion of water from any adjacent stream, lake or river, by conveying it over lands which do not belong to them, & to run the surplus water after irrigation through adjacent lands by means of flumes, ditches or drains, all subject to provisions for compensation, & resps. brought water upon their land in such manner as to be the substantial cause of damage to applt.'s line of railway by causing a slide of their land:—*Held:* in the absence of provisions showing an intention on the part of the legislature to take away applts.' right to protect their property from invasion, they were entitled to an injunction to prevent resps.' user of the water in disregard of their common law obligation to do no damage to applts.' land.—CANADIAN PACIFIC RY. CO. *v.* PARKE, [1899] A. C. 535; 68 L. J. P. C. 89; 81 L. T. 127; 48 W. R. 118; 15 T. L. R. 427, P. C.

Annotations:—**Refd.** A.-G. *v.* Dorchester Corpn. (1905), 93 L. T. 290; West *v.* Bristol Tram & Carriage Co. (1908), 72 J. P. 145; Hanley *v.* Edinburgh Corpn. (1913), 77 J. P. 233. **Mentd.** Metropolitan Water Board *v.* Solomon, [1908] 2 Ch. 214.

By public authorities, bodies & officials.]—*See* PUBLIC AUTHORITIES, & Titles *passim*.

SECT. 7.—**GASWORKS.**

See GAS, Vol. XXV., pp. 485–488, 495, Nos. 89–101, 133, 134.

SECT. 8.—**HIGHWAYS.**

See HIGHWAYS, Vol. XXVI., pp. 413–460, 569, Nos. 1330–1760, 2614–2618.

SECT. 9.—**NOISE AND VIBRATION.**

SUB-SECT. 1.—COMMERCIAL OPERATIONS.

78. Circular saw.]—Where the injury sought to be restrained has been completed before the filing of the bill, & pltf. has, in the first instance, demanded damages, the ct. will not grant a mandatory injunction even where the injury is substantial but will direct an inquiry as to damages.

The noise & vibration occasioned by a steam engine & circular saw considered an annoyance amounting to a nuisance, in respect of which an inquiry as to damages was granted.—GORT (VISCOUNTESS) *v.* CLARK (1868), 18 L. T. 343; 16 W. R. 569, L. JJ.

Annotations:—**Apld.** Roskell *v.* Whitworth (1871), 19 W. R. 804. **Refd.** Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287.

79. ——.]—HUSEY *v.* BAILEY (1895), 11 T. L. R. 221.

80. Steam hammer.]—If the ct. be satisfied of the existence of a nuisance which it has the power to abate or redress, whether the nuisance be public or private, the ct. will exercise its authority without sending the matter to be tried before a jury.

The ct. has still power, even since the passing of 25 & 26 Vict. c. 42, to direct issues of fact to be tried before a jury; but the ct. will not do so unless the issue be one which the ct. feels itself incompetent to decide, or some inexorable necessity requires that a jury should be resorted to in order to do complete justice.

The ct. must deal with the question of nuisance or no nuisance as it would deal with any other question within its jurisdiction. If the evidence is satisfactory to the mind of the ct., the ct. will at once decide upon it; if not, the ct. will send the matter to a jury.

W., the proprietor of an iron & steel manufactory at Manchester, commenced in May, 1868,

PART II. SECT. 9, SUB-SECT. 1.

a. *General rule.*]—The occupant of a dwelling-house is entitled to damages & to an injunction when the ordinary comfort of his existence has been materially interfered with by reason of vibration caused to his dwelling by the working of deft.'s machinery set up in a neighbouring factory, & by reason of noise therefrom.—O'KEEFE *v.* POPE (1910), 9 Nfld. L. R. 442.—**NFLD.**

b. ——.]—WARNER'S, LTD. *v.* LYTTELTON TIMES CO., LTD. (1905), 25 N. L. Z. L. R. 746.—**N.Z.**

the use of a steam hammer, which was challenged by R. & others, trustees of a Roman Catholic chapel, as a nuisance, disturbing the congregation in their devotions & interfering with the business of the schools & the comfortable enjoyment of the rectory house.

On bill filed by R. & others to restrain the nuisance, deft. alleged *inter alia* that the nuisance was a public nuisance, & should have been proceeded against by indictment:—*Held:* the ct. had jurisdiction on bill filed to give relief: & the ct. accordingly directed an injunction, as well as an inquiry as to damages.—ROSKELL *v.* WHITWORTH (1871), 19 W. R. 804, L. JJ.

81. ——.]—The bill prayed that deft. might be restrained from working a steam hammer in such a way as to cause a nuisance or injury to pltf. & his premises. The Master of the Rolls considered that a nuisance was caused by machinery other than the steam hammer, & granted an injunction to restrain deft. from so conducting his works as to cause injury, damage, or annoyance to pltf. as owner or occupier of the premises:—*Held:* the injunction should be granted in the terms of the prayer in the bill, & decree varied accordingly.—GOOSE *v.* BEDFORD (1873), 21 W. R. 449, L. C. & L. J.

82. Steam engine.]—GORT (VISCOUNTESS) *v.* CLARK, No. 78, *ante*.

83. ——.]—A nuisance by noise, supposing malice to be out of the question, is a question of degree. It is not every occasional & accidental noise more loud or harsh than usual, that will entitle a pltf. to an injunction where the general case of "habitual nuisance" is not satisfactorily proved.

Deft. in Jan. 1865, erected a steam engine in a shed adjoining the stable belonging to pltfs., by which the stable was rendered unfit for horses, & some inconvenience occasioned in pltfs.' dwelling-house. No complaint was made by pltfs. until June, 1870:—*Held:* an injunction could not be granted under the circumstances to restrain deft. from working the engine.—GAUNT *v.* FYNNEY (1872), 8 Ch. App. 8; 42 L. J. Ch. 122; 27 L. T. 569; 37 J. P. 100; 21 W. R. 129, L. C.

Annotations:—**Consd.** Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685; Gosnell *v.* Aerated Bread Co. (1894), 10 T. L. R. 661; Sanders-Clark *v.* Grosvenor Mansions Co. & D'Allessandri (1900), 82 L. T. 768. **Refd.** Byass *v.* Bettam (1885), 2 T. L. R. 88; Rogers *v.* G. N. Ry. (1889), 53 J. P. 484; Christie *v.* Davey, [1893] 1 Ch. 316; Heath *v.* Brighton Corpn. (1908), 98 L. T. 718. **Mentd.** Fullwood *v.* Fullwood (1878), 9 Ch. D. 176.

84. ——.]—BEAUMONT *v.* EMERY, [1875] W. N. 106, L. JJ.

85. Forge.]—GULLICK *v.* TREMLETT (1872), 20 W. R. 358.

86. Printing machinery.]—Pltfs., a firm of solrs., were the owners & occupiers of offices adjoining defts.' steam printing works, which had been working from 1848 to May, 1875, without any complaint by pltfs. of nuisance occasioned by the noise & vibration of the machinery, though a slight noise & vibration could at times be heard & felt. In May, 1875, defts. made some alteration in their machinery, which pltfs. contended increased the noise & vibration, & they accordingly commenced an action for an injunction to restrain defts. from working their machinery so as to occasion a nuisance to pltfs.:—*Held:* pltfs. were entitled to an injunction restraining defts. from working their machinery so as to occasion a nuisance or injury by vibration to any greater degree than had previously been occasioned up to May, 1875. *Semble:* the fact that noise & vibration from machinery has never been complained of for more than twenty years, does not deprive a neighbour of his right to prevent any increased noise, even though such increase be slight.—HEATHER *v.* PARDON (1877), 37 L. T. 393.

87. ——.]—SMITH *v.* JAFFRAY (1886), 2 T. L. R. 480, D. C.

88. ——.]—POLSUE & ALFIERI, LTD. *v.* RUSHMER, No. 405, *post*.

89. Breakwater construction.]—HOWLAND *v.* DOVER HARBOUR BOARD (1898), 14 T. L. R. 355, C. A.

90. Aeroplane engine factory.]—Injunction granted to restrain noise caused by the manufacture of aeroplane engines which was a serious interference with the comfort of pltfs. & their families in the occupation of their houses in a residential district, according to the ordinary notions prevalent amongst reasonable English men & women.—BOSWORTH-SMITH *v.* GWYNNES, LTD. (1919), 89 L. J. Ch. 368; 122 L. T. 15.

91. Building operations—Hammering.]—WEBB *v.* BARKER, [1881] W. N. 158.

92. —— Steam crane.]—BROWNING *v.* HARROD'S STORES, LTD. (1902), *Times*, Aug. 13, C. A.

Annotation:—**Refd.** Clark *v.* Lloyd's Bank, (1910), 79 L. J. Ch. 645.

93. —— Pile driving—By night.]—In conducting building operations it is not reasonable & proper to do pile driving by night so that residents in an adjoining building cannot sleep, & such conduct is liable to be restrained by injunction.—DE KEYSER'S ROYAL HOTEL, LTD. *v.* SPICER BROTHERS, LTD. & MINTER (1914), 30 T. L. R. 257.

94. —— ——.]—HOARE & CO. *v.* MCALPINE, No. 340, *post*.

95. Dairy—Clanging churns.]—FANSHAWE *v.* LONDON & PROVINCIAL DAIRY CO. (1888), 4 T. L. R. 694.

Annotation:—**Refd.** Tinkler *v.* Aylesbury Dairy Co. (1888), 5 T. L. R. 52.

96. —— ——.]—As to the alleged noise from the engine, though there is some evidence, the charges made in the pleadings are exaggerated & the evidence of personal discomfort is slight & shows no nuisance during the night. The noises made by defts.' carts in the streets might also be put aside. There is some noise occasioned, even in the night hours; but if that stands alone it will not justify the interference of the ct., nor is it a sufficient make weight. In the day time the cart noise is merged in the greater din of the street traffic. There remains then, the charge of nuisance by rattling cans & milk churns inside the dairy co's. premises. Complaint is made, not so much with regard to the placing of the cans & churns in the carts, as in respect of depositing them on the platform & rolling them about. I think there is sufficient evidence to show that this noise caused depreciation in the value of pltf.'s property & interfered with the personal comfort of the dwellers . . . assuming the fact of general

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82 i. *Steam engine.*]—Defts. introduced steam power, which complainant alleged caused vibration & smoke which interfered with his enjoyment of his property, & caused an injunction to issue restraining them from so using their factory as to cause the annoyance complained of:—*Held:* the injunction must be made perpetual to restrain defts. from so operating their factory as to diminish complainant's comfortable enjoyment of his home either by tremulous motion or thumping, or by causing disagreeable noises.—ALLEY *v.* DUCHEMIN (1880), 2 P. E. I. 340.—**CAN.**

c. *Operation of "joy wheel."*]—KEIL *v.* Ross (1910), 13 W. L. R. 512.—**CAN.**

d. *Gas engine.*]—Vibration due to the working of a gas engine, whereby the structure of the adjoining premises was injured & the comfort of its occupants affected, constituted a nuisance which

Sect. 9.—*Noise and vibration: Sub-sects.* 1 & 2. . 10 & 11: *Sub-sects.* 1, 2 & 3.]

depression in value there is over & above that depreciation caused by the noises in the dairy co's. business. On account of that, persons have been driven away from, or not attracted to, the neighbourhood. On this ground alone I would have been prepared to give relief. But on the ground of interference with personal comfort there is a nuisance in respect of which relief must be granted (KEKEWICH, J.).—TINKLER *v.* AYLESBURY DAIRY CO., LTD. (1888), 5 T. L. R. 52.

97. Loading carts.]—Defts. had, since July, 1894, carried on the business of newspaper forwarding agents at premises in the City of London. Pltfs. were respectively the leaseholders & the part occupiers of certain residential premises erected in 1886, & which were opposite to defts.' premises. The occupying pltfs. & others of the tenants of pltfs.' premises had been so disturbed by the noise of defts.' carts & the shouts of their drivers & other of defts.' employees between 2 a.m. & 6 a.m. that they were in many cases unable to sleep; & some of pltfs.' tenants had in consequence left & others had threatened to leave: —*Held:* defts.' business had caused a nuisance by noise so continuous & of such a character as to entitle pltfs. to an injunction.—BARTLETT *v.* MARSHALL (1896), 60 J. P. 104; 44 W. R. 251; 40 Sol. Jo. 99.

98. Poultry farm—Cock crowing.]—In an action for an injunction to restrain a nuisance caused by a poultry farm & cock crowing, defts. pleaded a previous action against them by pltf.'s predecessor in title which was compromised & stayed:—*Held:* (1) there was no privity of estate & the action could be maintained; (2) there was no actionable nuisance.—HUNT *v.* COOK (W. H.), LTD. (1922), 66 Sol. Jo. 557.

Animals.]—*See* ANIMALS, Vol. II., pp. 251, 252, Nos. 337–341.

Electric generators.]—*See* ELECTRIC LIGHTING, Vol. XX., pp. 209, 210, Nos. 66–70.

From theatres & amusements.]—*See* Sect. 17, *post.*

SUB-SECT. 2.—OPERATIONS UNCONNECTED WITH COMMERCE.

99. Church bells.]—SOLTAU *v.* DE HELD, No. 66, *ante*

100. ——.]—HARDMAN *v.* HOLBERTON, [1866] W. N. 379.

101. Dancing.]—JENKINS *v.* JACKSON, No. 590, *post.*

102. Music lessons.]—CHRISTIE *v.* DAVEY, No. 360, *post.*

103. Day nursery.]—MOY *v.* STOOP, No. 9, *ante.*

SECT. 10.—NEIGHBOURING OWNERS.

See Part III., *post.*

SECT. 11.—OFFENSIVE TRADES.

SUB-SECT. 1.—INJURY TO HEALTH.

104. Whether necessary to constitute trade a nuisance.]—JONES *v.* POWELL (1628), Hut. 135; Palm. 536; 123 E. R. 1155.

Annotations:—**Consd.** Fleming *v.* Hislop (1886), 11 App. Cas. 686. **Refd.** Bamford *v.* Turnley (1862), 3 B. & S. 66. **Mentd.** Bradley *v.* Gill (1688), 1 Lut. 69.

105. ——.]—To constitute a nuisance . . . the grievance must either be destructive to the general health of the inhabitants or render their dwellings uncomfortable or untenantable (HEATH, J.).—R. *v.* DAVEY (1805), 5 Esp. 217; 170 E. R. 791, N. P.

106. ——.]—To support an indictment for a nuisance, it is not necessary that the smells produced by it, should be injurious to health, it is sufficient if they be offensive to the senses.

It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses that is enough, as the neighbourhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place . . . but the presence of other nuisances, will not justify any one of them (ABBOTT, C. J.).—R. *v.* NEIL (1826), 2 C. & P. 485.

107. ——.]—A.-G. *v.* FRANCIS (1874), 1 Seton's Judgments & Orders, 7th ed. 595, 601, L. J.

108. ——.]—Pltfs., who respectively owned & occupied a dwelling-house, obtained an injunction against defts., owners of a sewage farm about 800 yards south-west of pltfs.' premises, restraining defts. from conducting their sewage farm so as to cause offensive smells & vapours in pltfs.' premises.—BAINBRIDGE *v.* CHERTSEY URBAN COUNCIL (1914), 84 L. J. Ch. 626; 79 J. P. 134; 13 L. G. R. 935.

Annotation:—**Refd.** G. C. Ry. *v.* Doncaster R. D. C. (1917), 62 Sol. Jo. 212.

SUB-SECT. 2.—POLLUTION OF AIR.

See Part III., Sect. 3, sub-sect. 2, *post.*

SUB-SECT. 3.—REASONABLE CONDUCT OF TRADE AND EFFORT TO AVOID NUISANCE.

109. Whether amounting to defence.]—WALTER *v.* SELFE, No. 1, *ante.*

110. ——.]—In an action for a nuisance arising from the burning of bricks on deft.'s own land near to pltf.'s dwelling house, the judge told the jury that no action lies for the reasonable use of a lawful trade in a convenient & proper place, even might be restrained by interdict, notwithstanding that the premises were situated in an industrial district of Glasgow.—M'EWAN *v.* STEEDMAN & M'ALISTER, [1912] S. C. 156.—**SCOT.**

PART II. SECT. 9, SUB-SECT. 2.

99 i. *Church bells.*]—The ringing of a church bell in the early morning hours of Sundays & public holidays in such a manner as to disturb persons residing in the neighbourhood may be a legal nuisance; whether it is so or not is a question of fact, depending, among other things, on the degree of disturbance caused.—HADDON *v.* LYNCH, [1911] V. L. R. 230.—**AUS.**

102 i. *Music lessons.*]—*Held:* the noise to which objection was taken was reasonably connected with & incidental to the teaching; deft.'s use of the premises was not an unreasonable one; & to offend against the law, the teaching of music in such premises must be done in a manner which beyond fair controversy ought to be regarded as unreasonable; an injunction would break up deft.'s business, & it would be better that pltf. should be compensated in damages if he was entitled to recover; & the injunction was refused. —POPE *v.* PEATE (1904), 24 C. L. T. 131; 7 O. L. R. 207; 3 O. W. R. 243.—**CAN.**

e. *Religious meetings.*]—*Held:* as persons may lawfully assemble for the purpose of religious worship the sounds proceeding from such services as ordinarily conducted cannot be a nuisance, but defts. must be restrained from continuing the nuisance of band playing either with or without the accompaniment of singing.—MCKENZIE *v.* POWLEY, [1916] S. A. L. R. 1.—**AUS.**

PART II. SECT. 11, SUB-SECT. 1.

f. *General rule.*]—WHITEHEAD *v.* VICTOR LEGGO CHEMICAL CO. PTY., LTD., [1926] V. L. R. 267; 47 A. L. T. 163; [1926] Argus, L. R. 205.—**AUS.**

PART II. SECT. 11, SUB-SECT. 3.

g. *General rule.*]—*Held:* defenders should only be interdicted "from burning or calcining the heaps in any manner so as to occasion material discomfort & annoyance to pursuers" thus leaving it open to defenders to use any innocuous mode of burning that might

though some one may suffer inconvenience from its being so carried on; & he left to them two questions—(*a*) was the place in which the bricks were burned a proper & convenient place for the purpose, (*b*) if they thought the place was not a proper place for the purpose, then, was the nuisance such as to make the enjoyment of life & property uncomfortable:—*Held:* no misdirection.—HOLE *v.* BARLOW (1858), 4 C. B. N. S. 334; 27 L. J. C. P. 207; 22 J. P. 530; 4 Jur. N. S. 1019; 6 W. R. 619; 140 E. R. 1113; *sub nom.* HOLL *v.* BARLOW, 31 L. T. O. S. 134.

Annotations:—**Folld.** Pinckney *v.* Ewens (1861), 4 L. T. 741. **Distd.** Stockport Waterworks Co. *v.* Potter (1861), 7 H. & N. 160; Beardmore *v.* Tredwell (1862), 3 Giff. 683. **Overd.** Bamford *v.* Turnley (1862), 3 B. & S. 66 **N.F.** Cavey *v.* Ledbitter (1863), 13 C. B. N. S. 470. **Consd.** Tipping *v.* St. Helen's Smelting Co. (1863), 4 B. & S. 608. **Expld.** Wanstead L. B. *of Health v.* Hill (1863), 13 C. B. N. S. 479. **Consd.** Crump *v.* Lambert (1867), L. R. 3 Eq. 409; Luscombe *v.* Steer (1867), 17 L. T. 229; Shotts Iron Co. *v.* Inglis (1882), 7 App. Cas. 518. **Refd.** Brand *v.* Hammersmith & City Ry. (1867), L. R. 2 Q. B. 223; Fleming *v.* Hislop (1886), 11 App. Cas. 686. *Hole* v. *Barlow* has been long since overruled (LORD HALSBURY); Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685. **Mentd.** *Re* Petition of Right, [1915] 3 K. B. 649; A.-G. *v.* De Keyser's Royal Hotel, [1920] A. C. 508.

111. ——.]—Where a man, by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement as to amount *primâ facie* to a cause of action, it is no answer that the act was done in a proper & convenient spot, & was a reasonable use of the land. The fitness of the locality does not prevent the carrying on of an offensive, though lawful, trade from being an actionable nuisance; but whenever, taking all the circumstances into consideration, including the nature & extent of pltf.'s enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance, an action will lie whatever the locality may be.

I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases & useful in deciding them. The question so entirely depends on the surrounding circumstances, the place where, the time when, the alleged nuisance, what the mode of committing it, how, & the duration of it, whether temporary or permanent, occasional or continual, as to make it impossible to lay down any rule of law applicable to every case & which also will be useful in assisting a jury to come to a satisfactory conclusion, it must at all times be a question of fact with reference to all the circumstances of the case (POLLOCK, C.B.).—BAMFORD *v.* TURNLEY (1862), 3 B. & S. 66; 31 L. J. Q. B. 286; 6 L. T. 721; 9 Jur. N. S. 377; 10 W. R. 803; 122 E. R. 27, Ex. Ch.

Annotations:—**Folld.** Cavey *v.* Ledbitter (1863), 13 C. B. N. S. 470; Tipping *v.* St. Helen's Smelting Co. (1864), 4 B. & S. 616. **Consd.** Brand *v.* Hammersmith & City Ry. (1867), L. R. 2 Q. B. 223. **Expld.** Luscombe *v.* Steer (1867), 17 L. T. 229. **Apprvd.** Shotts Iron Co. *v.* Inglis (1882), 7 App. Cas. 518; Fleming *v.* Hislop, (1886), 11 App. Cas. 686. **Consd.** Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685. **Apld.** A.-G. *v.* Cole, [1901] 1 Ch. 205. **Consd.** Colwell *v.* St. Pancras B. C., [1904] 1 Ch. 707; Heath *v.* Brighton Corpn. (1908), 98 L. T. 718; West *v.* Bristol Tram. Co., [1908] 2 K. B. 14; Bedford *v.* Leeds Corpn. (1913), 77 J. P. 430. **Refd.** Wanstead L. B. of Health *v.* Hill (1863), 13 C. B. N. S. 479; Grosvenor Hotel Co. *v.* Hamilton, [1894] 2 Q. B. 836; Lyons *v.* Wilkins, [1899] 1 Ch. 255; Knight *v.* Isle of Wight Electric Light & Power Co. (1904), 73 L. J. Ch. 299; Clark *v.* Lloyd's Bank (1910), 79 L. J. Ch. 645; Mudge *v.* Penge U. C. (1916), 86 L. J. Ch. 126.

112. ——.]—A nuisance occasioned by polluting the waters of a river, by discharging the refuse of a mill into the stream, cannot be justified on the ground that the trade carried on in the mill was useful to the community, unless it be shown that it was carried on in a reasonable manner & in a proper place.—STOCKPORT WATERWORKS CO. *v.* POTTER (1861), 7 H. & N. 160; 31 L. J. Ex. 9; 26 J. P. 56; 7 Jur. N. S. 880; 158 E. R. 433.

113. ——.]—It is no answer to an action for a nuisance in burning bricks so near to pltf.'s dwelling house as to cause substantial annoyance & discomfort to himself & his family, that the act complained of was done at a convenient time & place. Therefore, in such a case, the refusal of the judge to leave it to the jury to say whether the bricks had been burned in a convenient place for the purpose, is no misdirection. The judge having directed the jury to find for pltf., if there was annoyance to a substantial degree:—*Held:* in accordance with the decision of the Ex. Ch. in *Bamford* v. *Turnley*, No. 111, *ante*, a proper direction.—CAVEY *v.* LEDBITTER (1863), 13 C. B. N. S. 470; 32 L. J. C. P. 104; 9 Jur. N. S. 798; 143 E. R. 187.

Annotations:—**Consd.** Roskell *v.* Whitworth (1871), 19 W. R. 804. **Refd.** Shotts Iron Co. *v.* Inglis (1882), 7 App. Cas. 518; Bedford *v.* Leeds Corpn. (1913), 77 J. P. 430.

114. ——.]—In order to constitute a nuisance there must be, not merely a nominal, but such a sensible & real damage as a sensible person, if subjected to it, would find injurious, regard being had to the situation & mode of occupation of the property injured.

Semble: if a man builds a rolling mill close to inhabited cottages, so that the vibration produced by the hammers cracks the walls of the cottages, & the noise of the mill causes them to become & remain uninhabited, he cannot justify these injuries, on the ground that they were caused by him in the reasonable & proper exercise of his trade in a reasonable & proper place.—SCOTT *v.* FIRTH (1864), 4 F. & F 349; 10 L. T. 240, N. P.

Annotation:—**Consd.** Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685.

115. ——.]—Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that & similar trades, will not exempt the person carrying it on from liability to an action for damages, in respect of injury created by it to property in the neighbourhood.

A. brought an action against B. for injury done to the trees, shrubs, etc., on his, A.'s, land by the vapours, etc., exhaling from B.'s smelting works. The jury found that A.'s property had been injured by such vapours, etc:—*Held:* B. was liable for this injury, notwithstanding the fact that the smelting was an ordinary business carried on in a proper way & in as good a manner as possible, & there were many other manufactories in the neighbourhood, & the whole district around A.'s land was more or less injured by the vapours, etc., from such manufactories.

It is a very desirable thing to mark the difference between an action brought for a nuisance, upon the ground that the alleged nuisance produces material injury to the property, & an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience & interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether

be desired.—FLEMING *v.* HISLOP (1886), 13 R. (Ct. of Sess.) (H. L.) 43; 23 Sc. L. R. 491.—**SCOT.**

h. ——.]—The business of cow keeping may be so conducted & regulated within a burgh as not to be a nuisance.—MANSON *v.* FORREST (1887), 14 R. (Ct. of Sess.) 802; 24 Sc. L. R. 578.—**SCOT.**

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that may or may not be denominated a nuisance must undoubtedly depend greatly on the circumstances where the thing complained of actually occurs. If a man lives in a town, of necessity he should submit himself to the consequence of those obligations of trade which may be carried on in his immediate locality, which are actually necessary for trade & commerce, also for the enjoyment of property & for the benefit of the inhabitants of the town & of the public at large. If a man lives in a street where there are numerous shops, & a shop is opened next door to him, which is carried on in a fair & reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop; but when an occupation is carried on by one person in the neighbourhood of another, & the result of that trade, or occupation, or business is material injury, then unquestionably, arises a very different consideration; & I think that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate & free exercise of the trade of their neighbours, would not apply to circumstances, the immediate result of which is sensible injury to the value of the property. . . . The word "suitable" unquestionably cannot carry with it this consequence —that a trade may be carried on in a particular locality the consequence of which trade may be injury & destruction to the neighbouring property (LORD WESTBURY, C.).

Everything must be looked to from a reasonable point of view: therefore the law does not regard trifling & small inconveniences but only regards sensible inconveniences which sensibly diminish the comfort, enjoyment or value of the property which is affected (LORD WENSLEYDALE.).—ST. HELEN'S SMELTING CO. *v.* TIPPING (1865), 11 H. L. Cas. 642; 35 L. J. Q. B. 66; 12 L. T. 776; 29 J. P. 579, 11 Jur. N. S. 785; 13 W. R. 1083; 11 E. R. 1483, H. L.; *affg.* S. C. *sub nom.* TIPPING *v.* ST. HELEN'S SMELTING CO. (1864), 4 B. & S. 616, Ex. Ch.

Annotations:—**Consd.** Brand *v.* Hammersmith & City Ry. (1867), L. R. 2 Q. B. 223; Cooke *v.* Forbes (1867), L. R. 5 Eq. 166; Crump *v.* Lambert (1867), L. R. 3 Eq. 409. **Apld.** Crossley *v.* Lightowler (1867), 2 Ch. App. 478; Gaunt *v.* Fynney (1872), 8 Ch. App. 8. **Consd.** Saville *v.* Kilner (1872), 26 L. T. 277. **Distd.** Benjamin *v.* Storr (1874), 43 L. J. C. P. 162. **Apld.** Salvin *v.* North Brancepeth Coal Co. (1874), 9 Ch. App. 705. **Consd.** Blair & Sumner *v.* Deakin, Eden & Thwaites *v.* Deakin (1887), 57 L. T. 522; Fanshawe *v.* London & Provincial Dairy Co. (1888), 4 T. L. R. 694. **Apld.** Rushmer *v.* Polsue & Alfieri, [1906] 1 Ch. 234. **Consd.** Heath *v.* Brighton Corpn. (1908), 98 L. T. 718. **Refd.** A.-G. *v.* Bradford Canal Proprietors (1866), L. R. 2 Eq. 71; Dent *v.* Auction Mart Co., Pilgrim *v.* Same, Mercer's Co. *v.* Same (1866), L. R. 2 Eq. 238; Smith *v.* Thackerah (1866), L. R. 1 C. P. 564; Luscombe *v.* Steer (1867), 17 L. T. 229; Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109; Roskell *v.* Whitworth (1870), 5 Ch. App. 459; Colls *v.* Home & Colonial Stores, [1904] A. C. 179; Bosworth-Smith *v.* Gwynnes (1919), 122 L. T. 15. **Mentd.** Croydon Corpn. *v.* Postmaster-General (1910), 74 J. P. 424.

116. ——.]—R. S. C., Ord. 36, r. 26, applies to cases where cts. of law & equity had concurrent jurisdiction. Where deft. desires a jury, r. 26 is not to be put in force without special reason. In an action to restrain carrying on works as a nuisance, the reasonableness of the mode of working is not proper to be put in issue.—WEST *v.* WHITE (1877), 4 Ch. D. 631; 46 L. J. Ch. 333; 36 L. T. 95; 25 W. R. 342.

Annotations:—**Refd.** Brooke *v.* Wigg (1878), 8 Ch. D. 510. **Mentd.** Back *v.* Hay (1877), 5 Ch. D. 235; Bordier *v.* Burrell (1877), 5 Ch. D. 512; Ruston *v.* Tobin (1879), 10 Ch. D. 558; Singer Manufacturing Co. *v.* Loog (1879), 11 Ch. D. 656.

117. ——.]—An action will lie to restrain a nuisance whenever it can be shown that pltf. suffers material injury from the act complained of, & it is not a sufficient defence to prove that the nuisance arises from the reasonable use by deft. of his own property.

Owing to the heat caused by the use of a cooking stove in the kitchen of an hotel, a small wine-cellar upon adjoining premises was rendered unfit for the storage of wine; the position & use of the stove were reasonable:—*Held:* an injunction should be granted to prevent the injury to the wine cellar.—REINHARDT *v.* MENTASTI (1889), 42 Ch. D. 685; 58 L. J. Ch. 787; 61 L. T. 328; 38 W. R. 10; 5 T. L. R. 709.

Annotations:—**Dbtd.** Sanders-Clark *v.* Grosvenor Mansions Co. & D'Allesandri, [1900] 2 Ch. 373. **Expld.** A.-G. *v.* Cole, [1901] 1 Ch. 205.

118. ——.]—In an action to restrain a nuisance, the question whether deft. is acting reasonably from his own point of view is not material, & if he is carrying on business so as to cause a nuisance to his neighbours he is not acting reasonably as regards them, & may be restrained by injunction, although he may be conducting his business [fat melting] in a proper manner.—A.-G. *v.* COLE & SON, [1901] 1 Ch. 205; 70 L. J. Ch. 148; 83 L. T. 725; 65 J. P. 88.

119. ——.]—POLSUE & ALFIERI, LTD. *v.* RUSHMER, No. 405, *post*.

120. ——.]—A nuisance arising from smell in the carrying on of a factory [fish guano works] will be restrained by injunction even though every endeavour has been made to abate the nuisance. —A.-G. *v.* PLYMOUTH FISH GUANO & OIL CO., LTD. (1911), 76 J. P. 19.

121. ——.]—ADAMS *v.* URSELL, No. 194, *post*.

122. Successful precautions avoiding all smell.] The C. co., without leave of the sanitary authority, carried on a business of steaming bones by screwing them down in metal cylinders hermetically sealed, & introducing dry steam, which stripped the bones & caused no offensive smell, no water being used in the process:—*Held:* quarter sessions were right in quashing a conviction of C. for using an offensive trade of bone boiling.—CARDIFF MANURE CO. *v.* CARDIFF UNION (1890), 54 J. P. 661, D. C.

SUB-SECT. 4.—USEFULNESS OR LAWFULNESS OF TRADE.

123. Whether a justification for the nuisance—Lawfulness.]—The trades of soapboiling, calendering & brewing, though lawful, yet if carried on to the annoyance of the neighbourhood, are nuisances.—R. *v.* PIERCE (1683), 2 Show. 327; 89 E. R. 967.

124. —— **Usefulness.**]—RANKETT'S CASE (1606), 2 Roll. Abr. 139.

Annotation:—**Refd.** Stockport Waterworks Co. *v.* Potter (1861), 7 H. & N. 160.

125. —— ——.]—STOCKPORT WATERWORKS CO. *v.* POTTER, No. 112, *ante*.

SUB-SECT. 5.—INCREASE IN AMOUNT OF NUISANCE.

126. Where business long established—Whether indictable.]—(1) A bond given by deft. acknowledging himself to be guilty of a nuisance, is good

k. *Whether indictable.*]—COLVILLE *v.* DALE (1899), 24 V. L. R. 590.—AUS.

evidence on the trial of an indictment for a nuisance, in carrying on the same business in another place.

(2) A man setting up a noxious business in a neighbourhood where such business has long been carried on, is not indictable for a nuisance, unless the noxious vapour is much increased by his manufacture.—R. *v.* NEVILLE (1791), Peake, 125, 170 E. R. 102, N. P.

Annotation :—As to (1) **N.F.** R. *v.* Fairie (1857), 8 E. & B. 486.

127. ——— ———.] — A man carrying on a noxious business in a place where it has been long established, is indictable for a nuisance, if the mischief is increased by the manner or extent in which he carries it on; not otherwise, although the business has increased in amount.—R. *v.* WATTS (1829), Mood. & M. 281, N. P.

SUB-SECT. 6.—BY STATUTE.

See, generally, PUBLIC HEALTH.

128. Offensive trade need not be injurious to health.]—The case of an offensive trade causing effluvia is within Public Health Act, 1875 (c. 55), s. 114, if the effluvia, though not injurious to persons in sound health, cause sick persons to become worse.

It is not necessary to constitute an offence under that sect. that such effluvia if they amount to a nuisance should also be injurious to health.—MALTON BOARD OF HEALTH *v.* MALTON MANURE CO. (1879), 4 Ex. D. 302; 49 L. J. M. C. 90; 40 L. T. 755; 44 J. P. 155; 27 W. R. 802.

Annotation :—**Consd.** Bishop Auckland L. B. *v.* Bishop Auckland Iron Co. (1882), 10 Q. B. D. 138.

129. Business established before trade declared offensive.]—By Public Health Act, 1875 (c. 55), s. 112, any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say, the trade of, then follow six specified trades, or any other noxious of offensive trade, business, or manufacture, shall be liable to a penalty not exceeding £50, in respect of the establishment thereof, & any person carrying on a business so established shall be liable to a penalty not exceeding 40s. for every day on which the offence is continued. By Public Health Acts Amendment Act, 1907 (c. 53), s. 51, the words "any other trade, business or manufacture which the local authority declare by order confirmed by the Local Govt. Board, & published in such manner as the Board direct, to be an offensive trade, shall be substituted for the words any other noxious or offensive trade, business, or manufacture," in Public Health Act, 1875 (c. 55), s. 112:—*Held :* it was not an offence to carry on a business, not being one of the six offensive trades specified in the sect., which had been declared by order of the local authority to be an offensive trade, where the business was established before the coming into operation of the order declaring it to be an offensive trade.—BUTCHERS' HIDE, SKIN & WOOL CO., LTD. *v.* SEACOME, [1913] 2 K. B. 401; 82 L. J. K. B. 726; 108 L. T. 969; 77 J. P. 219; 29 T. L. R. 415; 11 L. G. R. 572; 23 Cox, C. C. 400.

Annotation :—**Apld.** Mayo *v.* Stazicker, [1921] 2 K. B. 196.

130. ———.] — By Public Health Act, 1875 (c. 55), s. 112, "Any person who . . . establishes" an offensive trade in a district without the written consent of the urban authority is liable to a penalty. In 1911 by an order of the local authority the trade of rag & bone dealer was duly declared an offensive trade within the sect. In 1908, before the making of the above order, which consequently did not apply to him, applt. had established the trade of a rag & bone dealer in certain premises, & continued to carry it on until Aug. 1918, when he let the premises on a yearly tenancy to J., who carried on the same trade there for nearly two years, but did not purchase the goodwill. Applt. then resumed possession of the premises & carried on the same business thereon in Sept. 1920. He was convicted of establishing the trade without the permission of the urban authority within Public Health Act, 1875 (c. 55), s. 112:—*Held :* on resuming the trade applt. did not "establish" it within the meaning of the sect., but that he had established it in 1908. The conviction was accordingly quashed.—MAYO *v.* STAZICKER, [1921] 2 K. B. 196; 90 L. J. K. B. 945; 124 L. T. 825; 85 J. P. 141; 37 T. L. R. 383; 65 Sol. Jo. 380; 19 L. G. R. 240, D. C.

131. Brickmaking.]—Brickmaking is not necessarily a noxious or offensive business, trade, or manufacture, within 11 & 12 Vict. c. 63, s. 64.—WANSTEAD LOCAL BOARD OF HEALTH *v.* HILL (1863), 13 C. B. N. S. 479; 1 New Rep. 282; 32 L. J. M. C. 135; 7 L. T. 744; 9 Jur. N. S. 972; 11 W. R. 368; 143 E. R. 190.

Annotations :—**Apld.** Braintree L. B. of Health *v.* Boyton (1885), 52 L. T. 99; Withington L. B. of Health *v.* Manchester Corpn., [1893] 2 Ch. 19.

132. ———.]—Applt. was summarily convicted under Public Health (London) Act, 1891 (c. 76), s. 21, on a complaint by the sanitary authority that premises on which he carried on the business of a brickmaker in the process of brickburning caused effluvia & were a nuisance & dangerous to health:—*Held :* it was not a condition precedent to such conviction that a notice under Public Health (London) Act, 1891 (c. 76), s. 4, should have been served upon applt. requiring him to abate the [trade] nuisance; such a notice was only required in the case of the particular nuisance enumerated in Public Health (London) Act, 1891 (c. 76), s. 2.—BIRD *v.* ST. MARY ABBOTTS KENSINGTON, VESTRY, [1895] 1 Q. B. 912; 64 L. J. M. C. 215; 72 L. T. 599; 59 J. P. 391; 15 R. 442, D. C.

133. Fish frying business.] — A fish frying business, which is as a fact an offensive business by reason of effluvia arising therefrom & extending to a distance of two or three hundred yards, is not a noxious or offensive business within the meaning of Public Health Act, 1875 (c. 55), s. 112, which only applies where a business is necessarily noxious or offensive.—BRAINTREE LOCAL BOARD OF HEALTH *v.* BOYTON (1884), 52 L. T. 99; 48 J. P. 582, D. C.

Annotations :—**Apld.** Withington L. B. of Health *v.* Manchester Corpn., [1893] 2 Ch. 19. **Reld.** Devonshire *v.* Brookshaw (1899), 81 L. T. 83.

134. ———.]—Although the business of a fried-fish seller is not necessarily an offensive trade or business within the meaning of Public Health Act, 1875 (c. 55), s. 112, where such business is shown by the evidence to be carried on in such a way as to be offensive to the neighbours, the ct. will grant an injunction for breach of a covenant against using the premises for any offensive trade or business whatsoever.—DEVONSHIRE (DUKE) *v.* BROOKSHAW (1899), 81 L. T. 83; 63 J. P. 569; 43 Sol. Jo. 675.

135. Smallpox hospital.]—WITHINGTON LOCAL BOARD OF HEALTH *v.* MANCHESTER CORPN., No. 210, *post*.

136. Gut cleaning.]—By an order made in pursuance of 37 & 38 Vict. c. 67, s. 3, the business of a gut scraper—that is to say, any business in which gut is cleansed, scraped, or dealt with

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otherwise than for the manufacture of catgut was declared an offensive business, & was not to be carried on anew without the sanction of the local authority.

37 & 38 Vict. c. 67, s. 3, was repealed by Public Health (London) Act, 1891, c. 76, but was re-enacted by Public Health (London) Act, 1891, making the county council the authority to give the sanction for carrying on offensive businesses, & the force of all orders previously issued was preserved.

Resps. purchased from gut scrapers the intestines of sheep which have been previously cleansed & scraped by such gut scrapers, as sausage casings, & their business consisted of sorting these cases into different sizes & lengths. They then repack them, & supply them to sausage makers:—*Held:* this was not a business within the order.—LONDON COUNTY COUNCIL *v.* HIRSCH & CO. (1899), 81 L. T. 447; 63 J. P. 822; 19 Cox, C. C. 405, D. C.

137. Tannery—Pollution of public sewers.]—A.-G. *v.* WHITMORE (1901), *Times*, May 2, C. A.

SUB-SECT. 7.—PARTICULAR TRADES.

138. Alkali works.]—ATHA *v.* THOMPSON (1849), 14 L. T. O. S. 156.

139. Arsenic burning.]—R. *v.* GARLAND, No. 800, *post.*

140. Blacksmith.]—BRADLEY *v.* GILL (1688), 1 Lut. 69; 125 E. R. 36.

141. Bone boilers.]—CARDIFF MANURE CO. *v.* CARDIFF UNION, No. 122, *ante.*

142. Brew house.]—JONES *v.* POWELL (1628), Hut. 135; Palm. 536; 123 E. R. 1155.

Annotations:—**Consd.** Bamford *v.* Turnley (1862), 3 B. & S. 66. **Refd.** Bradley *v.* Gill (1688), 1 Lut. 69; Fleming *v.* Hislop (1886), 11 App. Cas. 686.

143. ——.]—Specific performance of an agreement to grant a building lease, decreed generally, although pltf. had built a brewhouse upon part of the land comprised in the agreement, & thereby injured the adjoining property of the lessor.

A brewhouse is not necessarily a nuisance, & if it be so used as to become a nuisance, the law is open to deft. (LEACH, V.-C.).—GORTON *v.* SMART (1822), 1 Sim. & St. 66; 57 E. R. 26; *sub nom.* GORDON *v.* SMART, 1 L. J. O. S. Ch. 36.

144. Brick burning.]—GRAFTON (DUKE) *v.* HILLIARD (1736), 4 De G. & Sm. 326; 64 E. R. 853, L. C.

Annotations:—**Refd.** A.-G. *v.* Cleaver (1811), 18 Ves. 211; Walter *v.* Selfe (1851), 4 De G. & Sm. 315; Pollock *v.* Lester (1853), 11 Hare, 266.

145. ——.]—BARWELL *v.* BROOKES (1843), 1 L. T. O. S. 75; *subsequent proceedings*, 1 L. T. O. S. 454.

146. ——.]—WALTER *v.* SELFE, No. 1, *ante.*

147. ——.]—Injunction granted before a trial at law to restrain the burning of bricks, not then already burning in clamp, on ground within 60 yards from pltf.'s houses, & from continuing after a certain day to burn such as were then burning, upon evidence of ill consequences suffered by some of pltfs.' & their families from the noxious effects of the operation, pltfs. undertaking to proceed with the action at the assizes about to take place, & to abide any order the ct. might make as to damages to deft.—POLLOCK *v.* LESTER (1853), 11 Hare, 266; 68 E. R. 1274.

Annotations:—**Refd.** Cleeve *v.* Mahany (1861), 25 J. P. 819; Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109; Appleton *v.* Chapel Town Paper Co. (1876), 45 L. J. Ch. 276.

148. ——.]—Where the comfort & enjoyment of a mansion were injured, & the trees planted & standing for ornament & to exclude the view of unsightly objects from the mansion were in some cases destroyed, & in many cases injured, by brick burning, the ct. granted an injunction to restrain such brick burning as, although deft. carried on the brick burning complained of in order to execute a contract for the construction of the fortifications on Portsdown Hill, near Portsmouth, it appears that the brickburning might have been carried on elsewhere on the land in deft.'s occupation without any inconvenience to pltf., or without that degree of injury to pltf. which would entitle her to complain.—BEARDMORE *v.* TREDWELL (1862), 3 Giff. 683; 31 L. J. Ch. 892; 7 L. T. 207; 9 Jur. N. S. 272; 66 E. R. 582, L. C.

Annotation:—**Refd.** Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109.

149. ——.]—A nuisance against which this ct. will grant an injunction must be a material injury to property, or to the comfort of the existence of those who dwell in the neighbourhood.

Deft. having taken lands adjoining the residence, lake & grounds of pltf., made preparations for burning bricks upon them. He commenced burning one clamp at a distance of 1,447 feet from pltf.'s house, & 422 feet from the lake, upon the margin of which lake was a cottage occupied by a person in pltf.'s employment. Pltf. obtained an *ex parte* injunction, upon which the fire was at once extinguished & nothing further was ever done, though it was admittedly deft.'s intention to burn bricks:—*Held:* the actual facts did not amount to a nuisance; & as to future injury there was not sufficient, having regard to the proximity of the clamp, nor to the estimated degree of damage, nor upon the circumstances generally to warrant this injunction of the ct.—LUSCOMBE *v.* STEER (1867), 17 L. T. 229; 15 W. R. 1191, L. J.

150. ——.]—Brick burning is a nuisance to persons living within the limit affected by it, & two hundred & forty yards is not an extreme limit:—*Held:* an injunction to abate such a nuisance would be ordered by this ct.—ROBERTS *v.* CLARKE (1868), 18 L. T. 49.

151. ——.]—BAREHAM *v.* HALL, No. 254, *post.*

152. ——.]—The Shotts Iron Co. possess valuable mining leases of the iron ore under the estate of (*inter alia*) Penicuik, under the condition, not to calcine within a certain area. They calcined beyond this area, but near to the boundary of the lands of glencorse. The calcining was carried on in open bings eight feet high. The proprietor of glencorse on the ground, *inter alia*, that his ornamental plantations were being destroyed by the fumes from the bings, raised an action concluding for interdict against the co. calcining within two miles of his estate:—*Held:* the glencorse plantations had been injured by the calcining, & that the pursuer was entitled to interdict to prevent the co. from carrying on their calcining within one mile of his lands, in the same manner hitherto pursued by them, or in any other manner whereby noxious vapours may be caused to pass over the pursuer's lands, or any part thereof, to the damage or injury of his plantations or estate.—SHOTTS IRON CO *v.* INGLIS (1882), 7 App. Cas. 518, H. L.

Annotation:—**Refd.** Fleming *v.* Hislop (1886), 11 App. Cas. 686.

153. ——.]—DUNSTON *v.* NEAL, SEELY *v.* NEAL (1885), 1 T. L. R. 462.

——.]—*See* Nos. 110, 111, 113, 131, 132, *ante.*

154. Candle works.]—RANKETT'S CASE (1606), 2 Roll. Abr. 139.

Annotation:—**Refd.** Stockport Waterworks Co. *v.* Potter (1861), 7 H. & N. 160.

155. ——.]—BLISS *v.* HALL, No. 25, *ante*.

156. Cement works.] — A.-G. *v.* FRANCIS (1874), 1 Seton's Judgments & Orders, 7th ed.

157. Charcoal manufactory.] — R. *v.* FAIRIE (1857), 8 E. & B. 486; 30 L. T. O. S. 131; 4 Jur. N. S. 300; 6 W. R. 56; 8 Cox, C. C. 66; 120 E. R. 181.

158. Chemical works.]—BARLOW *v.* BAILEY, No. 693, *post*.

159. Coke ovens.]—R. *v.* DAVEY (1805), 5 Esp. 217; 170 E. R. 791, N. P.

160. Dye house.]—ALDRED'S CASE, No. 168, *post*.

161. Fat melting.] — A.-G. *v.* COLE & SON, No. 118, *ante*.

162. Fellmonger's yard.]—PINCKNEY *v.* EWENS (1861), 4 L. T. 741, N. P.

163. Fried provision shop.] — PHILBRICK *v.* ISAACS (1884), 1 T. L. R. 184.

164. ——.] — ADAMS *v.* URSELL, No. 194, *post*.

——.]—*See* Nos. 133, 134, *ante*.

165. Guano works.]—A.-G. *v.* PLYMOUTH FISH GUANO & OIL CO., LTD., No. 120, *ante*.

166. Gut cleaning.] — LONDON COUNTY COUNCIL *v.* HIRSCH & CO., No. 136, *ante*.

167. Horse-flesh boiling.] — GRINDLEY *v.* BOOTH (1865), 3 H. & C. 669; 34 L. J. Ex. 135; 12 L. T. 469; 29 J. P. 503; 11 Jur. N. S. 745; 159 E. R. 695.

168. Lime kiln.]—An action on the case lies for erecting a hogstye so near the house of pltf. that the air thereof was corrupted. So of a lime-kiln, if the smoke enters pltf.'s house so that he cannot dwell there: so of a dyehouse, etc., if the filth runs into his fish pond, etc.—ALDRED'S CASE (1610), 9 Co. Rep. 57 b; 77 E. R. 816.

Annotations:—**Refd.** Bradley *v.* Gill (1688), 1 Lut. 69; Rich *v.* Basterfield (1847), 4 C. B. 783; Simpson *v.* Savage (1856), 1 C. B. N. S. 347; Bamford *v.* Turnley (1862), 3 B. & S. 66; Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5; Tod-Heatly *v.* Benham (1888), 40 Ch. D. 80; Chastey *v.* Ackland, [1895] 2 Ch. 389; Colls *v.* Home & Colonial Stores, [1904] A. C. 179. **Mentd.** Bonomi *v.* Backhouse (1858), E. B. & E. 622; Webb *v.* Bird (1861), 10 C. B. N. S. 268; Dalton *v.* Angus (1881), 6 App. Cas. 740; Aldin *v.* Latimer, Clark, Muirhead, [1894] 2 Ch. 437; Warren *v.* Brown, [1900] 2 Q. B. 722; Davis *v.* Town Properties Investment Corpn. (1902), 71 L. J. Ch. 900; Kine *v.* Jolly, [1905] 1 Ch. 480.

169. Petroleum works.] — Although a strong case of nuisance is established in support of an interlocutory application for restraining the carrying on of a noxious trade [petroleum works], the ct. will reserve the question till the hearing.—A.-G. *v.* CHARLES (1863), 27 J. P. 164; 11 W. R. 253.

170. Pig keeping.] — ALDRED'S CASE, No. 168, *ante*.

171. Rolling mill.]—SCOTT *v.* FIRTH, No. 114, *ante*.

172. Sewage farm.]—BAINBRIDGE *v.* CHERTSEY URBAN COUNCIL, No. 108, *ante*.

173. Slaughter-house.] — R. *v.* CROSS (1826), 2 C. & P. 483.

174. ——.]—By a private Act of Parliament, all houses for the slaughtering of horses within 1,000 yards of a certain workhouse, are to be deemed public nuisances & removed; but if they existed before the Act, the owners are to receive a compensation:—*Held:* if an indictment be framed at common law with counts on that Act, deft. may be convicted if he so carried on the trade as to make it a public nuisance, & he is not then entitled to any compensation.—R. *v.* WATTS (1826), 2 C. & P. 486.

175. ——.]—PEDIE *v.* SWINTON (1839), Macl. & Rob. 1018; 9 E. R. 382, H. L.

176. ——.]—The motion is founded on the covenant, & more particularly on the general words at the end. It is clear on the authorities that carrying on the business of a slaughter-house keeper was not, *per se*, carrying on an offensive business. . . . There is no experience of the actual carrying on of the business on the new site, & it cannot be inferred from what the business was as carried on at the old place from which deft. was moving that it would be offensive. On the whole pltf. has not made a strong enough *primâ facie* case. The treatment of slaughter-houses in the Public Health Act shows that they might be carried on without being offensive (CHITTY, J.).—RAPLEY *v.* SMART (1893), 10 T. L. R. 174; 38 Sol. Jo. 129.

177. Smelting works.]—ST. HELEN'S SMELTING CO. *v.* TIPPING, No. 115, *ante*.

178. Soap works.] — R. *v.* PIERCE, No. 123, *ante*.

179. ——.]—A.-G. *v.* CLEAVER (1811), 18 Ves. 211; 34 E. R. 297, L. C.

Annotations:—**Refd.** Crowder *v.* Tinkler (1816), 19 Ves. 617; A.-G. *v.* Johnson (1819), 2 Wils. Ch. 87; Ripon *v.* Hobart (1834), 3 My. & K. 169; Haines *v.* Taylor (1846), 10 Beav. 75; Elmhirst *v.* Spencer (1849), 2 Mac. & G. 45; Soltau *v.* De Held (1851), 2 Sim. N. S. 133; Walter *v.* Selfe (1851), 4 De G. & Sm. 315; A.-G. *v.* Sheffield Gas Consumers Co. (1853), 3 De G. M. & G. 304. **Mentd.** Blakemore *v.* Glamorganshire Canal Navigation (1832), 1 My. & K. 154.

180. Sulphuric acid manufacture.] — It is a common nuisance to make acid spirit of sulphur, & thereby impregnate the air with noisome stinks.—R. *v.* WHITE & WARD (1757), 1 Burr. 333; 97 E. R. 338.

Annotations:—**Refd.** A.-G. *v.* Cleaver (1811), 18 Ves. 211, **Mentd.** Philpot *v.* Page (1825), 4 B. & C. 160.

181. Tallow melting.]—A tallow furnace erected in the neighbourhood of other houses is a nuisance.—MORLEY *v.* PRAGNELL (1638), Cro. Car. 510; 79 E. R. 1039.

Annotations:—**Refd.** Iveson *v.* Moore (1699), 1 Ld. Raym. 486; Walter *v.* Selfe (1851), 4 De G. & Sm. 315.

182. Tannery.] — R. *v.* PAPPINEAU, No. 409, *post*.

·.]—*See* No. 137, *ante*

183. Varnish making.] — R. *v.* NEIL (1826), 2 C. & P. 485.

PART II. SECT. 11, SUB-SECT. 7.

173 i. *Slaughter-house.*]—GREGG *v.* CAMBRIDGE VILLAGE MANAGEMENT BOARD (1897), 11 E. D. C. 98.—**S. AF.**

177 i. *Smelting works.*]—In actions for damages for injury to the crops of pltfs. by reason of noxious vapours or fumes from defts.' smelting works:—*Held:* pltfs. had sufficiently established by evidence that the injury was due to sulphur smoke streams from defts.' works, & the amounts assessed for damages were reasonable.—LINDALA (DAVID & GIROUX) *v.* CANADIAN COPPER CO. (FOUR ACTIONS) (1920), 47 O. L. R. 28; 51 D. L. R. 565; 17 O. W. N. 397.—**CAN.**

178 i. *Soap works.*]—BALLENY *v.* COMB (1813), 17 Fac. Coll. 159.—**SCOT.**

181 i. *Tallow melting.*]—Where a manufacturer engaged in the manufacture of an article has in the course of his operations to melt some tallow to form an ingredient in his product he does not thereby establish the trade of "tallow melting."—DOYLE *v.* HALL (1913), 32 N. Z. L. R. 654.—**N.Z.**

l. *Glue works.*]—CHARITY *v.* RIDDELL (1808), 14 Fac. Coll. 237.—**SCOT.**

m. *Whale blubber boilers.*]—TROTTER *v.* FARNIE (1830), 9 Sh. (Ct. of Sess.) 144; 6 Fac. Coll. 101.—**SCOT.**

SECT. 12.—**OPEN SPACES AND COMMONS.**

See, generally, COMMONS, Vol. XI., pp. 5–90.

Bye-laws on metropolitan commons—Metropolitan Commons Act, 1866.]—*See* COMMONS, Vol. XI., p. 88, No. 1077.

SECT. 13.—**POLLUTION OF AIR.**

SUB-SECT. 1.—IN GENERAL.

184. Right to purity of air.]—WALTER *v.* SELFE, No. 1, *ante*.

185. ——.]—(1) Every man has a natural right to enjoy the air pure & free from noxious smells or vapours, & any one who sends on his neighbour's land that which makes the air impure is guilty of a nuisance. But a man must not impose an obligation on his neighbour by having a want of proper ventilation on his own premises.

(2) An interference with light or air which is not otherwise actionable cannot be restrained on the ground of nuisance.

(3) Unless the right to have a free passage of air over the land of another has been acquired by lapse of time, the mere diminution of quantity is not a nuisance at law.

(4) An undefined passage of air is too vague to form the subject-matter of a grant.—CHASTEY *v.* ACKLAND, [1895] 2 Ch. 389; 64 L. J. Q. B. 523; 72 L. T. 845; 43 W. R. 627; 11 T. L. R. 460; 39 Sol. Jo. 582; 12 R. 420, C. A.; *on appeal*, [1897] A. C. 155, H. L.

Annotation:—Generally, **Mentd.** Davis *v.* Town Properties Investment Corpn., [1903] 1 Ch. 797.

186. Whether sufficient to constitute nuisance.]—ALDRED'S CASE, No. 168, *ante*.

187. ——.]—R. *v.* PIERCE, No. 123, *ante*.

.]—R. *v.* PAPPINEAU (1726), 2 Stra. 686; 2 Sess. Cas. K. B. 34; 93 E. R. 784.

Annotations:—**Refd.** Cooper *v.* Marshall (1757), 1 Burr. 259; R. *v.* White & Ward (1757), 1 Burr. 333; R. *v.* West Riding of Yorkshire JJ. (1798), 7 Term Rep. 467; R. *v.* Stead (1799), 8 Term Rep. 142; Wednesbury Corpn. *v.* Lodge Holes Colliery Co., [1907] 1 K. B. 78.

189. ——.]—R. *v.* WHITE & WARD, No. 180, *ante*.

190. ——.]—R. *v.* DAVEY, No. 105, *ante*.

191. ——.]—R. *v.* NEIL, No. 106, *ante*.

192. ——.]—A.-G. *v.* FRANCIS (1874), 1 Seton's Judgments & Orders, 7th ed. 595.

193. ——.]—PHILBRICK *v.* ISAACS (1884), 1 T. L. R. 184.

194. ——.]—(1) A fried fish shop, carried on in close proximity to a dwellinghouse, may cause an actionable nuisance, & will be restrained, if the evidence shows that the odour causes an inconvenience materially interfering with the ordinary comfort physically of human existence within the definition contained in the judgment in *Walter* v. *Selfe*, No. 1, *ante*.

(2) On an application for an interlocutory injunction to restrain an alleged nuisance the ct. held that a nuisance at common law had been established, & granted the application, although evdence was tendered for the defence that a still greater, although a different, nuisance had existed on the premises for many years past.—ADAMS *v.* URSELL, [1913] 1 Ch. 269; 82 L. J. Ch. 157; 108 L. T. 292; 57 Sol. Jo. 227.

Offensive trades.]—*See* Part II., Sect. 11, *ante*.

SUB-SECT. 2.—NOXIOUS EFFLUVIA AND FUMES.

195. Creosoted wood block pavement.]—WEST *v.* BRISTOL TRAMWAYS CO., No. 356, *post*.

196. Deposit of manure.]—It is not in every case of a nuisance being proved that this ct. will interfere by injunction.

Where therefore a pltf. filed a bill to restrain a railway co. from using a siding for the deposit & stacking of manure in such a manner as to cause a nuisance to himself & his family, but failed to prove the continuance of such nuisance, the ct. refused at the hearing to interfere by injunction & left deft. to his remedy at law.—SWAINE *v.* GREAT NORTHERN RY. CO. (1864), 4 De G. J. & Sm. 211; 3 New Rep. 399; 33 L. J. Ch. 399; 9 L. T. 745; 10 Jur. N. S. 191; 12 W. R. 391; 46 E. R. 899, L. JJ.

Annotations:—**Refd.** Crump *v.* Lambert (1867), 17 L. T. 133. **Mentd.** Langmead *v.* Maple (1865), 18 C. B. N. S. 255; Dowling *v.* Pontypool, Caerleon & Newport Ry. (1874), L. R. 18 Eq. 714; Serrao *v.* Noel (1885), 15 Q. B. D. 549; Gosnell *v.* Aerated Bread Co. (1894), 10 T. L. R. 661; A.-G. *v.* Preston Corpn. (1896), 13 T. L. R. 14.

197. ——.]—On a *primâ facie* case by a pltf. that certain works for the purpose of deodorising night soil for agricultural purposes constituted a nuisance, & that the effluvium arising therefrom was injurious to the health of pltf. & his family who resided in the immediate neighbourhood of deft.'s works:—*Held:* pltf. was entitled to an injunction until the hearing of the cause to restrain deft. from bringing the night soil to the premises for the purposes of manufacture as agricultural manure, or any of the processes of such manufacture.—KNIGHT *v.* GARDNER (1869), 19 L. T. 673.

198. ——.]—DE CASTRO *v.* POUPART (1892), 36 Sol. Jo. 769.

199. ——.]—The occupiers of a dwelling-house adjoining a market garden, where intensive culture was practised, suffered physical inconvenience

PART II. SECT. 13, SUB-SECT. 1.

184 i. *Right to purity of air.*]—Every one has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country.—CARTWRIGHT *v.* GRAY (1866), 12 Gr. 399.—**CAN.**

186 i. *Whether sufficient to constitute nuisance.*]—An offensive smell arising on two consecutive nights may constitute a nuisance within Health Act, 1890, s. 226.—BULLOWS *v.* KITCHEN & SONS, LTD., [1910] V. L. R. 130.—**AUS.**

186 ii. ——.]—BLACK *v.* CANADIAN COPPER CO. (1912), 23 O. W. R. 95; 4 O. W. N. 111; 6 D. L. R. 855.—**CAN.**

186 iii. ——.]—In an action by the owner & occupier of a dwelling-house against the owner of an adjoining stable, complaining of offensive odours & noises from the stable:—*Held:* deft. was liable in damages for permitting the offensive odours & noises to penetrate into pltf.'s house, & pltf. was entitled to an injunction to prevent a repetition of the same.—HAMPTON *v.* HARVEY (1901), 8 Nfld. L. R. 458.—**NFLD.**

186 iv. ——.]—BRIGHTLING *v.* THROP (1909), 18 N. Z. L. R. 785.—**N.Z**

186 v. ——.]—When a proprietor of land begins to carry on works which pollute the atmosphere, the proprietor of adjacent ground has an immediate interest & title to apply for interdict although the use of the ground may not be injuriously affected at the time.—HARVIE *v.* ROBERTSON (1903), 5 F. (Ct. of Sess.) 338; 40 Sc. L. R. 855; 10 S. L. T. 581.—**SCOT.**

PART II. SECT. 13, SUB-SECT. 2.

n. *Pulp mill.*]—Nauseous & offensive odours, & fumes emitted by a pulp mill to the detriment of a neighbouring property, causing to its occupants intolerable inconvenience & rendering it, at times, unhabitable are a proper subject of restraint; & in such a case, the cts. are not restricted to awarding relief by way of damages, but may grant a perpetual injunction to restrain the manufacturer from continuing or repetition of the nuisance.—CANADA PAPER CO. *v.* BROWN (1922), 63 S. C. R. 243; 66 D. L. R. 287.—**CAN.**

o. *Gasoline oil pump.*]—A gasoline oil tank & pump placed by deft. J., with the consent of deft. town corpn. upon a highway in the town, in front of deft. J.'s garage & repair shop was held to be an unlawful obstruction in the highway & a public nuisance; & pltf., whose dwelling was situated about

from the smell from & flies bred in a large heap of manure. The locality was one where market gardening was carried on, but the collection of manure in question was in excess of what might be expected in the locality:—*Held:* the manure heap was a serious inconvenience & interference with the comfort of the occupiers of the dwelling-house according to notions prevalent among reasonable English men & women, & it amounted to a nuisance in law.—BLAND *v.* YATES (1914), 58 Sol. Jo. 612.

Annotation:—**Refd.** Stearn *v.* Prentice, [1919] 1 K. B. 394.

200. Forge.] — GULLICK *v.* TREMLETT (1872), 20 W. R. 358.

201. Photographic business.] — TURNER *v.* ELLIOTT (1892), 36 Sol. Jo. 217.

202. Refuse tip.]—(1) Where on the evidence the ct. came to the conclusion that defts., a local authority, were causing a nuisance by reason of offensive smells arising from a refuse tip, although they had taken steps to abate it by keeping the tip covered with earth, but that by reason of war & consequent shortage of labour it was difficult for the local authority to abate the nuisance, the ct. in granting an injunction ordering them to do so suspended its operation until after the termination of hostilities.

(2) Where there is a large mass of honest & valuable evidence as to a nuisance, this testimony cannot be rebutted by an equal mass of merely negative evidence.—GREAT CENTRAL RY. CO. *v.* DONCASTER RURAL COUNCIL (1917), 87 L. J. Ch. 80; 118 L. T. 19; 82 J. P. 33; 62 Sol. Jo. 212; 15 L. G. R. 813.

203. Restaurant.] — DORE *v.* PECORINI (1887), 31 Sol. Jo. 726.

204. ——.]—Deft. was the occupier of premises underneath a residential flat, & he turned the premises into a restaurant, & thereby caused a nuisance by heat & smell to the occupier of the flat above:—*Held:* the alterations made by deft. were not reasonable as regards his user of the premises, & he was liable for the nuisance.—SANDERS-CLARK *v.* GROSVENOR MANSIONS CO., LTD. & D'ALLESSANDRI, [1900] 2 Ch. 373; 69 L. J. Ch. 579; 82 L. T. 758; 48 W. R. 570; 16 T. L. R. 428; 44 Sol. Jo. 502.

Annotations:—**Apld.** A.-G. *v.* Cole, [1901] 1 Ch. 205. **Refd.** Rushmer *v.* Polsue & Alfieri (1905), 93 L. T. 823.

205. Staling of standing horses.] — BENJAMIN *v.* STORR, No. 550, *post.*

206. Tramway stables.] — A co. incorporated under the Companies Acts acquired under the authority of a special Act the undertakings of two tramways cos., which had power under their special Acts to purchase for the purposes of their undertakings. The co. was subsequently authorised by special Act to construct & maintain three short extensions of their tramways with all proper rails, plates, works, & conveniences connected therewith. The co. acquired land near one of such extensions & erected stabling thereon for the accommodation of horses employed on the tramway. A neighbouring householder claimed an injunction to restrain a nuisance caused by smells arising from these stables:—*Held:* their Acts did not give the co. a statutory power to create the nuisance provided they took all reasonable care to prevent it; & in the absence of such power the injunction must be granted.—RAPIER *v.* LONDON TRAMWAYS CO., [1893] 2 Ch. 588; 63 L. J. Ch. 36; 69 L. T. 361; 9 T. L. R. 468; 37 Sol. Jo. 493; 2 R. 448, C. A.

Annotation:—**Mentd.** National Telephone Co. *v.* Baker, [1893] 2 Ch. 186.

Gas works.]—*See* GAS, Vol. XXV., pp. 485–488.

Offensive trades.]—*See* Sect. 11, *ante.*

SUB-SECT. 3.—SMOKE.

SUB-SECT. 4.—INFECTION.

207. Smallpox hospital.]—METROPOLITAN ASYLUM DISTRICT MANAGERS *v.* HILL (Appeal No. 1), No. 695, *post.*

208. ——.] — Defts. established within 685 yards of pltf.'s house a camp for smallpox patients. Pltf. alleged that the health of the neighbourhood had been endangered by the camp, & that the camp was a nuisance, & claimed an injunction to restrain defts. from maintaining the same:—*Held:* pltf. had failed to prove that there was any danger to him, or his property, & the action must be dismissed.—FLEET *v.* METROPOLITAN ASYLUMS BOARD, DARENTH SMALLPOX CAMP CASE (1886), 2 T. L. R. 361, C. A.

Annotations:—**Consd.** A.-G. *v.* Manchester Corpn., [1893] 2 Ch. 87. **Refd.** Bendelow *v.* Wortley Union Grdns. (1887), 57 L. J. Ch. 762; A.-G. *v.* Nottingham Corpn., [1904] 1 Ch. 673.

209. ——.] — BENDELOW *v.* WORTLEY UNION GUARDIANS, No. 679, *post.*

210. ——.]—A local urban authority proposed to erect a temporary smallpox hospital on land of their own within the district of an adjoining local authority without their consent. The adjoining local authority brought an action & moved for an injunction to restrain them from erecting the hospital:—*Held:* the smallpox hospital was not a noxious or offensive business within Public Health Act, 1875 (c. 55), s. 112.—WITHINGTON LOCAL BOARD OF HEALTH *v.* MANCHESTER CORPN., [1893] 2 Ch. 19; 62 L. J. Ch. 393; 68 L. T. 330; 41 W. R. 306; 9 T. L. R. 257; 37 Sol. Jo. 249; 2 R. 367; *sub nom.* CROFTON *v.* MANCHESTER CORPN., WITHINGTON LOCAL BOARD *v.* SAME, A.-G. *v.* SAME, 57 J. P. 340, C. A.

Annotations:—**Refd.** Mudge *v.* Penge U. D. C. (1916), 80 J. P. 441. **Mentd.** Cave *v.* Horsell (1912), 106 L. T. 147.

211. ——.] — Some observations have been made as to want of judgment on part of defts. in selecting [a] site for a smallpox hospital. . . . The question is, is there here a real apprehension of a real danger, not a sentimental or fanciful one? (KEKEWICH, J.).—A.-G. *v.* GUILDFORD, GODALMING & WOKING JOINT HOSPITAL BOARD (1895), 12 T. L. R. 54.

212. ——.]—The theory of the aerial convection or dissemination of the disease of smallpox has not received the unequivocal sanction of medical science; & the establishment of a smallpox hospital, properly conducted, is not of itself necessarily such a serious source of danger to persons resident, working, or passing by in its immediate vicinity, say, a radius of fifty feet,

100 feet from the garage, had shown sufficient special damage, noxious odours from the tank & pump in operation, to enable him to maintain an action for the abatement of the nuisance.—CODE *v.* JONES & TOWN OF PERTH (1923), 54 O. L. R. 425.—**CAN.**

p. *Calcining.*]—SHOTTS IRON CO. *v.* INGLIS (1882), 7 A. C. 518; 9 (Ct. of Sess.) (H. L.) 78; 19 Sc. L. R. 902.—**SCOT.**

PART II. SECT. 13, SUB-SECT. 4.

207 i. *Smallpox hospital.*]—A.-G. *v.* RATHMINES & PEMBROKE HOSPITAL BOARD, [1904] 1 I. R. 161.—**IR.**

q. *Cholera hospital.*]—A cholera hospital is not a nuisance at common law.—MUTTER *v.* FIFE (1848), 11 Dunl. (Ct. of Sess.) 303; 21 Sc. Jur. 51, 91.—**SCOT.**

Sect. 13.—*Pollution of air: Sub-sect.* 4. *Sect.* 14: *Sub-sects.* 1 *& 2, A.*]

as to constitute a public or a private nuisance for which an injunction will lie in a *quia timet* action.—A.-G. *v.* NOTTINGHAM CORPN., [1904] 1 Ch. 673; 73 L. J. Ch. 512; 90 L. T. 308; 68 J. P. 125; 52 W. R. 281; 20 T. L. R. 257; 2 L. G. R. 698.

Annotations:—**Mentd.** East London Ry. *v.* Thames Conservators (1904), 68 J. P. 302; R. *v.* L. G. Board, *Ex p.* Arlidge, [1914] 1 K. B. 160.

213. Tuberculosis hospital.]—By a lease dated Feb. 18, 1887, H., the tenant for life in possession of a settled estate, demised to deft. T., a parcel of land at Newport, Monmouthshire, on which Cardigan House was built, for a term of ninety-nine years, with a covenant by the lessee not to exercise or carry on upon the demised premises any noisy, noisome, or offensive trade or business, or do or suffer to be done, anything which might be hazardous or noisome or injurious, or offensive to the lessor or his property or any of his tenants. Other similar building leases with identical covenants were granted according to a building scheme applicable to part of the estate. By a deed dated Aug. 2, 1889, H. & his trustees conveyed the site of Cardigan House, subject to the existing lease, to W. in fee, & she covenanted with H. to the intent that the burden of the covenant might run with the premises, that she, her heirs, & assigns, would not at any time thereafter permit the premises to be used for the purpose of any trade or business or otherwise than as a private dwelling-house. On Apr. 14, 1893, W. conveyed & released the site of Cardigan House to T. subject to the lease of Feb. 18, 1887, but to the intent that the term thereby created might be thenceforth absolutely merged in the reversion, & T. covenanted to indemnify W. against the covenants in the conveyance of 1889. In Jan. 1915, T. offered Cardigan House to deft. assocn., & it was subsequently opened as a children's hospital for surgical tuberculosis.

In an action by H. & others entitled to freehold & leasehold interests in houses in the vicinity, alleging breaches of covenants by reason of sights, noise, smells, & risk of infection to the neighbourhood, & asking for an injunction to restrain defts. from using the house for the purpose of a hospital so as to cause a nuisance, or from using the premises "otherwise than as a private dwelling-house" or in breach of the covenants in the lease of 1887: —*Held:* (1) the carrying on of a properly equipped & well managed establishment, such as the hospital was proved to be, was not *per se* a noisy, noisome, or offensive business. (2) On the evidence, & in particular upon the ground that the medical evidence was unanimous & unshaken to the effect that the hospital was not a source of danger to the neighbourhood & that there was no risk of infection, the action failed as to the alleged breaches of the covenant in the lease of 1887, & also as to the alleged nuisance at common law. —FROST *v.* KING EDWARD VII. WELSH, ETC. ASSOCN., [1918] 2 Ch. 180; 87 L. J. Ch. 561; 119 L. T. 220; 82 J. P. 249; 34 T. L. R. 450; 62 Sol. Jo. 584; *on appeal*, 35 T. L. R. 138, C. A.

SECT. 14.—PUBLIC HEALTH, COMFORT AND SAFETY.

SUB-SECT. 1.—AT COMMON LAW.

See, generally, PUBLIC HEALTH.

214. Keeping explosives to danger of neighbour.]—Keeping gunpowder in great quantities is a nuisance.—R. *v.* TAYLOR (1742), 2 Stra. 1167; 93 E. R. 1104.

Annotations:—**Refd.** R. *v.* Scofield (1784), Cald. Mag. Cas. 397; R. *v.* Lister & Biggs (1856), Dears. & B. 209.

215. ——.]—Defts. were convicted on a count of an indictment which charged that they unlawfully, knowingly & wilfully did deposit in a warehouse belonging to them near to divers streets & highways & to divers dwelling houses of her Majesty's subjects, divers large & excessive quantities of a dangerous ignitable & explosive fluid called wood naptha, & did keep in the warehouse & near to the streets, highways & dwelling houses the fluid in such large, excessive & dangerous quantities, whereby the Queen's subjects passing along the streets & highways, & residing in the dwelling houses were in great danger of their lives & property & were kept in great alarm & terror *ad commune nocumentum.*

It appeared in evidence that naptha is very inflammable &, if inflamed, water could not put out the fire, unless applied in enormous quantities, & that a fire arising & communicating with the quantity kept upon defts.' premises could not be quenched, & would produce very disastrous consequences to the neighbourhood. It also appeared that it was the practice never to allow any candles, fire or gas light to be in the warehouse, & that so long as that continued the naptha would not produce danger:—*Held:* the jury were entitled to take into consideration the liability to ignition *ab extra*; it was a question for the jury, whether the keeping & depositing did create danger to life & property as alleged; &, although the judge would not have been justified in directing a verdict of guilty without taking the opinion of the jury upon it, he was fully justified in telling the jury, that if the depositing & keeping the naptha, coupled with its liability to ignition *ab extra*, created danger to life & property to the degree alleged, they might find a verdict of guilty.—R. *v.* LISTER & BIGGS (1857), Dears. & B. 209; 26 L. J. M. C. 196; 21 J. P. 422; 3 Jur. N. S. 570; 5 W. R. 626; 7 Cox, C. C. 342, C. C. R.

Annotations:—**Apld.** Hepburn *v.* Lordan (1865), 2 Hem. & M. 345. **Consd.** R. *v.* Chilworth Gunpowder Co. (1888), 4 T. L. R. 557. **Refd.** Todd *v.* Flight (1860), 9 C. B. N. S. 377; Cowper-Essex *v.* Acton L. B. (1889), 14 App. Cas. 153; M'Murray *v.* Cadwell (1889), 6 T. L. R. 76; A.-G. *v.* Manchester Corpn., [1893] 2 Ch. 87; Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487.

——.]—*See, also*, CRIMINAL LAW, Vol. XV., p. 1031, Nos. 11614–11621.

216. Storing goods liable to combustion.] —Injunction granted to restrain the storing & drying of damp jute on premises adjoining pltf.'s, evidence being given of the danger of combustion. —HEPBURN *v.* LORDAN (1865), 2 Hem. & M. 345; 5 New Rep. 301; 34 L. J. Ch. 293; 13 L. T. 59; 29 J. P. 228; 11 Jur. N. S. 132; 13 W. R. 368; 71 E. R. 497; *on appeal*, 11 Jur. N. S. 254, L. JJ.

Annotations:—**Distd.** Cooke *v.* Forbes (1867), L. R. 5 Eq. 166. **Consd.** M'Murray *v.* Cadwell (1889), 6 T. L. R. 76. **Refd.** A.-G. *v.* Manchester Corpn., [1893] 2 Ch. 87; Wood *v.* Conway Corpn., [1914] 2 Ch. 47; Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487.

217. Conversion of buildings to dangerous purpose.]—Injunction in pressing cases upon petition & affidavit. In this instance, converting old houses in London to a purpose that made them dangerous to the public, the Lord Chancellor granted the injunction; but said, the Lord Mayor by his general jurisdiction could apply a much more proper & effectual remedy.—LONDON CORPN. *v.* BOLT (1799), 5 Ves. 129; 31 E. R. 507, L. C.

Annotation:—**Refd.** Blakemore *v.* Glamorganshire Canal Navigation (1832), 1 My. & K. 154.

218. Exposure for sale of unwholesome food.]—By 5 & 6 Will. 4, c. 76, s. 90 it is lawful for the council of a borough to make bye-laws (*inter alia*), for the prevention & suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force in such borough. A town council of a borough made a bye-law that if any butcher or dealer in meat, or any fishmonger, poulterer or other person shall expose or offer for sale on his premises or have in his possession with intent to sell or expose for sale, any meat fish poultry or other victuals or provisions unfit for the food of man, he shall be subject to a penalty to be recovered before justices who shall decide on the unfitness. Applt., a grocer, exposed for sale on his premises cheese which the justices held was unfit for food, & convicted him accordingly:—*Held:* to expose for sale, or to have possession of, with intent to sell, things unfit for food, was a nuisance at common law, consequently the bye-law was within the powers of 5 & 6 Will. 4, c. 76, s. 90, & the applt. was within the bye-law.—SHILLITO *v.* THOMPSON (1875), 1 Q. B. D. 12; 45 L. J. M. C. 18; 33 L. T. 506; 40 J. P. 535; 24 W. R. 57, D. C.

Annotations:—**Refd.** Firth *v.* McPhail (1905), 3 L. G. R. 478. **Mentd.** Hewett *v.* Hattersley, [1912] 3 K. B. 35.

——.]—*See, also,* FOOD & DRUGS, Vol. XXV., pp. 108–114.

219. Vacant land—Owner's duty to prevent nuisances—Gipsy encampment.]—An injunction will be granted to restrain the letting of land to gipsies or persons dwelling in tents when it can be shown that such occupation of the land is dangerous to the health of the neighbourhood.—A.-G. *v.* STONE (1895), 60 J. P. 168; 12 T. L. R. 76.

220. —— —— ——.]—A.-G. *v.* BROWN (1898), *Times*, July 23.

221. —— —— **Rubbish deposit.**]—Deft. was the owner & occupier of a vacant piece of land in the metropolis. He had surrounded it by a hoarding, but people threw filth & refuse over, & broke up the hoarding, so that the condition of the land & the use to which it was put constituted a continuing public nuisance. In an action by the A.-G. at the relation of the vestry of the parish:—*Held:* it was a common law duty of the owner of the piece of land to prevent it from being so used as to be a public nuisance; & the A.-G. was entitled to an injunction to enforce the performance of that duty.—A.-G. *v.* TOD HEATLEY, [1897] 1 Ch. 560; 66 L. J. Ch. 275; 76 L. T. 174; 45 W. R. 394; 13 T. L. R. 220; 41 Sol. Jo. 311; 61 J. P. Jo. 164, C. A.

Annotations:—**Expld.** Barker *v.* Herbert, [1911] 2 K. B. 633. **Consd.** Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341. **Apld.** Clayton *v.* Sale U. C., [1926] 1 K. B. 415. **Refd.** A.-G. *v.* Roe, [1915] 1 Ch. 235.

222. —— —— **Seaside encampment.**]—Defts. erected certain bungalows on low lying land near the sea wall at Birkenhead. These bungalows were erected without the consent & not in conformity with the bye-laws of pltf. council. After nineteen bungalows had been erected the council obtained an undertaking from defts. to take them down if required. Other bungalows were subsequently erected but on similar terms as to being taken down. The land lay on sandy soil below the level of the tide, & no drainage system was practicable. Eventually some seventy four bungalows were erected & occupied. Tents were also erected. Complaints having been made with regard to the use to which the land was put by some residents in the parish—the complaints being more as to the general objectionable conditions under which it was considered the occupants of the farm had to live than as to any question of health, the Local Govt. Board made suggestions to the council as to alteration of the conditions. Deft. K. expressed himself willing to do what was necessary to improve the sanitary conditions. Deft. B. occupied one of the bungalows which was erected in 1907.

In an action by the A.-G. on the relation of the council claiming an injunction to restrain a nuisance & to restrain defts. from maintaining bungalows erected not in accordance with the bye-laws:—*Held:* (1) although having regard to the number of bungalows on the land their existence there was a matter which was properly inquired into there was no evidence of a nuisance or a danger to public health; (2) although the level of the ground was low the fact that the ground was sandy & porous. & it contained a sufficient quantity of good soil to deodorise fæcal matter rendered it unobjectionable.—A.-G. *v.* KERR & BALL (1914), 79 J. P. 51; 12 L. G. R. 1277.

223. Watching or besetting.]—(1) To watch or beset a man's house, with the view to compel him to do or not to do that which it is lawful for him not to do or to do, is, unless some reasonable justification for it is consistent with the evidence, a wrongful act: (*a*) because it is an offence within Conspiracy & Protection of Property Act, 1875 (c. 86), s. 7, & (*b*) because it is a nuisance at common law for which an action on the case would lie; for such conduct seriously interferes with the ordinary comfort of human existence & the ordinary enjoyment of the house beset.

(2) Proof that the nuisance was caused by an attempt peaceably to persuade other people would afford no defence to such an action; though persons may be peaceably persuaded provided the method employed is not a nuisance.—LYONS (J.) & SONS *v.* WILKINS, [1899] 1 Ch. 255; 68 L. J. Ch. 146; 79 L. T. 709; 63 J. P. 339; 47 W. R. 291; 15 T. L. R. 128, C. A.

Annotations:—*Generally,* **Mentd.** Charnock *v.* Court, [1899] 2 Ch. 35; Walters *v.* Green, [1899] 2 Ch. 696; Taff Vale Ry. *v.* Amalgamated Soc. of Railway Servants, [1901] A. C. 426; Ward, Lock *v.* Operative Printers' Assistants' Soc. (1906), 22 T. L. R. 327; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244.

224. Going armed in public.]—Not only is the offence charged against the prisoner one under the Statute of Edward III., but also under the common law, by which he is liable to punishment for making himself a public nuisance by firing a revolver in a public place, with the result that the public were frightened or terrorised (WILLS, J.).—R. *v.* MEADE (1903), 19 T. L. R. 540.

—.]—*See, also,* CRIMINAL LAW, Vol. XV., pp. 639, 640.

Infected persons or animals on highways. *See* HIGHWAYS, Vol. XXVI., pp. 434, 435, Nos. 1524–1527.

Keeping corpse unburied.]—*See* BURIAL, Vol. VII., p. 522, No. 14.

SUB-SECT. 2.—UNDER STATUTE.

A. In General.

See Public Health Act, 1875 (c. 55): PUBLIC HEALTH.

225. Must be public nuisance — Or private nuisance injurious to health.]—By 18 & 19 Vict. c. 121, s. 8, the word nuisances shall include any premises in such a state as to be a nuisance or injurious to health. Applts. were the owners of a railway bridge over a highway. The rain water collected on the bridge, & running through the planks, dripped on to the highway & on persons

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using the highway. Applts. were summoned, under 18 & 19 Vict. c. 121, s. 12, for allowing a nuisance to exist on their premises, & the justices ordered its abatement:—*Held:* 18 & 19 Vict. c. 121, being a sanitary Act, applied only to such nuisances as were injurious to health; & as the nuisance complained of was not injurious to health, the justices were wrong in ordering its abatement.

The Act speaks of nuisances or things injurious to health, & I think that the distinction taken . . . is the true one, that it was intended for the benefit of public health or health generally, to secure the means of abating things that were either matters of public or private nuisance, of public nuisance as coming within the word "nuisance," & private nuisance as coming within the words "injurious to health" (COCKBURN, C.J.).—GREAT WESTERN RY. CO. *v.* BISHOP (1872), L. R. 7 Q. B. 550; 41 L. J. M. C. 120; 26 L. T. 905; 37 J. P. 5; *sub nom.* R. *v.* GLAMORGAN JJ., GREAT WESTERN RY. CO. *v.* BISHOP, 20 W. R. 969.

Annotations:—**Apld.** Malton Board of Health *v.* Malton Manure Co. (1879), 4 Ex. D. 302. **Distd.** Bishop Auckland L. B. *v.* Bishop Auckland Iron Co. (1882), 10 Q. B. D. 138. **Consd.** Warman *v.* Tibbatts (1922), 128 L. T. 477. **Refd.** Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418.

226. Whether injury to health essential.]—MALTON BOARD OF HEALTH *v.* MALTON MANURE CO., No. 128, *ante*.

227. ——.]—BANBURY URBAN SANITARY AUTHORITY *v.* PAGE, No. 5, *ante*.

228. ——.]—By Public Health Act, 1875 (c. 55), s. 91, any accumulation or deposit which is a nuisance or injurious to health shall be deemed to be a nuisance liable to be dealt with summarily under Public Health Act, 1875 (c. 55):—*Held:* an offence within the sect. was committed where the accumulation emitted offensive smells which interfered with the personal comfort of persons living in the neighbourhood, but did not cause injury to health.—BISHOP AUCKLAND LOCAL BOARD *v.* BISHOP AUCKLAND IRON CO. (1882), 10 Q. B. D. 138; 52 L. J. M. C. 38; 48 L. T. 223; 47 J. P. 389; 31 W. R. 288, D. C.

229. ——.]—Where a medical officer certifies that a nuisance has been caused it is not necessary that the certificate shall contain the words injurious to health to support an information.—HOULDERSHAW *v.* MARTIN (1885), 1 T. L. R. 323, D. C.

230. Disorderly house.]—By a local Act of Parliament, the trustees of a paving board were authorised upon complaint made to them by any inhabitant of the parish of any hogstye, necessary house, or other nuisance, by notice in writing to order such nuisance & offence to be remedied & removed. No action was to be brought against them for anything done in pursuance of the act until after thirty days' notice in writing had been given to their clerk. *Qu.:* whether a disorderly house is a nuisance within the meaning of this Act.—NORRIS *v.* SMITH (1839), 10 Ad. & El. 188; 2 Per. & Dav. 353; 8 L. J. Q. B. 274; 113 E. R. 72.

231. Annoyance—Shouting in streets—Local bye-law.]—STANLEY *v.* FARNDALE (1892), 56 J. P. Jo. 709, D. C.

232. Circumstances attending discovery—Whether jurisdiction of magistrate affected.]—The circumstances under which a nuisance within the meaning of the nuisance clauses of the Public Health (London) Act, 1891 (c. 76), has been discovered do not affect the jurisdiction of a ct. of summary jurisdiction to deal with the nuisance when it has in fact been discovered.

On summary proceedings under Public Health (London) Act, 1891 (c. 76), in respect of an alleged nuisance due to the condition of a drain, the magistrate found that there was on the premises in question a leaking drain, which he held to be a nuisance within the meaning of Public Health (London) Act, 1891 (c. 76):—*Held:* as the magistrate had found that the drain was leaking & not merely leaky his decision must be upheld.

Semble: a defective drain is not in itself a nuisance within the Public Health (London) Act, 1891 (c. 76), but that to establish the existence of a nuisance in such a case, it must be shown that the defect leads to evil consequences.—FARMER *v.* LONG (1907), 72 J. P. 91; 6 L. G. R. 368, D. C.

B. Unwholesome Premises.

233. Premises injurious to health—Percolation of water.]—GREAT WESTERN RY. CO. *v.* BISHOP, No. 225, *ante*.

234. Premises decayed, dilapidated, or out of order—Nuisance arising from sewage works.]—(1) The provisions of Public Health Act, 1875 (c. 55), ss. 91–96, for the abatement of certain nuisances, do not apply to a nuisance arising from sewage tanks & works constructed under Public Health Act, 1875 (c. 55), s. 27, by a local board of health, & a ct. of summary jurisdiction has, therefore, no power, on proof of a nuisance so caused, to make an order for the abatement of such nuisance under Public Health Act, 1875 (c. 55), s. 96.

(2) It is clear that the expression premises in such a state as to be a nuisance has not the wide application claimed for it by resps. . . . but we think it is confined to cases in which the premises themselves are decayed, dilapidated, dirty, or out of order, as, for instance, where houses have been inhabited by tenants whose habits & ways of life have rendered them filthy or impregnated with disease, or where foul matter has been allowed to soak into walls or floors, or where they are so dilapidated as to be a source of danger to life & limb (WILLS, J.).—R. *v.* PARLBY (1889), 22 Q. B. D. 520; 58 L. J. M. C. 49; 60 L. T. 422; 53 J. P. 327; 37 W. R. 335; 5 T. L. R. 257, D. C.

Annotation:—*As to* (2) **Consd.** Warman *v.* Tibbatts (1922), 128 L. T. 477.

235. —— **Defective kitchen grate.**]—Applt., who was the owner of a dwelling-house, within Public Health (London) Act, 1891 (c. 76), having been served with a statutory notice to repair the kitchen range on the ground floor, failed to comply with the notice, & the use of the kitchen grate & oven occasioned a nuisance. On the first floor there were a small range in a room used as a bedroom, & a gas stove on the landing, & they were in good repair & could be used for cooking, both floors being let to the same tenant. On a complaint against applt. under Public Health (London) Act, 1891 (c. 76), s. 5 (1), the magistrate held that the tenant should not be compelled to turn his bed-

PART II. SECT. 14, SUB-SECT. 2.—A.

226 i. *Whether injury to health essential.*]—In order to constitute an offence under Penal Code, s. 268, it is not necessary that the alleged nuisance should produce smells injurious to health, it is sufficient if they be offensive to the senses.—BERCEEFELD *v.* R. (1906), I. L. R. 34 Calc. 73.—**IND.**

r. *Annoyance—Beating of drums.*]—By Ord. 9, 1836, s. 42, municipalities created under that Ord. are authorised to remove, put down, & abate all nuisances of a public nature "which may tend to injure the health, destroy the comfort, or in any way affect the rights of the inhabitants":—*Held:* the making of a regulation prohibiting the beating of drums in the public streets within the municipality on Sundays as a nuisance *per se* was beyond the powers of the comrs.—R. *v.* CASS (1890), 7 S. C. 324.—**S. AF.**

room or staircase into a kitchen, & made a nuisance order against him :—*Held :* the defect was not a nuisance within Public Health Act, 1891 (c. 76), & the order of the magistrate was wrong.—WARMAN *v.* TIBBATTS (1922), 128 L. T. 477 ; 87 J. P. 53 ; 21 L. G. R. 134, D. C.

236. Nuisance arising from sewage.]—Applts., as the sanitary authority, summoned resps. to abate a nuisance from " foul smells " arising from a surface sewer ventilator constructed by them in a roadway within applts.' district :—*Held :* Public Health (London) Act, 1891 (c. 76), s. 2 (1) (*b*), did not apply to public sewers, & the justices were right in refusing to make the order on the ground that they had no jurisdiction to deal with the complaint.—FULHAM VESTRY *v.* LONDON COUNTY COUNCIL, [1897] 2 Q. B. 76 ; 66 L. J. Q. B. 515 ; 76 L. T. 691 ; 61 J. P. 440 ; 45 W. R. 620 ; 13 T. L. R. 427 ; 41 Sol. Jo. 530, D. C.

C. Accumulations or Deposit.

237. Sheep droppings in market — Nuisance to public on highway.]—The owner of a market, by her agent, placed hurdles in the public street for the purpose of penning sheep on market days, for which she received certain tolls. The droppings of the sheep created a nuisance on the pavement, which the justices, on summons under the Nuisances Removal Act, 1855 (c. 121), held to have been created by the " act, default, permission, or sufferance " of the owner of the market, within sect. 12 of the Act, & made an order upon her to remove the same :—*Held :* the decision of the justices was correct.—DRAPER *v.* SPERRING (1861), 10 C. B. N. S. 113 ; 30 L. J. M. C. 225 ; 4 L. T. 365 ; 25 J. P. 566 ; 9 W. R. 656 ; 142 E. R. 392.

238. Dung accumulation — Offensive odours to neighbours—Local Improvement Act.]—Where a stableman kept dung accumulating so that the neighbouring inhabitants had to shut their windows :—*Held :* he was liable to be convicted under a local Act, which imposed a penalty on offensive matter being kept so as to be a nuisance. —SMITH *v.* WAGHORN (1863), 27 J. P. 744.

239. —— —— Local bye-law.] — Applts. received in their goods yard at H., a truck of manure which had been carried by them in the ordinary course of their business. It arrived on the Sunday, & notice was at once given to the consignee, who proceeded to remove it on the Monday, & on being emptied it gave forth a very offensive smell. The magistrates convicted applts. of a breach of bye-law :—*Held :* the magistrates were wrong.—LONDON, BRIGHTON & SOUTH COAST RY. CO. *v.* HAYWARD'S HEATH URBAN DISTRICT COUNCIL (1899), 80 L. T. 266 ; 19 Cox, C. C. 255, D. C.

240. Seaweed in harbour.] — The harbour of Margate was vested in the Margate Pier & Harbour co., & by the action of the sea a quantity of seaweed was drifted into the harbour, &, being left there, became a nuisance :—*Held :* the co. were bound to remove it, & not having effectually done so, an order was rightly made upon them under Nuisances Removal Act, 1855 (c. 121), s. 12.—MARGATE PIER & HARBOUR (CO. OF PROPRIETORS) *v.* MARGATE TOWN COUNCIL (1869), 20 L. T. 564 ; 33 J. P. 437.

Annotations :—**Apld.** A.-G. *v.* Tod Heatley, [1897] 1 Ch. 560. **Refd.** Thames Conservators *v.* Port of London Sanitary Authority (1893), 69 L. T. 803.

241. Offensive smells interfering with personal comfort—Need not be injurious to health.]—BISHOP AUCKLAND LOCAL BOARD *v.* BISHOP AUCKLAND IRON CO., No. 228, *ante*.

D. Overcrowding Premises.

242. Dangerous or prejudicial to health of inmates—Only one family in house.]—A house which is so overcrowded as to be dangerous or prejudicial to the health of the inmates, is included within the definitions of " nuisances " in Sanitary Act, 1866 (c. 90), s. 19, although it be occupied by one family only, & proceedings may be taken under that Sanitary Act, 1866 (c. 90), to compel the abatement of the nuisance.—RYE UNION GUARDIANS *v.* PAYNE (1875), 44 L. J. M. C. 148 ; 32 L. T. 757 ; 40 J. P. 166 ; 23 W. R. 692.

243. " House "—Building used as night shelter for destitute—Public Health (London) Act, 1891 (c. 76).]—A building, belonging to the trustees of a religious assocn., & used for purposes of religious service in the daytime, was used at night as a shelter for the homeless & destitute poor. It contained no sleeping accommodation, but the persons admitted slept on the chairs used to seat the congregations or on the bare floor :—*Held :* it was a house within Public Health (London) Act, 1891 (c. 76), s. 2 (1) (*e*).

Orders as to the number of persons to be admitted were given by the superintendent of the philanthropic work of the religious association to the caretaker of the building, apparently on his own responsibility :—*Held :* the superintendent was the person by whose act, default, or sufferance, a nuisance consisting in the overcrowding of the building at night arose.—R. *v.* MEAD, *Ex p.* GATES (1895), 64 L. J. M. C. 169 ; 59 J. P. 150 ; 11 T. L. R. 242, D. C.

Annotations :—**Folld.** R. *v.* Slade (1896), 65 L. J. M. C. 108. **Apld.** Wimbledon U. D. C. *v.* Hastings (1902), 87 L. T. 118.

244. —— —— ——.]—By an order made under above Act, sect. 4, by a metropolitan police magistrate on the chief officer in charge of the Salvation Army shelter situate at 115a, Blackfriars Road, London, S.E., after reciting that proof had been given of the existence of a nuisance at the premises situate at 115a, Blackfriars Road, & that the premises, or certain parts thereof, were so overcrowded as to be injurious or dangerous to the health of the inmates, the recurrence of the nuisance was prohibited, thereupon a rule *nisi* for a *certiorari* was obtained to quash the order on the ground that the premises were not a " house or part of a house " within above Act, sect. 4 (1) (*e*) ; & that the persons temporarily sheltered there were not " inmates " within the meaning of the same clause :—*Held :* the rule must be discharged upon both grounds.—R. *v.* SLADE (1896), 65 L. J. M. C. 108 ; 74 L. T. 656 ; 60 J. P. 358 ; 18 Cox, C. C. 316, D. C.

245. —— Day school—Public Health Act, 1875 (c. 55).]—Resp. was a mistress of a high school for

PART II. SECT. 14, SUB-SECT. 2.—C.

t. *Offensive smells interfering with personal comfort.*]—MOWLING *v.* HAWTHORN JJ. (1891), 17 V. L. R. 150.—**AUS.**

a. ——.]—LEWIS *v.* CITY OF NTO CORPN. (1876), 39 U. C. R. —**CAN.**

b. *Depositing garbage.*]—The piling by a municipality of a large quantity of garbage on the bank of a river at a place within a residential district held to constitute an actionable nuisance.—STILL *v.* ST. VITAL RURAL MUNICIPALITY, [1925] 2 W. W. R. 780.—**CAN.**

c. *Loading & unloading manure.*]—The G. N. Ry. co. loaded & unloaded manure at L. The urban district sanitary authority of L., in the centre of which town the station was built, obtained an order of justices under Public Health Act, 1878, prohibiting the co. from loading or unloading manure on any part of their station or line within a hundred yards of any dwelling-house :—*Held :* this did not constitute a nuisance under the Act & the order was wrong.—GREAT NORTHERN RY. CO. *v.* LURGAN TOWN COMRS., [1897] 2 I. R. 340.—**IR.**

Sect. 14.—*Public health, comfort and safety: Sub-sect.* 2, *D., E., F., G. & H. Sects.* 15 & 16: *Sub-sects.* 1 & 2, *A. & B.* (*a*).]

girls where no boarders were received. A complaint having been received as to the overcrowding of the class rooms, resp. refused to allow the inspector to enter. An application was made to the justices for an order under above Act, sect. 102, requiring resp. to admit the inspector to the school, & in support of such application a complaint on oath was made by the inspector. An order was made by the justices. Resp. appealed to quarter sessions, who were of opinion that the scholars attending the school were not "inmates" within above Act, sect. 91 (5), & that applts. had not alleged the existence of any nuisance within that above Act, or shown reasonable grounds for suspecting such a nuisance, & quashed the order of the justices:—*Held:* (1) "house" in above Act, sect. 91 (5), includes a day school, "inmates" include scholars; (2) where an application is made to a justice under above Act, sect. 102, for an order to enter premises where a nuisance is alleged to exist, the justice, although he has not to decide the fact of the existence of such a nuisance, may consider whether there are reasonable grounds for such suspicion, & receive evidence for that purpose. If an order is made, the form of the order should state that it is in reference to a particular subject-matter.—WIMBLEDON URBAN DISTRICT COUNCIL *v.* HASTINGS (1902), 87 L. T. 118; 67 J. P. 45, D. C.

Annotation:—**Folld.** Consett U. C. *v.* Crawford, [1903] 2 K. B. 183.

246. "Inmate"—Destitute sheltered for the night—Public Health (London) Act, 1891 (c. 76).]—R. *v.* SLADE, No. 244, *ante*.

247. ——Scholars in day school—Public Health Act, 1875 (c. 55).]—WIMBLEDON URBAN DISTRICT COUNCIL *v.* HASTINGS, No. 245, *ante*.

248. Person by whose default overcrowding arises—Night shelter—Superintendent.]—R. *v.* MEAD, *Ex p.* GATES, No. 243, *ante*.

E. Boundary Ditches.

249. Ditch along highway dividing two districts—Jurisdiction of rural sanitary authority.]—A ditch ran along a highway which divided two rural sanitary districts. The ditch was situated in N., but a nuisance was caused in greater part by sewage from premises in W. The W. sanitary authority applied to justices for an order on the N. authority to cleanse the ditch as being in their area:—*Held:* the justices were right in ordering W. to cleanse the ditch.—WOBURN UNION *v.* NEWPORT PAGNELL UNION (1887), 51 J. P. 694, D. C.

F. Nuisances from Sewers and Drains.

See SEWERS & DRAINS.

G. Food and Drugs.

See FOOD & DRUGS, Vol. XXV., pp. 108–114.

H. Sanitary Accommodation.

See PUBLIC HEALTH.

SECT. 15.—**PUBLIC MORALITY.**

Disorderly houses.]—*See* CRIMINAL LAW, Vol. XV., pp. 754–757, Nos. 8128–8147.

Gaming houses.]—*See* GAMING & WAGERING, Vol. XXV., pp. 422–450, Nos. 247–415.

Lotteries.]—*See* GAMING & WAGERING, Vol. XXV., pp. 452–459, Nos. 429–469.

Indecent exposure.]—*See* CRIMINAL LAW, Vol. XV., pp. 745–747, Nos. 8041–8062.

Obscene exhibitions.]—*See* CRIMINAL LAW, Vol. XV., pp. 747, 748, Nos. 8063–8067; HIGHWAYS, Vol. XXVI., p. 429, Nos. 1484, 1485.

Obscene publication.]—*See* CRIMINAL LAW, Vol. XV., pp. 748–751, Nos. 8068–8099.

Indecent language.]—*See* CRIMINAL LAW, Vol. XV., p. 751, No. 8100.

SECT. 16.—**SMOKE.**

SUB-SECT. 1.—IN GENERAL.

250. Smoke alone an actionable nuisance.]—CRUMP *v.* LAMBERT, No. 21, *ante*.

251. Necessity for proof of substantial damage.]—In nuisance of this particular kind [smoke], it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, & therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle that, unless substantial damage is proved to have been sustained, this ct. will not interfere (MELLISH, L.J.).—SALVIN *v.* NORTH BRANCEPETH COAL CO. 9 Ch. App. 705; 44 L. J. Ch. 149; 31 L. T. 154; 22 W. R. 904, L. JJ.

Annotations:—**Consd.** Shotts Iron Co. *v.* Inglis (1882), 7 App. Cas. 518; Fletcher *v.* Bealey (1885), 28 Ch. D. 688. **Refd.** M'Murray *v.* Cadwell (1889), 6 T. L. R. 76; A.-G. *v.* Manchester Corpn., [1893] 2 Ch. 87; Wood *v.* Conway Corpn. (1914), 110 L. T. 917; Slack *v.* Leeds Industrial Co-op. Soc., [1923] 1 Ch. 431.

252. From factory—Lime kiln.]—ALDRED'S CASE, No. 168, *ante*.

253. —— Glass making.]—R. *v.* BROOKS (1678), Trem. P. C. 195.

Annotation:—**Refd.** R. *v.* Lister (1857), 3 Jur. N. S. 570.

254. —— Brick burning.]—A brick-kiln, sufficiently near a dwelling-house to affect it with smoke, is a nuisance, & the owner's prescriptive right to another kiln nearer to the house, & almost in a line with the kiln complained of, cannot be urged as a reason for the ct.'s not granting an injunction.—BAREHAM *v.* HALL (1870), 22 L. T. 116.

Effect of twenty years' user.]—*See* EASEMENTS, Vol. XIX., p. 179, No. 1297.

Increase in amount—Whether injunction granted.]—*See* INJUNCTION, Vol. XXVIII., p. 423, No. 476.

Smoke from railways.]—*See* RAILWAYS.

SUB-SECT. 2.—SUMMARY ABATEMENT UNDER STATUTE.

A. In General.

See, generally, Public Health Act, 1875 (c. 55), ss. 91–111, 334; Public Health (London) Act, 1891 (c. 76), s. 24; Public Health (Smoke Abatement) Act, 1926 (c. 43).

255. Each daily emission a separate offence.]—Justices acting in pursuance of Nuisances Removal Act, 1855 (c. 121), & Sanitary Act, 1866 (c. 90), ordered the occupiers of certain premises to cease

250 i. *Smoke alone an actionable nuisance.*]—BYRON *v.* STIMPSON (1878), 1 P. & B. 697.—**CAN.**

250 ii. ——.]—SMITH *v.* CONSOLIDATED MINING & SMELTING CO. (1909), 11 W. L. R. 488.—**CAN.**

to send forth black smoke from their chimney, so that the same should be no longer a nuisance. The order having been persistently disregarded, & the offenders summoned & a penalty imposed on them, under Nuisances Removal Act, 1855 (c. 121), s. 14, for their default, nineteen separate informations were eventually laid, & the same number of summonses simultaneously issued, in respect of as many acts of disobedience, each committed on a different day, by sending forth black smoke. At the hearing of the summonses, the full penalty of 10*s.* was imposed for the offence alleged in each, & the offenders were ordered also to pay 15*s.* costs upon the first summons, & 16*s.* costs upon every other. They objected that their disobedience was but one default, & that the divers acts complained of should have been charged in a single summons, to which one set of costs only would have attached; & they obtained a rule calling on the justices to show cause why they should not state a case under Summary Jurisdiction Act, 1857 (c. 43):—*Held:* each daily emission of smoke was a separate act of disobedience, for which a separate summons might be lawfully issued, & under the circumstances the justices had not so exercised their discretion in awarding costs as to render the interference of the ct. necessary.—R. *v.* WATERHOUSE (1872), L. R. 7 Q. B. 545; 41 L. J. M. C. 115; 26 L. T. 761; 36 J. P. 471; *sub nom.* R. *v.* WEST RIDING OF YORKSHIRE JJ., 20 W. R. 712.

Annotations:—**Refd.** Eddleston *v.* Barnes (1875), 1 Ex. D. 67; Greenwich B. C. *v.* L. C. C. (1912), 106 L. T. 887.

256. Factory having several chimneys—Summons not specifying which complained of.]—B. charged N. that black smoke issued from certain chimneys on his premises so as to be a nuisance, & this was caused by the act & default of N. The fact was that there were five separate chimneys together, each used for a separate purpose. N. objected that the summons was bad for not showing from which of the chimneys was said to issue the smoke:—*Held:* the justices were wrong in allowing this objection to the summons, & they ought to have heard the evidence & made their order as to one or more of the chimneys.—BARNES *v.* NORRIS (1876), 41 J. P. 150.

257. Construction of furnace as defence—When available under Public Health Act, 1875 (c. 55), s. 91 (7).]—An information was laid against the proprietor of a brewery, for that black smoke was from time to time sent forth from the chimney of his brewery in such quantities as to be a nuisance, & he was convicted & fined thereon:—*Held:* the proviso [of above sub-sect.] applied only to the first part of above sub-sect., & not to the latter part making it an offence to send forth black smoke in such a quantity as to be a nuisance, & deft. was not entitled to call evidence as to the construction of the furnace.—WEEKES *v.* KING (1885), 53 L. T. 51; 49 J. P. 709; 1 T. L. R. 514; 15 Cox, C. C. 733, D. C.

Annotation:—**Refd.** Tough *v.* Hopkins (1904), 2 L. G. R. 1213.

258. Recurrence of nuisance after order to abate—Presumption that previous order complied with—Lapse of time.]—Applts. gave notice to resp. on Mar. 18, 1904, under Public Health (London) Act, 1891 (c. 76), s. 4, forthwith to abate & within the like period to prevent the recurrence of a nuisance consisting of black smoke issuing from the chimney of a bakehouse. No further nuisance was observed till Jan. 5, 1906, when the chimney was seen to send forth black smoke in such a quantity as to be a nuisance. Applt's. thereupon summoned resp. for making default in complying with the notice of Mar. 18, 1904. The magistrate held upon the evidence that it must be assumed that immediately on receipt of the notice the nuisance was abated, & he dismissed the summons:—*Held:* as it was open to the magistrate to hold that the two occurrences were not connected with one another, his decision was right.—BATTERSEA BOROUGH COUNCIL *v.* GOERG (1906), 71 J. P. 11; 5 L. G. R. 62, D. C.

Annotation:—**Folld.** Greenwich B. C. *v.* L. C. C. (1912), 106 L. T. 887.

259. —— —— ——.]—A sanitary authority being satisfied that a nuisance existed at an electric power station of the London County Council by reason of a chimney of the power station sending forth black smoke in such quantity as to be a nuisance, upon Nov. 6, 1910, served on the county council a notice under Public Health (London) Act, 1891 (c. 76), s. 4, requiring them within three days to abate the nuisance & to execute such works as were necessary to prevent its recurrence. Similar nuisances occurred in Mar. 1911, & on Apr. 9, the chimney sent forth black smoke in such quantity as to be a nuisance. A summons was then taken out by the authority under Public Health (London) Act, 1891 (c. 76), s. 4 (4), against the County Council for having made default in complying with the requirements of the statutory notice served on them on Nov. 6, & the magistrate having found as a fact that the nuisance of Apr. 9 was a recrudescence & not a continuance of the nuisance which the notice required the Council to abate, determined that the Council had not made default in complying with the notice, & he dismissed the summons:—*Held:* there was sufficient evidence to justify the magistrate in finding that the nuisance of Apr. 9, 1911, was a separate & independent occurrence & not a recurrence of the first nuisance, & there had not been a failure to comply with the statutory notice to abate the earlier nuisance.—GREENWICH BOROUGH COUNCIL *v.* LONDON COUNTY COUNCIL (1912), 106 L. T. 887; 76 J. P. 267; 10 L. G. R. 488; 23 Cox. C. C. 32, D. C.

See No. 770,

B. Exemptions from Liability.

(a) Private Dwelling-House.

See Public Health Act, 1875 (c. 55), s. 91; Public Health (London) Act, 1891 (c. 76), s. 24.

260. What is private dwelling-house—Block of residential flats.]—QUEEN ANNE RESIDENTIAL MANSIONS & HOTEL CO. *v.* WESTMINSTER CORPN. (1901), 46 Sol. Jo. 70, D. C.

Annotation:—**Refd.** McNair *v.* Baker (1903), 90 L. T. 24.

261. —— Club.]—A club of seven hundred & fifty members, managed by a committee of the members, had for many years occupied premises which had previously been a private dwelling-house; the premises comprised the ordinary accommodation of a club, & there were five bedrooms for the use of the members & eight for the club staff. In the basement were cooking ranges, a large roasting grate, & a vertical boiler with furnace attached, which latter were used for heating the premises; the smoke from all of them was discharged into one flue or chimney, which sent forth black smoke in such quantity as to be a nuisance. A summons against resp., the club secretary, for making default in complying with a notice of the local authority requiring him to abate the nuisance was dismissed by the magistrate on the ground that the chimney was the chimney of a private dwelling-house:—*Held:* the dismissal of the summons was wrong; the premises as used

Sect. 16.—*Smoke: Sub-sect.* 2, *B.* (*a*) & (*b*), *C.*, *D.*,

were not a private dwelling-house within Public Health (London) Act, 1891 (c. 76), s. 24, & resp. ought to have been convicted of the offence charged.—MCNAIR *v.* BAKER, [1904] 1 K. B. 208; 73 L. J. K. B. 120; 90 L. T. 24; 68 J. P. 66; 20 T. L. R. 95; 48 Sol. Jo. 118; 2 L. G. R. 143, D. C.

(*b*) *Particular Industries.*

See Public Health Act, 1875 (c. 55), s. 334.

262. Extent of exemption—Confined to nuisances.]—The Public Health Act, 1875 (c. 55), imposes on landowners, through whose land a sewer is run under Public Health Act, 1875 (c. 55), an obligation to preserve to such sewer subjacent support, & gives them a right to immediate compensation for being deprived of free power to work subjacent mines, but not for the risk of percolation of sewage into the subjacent mines.

Sect. 334 of Public Health Act, 1875 (c. 55), which provides that nothing in the Act shall be construed to extend to mines, . . . is confined in its operation to those clauses of the Act which deal with the prevention of nuisances (COTTON, L.J.).—*Re* DUDLEY CORPN. & DUDLEY'S (EARL) TRUSTEES (1881), 8 Q. B. D. 86; 51 L. J. Q. B. 121; 45 L. T. 733; 46 J. P. 340, C. A.

Annotations:—**Consd.** Jary *v* Barnsley Corpn., [1907] 2 Ch. 600. **Refd.** Normanton Gas Co. *v.* Pope & Pearson (1883), 52 L. J. Q. B. 629; South Staffordshire Waterworks Co. *v.* Mason (1886), 56 L. J. Q. B. 255; L. & N. W. Ry. *v.* Evans, [1893] 1 Ch. 16; Glamorganshire Canal Navigation Co. *v.* Nixon's Navigation Co. (1901), 85 L. T. 53; Manchester Corpn. *v.* New Moss Colliery, [1906] 1 Ch. 278.

263. —— Common law liability preserved.]—(1) A local authority may act as relators in an action brought by the A.-G. for the purpose of abating a public nuisance, & may themselves maintain an action for damages for a nuisance affecting property of which they are the actual owners.

(2) The provision in Public Health Act, 1875 (c. 55), s. 334, that nothing in that Act shall extend to certain businesses therein specified, exempts their proprietors only from the liabilities created & penalties imposed by that Act, & does not relieve them from liability for a public nuisance in a suit brought by the A.-G. for its abatement, nor from their ordinary common law liability to an owner whose property is injuriously affected by it.—A.-G. *v.* LOGAN, [1891] 2 Q. B. 100; 65 L. T. 162; 55 J. P. 615; 7 T. L. R. 279, D. C.

Annotations:—*As to* (1) **Apld.** Wednesbury Corpn. *v.* Lodge Holes Colliery Co., [1907] 1 K. B. 78. *As to* (2) **Refd.** A.-G. & Spalding R. C. *v.* Garner, [1907] 2 K. B. 480.

264. —— Provisional order of Local Government Board confirmed by private Act.]—Under the powers given to the Local Govt. Board by Public Health Act, 1875 (c. 55), s. 303, to make provisional orders repealing, altering, or amending local Acts, the board made an order which was confirmed by an Act of Parliament in 1893, an article of which, after repealing a sect. of a previous local Act dealing with nuisance arising from smoke, provided that "if from any chimney, not being the chimney of a private dwelling-house, black smoke is emitted" in such quantity as to be a nuisance, the owner or occupier of the place should be liable to a penalty if, after notice, the emission was repeated; & by Public Health Act, 1875 (c. 55), s. 334, nothing in the Act was to extend "to the calcining, puddling, & rolling of iron & other metals, nor to the conversion of pig iron into wrought iron, so as to obstruct or interfere with any of such processes":—*Held:* the order made by the board, having been confirmed by Parliament, was itself an independent Act of Parliament, & was not subject to or controlled by the exceptions in Public Health Act, 1875 (c. 55), s. 334, or by any similar exceptions in any of the previous local Acts.—BESSEMER & CO., LTD. *v.* GOULD (1912), 107 L. T. 298; 76 J. P. 349; 10 L. G. R. 744; 23 Cox, C. C. 145, D. C.

265. —— In respect of what industries—Manufacture of produce of ore & minerals.]—Applts., the occupiers of a manufactory of bichrome, which is the produce of ores & minerals, were charged, upon information, with having, as part of their works, a chimney sending forth black smoke in such quantity as to be a nuisance, under Sanitary Act, 1866 (c. 90), s. 19. The justices found that the smoke from applts.' chimney was a nuisance, & ordered its abatement:—*Held:* applts. came within the exemption contained in the Nuisances Removal Act, 1855 (c. 121), s. 44, of mines, smelting, & the manufacturing of the produce of ores & minerals; these two Acts, being, by Sanitary Act, 1866 (c. 90), s. 14, to be construed as one, the exemption in Nuisances Removal Act, 1855 (c. 121), applied to the nuisances created by Sanitary Act, 1866 (c. 90); & the justices had no jurisdiction to make the order.—NORRIS *v.* BARNES (1872), L. R. 7 Q. B. 537; 41 L. J. M. C. 154; 26 L. T. 622; *sub nom.* R. *v.* YORKSHIRE JJ., NORRIS *v.* BARNES, 20 W. R. 703; *sub nom.* MORRIS *v.* BARNES, 37 J. P. 246.

Annotation:—**Refd.** Rye Union Grdns. *v.* Payne (1875), 44 L. J. M. C. 148.

266. —— —— ——.]—A.-G. *v.* LOGAN, [1891] 2 Q. B. 100; 65 L. T. 162; 55 J. P. 615; 7 T. L. R. 279, D. C.

Annotations:—**Refd.** A.-G. & Spalding R. C. *v.* Garner, [1907] 2 K. B. 480; Wednesbury Corpn. *v.* Lodge Holes Colliery Co., [1907] 1 K. B. 78.

267. —— —— ——.]—BESSEMER & CO., LTD. *v.* GOULD, No. 264, *ante*.

268. —— —— Mines.]—*Re* DUDLEY CORPN. & DUDLEY'S (EARL) TRUSTEES, No. 262, *ante*.

269. —— —— ——.]—P. charged the C. coal mine owners with allowing their chimney to send forth black smoke. The justices held it to be doubtful if Public Health Act, 1875 (c. 55), s. 91, applied to chimneys of coal mines, & dismissed the case:—*Held:* the justices were wrong, & Public Health Act, 1875 (c. 55), did apply to such mines, & case remitted with that opinion.—PATTERSON *v.* CHAMBER COLLIERY CO. (1892), 56 J. P. 200; 8 T. L. R. 278, D. C.

C. Smoke of Steam Vessels.

270. Plying on Thames.]—A steam tug which plies on the river Thames, & in towing vessels up & down the river between London Bridge, & the Nore-Light, is within 19 & 20 Vict. c. 107, s. 1, which applies to "steam vessels plying to & fro between London-Bridge & any place on the river Thames to the Westward of the Nore-Light," & should therefore be constructed so as to consume its own smoke.—WALKER *v.* EVANS (1859), 2 E. & E. 356; 29 L. J. M. C. 22; 1 L. T. 59; 24 J. P. 40; 6 Jur. N. S. 71; 8 W. R. 61; 121 E. R. 135, D. C.

Annotation:—**Refd.** The Steam Tug Victory (1860), 2 L. T. 333.

271. —— Public Health (London) Act, 1891 (c. 76), s. 24.]—By above sect. "any chimney, not

being the chimney of a private dwelling-house, sending forth black smoke in such quantity as to be a nuisance" is liable to be dealt with summarily:—*Held:* the funnel of a steam-tug was a chimney within the sect.

An abatement or prohibition order is not bad because it does not, under above Act, sect. 5, sub-sect. 5, specify the works to be executed for the purpose of abating or preventing the recurrence of the nuisance, although the person on whom the order is made may have required them to be specified.—TOUGH *v.* HOPKINS, [1904] 1 K. B. 804; 73 L. J. Q. B. 628; 90 L. T. 672; 68 J. P. 274; 52 W. R. 605; 20 T. L. R. 323; 48 Sol. Jo. 312; 2 L. G. R. 1213; 9 Asp. M. L. C. 562; 20 Cox C. C. 650, D. C.

272. Trading direct from Liverpool to foreign ports—Liverpool Sanitary Amendment Act, 1854 (c. xv), s. 24.]—Above sect., which relates to the emission of smoke, does not apply to steam vessels trading direct with foreign ports, even although smoke is negligently emitted when the steam vessel is within the port of Liverpool.—MACAULAY *v.* MOSS S.S. CO., LTD. (1910), 102 L. T. 887; 74 J. P. 243; 8 L. G. R. 615, D. C.

D. Proof of Nuisance.

273. Whether injury to health essential.]—Where a chimney, not belonging to a private house, sends forth black smoke so as to be a nuisance, it is not necessary, in proceedings to abate it, to prove that the smoke is injurious to health.—GASKELL *v.* BAYLEY (1874), 30 L. T. 516; 38 J. P. 805.

274. No evidence of injury to particular person or property.]—Upon the hearing of complaints under Public Health (London) Act, 1891 (c. 76), s. 24 (b), it was proved that black smoke issued from a chimney several times a day during a series of days for periods varying from a few minutes to upwards of an hour:—*Held:* upon these facts the magistrate was justified in finding that the smoke issued in such quantity "as to be a nuisance," although there was no evidence that any particular person or property was injuriously affected thereby.—SOUTH LONDON ELECTRIC SUPPLY CORPN. *v.* PERRIN, [1901] 2 K. B. 186; 70 L. J. K. B. 643; 84 L. T. 630; 65 J. P. 627; 49 W. R. 539; 17 T. L. R. 475; 45 Sol. Jo. 486; 19 Cox, C. C. 717, D. C.

E. Liability of Employer for Negligence of Servant.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 38–47.

275. Whether master liable.]—A local improvement Act enacted that every furnace used shall be constructed so as to consume its own smoke, & if any person use a furnace not so constructed, or shall use such furnace so negligently that the smoke shall not be consumed, every person so offending, being the owner or occupier, or being a foreman or other person employed by such owner or occupier, shall forfeit a sum of £5, etc.

W., the owner, used furnaces properly constructed, & employed a competent person to use them, but, without W.'s knowledge, the servant negligently used them so that smoke was not consumed:—*Held:* the servant only could be convicted of the offence, & not the master.—WILLCOCK *v.* SANDS (1868), 32 J. P. 565.

276. ——.]—By Sanitary Act, 1866 (c. 90), s. 19, the word "nuisances," under Nuisance Removal Acts, shall include any chimney, not being the chimney of a private dwelling-house, sending forth black smoke in such quantity as to be a nuisance:—*Held:* in the event of such a nuisance existing, the occupier of the premises is liable to be charged & to have an order made upon him for the abatement of the nuisance, although it may have arisen or have been continued by the act of a servant employed by him upon the premises.—BARNES *v.* AKROYD (1872), L. R. 7 Q. B. 474; 41 L. J. M. C. 110; 26 L. T. 692; 37 J. P. 116; *sub nom.* R. *v.* YORKSHIRE JJ., BARNES *v.* ACKROYD, 20 W. R. 671.

Annotation:—**Mentd.** Sherras *v.* De Rutzen, [1895] 1 Q. B. 918.

277. ——.]—Deft., who was the owner & occupier of certain premises in the metropolis used for the purpose of manufacture, was summoned under 16 & 17 Vict. c. 128, for negligently using a furnace in such premises so that the smoke arising therefrom was not effectually consumed. The furnace in question was constructed so as to consume its own smoke if carefully used, & the emission of smoke complained of was caused by the carelessness of the stoker employed by deft. to attend to the furnace. Deft. was not personally guilty of any negligence in connection with the matter:—*Held:* deft. was not criminally responsible for the negligence of his servant, & could not be convicted of the offence.—CHISHOLM *v.* DOULTON (1889), 22 Q. B. D. 736; 58 L. J. M. C. 133; 60 L. T. 966; 53 J. P. 550; 37 W. R. 749; 5 T. L. R. 437; 16 Cox, C. C. 675, D.

Annotations:—**Distd.** Niven *v.* Greaves (1890), 54 J. P. 548; Armitage *v.* Nicholson (1913), 108 L. T. 993.

278. ——.]—G.'s mill sent forth black smoke more than ten minutes. The furnace was properly constructed & efficient firemen superintended, & the stoker's own negligence was the sole cause of the smoke. G. was summoned for an offence contrary to Public Health Act, 1875 (c. 55), s. 96:—*Held:* the justices were wrong in dismissing the charge & in holding that G. was not liable.—NIVEN *v.* GREAVES (1890), 54 J. P. 548, D. C.

279. ——.]—Applts. were the owners & the occupiers of a dyehouse which had a furnace & a chimney appertaining thereto. In consequence of negligent stoking on the part of one of the servants of applts., of which applts. were ignorant, smoke which was not completely burned was allowed to escape from the chimney of the dyehouse:—*Held:* applts. were rightly convicted of an offence under Bradford Corporation Act, 1910 (c. cxvii), s. 52.—ARMITAGE, LTD. *v.* NICHOLSON (1913), 108 L. T. 993; 77 J. P. 239; 29 T. L. R. 425; 11 L. G. R. 547; 23 Cox, C. C. 416, D. C.

280. ——.]—Upon the hearing of an information under Bradford Corporation Act (c. cxvii), s. 53, an expert witness gave evidence that the emission of the smoke could not have been caused otherwise than by means of some act or default of the stokers or engineer:—*Held:* (1) the justices were not bound to accept this evidence as conclusive, but were entitled to exercise their own judgment, upon the whole of the evidence & to convict defts.; (2) the burden of showing that they came within the exemption in Bradford Corporation Act, 1913 (c. xcvi), s. 72 (3), lay upon defts.—DRUMMOND & SONS *v.* NICHOLSON (1915), 84 L. J. K. B. 2190; 113 L. T. 852; 79 J. P. 525; 13 L. G. R. 958, D. C.

F. Procedure.

See Part IV., Sect. 3, *post*.

Sect. 16.—*Smoke: Sub-sect.* 3, *A. & B.; sub-sect.* 4. *Sects.* 17 & 18.]

SUB-SECT. 3.—UNDER STATUTES INFLICTING PENALTIES.

A. In General.

281. Consumption by trade furnaces — "Consume as far as possible"—Towns Improvement Clauses Act, 1847 (c. 34), s. 108.]—Above sect. imposes a penalty on persons so negligently using a furnace as not to "consume the smoke" arising from it. A local Act incorporates above sect., but provides that the words "consume the smoke" shall not be in all cases read as "consume all the smoke"; & that the penalty may be remitted if the person summoned under that sect. has so constructed or altered his furnace as to consume as far as possible its smoke, "& has carefully attended to the same, & consumed as far as possible" its smoke. On an information against applt. for so negligently using his furnace as not to consume its smoke, it was not shown that the furnace was improperly constructed; it was found that it was capable of consuming more smoke than it in fact did; but that to use the means provided for that purpose would render it impossible to carry on applt.'s trade with that furnace. Applt. was convicted:—*Held:* assuming the furnace to be properly constructed, "as far as possible" meant as far as possible consistently with carrying on the trade in which the furnace was employed; & applt. was wrongly convicted.—COOPER *v.* WOOLLEY (1867), L. R. 2 Exch. 88; 36 L. J. M. C. 27; 15 L. T. 539; 31 J. P. 135; 15 W. R.

B. On Highways.

See, generally, Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 30; Locomotives on Highways Act, 1896 (c. 36), s. 1; Motor Car Act, 1903 (c. 36).

282. Steam engine—Onus of proof.]—All that prosecutor had to prove was that, in fact, the engine was emitting smoke & did not consume its own smoke, which throws the *onus* on deft. (GRANTHAM, J.).—PITT RIVERS *v.* GLASSE (1891), 55 J. P. 663; 7 T. L. R. 438, D. C.

283. Exemption of light locomotives—Emission only from temporary cause—Motor car.]—Where the emission of smoke from a motor car is due to carelessness, that does not prevent the car from coming within the provisions of Locomotives on Highways Act, 1896 (c. 36), s. 1.—R. *v.* WILHAHAM, *Ex p.* ROWCLIFFE (1907), 96 L. T. 712; *sub nom.* R. *v.* WILBRAHAM, *Ex p.* ROWCLIFFE, 71 J. P. 336; 5 L. G. R. 764, D. C.

Annotations:—**Refd.** Star Omnibus Co. (London) *v.* Tagg (1907), 97 L. T. 481; Hindle & Palmer *v.* Noblett (1908), 72 J. P. 373.

284. —— —— Motor bus.]—Applts. were summoned under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 30, for using on a highway a locomotive which did not consume so far as practicable its own smoke. The locomotive belonged to applts., & was a petrol motor omnibus weighing less than five tons. It had a smokeless engine, but it was seen by respt. to emit considerable quantities of smoke which smelt of burnt oil. This was caused by the negligence of applts.' driver in supplying an excessive quantity of lubricating oil to the working parts. The magistrate found as a fact that the omnibus was so constructed that no smoke or visible vapour could be emitted therefrom except by reason of the driver's negligence:—*Held:* as the motor omnibus weighed less than five tons, & was so constructed that no smoke or vapour was emitted therefrom except from any temporary cause, it was exempted by Locomotives on Highways Act, 1896 (c. 36), s. 1, as varied by Art. III. of the Heavy Motor Car Order, 1904, from the operation of Highways & Locomotives Act, 1878 (c. 77), s. 30, &, therefore, applts. had committed no offence against the sect. under which they were summoned.—STAR OMNIBUS CO. (LONDON), LTD. *v.* TAGG (1907), 97 L. T. 481; 71 J. P. 352; 23 T. L. R. 488; 51 Sol. Jo. 467; 5 L. G. R. 808; 21 Cox, C. C. 519, D. C.

285. —— —— Motor engines.]—Applts. were summoned under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 30, for respectively using on a highway two motor engines which did not so far as practicable consume their own smoke. It was proved that on the highway the motor engines had emitted an excessive quantity of smoke & steam while they were respectively in charge of applts. Evidence was given on behalf of applts. that the engines were so constructed that no smoke or visible vapour was emitted therefrom except from some temporary or accidental cause. This evidence was not contradicted on the part of resp. The justices were of opinion that the emission of smoke & steam was due, not only to the carelessness of applts., but also to the fact that on the occasion in question the engines did not so far as practicable consume their own smoke, & they were not satisfied that the emission was due to a temporary or accidental cause within Locomotives on Highways Act, 1896 (c. 36), s 1:—*Held:* as the justices had not found upon the evidence that the locomotives were so constructed that no smoke would be emitted except from a temporary or accidental cause, they did not come within the exemption contained in Locomotives on Highways Act, 1896 (c. 36), s. 1, & applts. were rightly convicted.—HINDLE & PALMER *v.* NOBLETT (1908), 99 L. T. 26; 72 J. P. 373; 6 L. G. R. 825, D. C.

Annotation:—**Consd.** Evans *v.* Nicholl (1909), 100 L. T. 496.

286. Tramway engine—Mixed smoke & steam.]—D. was charged with emitting smoke & steam, contrary to bye-laws, from a tramway engine, & contended that these were two separate offences, & the summons was contrary to Summary Jurisdiction Act, 1847 (c. 43):—*Held:* the justices

PART II. SECT. 16, SUB-SECT. 3.—A.

d. *Consumption by trade furnaces—"Consume as far as possible"—Public Health Acts.*]—On a prosecution under Health Act, 1890, s. 222, charging thereby suffuance of defts. a nuisance within sect. 216 of the Act arose, viz. a chimney, not being one of a private house, sending forth smoke in such a quantity as to be a nuisance, it is not a defence that the fireplace connected with such chimney is constructed in such a manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, & that such fireplace has for that purpose been carefully attended to by the person having the charge thereof.—MCKERE *v.* RIDER (1908), 5 C. L. R. 480.—**AUS.**

e. —— —— ——.]—To prove the nuisance defined in Public Health Act, 1867, s. 16 (*h*), a furnace must be shown not to consume its own smoke either by reason of faulty construction, or by reason of systematic misuse, & the fact that a well constructed furnace had on ten occasions in a period of four months sent out quantities of offensive black smoke held not to be evidence of such systematic misuse as to bring it under the terms of that Act.—DUMFRIES LOCAL AUTHORITY *v.* MURPHY (1884), 11 R. (Ct. of Sess.) 694; 21 Sc. L. R. 489.—**SCOT.**

f. —— —— ——.]—*Held:* the fact that the furnace of the boiler of a steam engine in certain engineering works was not fitted with any of the systems for mechanical stoking, which have among their objects improved smoke consumption, did not make the furnace a nuisance within Public Health (Scotland) Act, 1897, s. 16 (9), mechanical stoking as contrasted with stoking by hand being unsuitable for the business in question.—LEITH MAGISTRATES *v.* BERTRAM (JAMES) & SON, LTD., [1915] S. C. 1133; 53 Sc. L. R. 40; [1915] 2 S. L. T. 193.—**SCOT.**

were right in overruling the objection, as emitting smoke was not the less an offence because steam was mixed with it.—DAVIS *v.* LOACH (1886), 51 J. P. 118, D. C.

Portable engine near highway.]—*See* HIGHWAYS, Vol. XXVI., p. 437, No. 1543.

SUB-SECT. 4.—ON RAILWAYS.

See RAILWAYS.

SECT. 17.—**THEATRES AND PLACES OF AMUSEMENT.**

See, generally, THEATRES.

287. Booth erected on street.]—A booth for rope dancing erected in a street is a nuisance, for which the master & workman may be indicted; or the judges may, upon view, order it to be abated.—HALL'S CASE (1671), 1 Mod. Rep. 76; 1 Vent. 169; 86 E. R. 744; *sub nom.* R. *v.* HALL, 2 Keb. 846.

Annotations:—**Distd.** R. *v.* Betterton (1694), 5 Mod. Rep. 142. **Mentd.** R. *v.* Wilts JJ. (1764), 1 Wm. Bl. 467.

288. Regatta.]—A railway co. became, by conveyance from a canal co., the owner of a canal, with lands acquired from several owners for the formation of a reservoir, from which to supply water to the canal, the rights of fishing & sporting over the reservoir, & for no other purpose, being reserved to the former owners. The co. projected & held a regatta with aquatic sports on the reservoir, they ran cheap trains, & thereby congregated a large concourse of persons, who trespassed on the park surrounding the mansion house of a lady & adjoining the reservoir, & injured her right of fishing & sporting over the greater part of the reservoir. Notwithstanding the remonstrances of the lady, the co. announced a second regatta. Upon motion on behalf of the lady in a suit by her against the co., the latter undertaking not to hold another regatta for a limited period, the ct. permitted pltf. to try her right at law against the co. On a trial at law the jury, not agreeing, were discharged; but, on a second trial, a verdict was given for pltf., with nominal damages. Their undertaking having expired, the co. announced another regatta on the reservoir. Pltf. again moved for an injunction:—*Held:* the regatta was a nuisance to pltf.'s property, & an injunction was granted to restrain them from holding the regatta; & the ct. directed an issue to try whether the co. could use the reservoir for any other purpose than to supply their canal with water.—BOSTOCK *v.* NORTH STAFFORDSHIRE RY. CO. (1852), 5 De G. & Sm. 584; *previous proceedings*, 18 L. T. O. S. 333; *subsequent proceedings* (1856), 3 Sm. & G. 283.

Annotations:—**Consd.** Norton *v.* L. & N. W. Ry. (1878), 9 Ch. D. 623. **Refd.** Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109. **Mentd.** Astley *v.* M. S. & L. Ry. (1858), 27 L. J. Ch. 299; Grand Junction Canal Co. *v.* Petty (1888), 57 L. J. Q. B. 572.

289. Fireworks.]—The collection of a crowd of noisy & disorderly people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music & fireworks are being given for profit, is a nuisance for which the giver of the entertainments is liable to an injunction; even though he has excluded all improper characters from the grounds, & the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police. *Semble:* letting off rockets & establishing a powerful band of music which plays twice a week for several hours continuously within one hundred yards of a dwelling-house, are nuisances which this ct. will restrain.—WALKER *v.* BREWSTER (1867), L. R. 5 Eq. 25; 37 L. J. Ch. 33; 17 L. T. 135; 32 J. P. 87; 16 W. R. 59.

Annotations:—**Consd.** Inchbald *v.* Robinson, Inchbald *v.* Barrington (1869), 4 Ch. App. 388. **Apld.** Winter *v.* Baker (1887), 3 T. L. R. 569. **Consd.** Barber *v.* Penley, [1893] 2 Ch. 447; Lyons *v.* Gulliver, [1914] 1 Ch. 631. **Refd.** Bellamy *v.* Wells (1890), 60 L. J. Ch. 156.

290. Circus.]—(1) A circus, the performances in which were to be carried on for eight weeks, was erected near pltf.'s house, & the performances, which took place every evening, lasted from about 7.30 p.m. till 10.30 p.m. It was proved that the noise of the music & shouting in the circus could be distinctly heard all over pltf.'s house, & was so loud that it could be heard above the conversation in the dining-room though the windows & shutters were closed, & several persons were talking in the room:—*Held:* this was such a nuisance as the ct. would restrain by injunction.

(2) No doubt the drawing crowds together may be a nuisance; but all the circumstances have to be considered (SELWYN, L. J.).

(3) One circumstance which has been much urged is, that pltf. is only a yearly tenant. He has, however, been many years in the house, & is not to lose his rights because he is only a yearly tenant; still, it is a circumstance to be considered (SELWYN, L.J.).—INCHBALD *v.* ROBINSON, INCHBALD *v.* BARRINGTON (1869), 4 Ch. App. 388; 20 L. T. 259; 33 J. P. 484; 17 W. R. 459, L. JJ.

Annotations:—*As to* (2) **Consd.** Barber *v.* Penley, [1893] 2 Ch. 447; Lyons *v.* Gulliver, [1914] 1 Ch. 631. *Generally*, **Refd.** Roskell *v.* Whitworth (1871), 19 W. R. 804.

291. Skittle alley.]—BARHAM *v.* HODGES, [1876] W. N. 234.

292. Fair.]—WINTER *v.* BAKER (1887), 3 T. L. R. 569.

Annotation:—**Refd.** Jenkins *v.* Jackson (1888), 40 Ch. D. 71.

293. Exhibition.]—Where the noise from side shows at an exhibition interfered with the comfortable occupation of pltf.'s house & injuriously affected the health of his family:—*Held:* the noise amounted to a nuisance, & pltf. was entitled to an injunction & damages.—BECKER *v.* EARLS' COURT, LTD. (1911), 56 Sol. Jo. 73; *subsequent proceedings*, 56 Sol. Jo. 206, C. A.

———.]—*See, also*, HIGHWAYS, Vol. XXVI., pp. 427–429, Nos. 1472–1485.

294. Steam organ.]—SPRUZEN *v.* DOSSETT (1896), 12 T. L. R. 246.

Crowds obstructing highways.]—*See* HIGHWAYS, Vol. XXVI., pp. 427–429, Nos. 1472–1485.

SECT. 18.—**WATERS AND WATERWAYS.**

See, generally, WATERS & WATERCOURSES.

Water supply.]—*See* WATER SUPPLY.

Canals.]—*See* RAILWAYS.

Sewers.]—*See* SEWERS & DRAINS.

Pollution of watercourses.]—*See* WATERS & WATERCOURSES.

Disturbance of fisheries.]—*See* FISHERIES, Vol. XXV., pp. 34–37.

Rights in nature of easements.]—*See* EASEMENTS, Vol. XIX., pp. 145–163.

PART II. SECT. 17.

291 i. *Skittle alley.*]—BOCK *v.* SCHRODER & LAND (1894), 9 E. D. C. 106.—**S. AF.**

g. *Entertainment hall.*]—CLARK *v.* SLOANE, [1923] N. Z. L. R. 1129.—**N.Z.**

SECT. 19.—OTHER NUISANCES.

295. Stopping church footway.]—THROWER'S CASE (1672), 1 Vent. 208; 86 E. R. 140; *sub nom.* R. *v.* THROWER, 3 Keb. 28.

Annotations:—**Refd.** R. *v.* Sainthill (1705), 2 Ld. Raym. 1174; R. *v.* Brookes (1754), Say. 167; Batten *v.* Gedye (1889), 41 Ch. D. 507.

296. Darkening street—Erection of building higher than former one.]—Darkening a street by enlarging a house is no nuisance.—R. *v.* WEBB (1698), 1 Ld. Raym. 737; 91 E. R. 1393.

297. Creating noise—By speaking trumpet.]—R. *v.* SMITH (1726), 2 Stra. 704; Sess. Cas. K. B. 126; 93 E. R. 795.

——.]—*See, also*, Sect. 9, *ante*.

298. Trotting match on highway.]—A trotting match along the high road is a legal race within the statutes relating to horse racing; & is not illegal as a nuisance at common law.—CHALLAND *v.* BRAY (1842), 1 Dowl. N. S. 783; 11 L. J. Q. B. 204; 6 Jur. 626.

Annotation:—**Mentd.** Bentinck *v.* Connop (1844), 5 Q. B. 693.

299. Execution of works in church—To injury of single parishioner.]—A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of defts. to execute works in the church which would be injurious to himself, & praying an injunction. Pltf. did not allege any right of property in a particular pew, but did allege that he was a parishioner, & that he was in the habit of attending divine service in the parish church. *Qu.:* whether this is a private nuisance & whether such a bill can be sustained by a single parishioner against the churchwardens.

Pltf. complained of works intended to be executed by defts., churchwardens of his parish, which he alleged, in the way in which it was proposed to execute them, constituted a nuisance; much negotiation took place, in the course of which defts. showed a continued acquiescence in the suggestions made by pltf. as to the mode of executing the works, & suspended their execution. While these negotiations were still going on, & before any works were commenced, pltf. filed his bill for an injunction, & obtained special leave to give notice of motion & served the notice of motion. On the day following the service of the notice of motion, defts. in order to avoid litigation passed a resolution at a vestry, at which pltf. was present, that the works should be wholly abandoned. After that pltf. brought on his motion:—*Held:* without going into the question whether there would be any nuisance, under the circumstances, the motion was useless & improper, & it was refused with costs.—WOODMAN *v.* ROBINSON (1852), 2 Sim. N. S. 204; 19 L. T. O. S. 8; 61 E. R. 318.

300. Golf links—Danger to person passing on highway.]—CASTLE *v.* ST. AUGUSTINE'S LINKS, LTD. (1922), 38 T. L. R. 615.

Small-pox hospital.]—*See* Part II., Sect. 13, sub-sect. 4, *ante*.

Vibration.]—*See* Part II., Sect. 9, *ante*.

Failure to maintain ferry.]—*See* FERRIES, Vol. XXIV., pp. 975, 976, Nos. 85–94.

Rights of way.]—*See* EASEMENTS, Vol. XIX., pp. 117–122, Nos. 783–821.

Part III.—Neighbouring Owners.

SECT. 1.—IN GENERAL.

301. Duty to use property so as not to injure neighbour.]—RUTLAND (EARL) *v.* BOWLER (1622), Palm. 290; 81 E. R. 1087.

Annotation:—**Refd.** Mason *v.* Hill (1833), 5 B. & Ad. 1.

302. ——.]—The rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used & managed that other persons are not injured, & that, whether his property is so used & managed that other persons are not injured, & that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises (LITTLEDALE, J.).—LAUGHER *v.* POINTER (1826), 5 B. & C. 547; 8 Dow. & Ry. K. B. 556; 108 E. R. 204.

Annotations:—**Apld.** White *v.* Jameson (1874), L. R. 18 Eq. 303. **Refd.** Rapson *v.* Cubitt (1842), 9 M. & W. 710; Rich *v.* Basterfield (1847), 4 C. B. 783; Reedie *v.* L. & N. W. Ry., Hobbit *v.* L. & N. W. Ry. (1849), 4 Exch. 244; Gayford *v.* Nicholls (1854), 2 C. L. R. 1066; Chibnall *v.* Paul (1881), 29 W. R. 536; Hughes *v.* Percival (1883), 49 L. T. 189; Greenhill *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165. **Mentd.** Smith *v.* Lawrence (1828), 2 Man. & Ry. K. B. 1; Smith *v.* Roberts (1828), 6 L. J. O. S. K. B. 208; Brady *v.* Giles (1835), 1 Mood. & R. 494; Fenton *v.* City of Dublin Steam Packet Co. (1838), 8 Ad. & El. 835; Milligan *v.* Wedge (1840), 12 Ad. & El. 737; Quarman *v.* Burnett (1840), 6 M. & W. 499; M'Laughlin *v.* Pryor (1842), 4 Man. & G. 48; Allen *v.* Hayward (1845), 7 Q. B. 960; Machu *v.* L. & S. W. Ry. (1848), 2 Exch. 415; Dalyell *v.* Tyrer (1858), E. B. & E. 899; Tobin *v.* R. (1864), 16 C. B. N. S. 310; Onoa Coal & Iron Co. *v.* Huntley (1877), 2 C. P. D. 464; Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890; *Re* The Quickstep (1890), 15 P. D. 196; Donovan *v.* Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Jones *v.* Scullard, [1898] 2 Q. B. 565; Dewar *v.* Tasker (1906), 95 L. T. 87; Pollard *v.* Goole & Hull Steam Towing Co. (1910), 3 B. W. C. C. 360.

303. ——.]—Where a watercourse runs through a swamp, a party has no right to convert the swamp into an ornamental piece of water, if in so doing he diminishes the quantity of water which has been used to flow past his premises, & has been appropriated by a party lower down the stream.

Deft. is liable to an action for doing any act to the injury of his neighbour. So, he is liable for stopping the water, even though it be but for a few days (PARKE, B.).—BURBEARY *v.* SHEPHERD (1843), 1 L. T. O. S. 59.

304. ——.]—RYLANDS *v.* FLETCHER, No. 311, *post*.

PART II. SECT. 19.

h. *Barbed wire fence.*]—*Held:* barbed wire fences constructed by a railway co. upon an ordinary country road could not be treated as a nuisance.—HILLYARD *v.* GRAND TRUNK RY. CO. (1885), 8 O. R. 583.—**CAN.**

k. *Branches overhanging highway.*]—HODGINS *v.* TORONTO CORPN. (1892), 19 A. R. 537.—**CAN.**

PART III. SECT. 1.

301 i. *Duty to use property so as not to injure neighbour.*]—A condenser pipe passed through the floor & discharged steam into a dock below, 20 feet from an adjoining warehouse into which the steam entered & damaged the contents:—*Held:* the act causing the injury, violated the rule of law which does not permit one, even on his own land, to do anything, lawful in itself, which necessarily injures another.—CHANDLER ELECTRIC CO. *v.* FULLER (1892), 21 S. C. R. 337.—**CAN.**

301 ii. ——.]—BHAYROO *v.* VAN ASWEGEN, [1915] T. P. D. 195.—**S. AF.**

305. ——.]—BALLARD *v.* TOMLINSON, No. 319, *post.*

306. Right to reasonable user.]—FANSHAWE *v.* LONDON & PROVINCIAL DAIRY CO. (1888), 4 T. L. R. 694.

Annotation :—**Refd.** Tinkler *v.* Aylesbury Dairy Co. (1888), 5 T. L. R. 52.

——.]—*See, further*, Part III., Sect. 2, sub-sect. 2, C. (*a*), *post.*

307. Legality of user—Immateriality of motive.] BRADFORD CORPN. *v.* PICKLES, No. 65, *ante.*

SECT. 2.—INJURY TO PROPERTY.

SUB-SECT. 1.—IN GENERAL.

308. Distinguished from injury to comfort.]—ST. HELEN'S SMELTING CO. *v.* TIPPING, No. 115, *ante.*

309. Right to protection of natural barrier against sea.]—It is the duty of the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers or by raising artificial barriers ; & therefore no subject is entitled to destroy a natural barrier against the sea ; & if the destruction of such natural barrier would cause an injury to a neighbouring landowner he is entitled to an injunction to restrain it.—A.-G. *v.* TOMLINE (1880), 14 Ch. D. 58 ; 49 L. J. Ch. 377 ; 42 L. T. 880 ; 44 J. P. 617 ; 28 W. R. 870, C. A.

Annotations :—**Folld.** Canvey Island Comrs. *v.* Preedy, [1922] 1 Ch. 179. **Refd.** West Norfolk Farmers' Manure Co. *v.* Archdale (1886), 16 Q. B. D. 754 ; Musselburgh Real Estate Co. *v.* Musselburgh, [1905] A. C. 491 ; Brighton & Hove Gas Co. *v.* Hove Bungalows (1923), 88 J. P. 61. **Mentd.** East Stonehouse District L. B. *v.* Willoughby (1902), 50 W. R. 698 ; A.-G. of Southern Nigeria *v.* Holt (Liverpool), [1915] A. C. 599.

310. ——.]—Pltfs. were incorporated under a local Act for protecting Canvey Island in Essex from inundation by the sea. They succeeded former comrs. appointed by an Act of 1792, which contained a power for these comrs. to erect a new sea wall further inward, on giving compensation to the owner whose land was taken for this purpose. In 1813 the new wall, 4,300 feet in length, was built, & £150 given as compensation to the owner of the land taken. Under the local Act the property & rights of the former comrs. were vested in pltfs. who had power under that Act to hold lands. Pltfs. claimed to be owners in possession of the foreshore between the new & the old wall. Deft. claimed under a conveyance of Apr. 1919, to be the freeholder in possession of a strip of land comprising part of this foreshore, & to be entitled as of right, to excavate & remove shells & other drift even although, as pltfs. alleged, it deprived the new wall of protection & support, & exposed it to injury by the action of wind & water. The greater risk to the wall in consequence of deft.'s action was established by the evidence. In an action by pltfs. to restrain deft. from so removing the drift, & from trespassing on the land :—*Held :* (1) assuming the strip in question to be deft.'s freehold, pltfs. were still entitled to an injunction restraining him from so removing drift from the strip as to expose their wall & works & the lands protected thereby to greater risk of inundations of the sea ; (2) pltfs. had established their statutory title under the Act of 1792 & the local Act to the whole of the land taken & set out pursuant to the first Act, & had exercised specific acts of ownership over the foreshore. The possession of pltfs. & of deft. being at most doubtful or equivocal the law attached possession to the title ; (3) deft. was a trespasser, & must be restrained from excavating or removing stones, shingle, shell or soil from the particular strip of foreshore & from otherwise trespassing on the same.—CANVEY ISLAND COMRS. *v.* PREEDY, [1922] 1 Ch. 179 ; 91 L. J. Ch. 203 ; 126 L. T. 445 ; 86 J. P. 21 ; 66 Sol. Jo. 182 ; 20 L. G. R. 125.

SUB-SECT. 2.—PRINCIPLE OF *RYLANDS* V. *FLETCHER.*

A. In General.

311. Absolute liability for non-natural user of property.]—A. was the lessee of mines. B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, & employed competent persons, an engineer & a contractor, to construct it. A. had worked his mines up to a spot where there were certain old passages of disused mines ; these passages were connected with vertical shafts which communicated with the land above, & which had also been out of use for years, & were apparently filled with marl & the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, & shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages & flooded A.'s mine :—*Held :* A. was entitled to recover damages from B. in respect of this injury.

Defts., treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used ; & if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, & if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by pltf., pltf. could not have complained that that result had taken place. . . .

If defts., not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities & in a manner not the result of any work or operation on or under the land, & if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape & to pass off into the close of pltf., then it appears to me that that which defts. were doing they were doing at their own peril ; &, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water & its passing away to the close of pltf. & injuring pltf., then for the consequence of that, in my opinion, defts. would be liable.

. . . The same result is arrived at on the principles, referred to by BLACKBURN, J., in his judgment, in the Ct. of Exch., where he states the opinion of that Ct. as to the law in these words : " We think that the true rule of law is, that the person who, for his own purposes, brings on his land & collects & keeps there anything likely to do mischief if it escapes, must keep it in at his peril ; & if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to pltf.'s default ; or, perhaps, that the escape was the consequence of *vis major*, or the act of God ; but as nothing of this sort exists here, it is

Sect. 2.—*Injury to property: Sub-sect.* 2, *A. & B.* (*a*), (*b*), (*c*)

unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes & noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; & it seems but reasonable & just that the neighbour who has brought something on his own property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, & it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural & anticipated consequence. Upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches (LORD CAIRNS, C.).

For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum* (LORD CRANWORTH).—RYLANDS *v.* FLETCHER (1868), L. R. 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220; 33 J. P. 70, H. L.; *affg.* S. C. *sub nom.* FLETCHER *v.* RYLANDS (1866), L. R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.

Annotations:—**Apld.** Jones *v.* Festiniog Ry. (1868), L. R. 3 Q. B. 733. **Distd.** Carstairs *v.* Taylor (1871), L. R. 6 Exch. 217; Wilson *v.* Newberry (1871), L. R. 7 Q. B. 31; Dunn *v.* Birmingham Canal Co. (1872), L. R. 7 Q. B. 244. **Consd.** Crompton *v.* Lea (1874), L. R. 19 Eq. 115. **Distd.** Madras Ry. *v.* Zemindar of Carvetinagarum (1874), 30 L. T. 770; Nichols *v.* Marsland (1875), L. R. 10 Exch. 255. **Apld.** Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5. **Distd.** Box *v.* Jubb (1879), 4 Ex. D. 76; Anderson *v.* Oppenheimer (1880), 5 Q. B. D. 602. **Apld.** Powell *v.* Fall (1880), 5 Q. B. D. 597. **Distd.** Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418. **Apld.** Snow *v.* Whitehead (1884), 27 Ch. D. 588. **Distd.** Snook *v.* Grand Junction Waterworks Co. (1886), 2 T. L. R. 308. **Apld.** Evans *v.* M. S. & L. Ry. (1887), 36 Ch. D. 626; Filburn *v.* People's Palace & Aquarium Co. (1890), 25 Q. B. D. 258. **Distd.** National Telephone Co. *v.* Baker, [1893] 2 Ch. 186; Gill *v.* Edouin (1894), 71 L. T. 762; Green *v.* Chelsea Waterworks Co. (1894), 70 L. T. 547. **Consd.** Ponting *v.* Noakes, [1894] 2 Q. B. 281; Blake *v.* Woolf, [1898] 2 Q. B. 426. **Apld.** Batcheller *v.* Tunbridge Wells Gas Co. (1901), 84 L. T. 765. **Consd.** Eastern & South African Telegraph Co. *v.* Cape Town Tram. Cos., [1902] A. C. 381. **Apld.** West *v.* Bristol Tram. Co., [1908] 2 K. B. 14; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393. **Distd.** Richards *v.* Lothian, [1913] A. C. 263. **Apld.** Charing Cross Electricity Supply Co. *v.* Hydraulic Power Co., [1914] 3 K. B. 772. **Consd.** Goodbody *v.* Poplar B. C. (1914), 84 L. J. K. B. 1230. **Apld.** Mansel *v.* Webb (1918), 88 L. J. K. B. 323; Miles *v.* Forest Rock Granite Co. (Leicestershire) (1918), 34 T. L. R. 500. **Consd. & Apld.** Musgrove *v.* Pandelis, [1919] 2 K. B. 43. **Apld.** A.-G. *v.* Cory, Kennard *v.* Cory, [1921] 1 A. C. 521; Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465; Hoare *v.* McAlpine, [1923] 1 Ch. 167. **Distd.** Manton *v.* Brocklebank, [1923] 2 K. B. 212. **Refd.** Gordon *v.* St. James, Westminster, Vestry (1865), 13 L. T. 511; Ross *v.* Fedden (1872), L. R. 7 Q. B. 661; Smith *v.* Fletcher (1874), L. R. 9 Exch. 64; Cattle *v.* Stockton [illegible] (1875), L. R. 10 Q. B. 453; Wilson *v.* Waddell (1876), 2 App. Cas. 95; Humphries *v.* Cousins (1877), 2 C. P. D. 239; Hurdman *v.* N. E. Ry. (1878), 3 C. P. D. 168; Nitro Phosphate & Odams Chemical Manure Co. [illegible] St. Katherine Docks Co. (1878), 27 W. R. [illegible] *v.* Tomline (1879), 12 Ch. D. 214; Fleming *v.* Manchester Corpn. (1881), 44 L. T. 517; Tillett *v.* Ward (1882), 10 Q. B. D. 17; Blake *v.* Land & House Property Corpn. (1887), 3 T. L. R. 667; Abelson *v.* [illegible] J. P. 119; Ruddiman *v.* Smith [illegible] 708; Bradford Corpn. *v.* Pickles (1894), 71 L. T. 793; Grosvenor & West End Ry. & Terminus Hotel Co. *v.* Hamilton (1894), 71 L. T. 362; Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165; St. Helens Corpn. *v.* United Alkali Co. (1901), *Times*, June 19; Ely Brewery Co. *v.* Pontypridd U. D. C. (1903), 68 J. P. 3; Smith *v.* Giddy, [1904] 2 K. B. 448; Chichester Corpn. *v.* Foster, [1906] 1 K. B. 167; Foster *v.* Warblington District Council, [1906] 1 K. B. 648; Baker *v.* Snell, [1908] 2 K. B. 825; Wing *v.* London General Omnibus Co., [1909] 2 K. B. 652; Lowery *v.* Walker, [1910] 1 K. B. 173; Jones *v.* Lee (1911), 106 L. T. 123; Maxey Drainage Board *v.* G. N. Ry. (1912), 106 L. T. 429; Hanley *v.* Edinburgh Corpn. (1913), 77 J. P. 233; Heath's Garage *v.* Hodges, [1916] 2 K. B. 370; Greenock Corpn. *v.* Calc. Ry., Greenock Corpn. *v.* G. & S. W. Ry., [1917] A. C. 556; Holgate *v.* Bleazard, [1917] 1 K. B. 443; Cheater *v.* Cater, [1918] 1 K. B. 247; Edwards *v.* Birmingham Canal Navigations, [1924] 1 K. B. 341; Booth *v.* Thomas (1926), 95 L. J. Ch. 160; Noble *v.* Harrison, [1926] 2 K. B. 332; Smith *v.* G. W. Ry. (1926), 135 L. T. 112. **Mentd.** R. *v.* Stephens (1866), L. R. 1 Q. B. 702; Woodall *v.* Hingley (1866), 14 L. T. 167; Richards *v.* Jenkins (1868), 18 L. T. 437; Saxby *v.* M. S. & L. Ry. (1869), 38 L. J. C. P. 153; The Thetis (1869), L. R. 2 A. & E. 365; Smith *v.* L. & S. W. Ry. (1870), L. R. 6 C. P. 14; Child *v.* Hearn (1874), L. R. 9 Exch. 176; Gas Light & Coke Co. *v.* St. Mary Abbot's, Kensington, Vestry (1884), Cab. & El. 368; Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131; Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127; Holliday *v.* Wakefield Corpn., [1891] A. C. 81; Price *v.* South Metropolitan Gas Co. (1895), 65 L. J. Q. B. 126; Prinsep *v.* Belgravia Estate (1895), 39 Sol. Jo. 381; Dixon *v.* G. W. Ry. (1896), 75 L. T. 245; Canadian Pacific Ry. *v.* Roy, [1902] A. C. 220; Ilford Gas Co. *v.* Ilford U. D. C. (1903), 67 J. P. 365; Evans *v.* Liverpool Corpn., [1906] 1 K. B. 160; Hobart *v.* Southend-on-Sea Corpn. (1906), 75 L. J. K. B. 305; Manchester Corpn. *v.* New Moss Colliery, [1906] 1 Ch. 278; Whitmores (Edenbridge) *v.* Stanford, [1909] 1 Ch. 427; Barker *v.* Herbert, [1911] 2 K. B. 633; Remorquage à Helice Soc. Anon. de *v.* Bennet, [1911] 1 K. B. 243; Titterton *v.* Kingsbury Collieries (1911), 104 L. T. 569; De Silva *v.* Korassa Ceylon Rubber Co. (1919), 88 L. J. P. C. 54; Quebec Ry. Light, Heat & Power Co. *v.* Vandry, [1920] A. C. 662; Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213; Jefferson *v.* Derbyshire Farmers, [1921] 2 K. B. 281; Postmaster-General *v.* Liverpool Corpn. (1922), 92 L. J. K. B. 382; Performing Right Soc. *v.* Ciryl Theatrical Syndicate (1923), 92 L. J. K. B. 811; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539; Cockburn *v.* Smith, [1924] 2 K. B. 119; Gayler & Pope *v.* Davies, [1924] 2 K. B. 75; Ilford U. C. *v.* Beal, [1925] 1 K. B. 671; Hines *v.* Tousley (1926), 95 L. J. K. B. 773.

312. Measure of liability—User of defendant's property.]—SANDERS-CLARK *v.* GROSVENOR MANSIONS CO., LTD. & D'ALLESSANDRI, No. 204, *ante*.

313. —— ——.]—The principle of *Rylands* v. *Fletcher*, No. 311, *ante*, is not inconsistent with the Roman law. It imposes a liability on a proprietor which is measured by the non-natural user of his own property, not by that of his neighbour. It applies to a proprietor who stores electricity on his land if it escapes therefrom & injures a person or the ordinary use of property. It does not apply to the case of injury done to a peculiar trade apparatus unnecessarily so constructed as to be affected by minute currents of the escaping force.

In an action for damages by applt. co. for disturbances in the working of their submarine cable caused by an escape of electricity stored by resps. for the due working of their tramway system:—*Held:* (1) in regard to that section of the tramway which had not been constructed under statutory authority, *Rylands* v. *Fletcher*, No. 311, *ante*, did not apply, because the disturbances only resulted when the cable was constructed without certain precautions, which the evidence showed had subsequently secured its immunity; (2) in regard to those sections of the tramway which had been constructed under statutes (Act 22 of 1895 & Act 29 of 1896), the escape of electricity, being a natural incident of the operations legalised thereby, & not resulting from a leak within the meaning of the statutory undertaking or condition, did not impose liability on resps.—EASTERN & SOUTH AFRICAN TELEGRAPH CO. *v.* CAPE TOWN TRAMWAYS COS., [1902] A. C. 381; 71 L. J. P. C.

122; 86 L. T. 457; 50 W. R. 657; 18 T. L. R. 523, P. C.

Annotations:—*As to* (1) **Consd.** Hoare *v.* McAlpine, [1923] 1 Ch. 167. *As to* (2) **Consd.** Hoare *v.* McAlpine, [1923] 1 Ch. 167. **Refd.** A.-G. *v.* Dorchester Corpn. (1905), 93 L. T. 290; Rickards *v.* Lothian, [1913] A. C. 263. *Generally*, **Refd.** Colls *v.* Home & Colonial Stores, [1904] A. C. 179; Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465.

314. Extent of principle — Whether confined to adjoining owners.]—Pltfs. hired of deft. the ground floor of a warehouse, the upper part of which was occupied by deft. himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse & wetted pltf.'s goods. Deft. had used reasonable care in examining & seeing to the security of the gutters & the box. In an action by pltfs. against deft. for the damage so caused:—*Held:* deft. was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse.

The decision in *Rylands* v. *Fletcher*, No. 311, *ante*, has really no bearing on the case, it referred only to acts of adjoining owners of land (MARTIN, B.).—CARSTAIRS *v.* TAYLOR (1871), L. R. 6 Exch. 217; 40 L. J. Ex. 129; 19 W. R. 723.

Annotations:—**Apld.** Ross *v.* Fedden (1872), L. R. 7 Q. B. 661. **Distd.** Humphries *v.* Cousins (1877), 2 C. P. D. 239. **Consd.** Hargroves Aronson *v.* Hartopp, [1905] 1 K. B. 472. **Refd.** Gill *v.* Edouin (1894), 11 T. L. R. 93; Blake *v.* Woolf, [1898] 2 Q. B. 426; Hart *v.* Rogers, [1916] 1 K. B. 646; Cockburn *v.* Smith, [1924] 2 K. B. 119. **Mentd.** Stanton *v.* Southwick, [1920] 2 K. B. 642.

315. —— —— Land occupied under licence. Pltfs. were the owners of electric cables which had been laid under certain public streets. Defts. were the owners of hydraulic mains which had been laid under the same streets under statutory powers. These mains burst in four different places, in each case damaging pltfs.' cables. The bursting of the mains was not due to any negligence on the part of defts. Two of the mains which so burst had been laid under a private Act which did not contain the usual clause providing that nothing in the Act should exempt the co. from liability for nuisance. The other two had been laid under a later Act which did contain such a clause. The later Act also provided that the two Acts should be "read & construed together as one Act":—*Held:* the doctrine of *Rylands* v. *Fletcher*, No. 311, *ante*, applies not only to cases in which the dangerous thing has escaped from defts.' land on to pltfs.' land & done damage there, but also to cases in which the site of pltfs.' injury was occupied by him only under a licence & not under any right of property in the soil, & in the absence of statutory authorisation of the nuisance defts. were liable for the damage caused by the bursting of their mains notwithstanding that they had been guilty of no negligence.—CHARING CROSS ELECTRICITY SUPPLY CO. *v.* HYDRAULIC POWER CO., [1914] 3 K. B. 772; 83 L. J. K. B. 1352; 111 L. T. 198; 78 J. P. 305; 30 T. L. R. 441; 58 Sol. Jo. 577; 12 L. G. R. 807, C. A.

Annotations:—**Distd.** Goodbody *v.* Poplar B. C. (1914), 84 L. J. K. B. 1230. **Refd.** A.-G. *v.* Cory, Kennard *v.* Same (1919), 88 L. J. Ch. 410; Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487; Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465 Postmaster-General *v.* Liverpool Corpn. (1922), 92 L. J. K. B. 382.

316. —— Confined to things dangerous per se.]—A branch of a beech tree growing on deft.'s land overhung a highway at a height of thirty feet above the ground. In fine weather the branch suddenly broke, fell upon pltf.'s vehicle, which was passing along the highway, & damaged it. In an action by pltf. claiming in respect of the damage to his vehicle:—*Held:* (1) the principle of *Rylands* v. *Fletcher*, No. 311, *ante*, had no application, inasmuch as a tree was not in itself a dangerous thing, & to grow trees was one of the natural uses of the soil; (2) the mere fact that the branch overhung the highway did not make it a nuisance, seeing that it did not obstruct the free passage of the highway, & although the branch proved to be a danger deft. was not liable, inasmuch as he had not created the danger & had no knowledge, actual or imputed, of its existence.—NOBLE *v.* HARRISON, [1926] 2 K. B. 332; 95 L. J. K. B. 813; 135 L. T. 325; 90 J. P. T. L. R. 518; 70 Sol. Jo. 691, D. C.

B. Application to Particular Nuisance.

(*a*) *Animals.*

Harmless domestic animals.]—*See* ANIMALS, Vol. II., pp. 223–236, Nos. 154–237.

Animals naturally vicious.]—*See* ANIMALS, Vol. II., pp. 236–238, 250, Nos. 238–244, 325.

Domestic animals known to be vicious.]—*See* ANIMALS, Vol. II., pp. 238–247, Nos. 245–306.

(*b*) *Escape of Electricity.*

See ELECTRIC LIGHTING, Vol. XX., pp. 210–212, Nos. 72–77.

(*c*) *Escape of Gas.*

See GAS, Vol. XXV., pp. 485–488, Nos. 89–101.

(*d*) *Escape of Sewage, etc.*

See, generally, SEWERS & DRAINS.

317. General rule.]—Case for not repairing the partition wall of deft.'s privy, *pro defectu* of which, the filth ran into pltf.'s cellar.

He whose dirt it is must keep it that it may not trespass (HOLT, C.J.).—TENANT *v.* GOLDWIN (OR GOLDING) (1704), 1 Salk. 21, 360; Holt, K. B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E. R. 20, 314.

Annotations:—**Distd.** Russell *v.* Shenton (1842), 3 Q. B. 449; Smith *v.* Kenrick (1849), 7 C. B. 515. **Apld.** Alston *v.* Grant (1854), 3 E. & B. 128; Hodgkinson *v.* Ennor (1863), 4 B. & S. 229; Fletcher *v.* Rylands (1866), L. R. 1 Exch. 265. **Distd.** Ross *v.* Fedden (1872), 26 L. T. 966. **Consd.** Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5. **Apld.** Snow *v.* Whitehead (1884), 27 Ch. D. 588; Ballard *v.* Tomlinson (1885), 29 Ch. D. 115. **Distd.** Ponting *v.* Noakes, [1894] 2 Q. B. 281. **Apld.** Foster *v.* Warblington District Council, [1906] 1 K. B. 648; Hobart *v.* Southend-on-Sea Corpn. (1906), 75 L. J. K. B. 305. **Refd.** Todd *v.* Flight (1860), 9 C. B. N. S. 377; R. *v.* Stephens (1866), 7 B. & S. 710; Wilson *v.* Newberry (1871), L. R. 7 Q. B. 31; Humphries *v.* Cousins (1877), 2 C. P. D. 239; Grosvenor & West End Ry. & Terminus Hotel Co. *v.* Hamilton (1894), 71 L. T. 362; Holgate *v.* Bleazard, [1917] 1 K. B. 443; A.-G. *v.* Cory, Kennard *v.* Same (1919), 88 L. J. Ch. 410. **Mentd.** Rider *v.* Smith (1790), 3 Term Rep. 766; Ricketts *v.* East & West India Docks, etc. Ry. (1852), 12 C. B. 160; White *v.* Bass (1862), 7 H. & N. 722; Ellis *v.* Manchester Carriage Co. (1876), 2 C. P. D. 12; Wheeldon *v.* Burrows (1879), 12 Ch. D. 31; Smith *v.* Hancock, [1894] 2 Ch. 377; Broomfield *v.* Williams, [1897] 1 Ch. 602.

318. ——.]—RYLANDS *v.* FLETCHER, No. 311, *ante*.

PART III. SECT. 2. SUB-SECT. 2.—B. (d).

1. *Discharge of hot water & steam into drain.*]—Deft. co. connected a drain leading from their premises with a private drain constructed by pltf. Hot water & steam, originating on deft.'s premises & passing into their drain, flowed back through pltf.'s drain & overflowed his cellar, & filled his house with steam:—*Held:* deft. was responsible in damages.—ANDREWS *v.* CAPE BRETON ELECTRIC CO. (1904), 37 N. S. R. 105.—**CAN**

Sect. 2.—Injury to property: Sub-sect. 2, B. (d)

319. ——.]—No one has a right to use his own land in such a way as to be a nuisance to his neighbour, & therefore if a man puts filth or poisonous matter on his land he must take care that it does not escape so as to poison water which his neighbour has a right to use although his neighbour may have no property in such water at the time it is fouled.

Pltf. & deft. were adjoining landowners & had each a deep well on his own land pltf.'s land being at a lower level than deft.'s. Deft. turned sewage from his house into his well & thus polluted the water that percolated underground from deft.'s to pltf.'s land & consequently the water, which came into pltf.'s well from such percolating water when he used his well by pumping came adulterated with the sewage from deft.'s well:—*Held:* pltf. had a right of action against deft. for so polluting the source of supply although until pltf. had appropriated it he had no property in the percolating water under his land & although he appropriated such water by the artificial means of pumping.—BALLARD *v.* TOMLINSON (1885), 29 Ch. D. 115; 54 L. J. Ch. 454; 52 L. T. 942; 49 J. P. 692; 33 W. R. 533; 1 T. L. R. 270, C. A.

Annotations:—**Consd.** Snow *v.* Whitehead (1884), 27 Ch. D. 588. **Apld.** Foster *v.* Warblington U. C., [1906] 1 K. B. 648. **Refd.** King *v.* Oxford Co-op. Soc. (1884), 51 L. T. 94; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; English *v.* Metropolitan Water Board, [1907] 1 K. B. 588.

320. ——.]—(1) Infringement of the rights of a riparian owner by the pollution of the water of a river opposite his property by sewage, & trespass on his land by the discharging, or allowing to escape, into the river, of sewage which is carried by the wind or current on to the land, constitute a permanent injury entitling the owner, though a reversioner, to maintain an action.

Guardians, who as the sanitary authority, had constructed sewers, were at common law under a duty to dispose of their sewage so as not to interfere with private rights, & a liability to others for injury caused by the escape of the sewage:—*Held:* this duty & liability were transferred by Local Government Act, 1894 (c. 73), s. 25, to a rural district council; & the liability was also included in a transfer to an urban district council, by an order of the county council converting the rural into an urban district, of the liabilities attaching to the rural district council.

(2) Anyone who turns fæcal matter or allows fæcal matter collected by him or under his control to escape into a river in such manner or under such conditions that it is carried, whether by the current or the wind, on to his neighbour's land, is guilty of a trespass (PARKES, J.).

(3) It is reasonably certain that a reversioner cannot maintain actions in the nature of trespass, including, I think, actions for infringement of natural rights, arising out of his ownership of land, without alleging & proving injury to the reversion. If the thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question for the jury. I take "permanent" in this connection, to mean such as will continue indefinitely unless something is done to remove it. Thus, a building which infringes ancient lights is permanent within the rule for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other hand, a noisy trade, or the exercise of an alleged right of way, are not in their nature permanent within the rule, for they cease of themselves unless there be some one to continue them (PARKER, J.).—JONES *v.* LLANRWST URBAN COUNCIL, [1911] 1 Ch. 393; 80 L. J. Ch. 145; 103 L. T. 751; 75 J. P. 68; 55 Sol. Jo. 125; 9 L. G. R. 222; *sub nom.* ISGOED-JONES *v.* LLANRWST URBAN DISTRICT COUNCIL, 27 T. L. R. 133; *subsequent proceedings* (1912), 76 J. P. Jo. 243.

Annotations:—*As to* (3) **Apld.** White *v.* London General Omnibus Co. (1914), 58 Sol. Jo. 339. *Generally,* **Mentd.** *Re* Porter, Amphlett & Jones (1912), 81 L. J. Ch. 544; *Re* Roney, [1914] 2 K. B. 529; Seal *v.* Turner, [1915] 3 K. B. 194.

321. Escape of sewage from stables—Artificial mound.]—(1) Deft. was tenant & occupier of a newly erected stable, adjoining & all but touching the flank wall of a house in the suburbs of London, which stable was erected on a mound of made earth at a higher level than the basement of pltf.'s house, & the result was that water, mixed with stable drainage & sewage leaking from a broken soil pipe in the stable yard, oozed through the wall of pltf.'s house, so as to be a nuisance. On a bill filed by pltfs., as owners of the house, for an injunction to restrain the nuisance occasioned by the damp, & also by the noise of the horses kept in the stable:—*Held:* the occupier of the house should be a party to the suit, inasmuch as the alleged nuisances were of a temporary nature.

(2) It appeared that the damp was due to the circumstance of the stable being erected on made earth, placed there unknown to deft. by some predecessor in title:—*Held:* an injunction should be granted, for the reason that the possessor of land is responsible for nuisances arising on it, by whatever means occasioned; (3) with regard to the noise, the stable was so situated that the ordinary use of it occasioned an annoyance amounting to a nuisance.

A man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise as to interfere with the ordinary use & enjoyment of his dwelling-house, so as to cause serious annoyance & disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that deft. is only making a reasonable use of his property (JESSEL, M.R.).—BRODER *v.* SAILLARD (1876), 2 Ch. D. 692; 45 L. J. Ch. 414; 40 J. P. 644; 24 W. R. 1011.

Annotations:—*As to* (1) **Apld.** House Property & Investment Co. *v.* H. P. Horse Nail Co. (1885), 29 Ch. D. 190. *As to* (2) **Consd.** Hurdman *v.* N. E. Ry. (1878), 3 C. P. D. 168. **Distd.** Prinsep *v.* Belgravia Estate (1895), 39 Sol. Jo. 381. **Refd.** Maxey Drainage Board *v.* G. N. Ry. (1912), 76 J. P. 237; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341; Sack *v.* Jones, [1925] Ch. 235. *As to* (3) **Apld.** Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685; Colwell *v.* St. Pancras B. C., [1904] 1 Ch. 707. **Refd.** Gill *v.* Edouin (1894), 71 L. T. 762; Lyons *v.* Wilkins, [1899] 1 Ch. 255. *Generally,* **Refd.** Humphries *v.* Cousins (1877), 2 C. P. D. 239.

322. Escape of sewage through old drain—Though existence not known to defendant.]—Pltf. & deft. were respectively occupiers of adjoining houses. An old drain which commenced on deft.'s premises, & thence passed under & received the drainage of several other houses, turned back under deft.'s house, & thence under the cellar of pltf.'s house, & ultimately into a public sewer. The part of the return drain which passed through deft.'s premises being decayed, the sewage escaped & flowing into pltf.'s cellar did damage. Deft. was unaware of the existence of this return drain, & consequently of its want of repair:—*Held:* deft. was liable for the damage done to pltf.: for deft.'s duty was to keep the sewage which he himself was bound to receive from passing from his own premises to pltf.'s premises otherwise than along the old accustomed channel, & this duty was independent of negligence on his part, &

independent of his knowledge or ignorance of the existence of the drain.—HUMPHRIES *v.* COUSINS (1877), 2 C. P. D. 239; 46 L. J. Q. B. 438; 36 L. T. 180; 41 J. P. 280; 25 W. R. 371; *on appeal*, 46 L. J. Q. B. at p. 442, C. A.

Annotations:—**Apld.** Firth *v.* Bowling Iron Co. (1878), 3 C. P. D. 254; Holland *v.* Lazarus (1897), 66 L. J. Q. B. 285. **Consd.** Ilford U. C. *v.* Beal, [1925] 1 K. B. 671. **Distd.** Noble *v.* Harrison, [1926] 2 K. B. 332. **Refd.** Gill *v.* Edouin (1894), 71 L. T. 762; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341.

Pollution of watercourses generally.] — *See* WATERS & WATERCOURSES.

Pollution of fisheries.] — *See* FISHERIES, Vol. XXV., pp. 34–36, Nos. 328–338.

(e) *Escape of Water.*

See, generally, WATERS & WATERCOURSES.

323. General rule.]—Defts., the owners of a mining property, sunk a shaft by which they tapped the water which had formerly found its way into certain old workings on their own ground, & had thence percolated into pltfs.' mines. Defts. then made a borehole at the bottom of the shaft. It was admitted that the making it was not in due course of mining, but only for the purpose of getting rid of the water. The effect of the borehole was to let off the water into the above-mentioned old workings on defts.' ground, whence it percolated into pltfs.' works in the same way in which it would have done if neither shaft nor boreholes had ever been made:—*Held:* defts. had not by making a shaft so appropriated the water as to lay themselves under an obligation to keep it from coming upon pltfs.' land, &, as the effect of defts.' operations was not to throw upon pltfs.' land any burden which it had not borne before, pltfs.' case failed.

Where the maxim [*sic utere tuo ut alienum non lædas*] is applied to landed property, it is subject to a certain modification, it being necessary for pltf. to show not only that he has sustained damages, but that deft. has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. If pltf. only shows that his own land is damaged by deft.'s using his land in the natural manner, he cannot succeed (BRETT, L.J.).—WEST CUMBERLAND IRON & STEEL CO. *v.* KENYON (1879), 11 Ch. D. 782; 48 L. J. Ch. 793; 40 L. T. 703; 43 J. P. 731; 28 W. R. 23, C. A.

Annotation:—**Refd.** Prinsep *v.* Belgravia Estate (1895), 39 Sol. Jo. 381.

324. Escape from reservoir.] — RYLANDS *v.* FLETCHER, No. 311, *ante*.

325. Escape of rain water — Surface of land artificially raised.]—A statement of claim alleged that the surface of deft.'s land had been artificially raised by earth placed thereon, & that in consequence rain water falling on defts.' land made its way through defts.' wall into the adjoining house of pltf., & caused substantial damage:—*Held:* the statement of claim disclosed a good cause of action.—HURDMAN *v* NORTH EASTERN RY. CO. (1878), 3 C. P. D. 168; 47 L. J. Q. B. 368; 38 L. T. 339; 26 W. R. 489, C. A.

Annotations:—**Consd.** Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131; Gill *v.* Edouin (1894), 71 L. T. 762; Maxey Drainage Board *v.* G. N. Ry. (1912), 106 L. T. 429. **Distd.** Gerrard *v.* Crowe, [1921] 1 A. C. 395. **Refd.** Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Ilford U. C. *v.* Beal, [1925] 1 K. B. 671. **Mentd.** Firth *v.* Bowling Iron Co. (1878), 3 C. P. D. 254.

326. —— Through trench cut by defendant.]—By reason of an unprecedented rainfall a quantity of water was accumulated against one of the sides of defts.' railway embankment, to such an extent as to endanger the embankment, when, in order to protect their embankment, defts. cut trenches in it by which the water flowed through, & went ultimately on to the land of pltf., which was on the opposite side of the embankment & at a lower level, & flooded & injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages for such injury the jury found that the cutting of the trenches was reasonably necessary for the protection of defts.' property, & that it was not done negligently:—*Held:* though defts. had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of pltf., & they were therefore liable.—WHALLEY *v.* LANCASHIRE & YORKSHIRE RY. CO. (1884), 13 Q. B. D. 131; 53 L. J. Q. B. 285; 50 L. T. 472; 48 J. P. 500; 32 W. R. 711, C. A.

Annotations:—**Consd.** Greyvensteyn *v.* Hattingh, [1911] A. C. 355; Maxey Drainage Board *v.* G. N. Ry. (1912), 106 L. T. 429. **Distd.** Gerrard *v.* Crowe, [1921] 1 A. C. 395. **Mentd.** Singleton Abbey (Owners) *v.* Paludina (Owners), The Paludina (1926), 95 L. J. P. 135.

327. —— Collected in cellar.] — Deft. allowed water to collect in his cellar & to percolate into pltf.'s cellar:—*Held:* this was a wrong within the decision of *Rylands* v. *Fletcher*, No. 311, *ante*, & pltf. was entitled to damages.—SNOW *v.* WHITEHEAD (1884), 27 Ch. D. 588; 53 L. J. Ch. 885; 51 L. T. 253; 33 W. R. 128.

328. —— Artificial channel substituted for natural channel.]—It is the duty of anyone who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, & if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.—GREENOCK CORPN. *v.* CALEDONIAN RY. CO., GREENOCK CORPN. *v.* GLASGOW & SOUTH WESTERN RY. CO., [1917] A. C. 556; 86 L. J. P. C. 185; 117 L. T. 483; 81 J. P. 269; 33 T. L. R. 531; 62 Sol. Jo. 8; 15 L. G. R. 749, H. L.

Annotations:—**Refd.** A.-G. *v.* Cory, Kennard *v.* Cory, [1921] 1 A. C. 521; Montreal City *v.* Watt & Scott, [1922] 2 A. C. 555.

329. Overflow from sink—Obstruction in waste pipe.]—Pltf. occupied the ground floor & deft. the third & fourth floors of the same building. Deft.'s employees, without his knowledge were in the habit of emptying tea leaves into a sink leading from his premises to a pipe, & in consequence the pipe was choked & an overflow of water ensued. The water came through the ceiling of pltf.'s rooms & did damage to certain goods which he had there. In an action against deft. for the damage sustained:—*Held:* pltf. was entitled to recover, as a duty

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PART III. SECT. 2, SUB-SECT. 2.—B. (e).

323 i. *General rule.*]—CENTRE STAR MINING CO. *v.* ROSSLAND-KOOTENAY MINING CO. (1905), 11 B. C. R. 231; 1 W. L. R. 336.—**CAN.**

326 i. *Escape of rain water—Through trench cut by defendant.*]—Where by putting in a culvert on a road allowance separating two pieces of land the owner of the higher land permits an accumulation of water to flow on to the lower land thereby causing it more harm than would have resulted from natural & unobstructed drainage, he is liable to the owner thereof for such extra damage.—BAKER *v.* DALY, [1926] 1 D. L. R. 422; [1926] 1 W. W. R. 71; 20 Sask. L. R. 315.—**CAN.**

327 i. —— *Collected in cellar.*]—ST. JOHN YOUNG MEN'S CHRISTIAN ASSOCN. (TRUSTEES) *v.* HUTCHINSON (1880), Cass. Dig. 2nd ed. 210.—**CAN.**

328 i. —— *Artificial channel substituted for natural channel.*]—A person who collects the water on his land into a non-natural & artificial channel of defective construction, thereby causing the water to be discharged on to the land of his neighbour, is liable for the damage caused thereby.—SPEAR *v.* NEWHAM, [1926] N. Z. L. R. 897.—**N.Z.**

m. —— *Sluices of dam choked up.*]—RAJENDRALAL *v.* SURAT CITY MUNICIPALITY (1908), I. L. R. 33 Bom. 393.—**IND.**

Sect. 2.—Injury to property: Sub-sect. 2, B. (e), (f),

was cast upon deft. to prevent an overflow, which duty he had failed to discharge.—ABELSON *v.* BROCKMAN (1889), 54 J. P. 119.

330. Burst of water main.]—CHARING CROSS ELECTRICITY SUPPLY CO. *v.* HYDRAULIC POWER CO., No. 315, *ante*.

Discharge of water from mines.]—*See* MINES, Vol. XXXIV., pp. 724–727, Nos. 1063–1086.

(*f*) *Explosives.*

See, generally, PUBLIC HEALTH.

331. Storage of explosives—Powder magazine.]—R. *v.* CHILWORTH GUNPOWDER CO., LTD. (1888), 4 T. L. R. 557.

332. —— Picric acid.]—In Aug. 1915, F. & P., who were interested in a novel process for making picric acid, a high explosive, from dinitrophenol, D.N.P., entered into an agreement with the Minister of Munitions to manufacture for him picric acid at Rainham, Essex. The contractors as agents for the Minister were to erect works for the purpose, the buildings, plant & machinery to be paid for by the Minister & to remain his property. The Minister was to deliver D.N.P. to the contractors, who were on their sole responsibility & at their risk, to convert it into picric acid at an agreed price. In Sept. 1915, F. & P. entered into an agreement for the tenancy of the land on which the factory was to be established & thereby covenanted not to assign or underlet or part with the possession of the premises without the previous consent of the landlords except to a Govt. Department. In Mar. 1916, a private co. formed by F. & P. for the purpose of acquiring & carrying on the undertaking, entered into agreements with F. & P. for the sale to the co., (*a*) of the rights of the vendors under their agreement with the Minister of Munitions, & (*b*) of the benefit of the tenancy agreement & of the buildings erected by the vendors, completion to take place on payment of the consideration, which was never paid. The vendors also agreed to allow the co. to go into & remain in occupation of the premises as tenants until the purchase consideration had been paid, but until payment the co. were to be deemed to be in possession of the premises, machinery & plant as agents for the vendors. F. & P. never obtained the consent of the landlords under the tenancy agreement to the assignment or parting with possession of the premises. The co. carried on the manufacture of explosives on the premises & large quantities of D.N.P. were delivered at the factory by the Minister & were stored there close to other inflammable materials, & as a result an explosion occurred which caused damage to neighbouring property. In an action for damages by the owners against the co. & F. & P.:—*Held:* (1) the co. were liable on the principle of *Rylands* v. *Fletcher*, No. 311, *ante*, for the damage caused by storing dangerous substances on land of which they were in actual physical possession; (2) F. & P. had not effectively divested themselves of the occupation which they held under the tenancy agreement, & that they also were liable on the same principle as occupiers.—RAINHAM CHEMICAL WORKS, LTD. *v.* BELVEDERE FISH GUANO CO., [1921] 2 A. C. 465; 90 L. J. K. B. 1252; 126 L. T. 70; 37 T. L. R. 973; 66 Sol. Jo. 7; 19 L. G. R. 657, H. L.; *affg.* S. C. *sub nom.* BELVEDERE FISH GUANO CO. *v.* RAINHAM CHEMICAL WORKS, FELDMAN & PARTRIDGE. IND. COOPE & CO. *v.* SAME, [1920] 2 K. B. 487, C. A.

Annotations:—As to (2) **Refd.** Kennard *v.* Cory, [1922] 1 Ch. 265. *Generally*, **Mentd.** Said *v.* Butt, [1920] 3 K. B. 497; British Thomson-Houston Co. *v.* Sterling Accessories, Same *v.* Crowther & Osborn, [1924] 2 Ch. 33; Performing Right Soc. *v.* Ciryl Theatrical Syndicate, [1924] 1. K. B. 1; Prichard & Constance (Wholesale) *v.* Amata (1924), 42 R. P. C. 63.

333. —— Firework factory.]—M'MURRAY *v.* CADWELL (1889), 6 T. L. R. 76.

Annotations:—**Refd.** Savory & Moore *v.* London Electric Supply Corpn. (1891), 8 T. L. R. 192; A.-G. *v.* Dorchester Corpn. (1905), 93 L. T. 290. **Mentd.** Philip *v.* Pennell [1907] 2 Ch. 577.

334. —— Chlorate of potassium.]—ST. HELENS CORPN. *v.* UNITED ALKALI CO., LTD. (1901), *Times*, June 19, C. A.

335. Use of explosives for blasting.]—A railway co. in making a cutting through rock, at a short distance from a private dwelling-house, conducted their operations by blasting, & pieces of stone were hurled on to the buildings & into the garden. Injunction granted as prayed.—ARNOLD *v.* FURNESS RY. CO. (1874), 22 W. R. 613.

336. ——.]—The duty of the owner of a quarry who brings explosives on to his premises & explodes them there is to keep all the results of the explosion on his own land, & if they escape from his land & cause damage he is liable, whether he has been guilty of negligence or not.—MILES *v.* FOREST ROCK GRANITE CO. (LEICESTERSHIRE), LTD. (1918), 34 T. L. R. 500; 62 Sol. Jo. 634, C. A.

(*g*) *Noise and Vibration.*

See Part II., Sect. 9, *ante*.

337. Noise—Machinery.]—GOOSE *v.* BEDFORD, No. 81, *ante*.

338. —— Depreciation in value of property—Milk business.]—TINKLER *v.* AYLESBURY DAIRY CO., LTD., No. 96, *ante*.

339. —— —— Steam organs & amusements.]—Pltfs. in this action were the trustees of the Bedford Estate, Leeds, & they sought an injunction against the Leeds Corpn. to restrain them from holding a certain annual feast known as Woodhouse Feast, which appeared to have been held on or in the neighbourhood of Woodhouse Moor for the past two hundred years, on the ground that the noise caused by the feast constituted a nuisance. They complained that their property, which adjoined the moor, had depreciated in value owing to the noise caused by switchbacks, shooting galleries, roundabouts, steam organs, etc., brought on to the moor. For defts. it was contended that the feast did not constitute a nuisance. It appeared in evidence that from 1908–1911 defts. leased the conduct of this feast to a contractor, & that during that time protests were lodged by pltfs. against the nuisance thereby occasioned, but it was subsequently agreed that pltfs. should accept compensation in respect of the feasts from 1908–1911 without prejudice to their rights thereafter. In the year 1912 the corpn. wrote to pltfs. threatening to again hold the feast on Woodhouse Moor; whereupon a writ was issued by pltfs. to restrain them by injunction:—*Held:* on the facts, the feasts from 1908–1911 constituted a nuisance & there must be a declaration to that effect, & the corpn. must pay the costs of the action. With regard to the year 1912, when the corpn. conducted the feast, there was no actionable nuisance which would justify the ct. in granting an injunction.—BEDFORD *v.* LEEDS CORPN. (1913), 77 J. P. 430.

340. Vibration—Driving in piles.]—In preparing a site for a large building in the heart of the city, defts. drove a very large number of piles into the soil, thereby setting up such a heavy vibration as to cause serious structural damage to an old

house belonging to pltfs., with the result that the greater part had to be taken down in compliance with a dangerous structure notice. Pltfs. sued for damages:—*Held:* (1) the principle of *Rylands* v. *Fletcher*, No. 311, *ante*, as explained in *National Telephone Co.* v. *Baker*, No. 372, *post*, & *A.-G.* v. *Cory Bros.*, No. 344, *post*, applied so that even if, as defts. alleged, pltfs.' house was in an abnormally unstable condition, defts. were responsible as insurers for all damage caused by the escape of the vibration they had so created; (2) on the actual facts pltfs.' house though very old was not in such an abnormally unstable condition as to prevent the vibration being treated as an ordinary actionable nuisance.—HOARE & CO. *v.* MCALPINE, [1923] 1 Ch. 167; 92 L. J. Ch. 81; 128 L. T. 526; 39 T. L. R. 97, 67 Sol. Jo. 146.

(*h*) *Removal of Support.*

See, generally, EASEMENTS, Vol. XIX., pp. 163–174, Nos. 1139–1237.

By mining.]—*See* MINES, Vol. XXXIV., pp. 700–714, Nos. 905–991; GAS, Vol. XXV., p. 474, No. 27.

(*i*) *Other Cases.*

341. Collecting crowd—Trespass by workmen.]—CHASE *v.* LONDON COUNTY COUNCIL & LESLIE & CO., LTD. (1898), 62 J. P. 184; 14 T. L. R. 177.

342. Noxious fumes—Creosote pavement.]—WEST *v.* BRISTOL TRAMWAYS CO., No. 356, *post*.

——.]—*See* Part II., Sect. 13, sub-sect. 2, *ante*.

343. Motor car—Damage by fire—Application of Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 86.]—Pltf. occupied rooms over a garage. Part of the garage was let to deft., who kept a motor car there. Deft.'s servant, who had little skill as a chauffeur, having occasion in the course of his employment to move the motor car, started the engine, & from some unexplained cause, & without negligence on the part of the servant, the petrol in the carburettor caught fire. If the servant had promptly turned off the tap leading from the petrol tank to the carburettor, the fire would have harmlessly burnt itself out. But he failed to do this; & the fire spread & burnt the car, the garage, & pltf.'s rooms & furniture. Pltf. brought an action for damages. Deft. pleaded that the fire "accidentally began" within above sect. The judge at the trial found that deft.'s servant was negligent in not promptly turning off the petrol tap:—*Held:* above Act did not protect a person who brought upon his premises an object likely to do damage if not kept in control, & a motor car ready to start, or such a car in charge of an unskilled chauffeur, was an object of that kind.—MUSGROVE *v.* PANDELIS, [1919] 2 K. B. 43; 88 L. J. K. B. 915; 120 L. T. 601; 35 T. L. R. 299; 63 Sol. Jo. 353. C. A.

Annotations:—**Apld.** Jefferson *v.* Derbyshire Farmers, [1921] 2 K. B. 281. **Consd.** Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341. **Mentd.** Denholme *v.* Shipping Controller (1920), 124 L. T. 378.

344. Tipping colliery spoil—Damage by landslide.]—A colliery co., under licence from the owners of the land, deposited debris from their colliery on the slope of a mountain between the years 1908 & 1916 to the amount of many thousand tons. In Aug., 1916, after heavy rain, a landslide took place on the mountain side, injuring houses belonging to a township at the foot of the mountain & imperilling a highway running along the valley. Two actions were brought in respect of the landslide, the first by the A.-G. on the relation of the local authority, against the colliery co. & the owners of the land, & the second by the owners of the land against the colliery co. In the first action the claim was for a declaration that the colliery co. was not entitled to deposit debris on the mountain side so as to threaten injury to the highway & to the tramways on it & to the water mains & sewers underneath it, & that the other defts. were not entitled to allow their land to be so used, & for injunctions accordingly & damages. In the second action the owner of the land claimed an indemnity from the colliery co.:—*Held:* as it appeared from the evidence that the landslide was caused by the weight of the mass of colliery debris deposited by the co., the case fell within the principle of *Rylands* v. *Fletcher*, No. 311, *ante*, & the colliery co. were liable for any damage caused by the escape of the debris which they had accumulated without evidence of negligence on their part; & as between the co. & the owners of the land, the licence to deposit the debris on the mountain side did not authorise depositing it in a negligent manner, or in such a manner as to cause injury or nuisance to neighbouring owners or occupiers.—A.-G. *v.* CORY BROTHERS & CO., KENNARD *v.* CORY BROTHERS & CO., [1921] 1 A. C. 521; 90 L. J. Ch. 221; 125 L. T. 98; 85 J. P. 129; 37 T. L. R. 343; 19 L. G. R. 145, H. L.; *subsequent proceedings*, [1922] 2 Ch. 1.

Annotation:—**Refd.** Hoare *v.* McAlpine, [1923] 1 Ch. 167.

Overstocking with game.]—*See* GAME, Vol. XXV., p. 359, Nos. 97, 98.

Trees overhanging highroad.]—*See* AGRICULTURE, Vol. II., pp. 114, 115, No. 970.

Poisonous trees—Injury to animals.]—*See* AGRICULTURE, Vol. II., pp. 65, 66, Nos. 412–416.

Decayed wire fence.]—*See* BOUNDARIES, Vol. VII., pp. 289, 290, No. 169.

PART III. SECT. 2, SUB-SECT. 2.—B. (i).

n. *Noxious fumes—Emitted from burning bing.*]—CHALMERS *v.* DIXON (1876), 3 R. (Ct. of Sess.) 461.—**SCOT.**

o. *Setting out fire.*]—A person lighting a fire upon his own land does so at his own risk, & is liable for any damage caused by its spreading to his neighbour's land, independently of any question of further negligence on deft.'s part.—SHEEHAN *v.* PARK (1882), 8 V. L. R. (L.) 25.—**AUS.**

p. ——.]—MITCHELLMORE *v.* SALMON (1905), 1 Tas. L. R. 109.—**AUS.**

q. ——.]—CRAIG *v.* PARKER (1906), 8 W. A. L. R. 161.—**AUS.**

r. ——.]—At common law the person who lights a fire does so at his own peril, & must answer for the consequences unless he can show the damage was caused by the act of a stranger, or by *vis major* or act of God.—YOUNG *v.* TILLEY, [1913] S. A. L. R. 87.—**AUS.**

t. ——.]—BALL *v.* GRAND TRUNK RY. CO. (1866), 16 C. P. 252.—**CAN.**

a. ——.]—FURLONG *v.* CARROLL (1882), 7 A. R. 145.—**CAN.**

b. ——.]—DATREE *v.* KINCAID (1896), 3 Terr. L. R. 395.—**CAN.**

c. ——.]—A fire started in brush & fallen timber by deft., for the purpose of clearing his land, spread on to pltf.'s lands adjoining:—*Held:* applying the principle of *Rylands* v. *Fletcher*, deft. maintained the fire at his own risk & was responsible for the damage caused by it.—CREWE *v.* MOTTERSHAW (1902), 9 B. C. R. 246.—**CAN.**

d. ——.]—GRANT *v.* CANADIAN PACIFIC RY. CO. (1904), 36 N. B. R. 528.—**CAN.**

e. ——.]—PIPER *v.* GEARY (1898), 17 N. Z. L. R. 357.—**N.Z.**

f. *Defective roof.*]—The roof of deft.'s house was blown off in a storm & fell on pltf.'s house next door causing damage:—*Held:* deft. was liable for the damage on the principle of *Rylands* v. *Fletcher*, & it was no defence that the house had been built by a competent & independent contractor.—LAMB *v.* PHILLIPS (1911), 11 S. R. N. S. W. 109; 28 N. S. W. W. N. 40.—**AUS.**

g. *Fumigating premises.*]—A henhouse in deft.'s barn was fumigated by placing a pan containing burning paper, splinters of wood, & sulphur, upon the floor of the barn:—*Held:* the act of fumigation, in the way in which it was done, amounted to a putting upon the land something which would not naturally come upon it & which was in itself dangerous & might become mischievous, within *Rylands* v. *Fletcher*, & deft. was liable for the consequences.—CREASER *v.*

Sect. 2.—Injury to property: Sub-sect. 2, B. (i), C. (a) i. & ii.]

Dangerous trap.]—*See* ANIMALS, Vol. II., pp. 216, 217, No. 120.

Locomotives on highway.]—*See* HIGHWAYS, Vol. XXVI., pp. 430–432, Nos. 1496–1510.

Offensive trades.]—*See* Part II., Sect. 11, *ante*.

C. Exclusion of Principle.

(a) Natural or Reasonable User.

i. *In General.*

345. General rule — Owner not liable.] — RYLANDS *v.* FLETCHER, No. 311, *ante*.

346. —— ——.]—WEST CUMBERLAND IRON & STEEL CO. *v.* KENYON, No. 323, *ante*.

347. —— ——.] — ILFORD URBAN COUNCIL *v.* BEAL, No. 364, *post*.

348. —— —— **User for benefit of community.**] —NICHOLS *v.* MARSLAND, No. 376, *post*.

349. —— —— ——.]—BARKER *v.* HERBERT, No. 374, *post*.

ii. *What Amounts to.*

350. Conduct of water for domestic purposes — Escape from defective supply pipe.] — Pltf. occupied for business purposes the ground floor & defts. the second floor of the same house, respectively, as tenants from year to year. There was a water closet on defts.' premises to & of which they alone had access & use. After their respective premises had been closed on a Saturday evening, water percolated from the water closet through the first floor to pltf.'s premises, & caused damage to his stock-in-trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order & failed to close, & the waste pipe being choked with paper. The defects could not be detected without examination, & defts. did not know of them, & were guilty of no negligence :—*Held :* there was no obligation on defts. to keep in the water at their peril ; & they were not liable to pltf. for the damage.—ROSS *v.* FEDDEN (1872), L. R. 7 Q. B. 661 ; 41 L. J. Q. B. 270 ; 26 L. T. 966 ; 36 J. P. 791.

Annotations :—**Distd.** Humphries *v.* Cousins (1877), 2 C. P. D. 239. **Refd.** Box *v.* Jubb (1879), 27 W. R. 415 ; Blake *v.* Land & House Property Corpn. (1887), 3 T. L. R. 667 ; Abelson *v.* Brockman (1889), 54 J. P. 119 ; Gill *v.* Edouin (1894), 39 Sol. Jo. 98 ; Blake *v.* Woolf, [1898] 2 Q. B. 426 ; Rickards *v.* Lothian, [1913] A. C. 263 ; Cockburn *v.* Smith, [1924] 2 K. B. 119.

351. —— ——.] — SUTTON & ASH *v.* CARD, [1886] W. N. 120.

352. —— ——.]—BLAKE *v.* WOOLF, No. 369, *post*.

353. —— **Overflow from lavatory basin.**] — In an action for damages to property located on the second floor of a building leased to deft., through a continuous overflow of water from a lavatory basin on the top floor caused by the water tap having been turned on full & the waste pipe plugged, the jury found that "this was the malicious act of some person" :—*Held :* (1) deft. was not responsible unless either he instigated the act or the jury had found that he ought reasonably to have prevented it ; (2) his having on his premises a proper & reasonable supply of water was an ordinary & proper user of his house, & although he was bound to exercise all reasonable care he was not responsible for damage not due to his own default, whether caused by inevitable accident or the wrongful acts of third persons.—RICKARDS *v.* LOTHIAN, [1913] A. C. 263 ; 82 L. J. P. C. 42 ; 108 L. T. 225 ; 29 T. L. R. 281 ; 57 Sol. Jo. 281, P. C.

Annotations :—*As to* (1) **Refd.** Charing Cross, West End & City Electricity Supply Co. *v.* London Hydraulic Power Co., [1913] 3 K. B. 442 ; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341. *As to* (2) **Refd.** Ruoff *v.* Long, [1916] 1 K. B. 148. *Generally*, **Refd.** Hanley *v.* Edinburgh Corpn. (1913), 77 J. P. 233 ; Noble *v.* Harrison, [1926] 2 K. B. 332 ; Smith *v.* G. W. Ry. (1926), 135 L. T. 112.

354. Use of private house as stable.]—Annoyance caused by the unusual use of a house may be a nuisance where like annoyance from the ordinary use of it would not be.

The occupier of a house in a street in London had, many years ago, converted the ground floor into a stable. In 1871 a new occupier altered the stable so that the noise of the horses was an annoyance to the next door neighbour, & prevented him from letting his house as lodgings :—*Held :* the fact of horses having been previously kept in the stable, but so as not to be an annoyance, did not deprive the neighbour of his right to have the nuisance restrained.—BALL *v.* RAY (1873), 8 Ch. App. 467 ; 30 L. T. 1 ; 37 J. P. 500 ; 22 W. R. 283, L. C. & L. JJ.

Annotations :—**Apld.** Howland *v.* Dover Harbour Board (1898), 14 T. L. R. 355. **Refd.** Broder *v.* Saillard (1876), 2 Ch. D. 692 ; Byass *v.* Bettam (1885), 2 T. L. R. 88 ; Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685 ; Harrison *v.* Southwark & Vauxhall Water Co., [1891] 2 Ch. 409 ; Sanders-Clark *v.* Grosvenor Mansions Co. & D'Allessandri, [1900] 2 Ch. 373 ; A.-G. *v.* Cole, [1901] 1 Ch. 205 ; Rushmer *v.* Polsue & Alfieri, [1906] 1 Ch. 234 ; Odell *v.* Cleveland House (1910), 102 L. T. 602.

355. Alternative method available—Obstruction of means of access.]—FRITZ *v.* HOBSON, No. 48, *ante*.

356. —— **Use of creosoted wood for street paving.**]—By a tramway co.'s special Act the co. were bound to pave a certain road with wood. There were then two methods of wood paving in general use, one being with blocks of hard Jarrah wood, & the other with blocks of soft creosoted wood. The co. paved the road with soft creosoted wood, as being more suitable for the locality. Particles of gaseous fumes from the creosoted blocks caused damage to pltf.'s market garden, which adjoined the road. In an action against the co. to recover for the damage so caused, the jury found that the wood paving used caused the damage :—*Held :* the use of creosoted wood was a non-natural user of the land, which rendered defts. liable ; & there being two modes of wood paving, & the co. having adopted that mode which caused the damage, they were not protected by their special Act, & were therefore liable for the damage caused to pltf.'s market garden.—WEST *v.* BRISTOL TRAMWAYS CO., [1908] 2 K. B. 14 ; 77 L. J. K. B. 684 ; 99 L. T. 264 ; 72 J. P. 243 ; 24 T. L. R. 478 ; 52 Sol. Jo. 393 ; 6 L. G. R. 609, C. A.

Annotation :—**Refd.** Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465.

CREASER (1907), 3 E. L. R. 216 ; 41 N. S. R. 480.—CAN.

PART III. SECT. 2, SUB-SECT. 2.—C. (a) ii.

h. *Growth of noxious weeds.*]—An occupier of land is under no duty at common law to keep down a noxious weed, such as prickly pear, growing naturally on his land so as to prevent it from spreading or extending to his neighbour's land ; & if owing to his failure to keep it down it grows in such a way as to damage his neighbour's fence that is not sufficient to render him liable.—SPARKE *v.* OSBORNE (1908), 7 C. L. R. 51.—AUS.

k. —— *Statutory liability.*]—Deft.'s land, separated only by a road allowance from pltf.'s land, was rank with the growth of a weed called "tumbling mustard." Deft. failed to destroy the weed, though notified to do so by the weed inspector ; & the seed was deposited upon pltf.'s land, & destroyed a portion of the pltf.'s wheat crop :—*Held :* the weed is a noxious one, within the meaning of 7 Edw. 7, c. 15, s. 2 (Alta.) ; & deft. was liable to pltf. for the breach of the statutory

357. User for ordinary trade purpose.]—Conduct which does not interfere with the ordinary comfort or enjoyment of life, or injuriously affect an ordinary trade, does not become a nuisance merely because it is injurious to a particular trade of a specially delicate nature.

R. rented one floor of a warehouse from K. for the purpose of storing brown paper. Subsequently K., for the purposes of his business, took to heating the cellar beneath R.'s floor. Brown paper is sold by weight, & the heat from K.'s cellar, though not sufficient to interfere with the ordinary comfort or enjoyment of R.'s floor as a living room, or with the use of it for the ordinary purposes of a paper merchant's warehouse, diminished the weight of R.'s brown paper by drying up the moisture in it, & also, by drying the air, prevented the paper increasing in weight, as intended, by absorbing fresh moisture. K. was aware when he let the floor that it was taken for the purpose of storing paper, but not that the paper was of a particular kind requiring a special temperature:—*Held:* under the above circumstances, the heating did not amount to a nuisance, or to a breach by K. of any implied covenant for quiet enjoyment for keeping the premises fit for the purposes for which they were let.—ROBINSON *v.* KILVERT (1889), 41 Ch. D. 88; 58 L. J. Ch. 392; 61 L. T. 60; 37 W. R. 545, C. A.

Annotations:—**Consd.** Hoare *v.* McAlpine, [1923] 1 Ch. 167. **Reld.** Jaeger *v.* Mansions Consolidated (1902), 87 L. T. 690; Heath *v.* Brighton Corpn. (1908), 98 L. T. 718. **Mentd.** Aldin *v.* Latimer Clark, Muirhead, [1894] 2 Ch. 437; Tebb *v.* Cave, [1900] 1 Ch. 642; Budd-Scott *v.* Daniell, [1902] 2 K. B. 351; Davis *v.* Town Properties Investment Corpn., [1903] 1 Ch. 797; Markham *v.* Pagot, [1908] 1 Ch. 697.

358. —— Artificial manure factory.]—Defts. carried on the business of bone manure manufacturers on premises near pltf.'s farm. For the purpose of their business they had on their premises a heap of bones, which caused large numbers of rats to assemble there. The rats made their way from defts.' premises on to pltf.'s land, & ate his corn, causing substantial loss, in respect of which pltf. claimed damages from defts. It was not proved that the bones kept by defts. were excessive or unusual in quantity:—*Held:* no cause of action had been established against defts.—STEARN *v.* PRENTICE BROTHERS, LTD., [1919] 1 K. B. 394; 88 L. J. K. B. 422; 120 L. T. 445; 35 T. L. R. 207; 63 Sol. Jo. 229; 17 L. G. R. 142, D. C.

—— **Mining.**]—*See* MINES, Vol. XXXIV., pp. 724–726, Nos. 1063–1072.

—— **Offensive trades.**]—*See* Part II., Sect. 11, *ante*.

359. Growth of thistles on land—Seeds blown on to neighbour's land.]—An occupier of land is under no duty towards his neighbour to periodically cut the thistles naturally growing on his land, so as to prevent them from seeding; & if, owing to his neglect to cut them, the seeds are blown on to his neighbour's land & do damage, he is not liable.—GILES *v.* WALKER (1890), 24 Q. B. D. 656; 59 L. J. Q. B. 416; 62 L. T. 933; 54 J. P. 599; 38 W. R. 782, D. C.

Annotations:—**Reld.** Stearn *v.* Prentice, [1919] 1 K. B. 394; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341.

360. Music lessons in private house.]—Pltf., the occupier of a semi-detached house, & her daughter, gave pianoforte, violin, & singing lessons in the house four days in the week, for seventeen hours in all. There was also practice of music & singing at other times, & occasional musical evenings:—*Held:* this was not an unreasonable user of the house which would be restrained at the suit of the adjoining tenant. The adjoining tenant was himself restrained from causing or permitting noises in his house so as to annoy pltf., the ct. being satisfied that such noises had been made wilfully for the purpose of annoyance.—CHRISTIE *v.* DAVEY, [1893] 1 Ch. 316; 62 L. J. Ch. 439; 3 R. 210.

Annotation:—**Reld.** Sanders-Clark *v.* Grosvenor Mansions Co. & D'Allessandri, [1900] 2 Ch. 373.

361. Provision of rain water gully.]—GILL *v.* EDOUIN, No. 366, *post*.

362. Excavation for building purposes.]—PRINSEP *v.* BELGRAVIA ESTATE, LTD. (1895), 39 Sol. Jo. 381.

363. User of chimney—Escape of smoke through defect.]—Pltf. owned C. house, which previous to 1886 was a detached residence, the western wall of which contained fireplaces & flues, useless to C. house, but useful to a new house, which was subsequently to 1886 joined on to the western wall of C. house. The owner of C. house sold to deft. (*inter alia*), the western half of the western wall of C. house, this wall being treated as divided from top to bottom throughout by a vertical plane in its centre parallel to its length, the intention being that the wall should be a party wall owned by the parties in divided moieties. Deft. used, as both parties intended that he should, the fireplaces on his side of the party wall. The smoke passed from the fireplace into the connecting flue which was partly on pltf.'s land, & which became defective, & let through smoke into rooms of pltf. In an action for an injunction to restrain the nuisance:—*Held:* the nature of deft.'s easement was the right for smoke to pass from his fireplace into the flue connecting therewith, notwithstanding that at any point of its passage up the flue it might pass from deft.'s moiety into pltf.'s moiety of the flue, & as he had exercised this right fairly & reasonably, & in the manner in which he was intended to exercise it when the easement was granted, the action failed.—JONES *v.* PRITCHARD, [1908] 1 Ch. 630; 77 L. J. Ch. 405; 98 L. T. 386; 24 T. L. R. 309.

Annotations:—**Distd.** Pwllbach Colliery Co. *v.* Woodman, [1915] A. C. 634. **Mentd.** Phelps *v.* London City Corpn., [1916] 2 Ch. 255; Hansford *v.* Jago, [1921] 1 Ch. 322; Sack *v.* Jones, [1925] Ch. 235; Simpson *v.* Weber (1925), 133 L. T. 46.

364. Erection of retaining wall.]—An owner of land is not liable for damage to a sewer lying beneath his land, caused by acts done or omitted

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duty imposed upon him by sect. 4 of that Act.—FLITTON *v.* STANGE (1913), 24 W. L. R. 275; 4 W. W. R. 686; 6 Alta. L. R. 87.—**CAN.**

l. *Setting out fire.*]—WILKINS *v.* ROW (1865), 15 C. P. 325.—**CAN.**

m. ——.]—A proprietor setting out fire on his land in order to clear it, is not an insurer that no injury shall happen to his neighbour; but is responsible only for negligence & *Fletcher* v. *Rylands* is not applicable to this case.—GILLSON *v.* NORTH GREY RY. CO. (1874), 35 U. C. R. 475.—**CAN.**

n. ——.]—*Qu.:* whether the doctrine of *Rylands* v. *Fletcher* applies to the case of a bush fire in B. C., so that a person setting out a fire acts "at his peril" so as to make him liable, even in the absence of "negligence," if the fire gets beyond his control & damages adjoining land.—GOOCH *v.* YOUSCHAK, [1924] 4 D. L. R. 508; [1924] 3 W. W. R. 273; 34 B. C. R. 454.—**CAN.**

o. *Manufacture of explosives.*]—*Fletcher* v. *Rylands* cannot apply to the carrying on of the manufacture of explosives.—CLARKSON *v.* HAMILTON POWDER CO. (B. C.) (1909), 10 W. L. R. 102.—**CAN.**

p. *Debris from trees planted for purposes of shelter.*]—Leaves & debris from some macrocarpa trees which applt. had planted on his property were blown across a road line on to resp's house about 60 ft. distant & there blocked the gutters & so polluted the water in the tanks that its utility for domestic purposes was impaired, & resp.'s health was injured by his drinking it:—*Held:* the rule in *Rylands* v. *Fletcher* did not apply because macrocarpa trees are not in themselves

Sect. 2.—Injury to property: Sub-sect. 2, C. (a) ii., (b), (c), (d) & (e).]

by him upon the land, where he did not know, & could not reasonably be expected to know, of the existence of the sewer.

FARWELL, L.J., in *Barker* v. *Herbert*, No. 374, *post*, draws the distinction between the absolute duty owed to others by one who is making an abnormal use of land & that owed by those whose use of land is merely normal. There can be no question that in the present case the use of the land by erecting a retaining wall upon it is a merely normal use, & the principle illustrated by such cases as *Nichols* v. *Marsland*, No. 376, *post*, & *Rylands* v. *Fletcher*, No. 311, *ante*, can have no application to it (BRANSON, J.).—ILFORD URBAN COUNCIL *v.* BEAL, [1925] 1 K. B. 671; 94 L. J. K. B. 402; 133 L. T. 303; 89 J. P. 77; 41 T. L. R. 317; 23 L. G. R. 260.

User of water.]—*See* WATERS & WATERCOURSES.

User causing injury to health or comfort.]—*See* Part III., Sect. 3, sub-sect. 1, C., *post*.

(b) *Storage for Benefit of Plaintiff.*

365. Rain water collected for common benefit—Landlord & tenant.]—CARSTAIRS *v.* TAYLOR, No. 314, *ante*.

366. —— Adjoining owner.]—An uncovered area belonging to deft. & inclosed on two sides by his premises, on another side by pltf.'s house, & on the fourth side by another house, was covered by deft. with a flat roof, in one corner of which was a gully or hole for the escape of rain water from the adjoining roofs. Pltf. had the right of discharging rain water from his roof on to this flat roof, & thence the water escaped through the gully down another pipe into the area, & so into deft.'s drain. Deft. had not in fact attended to or cleansed the roof or gully, & no complaint of their condition had been made to him, & there was no access to the roof from his premises. In consequence of an obstruction of the mouth of the gully the rain water accumulated on the flat roof, leaked into pltf.'s premises, & damaged same:—*Held:* in the absence of negligence, deft. was not liable for the damage, on the ground that he did no more than was ordinary & reasonable in conducting his own rain water from the roof to the gully, & also upon the ground that the provision of the gully was for the common benefit.—GILL *v.* EDOUIN (1894), 71 L. T. 762; 11 T. L. R. 93; 39 Sol. Jo. 98; 15 R. 109; *affd.* (1895), 72 L. T. 579; 11 T. L. R. 378, C. A.

Annotations:—**Consd.** Cockburn *v.* Smith, [1924] 2 K. B. 119. **Refd.** Blake *v.* Woolf, [1898] 2 Q. B. 426.

367. Water stored in house for benefit of plaintiff—Landlord & tenant.]—Deft. was owner of a house, which he let out in floors to separate tenants. Pltfs. became tenants of the ground floor & basement under a lease, by which deft. covenanted that pltfs. might "peaceably hold & enjoy the demised premises during the term without any interruption by deft." The different floors were supplied with water by a cistern at the top of the house, & the water was distributed by a main pipe connected with the cistern, each floor having a separate branch inserted in the main pipe. Deft. paid the water rate, receiving from pltfs. one half of the amount so paid, & the cistern was not demised to any one of the tenants. In consequence of the bursting of the branch service pipe supplying the first floor, a quantity of water flowed into the basement & injured pltfs.' goods. At a trial the jury found that the branch pipe was reasonably fit & proper for the purpose for which it had been fixed, & that deft. had not been guilty of any negligence in keeping & maintaining it:—*Held:* under the circumstances there had been no breach of deft.'s covenant for quiet enjoyment, & as the water had been stored in the cistern for the benefit of pltfs. as well as of the other tenants, the doctrine laid down in *Rylands* v. *Fletcher*, No. 311, *ante*, did not apply.—ANDERSON *v.* OPPENHEIMER (1880), 5 D. 602; 49 L. J.

Annotations:—**Refd.** Jenkins *v.* Jackson (1888), 40 Ch. D. 71; Harrison, Ainslie *v.* Muncaster, [1891] 2 Q. B. 680; Gill *v.* Edouin (1894), 71 L. T. 762; Blake *v.* Woolf, [1898] 2 Q. B. 426; Williams *v.* Gabriel, [1906] 1 K. B. 155; Booth *v.* Thomas, [1926] Ch. 109.

368. —— ——.]—BLAKE *v.* LAND & HOUSE PROPERTY CORPN., LTD. (1887), 3 T. L. R. 667.

369. —— —— Assent of plaintiff.]—Deft. was the owner of premises to which water was laid on, & he had a cistern on the fourth floor. Pltf. became tenant of the ground-floor, & took his supply of water from deft. A leakage from the cistern having been noticed by pltf., he informed deft., who instructed a competent plumber to remedy it. In consequence of the negligence of the plumber an overflow occurred, which damaged pltf.'s goods:—*Held:* deft. was not liable, since pltf. had assented to the water being on the premises, & therefore deft., by instructing a competent plumber to remedy the leakage, had discharged his duty to pltf.—BLAKE *v.* WOOLF, [1898] 2 Q. B. 426; 67 L. J. Q. B. 813; 79 L. T. 188; 62 J. P. 659; 47 W. R. 8; 42 Sol. Jo. 688.

Annotations:—**Consd.** Rickards *v.* Lothian, [1913] A. C. 263; Noble *v.* Harrison, [1926] 2 K. B. 332. **Refd.** Charing Cross, West End & City Electricity Supply Co. *v.* London Hydraulic Power Co., [1913] 3 K. B. 442; Cockburn *v.* Smith, [1924] 2 K. B. 119. **Mentd.** Performing Right Soc. *v.* Mitchell & Booker (Palais de [1924] 1 K. B. 762.

(c) *Statutory Authority.*

See, generally, PUBLIC AUTHORITIES; STATUTES, & Titles, *passim*.

370. General rule.]—The principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by statute (*per* CUR.).—MADRAS RY. CO. *v.* CARVATENAGARUM (ZEMINDAR OF) (1874), L. R. 1 Ind. App. 364; 30 L. T. 770; 38 J. P. 532; 22 W. R. 865, P. C.

Annotation:—**Distd.** Canadian Pacific Ry. *v.* Parke, [1899] A. C. 535.

Railway companies.]—*See* RAILWAYS.

Waterworks companies.]—*See* WATER SUPPLY.

Electric supply companies.]—*See* ELECTRIC LIGHTING, Vol. XX., p. 211, Nos. 13–75.

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noxious trees & cannot be regarded as things likely to do mischief; & the planting of trees such as macrocarpas for the purposes of shelter is part of the ordinary use to which land is put in New Zealand.—MATTHEWS *v.* FORGIE, [1917] N. Z. L. R. 921.—**N.Z.**

PART III. SECT. 2. SUB-SECT. 2.—C. (c).

q. *Statutory limit must not be exceeded.*]—Deft. co. had failed to control a dangerous substance which injured pltf. The co. contended that it was acting under statutory authority, & was, therefore liable, only in case of negligence:—*Held:* the statutory authority was limited; &, if the co. had gone beyond the limit, it was without statutory authority.—RAFFAN *v.* CANADIAN WESTERN NATURAL GAS CO. (1914), 29 W. L. R. 161; 6 W. W. R. 1295; 18 D. L. R. 13; 7 Alta. L. R. 459; 8 W. W. R. 676.—**CAN.**

PART III. SECT. 2. SUB-SECT. 2.—C. (g).

r. *Prescriptive right—Water stored in tanks.*]—The principle that if a man bring & accumulate upon his land anything which, if it escape, may cause damage to his neighbour, he does so at his peril, is not applicable to the case of water stored in tanks in India, which have existed from time immemorial, & are preserved & repaired by the landowners by reason of their tenure, as essential to the welfare & existence of the people.—MADRAS RY. CO. *v.* CARVETINAGARUM (ZEMINDAR) (1874), 30 L. T. 770, P. C.—**IND.**

(*d*) *Act of Plaintiff.*

371. General rule.] — RYLANDS *v.* FLETCHER, No. 311, *ante*.

372. User of own property for extraordinary purpose.]—A person who has created an electric current for his own purposes, & has discharged it into the earth beyond his control, is responsible for the damage done by that current to a neighbouring proprietor; notwithstanding that the discharge of electricity is not in itself noxious, & that the neighbouring proprietor is using his property for an extraordinary purpose in respect of which alone the damage arises.

A provisional order, which was duly confirmed by statute, authorised the construction of a tramway, & the use, with the consent of the Board of Trade, of electrical power, pneumatic power, steam power, or any mechanical power as the motive power. The lessee of the tramway, having duly obtained the consent of the Board of Trade, worked the same by electrical power upon the singlewire trolley system. Under that system the electric current passes from the generating station along a single overhead wire above the tramway rails, & returns, after passing through the motors in the cars, by means of the rails & an uninsulated copper wire connected thereto. The current employed was of considerable strength & of varying intensity, & acted, whilst passing through the overhead conductor, upon the current passing along the neighbouring wires of a telephone co., & also acted by leakage from the uninsulated wire to the earth returns of the telephone co., upon the apparatus of the co. The effect of this disturbance was to seriously interfere with & impair the efficiency of part of the system of the telephone co.; the currents employed by them being very weak as compared with the tramway currents, & their apparatus being peculiarly susceptible to electrical influence.

In an action by the telephone co. & a subscriber against the lessee of the tramway for an injunction to restrain him from working the tramway so as to occasion a nuisance to pltfs., as owners or users of telephonic lines & electric circuits, or so as to interfere with their property or business:—*Held:* (1) the action was maintainable on the ground that the deft. was using his property for a non-natural or extraordinary purpose, & was responsible for the damage caused thereby to a neighbouring proprietor.

(2) Pltfs. were not bound to protect themselves against the consequences of the non-natural use by deft. of his property.—NATIONAL TELEPHONE CO. *v.* BAKER, [1893] 2 Ch. 186; 62 L. J. Ch. 699; 68 L. T. 283; 57 J. P. 373; 9 T. L. R. 246; 3 R. 318.

Annotations:—*As to* (1) **Consd.** Eastern & South African Telegraph Co. *v.* Cape Town Tram. Cos., [1902] A. C. 381. **Refd.** Sholfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287; West *v.* Bristol Tram. Co., [1908] 2 K. B. 16, n.; Hoare *v.* McAlpine, [1923] 1 Ch. 167.

373. ——.] — EASTERN & SOUTH AFRICAN TELEGRAPH CO. *v.* CAPE TOWN TRAMWAYS COS., No. 313, *ante*.

374. Act of trespasser.]—Deft. was the owner in possession of a vacant house in a street, with an area which adjoined the highway. One of the rails of the area railings had been broken away by boys playing football in the street, & consequently, a gap had been created in the railings. Pltf., a child, got through this gap from the street, & was clambering along inside the railings, when he fell into the area, & sustained injuries through the fall. In an action brought on his behalf to recover damages from deft. in respect of his injuries, the jury found, in answer to questions left to them, that the area was, when the accident happened, a nuisance, but that deft. did not know, at the time of the accident, that the rail had been removed, that such a time had not elapsed after its removal that he would have known of it at the time of the accident, if he had used reasonable care, & that he had used reasonable care to prevent the premises from becoming dangerous to persons using the highway:—*Held:* upon these findings, deft. was not liable in respect of the nuisance created upon his premises by the action of trespassers; the nuisance could not be regarded as the cause of pltf.'s injuries, inasmuch as he did not fall through the gap in the railings while using the highway, but got through the gap in order to clamber along inside the railings.

The judgment of BRAMWELL, B., in *Nichols* v. *Marsland*, No. 376, *post*, very happily illustrates the view which I take. He says with regards to water stored in an artificial pool, "But suppose a stranger let it loose, would deft. be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, & the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be. Then, why is deft. liable if some agent over which she has no control lets the water out?" Then he takes as another illustration the case of a stack of chimneys, & says, "could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake?" Further on he differentiates such cases from cases like *Rylands* v. *Fletcher*, No. 311, *ante*, & says, "I am by no means sure that, if a man kept a tiger, & lightning broke his chain, & he got loose & did mischief, that the man who kept him would not be liable. But this case, & the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community." It is for the benefit of the community that property should be used in a manner which has been found to be convenient to the public (FARWELL, L.J.).—BARKER *v.* HERBERT, [1911] 2 K. B. 633; 80 L. J. K. B. 1329; 105 L. T. 349; 75 J. P. 481; 27 T. L. R. 488; 9 L. G. R. 1083, C. A.

Annotations:—**Consd.** Horridge *v.* Makinson (1915), 84 L. J. K. B. 1294. **Apld.** Noble *v.* Harrison, [1926] 2 K. B. 332. **Refd.** Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341; Ilford U. D. C. *v.* Beal, [1925] 1 K. B. 671; Smith *v.* G. W. Ry. (1926), 135 L. T. 112.

Allowing trespass by animal.] — *See* AGRICULTURE, Vol. II., p. 65, No. 415.

(*e*) *Act of God.*

See, generally, Part IV., Sect. 2, sub-sect. 3, F., *post*.

375. General rule.] — RYLANDS *v.* FLETCHER, No. 311, *ante*.

376. ——.]—One who stores water on his own land, & uses all reasonable care to keep it safely there, is not liable to an action for an escape of the water which injures his neighbour, if the escape be caused by an agent beyond his control, such as a storm, which amounts to *vis major*, or the act of God, in the sense that it is practically, though not physically, impossible to resist it.

On deft.'s land were artificial pools containing large quantities of water. These pools had been formed by damming up with artificial embankments a natural stream which rose above deft.'s land & flowed through it, & which was allowed

Sect. 2.—*Injury to property: Sub-sect.* 2, *C.* (*e*), (*f*) (*g*); *sub-sect.* 3. *Sect.* 3: *Sub-sect.* 1, *A.* (*a*).]

to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream & the water in the pools to swell so that the artificial embankments were carried away by the pressure, & the water in the pools, being thus suddenly loosed, rushed down the course of the stream & injured pltf.'s adjoining property. Pltf. having brought an action against deft. for damages, the jury found that there was no negligence in the construction or maintenance of the works, that the rainfall was most excessive, & amounted to *vis major*:—*Held:* the action was not maintainable.

Suppose a stranger let it loose, would the deft. be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house & the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be. . . . This case & the case I put of the chimneys are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community (BRAMWELL, B.).—NICHOLS *v.* MARSLAND (1875), L. R. 10 Exch. 255; 44 L. J. Ex. 134; 33 L. T. 265; 23 W. R. 693; *affd.* (1876), 2 Ex. D. 1; 46 L. J. Q. B. 174; 35 L. T. 725; 41 J. P. 500; 25 W. R. 173, C. A.

Annotations:—**Consd.** Box *v.* Jubb (1879), 4 Ex. D. 76. **Distd.** Thomas *v.* Birmingham Canal Co. (1879), 49 L. J. Q. B. 851. **Consd.** Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418. **Apld.** Barker *v.* Herbert, [1911] 2 K. B. 633. **Consd.** Rickards *v.* Lothian, [1913] A. C. 263. **Expld.** Greenock Corpn. *v.* Calc. Ry., Greenock Corpn. *v.* G. & S.-W. Ry., [1917] A. C. 556. **Refd.** Nitro-Phosphate & Odam's Chemical Manure Co. *v.* London & St. Katherine Docks Co. (1878), 9 Ch. D. 503; Baker *v.* Snell, [1908] 2 K. B. 825; Clinton *v.* Lyons, [1912] 3 K. B. 198; Charing Cross Electricity Supply Co. *v.* Hydraulic Power Co., [1914] 3 K. B. 772; A.-G. *v.* Cory, Kennard *v.* Same (1919), 88 L. J. Ch. 410; Quebec Ry. Light, Heat & Power Co. *v.* Vandry, [1920] A. C. 662; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341; Ilford U. D. C. *v.* Beale, [1925] 1 K. B. 671. **Mentd.** Saner *v.* Bilton (1878), 7 Ch. D. 815.

377. ——.]—BARKER *v.* HERBERT, No. 374, *ante*.

Clippings of poisonous tree.]—*See* AGRICULTURE, Vol. II., p. 65, No. 414.

(*f*) *Act of Third Party.*

See, generally, Part IV., Sect. 2, sub-sect. 3, G., *post*.

378. General rule—Owner not liable.]—NICHOLS *v.* MARSLAND, No. 376, *ante*.

379. —— ——.]—Defts. possessed a reservoir with sluices connected with a main drain or watercourse, from which the reservoir was supplied, & with sluices by which the surplus water was returned into the drain at a lower level. The combined effect of the emptying of a reservoir belonging to a third person above defts.' premises, & of an obstruction in the drain below them, was to force water through the sluices into defts.' reservoir & so cause an overflow thence on to pltf.'s land. In an action for damage caused thereby it was shown that defts. had no control over the main drain, or the other reservoir, or knowledge of the circumstances which caused the overflow, & that the sluices were maintained so as to prevent overflow under ordinary circumstances:—*Held:* defts. were not liable.—BOX *v.* JUBB (1879), 4 Ex. D. 76; [illegible] R. 415.

Annotations:—**Consd.** Rickards *v.* Lothian, [1913] A. C. 263; A.-G. *v.* Cory, Kennard *v.* Cory (1919), 88 L. J. Ch. 410. **Apld.** Smith *v.* G. W. Ry. (1926), 135 L. T. 112. **Mentd.** Charing Cross, West End & City Electricity Supply Co. *v.* London Hydraulic Power Co., [1913] 3 K. B. 442.

380. —— ——.]—The rule in *Rylands* v. *Fletcher*, No. 311, *ante*, that a person who for his own purposes brings on his land & collects there anything likely to do mischief if it escapes must keep it in at his peril, does not extend to making the owner of land liable for consequences brought about by the collecting & impounding on his land by another of water, or any other dangerous element, not for the purposes of the owner, but for the purposes of that other person.—WHITMORES (EDENBRIDGE), LTD. *v.* STANFORD, [1909] 1 Ch. 427; 78 L. J. Ch. 144; 99 L. T. 924; 25 T. L. R. 169; 53 Sol. Jo. 134.

381. —— ——.]—BARKER *v.* HERBERT, No. 374, *ante*.

382. —— ——.]—RICKARDS *v.* LOTHIAN, No. 353, *ante*.

383. —— ——.]—The principle enunciated in *Rylands* v. *Fletcher*, No. 311, *ante*, that a person who brings into being, or collects on his premises, an agent likely to do damage if it escapes, is liable for the consequences of such escape, does not apply where in the absence of negligence or nuisance the consequences are the result of a combination between that agent & another agent over which the owner or possessor of the first agent has no control.

A local authority, authorised under the Electric Lighting Acts to supply electricity within their district, had as part of their system, a brick built chamber under the pavement of a street within their district, including a box containing electric cables or wires & a fusing apparatus which acted as a kind of safety valve whenever the electric current was overloaded. The construction of the chamber & box was that generally adopted by suppliers of electricity. When the fusing took place, electric sparks were emitted from the fuse. Near the chamber were the gas mains of two gas cos., & gas frequently escaped from the mains & found its way into the chamber. This chamber was periodically examined, but it was found impossible to prevent the gas entering therein. An explosion occurred in this chamber, caused by a spark from the fusing which took place at the time coming into contact with a mixture of air & gas in the chamber, with the result that pltf., who was walking on the pavement close to the chamber, was injured. In an action brought by him against the local authority for damages for personal injuries the jury found, in answer to questions put to them by the county ct. judge with the consent of both parties, that the chamber did not constitute a nuisance, & that defts. were not guilty of negligence in having the chamber improperly constructed, & they assessed the damages, if recoverable, at £25. The judge entered judgment for defts.:—*Held:* his decision was right.—GOODBODY *v.* POPLAR BOROUGH COUNCIL (1914), 84 L. J. K. B. 1230; 79 J. P. 218; 13 L. G. R. 166, D. C.

.]—An oil tank was consigned by an oil co. to a railway co. for conveyance to a railway depot. On arrival at the depot the tank was found to be leaking, & a large quantity of oil penetrated into a watercourse on pltfs.' premises, rendering the water unfit for pltfs.' cattle to drink. On the leakage being discovered by the railway co.'s servants, every effort was made by the railway co. to stop it. Pltfs. sued the oil co. & the railway co. for damages for nuisance arising from the pollution of the watercourses:—*Held:* (1) the oil co. were liable, as they ought by the exercise of reasonable care to have discovered the defective condition of the tank before consigning it by rail; (2) the railway co. were not liable, as they did not in any way permit the continuance

of the nuisance, & as the damage was caused by the wrongful act of a third party, namely, the oil co., in sending a defective tank to the railway co.'s premises.—SMITH *v.* GREAT WESTERN RY. Co. (1926), 135 L. T. 112; 42 T. L. R. 391.

Clippings of poisonous trees.]—*See* AGRICULTURE, Vol. II., p. 65, No. 414.

(g) Prescriptive or Contractual Right.

385. Prescriptive right—Letting out water from stream.]—WINCHCOMBE *v.* SHEPARD (1628), Het. 118; 124 E. R. 389.

386. Power to carry on trade causing nuisance—Lease of colliery.]—A colliery co. were sub-lessees of land leased to a tinplate co., with power to that co. to carry on on the demised premises the trades authorised by their memorandum of assocn., which included the trade of miners. A butcher held the adjacent land under a subsequent lease from the same landowner subject to all rights & easements belonging to any adjoining & neighbouring property, & he built thereon a slaughter-house & sausage factory. Subsequently the colliery co. erected on the land demised to them screening apparatus near the butcher's trade buildings & as a result of their screening operations coal dust was deposited on these buildings. In an action of nuisance by the butcher against the colliery co. the jury found that a nuisance was caused by the co., but that the screening was carried on in a reasonable manner, & in the way which was usual in the district, & without negligence:—*Held:* the grant of the right to carry on the trade of miners did not authorise the committal of a nuisance, in the absence of proof that the trade could not be carried on otherwise, & pltf. was not precluded by the terms or the circumstances of the grant from obtaining relief.—PWLLBACH COLLIERY CO., LTD. *v.* WOODMAN, [1915] A. C. 634; 84 L. J. K. B. 874; 113 L. T. 10; 31 T. L. R. 271, H. L.

Annotations:—**Consd.** A.-G. *v.* Cory, Kennard *v.* Cory, [1921] 1 A. C. 521. **Reld.** Priest *v.* Manchester Corpn. (1915), 84 L. J. K. B. 1734; Malzy *v.* Eichholz, [1916] 2 K. B. 308. **Mentd.** Phelps *v.* London Corpn., [1916] 2 Ch. 255; Hansford *v.* Jago, [1921] 1 Ch. 322; Cory *v.* Davies, [1923] 2 Ch. 95; Simpson *v.* Weber (1925), 133 L. T. 46.

387. —— Effect of impossibility of user without nuisance—Sale of land for tipping refuse.]—A sale of land to a local authority for the purpose of tipping refuse thereon by a vendor who retains adjoining land does not impliedly authorise the local authority to tip refuse in such a way as to cause a nuisance on the adjoining land when such tipping can be done without causing the nuisance.

Qu.: whether, in the event of it being impossible to use the land for tipping without creating the nuisance, the local authority would be so authorised.

An owner of land conveyed a portion thereof to a local authority for the purpose of tipping refuse thereon, the local authority purchasing the same under the powers given to them by the Public Health Act, 1875 (c. 55), & two local Acts. Subsequently the owner of the remaining portion sold it to a purchaser, who formed a street thereon & built houses abutting on the said street. The local authority acting under their powers, from time to time deposited refuse on the land purchased by them, with the result that the deposit, gradually increasing in size & becoming impervious to rain water, caused the rain water, which previously to the deposit flowed in a direction away from the street, to be diverted & overflow into the street & form holes or gullies therein dangerous to passers by. Pltf., lawfully passing through the street, fell into one of these gullies & sustained personal injuries:—*Held:* the gully in the street was a nuisance caused by defts. without justification, & they were liable to pltf. in damages for the injuries sustained by him.—PRIEST *v.* MANCHESTER CORPN. (1915), 84 L. J. K. B. 1734; 13 L. G. R. 665; 79 J. P. Jo. 112.

388. —— Licence to tip colliery spoil.]—A.-G. *v.* CORY BROTHERS & CO., KENNARD *v.* CORY BROTHERS & CO., No. 344, *ante*.

SUB-SECT. 3.—DANGEROUS BUILDINGS.

389. Duty of neighbouring owner.]—The repairing & amending of a ruinous house is *primâ facie* the duty of him who occupies the premises & does not devolve upon the owner merely as such.

There is no obligation towards a neighbour to repair cast by law on the owner of a house, merely as owner, or to keep it in repair in a lasting & substantial manner; the only duty is to keep it in such a manner & in such a state that the neighbours may not be injured by its fall. A house may therefore be in a ruinous state provided it be shored up sufficiently; or a house, if it be ruinous, may be pulled down altogether. The owner is not bound to keep it in a state of substantial repair. All he is bound to do is to prevent it from being a nuisance (POLLOCK, C.B.).—CHAUNTLER *v.* ROBINSON (1849), 4 Exch. 163; 19 L. J. Ex. 170; 14 L. T. O. S. 107; 154 E. R. 1166.

Annotations:—**Consd.** Todd *v.* Flight (1860), 9 C. B. N. S. 377. **Reld.** Ross *v.* Fodden (1872), 26 L. T. 966; Hargroves, Aronson *v.* Hartop (1905), 74 L. J. K. B. 233; Sack *v.* Jones, [1925] Ch. 235. **Mentd.** Solomon *v.* Vintner's Co. (1859), 4 H. & N. 585; Gandy *v.* Jubber (1864), 5 B. & S. 78.

Liability of landlord & tenant.]—*See, generally,* LANDLORD & TENANT, Vol. XXXI., pp. 344–348, Nos. 4867–4905.

SECT. 3.—INJURY TO HEALTH AND COMFORT.

SUB-SECT. 1.—GENERAL PRINCIPLES.

A. Rights of Mutual Enjoyment.

(a) In General.

390. Ordinary comfort of human existence—Parties must not stand on extreme rights.]—ST. HELEN'S SMELTING CO. *v.* TIPPING, No. 115, *ante*.

391. —— House rendered useless or uninhabitable.]—STYAN *v.* HUTCHINSON (1799), 2 Selwyn's N. P., 13th ed. 1068, N. P.

392. —CRUMP *v.* LAMBERT, No. 21, *ante*.

393. —BRODER *v.* SAILLARD, No. 321, *ante*.

394. It is not every disagreeable smell that gives rise to an action of wrong & its consequences, the determining question being—Will the supposed wrongful proceeding abridge & diminish seriously & materially the ordinary comfort of existence to the occupiers, whatever their rank or station, or whatever their state of health may be? Where a person empties foul water into a stream, reference will be had, in an action against that person, for discharging the foul water, to the proportion & effect of such discharge on the stream. A riparian owner has the right to raise the banks of the river from time to time, as it becomes necessary, so as to confine the floodwater within the banks & prevent it from overflowing his lands, so long as he does not contravene the maxim, *Sic*

Sect. 3.—*Injury to health and comfort: Sub-sect.* 1 *A.* (*a*) & (*b*), *B.* (*a*) & (*b*), *C.* & *D.*; *sub-sects.* 2, 3, 4 & 5. *Sect.* 4.]

utere tuo ut alieni non lædas.—RIDGE *v.* MIDLAND RY. CO. (1888), 53 J. P. 55.

395. Action for personal discomfort—Distinguished from action for injury to property—Submission to local circumstances.]—ST. HELEN'S SMELTING CO. *v.* TIPPING, No. 115, *ante*.

Effect of nature of locality.]—*See* Sub-sect. 1, D., *post*.

Necessity for material interference.]—*See* Sub-sect. 1, B. (*a*), *post*.

Reasonable user of property.]—*See* Sub-sect. 1, C., *post*.

(b) Limitation of Rights.

By lease.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 138, No. 2741.

By prescription.]—*See* EASEMENTS, Vol. XIX., pp. 178, 179, Nos. 1289–1297.

B. Interference with Rights amounting to Nuisance.

(a) Material Interference.

396. General rule — Interference must be material.]—WALTER *v.* SELFE, No. 1, *ante*.

397. —— ——.]—EMBREY *v.* OWEN, No. 53, *ante*.

398. —— ——.]—ST. HELEN'S SMELTING CO. *v.* TIPPING, No. 115, *ante*.

399. —— ——.]—CRUMP *v.* LAMBERT, No. 21, *ante*.

400. —— ——.]—BRODER *v.* SAILLARD, No. 321, *ante*.

401. —— ——.]—(1) In granting or refusing injunctions against annoyances caused by working machinery on neighbouring premises the ct. will not interfere in cases of trifling inconvenience; & the character of the locality must be considered in every case.

(2) Injunction refused to restrain the working of a steam engine in a business neighbourhood, in the absence of evidence that any one on the premises of pltf., a lodging house keeper, had been awakened by the noise.—BYASS *v.* BETTAM (1885), 2 T. L. R. 88.

402. —— ——.]—FLEMING *v.* HISLOP, No. 23, *ante*.

403. —— ——.]—FANSHAWE *v.* LONDON & PROVINCIAL DAIRY CO. (1888), 4 T. L. R. 694.

Annotation:—**Refd.** Tinkler *v.* Aylesbury Dairy Co. (1888), 5 T. L. R. 52.

404. —— ——.]—BARTLETT *v.* MARSHALL, No. 97, *ante*.

405. —— ——.]—In considering whether a nuisance has been caused to pltf. through interference with his comfort & that of his family in the occupation of his house, according to ordinary notions prevalent among reasonable men & women, by reason of noise from the working of defts.' machine, regard must not be had to defts.' operations in the abstract & by themselves, but in connexion with all the circumstances of the locality, & in particular in reference to the nature of the trades usually carried on there, & the noises & disturbance existing prior to the commencement of defts.' operations; & if after taking these circumstances into consideration there is a serious & not merely a slight additional interference with pltf.'s comfort as above defined, it is the duty of the ct. to interfere. Pltf. had for many years carried on business as a dairyman & resided with his family in a part of the City of London which was almost entirely devoted to the printing trade. There was no appreciable disturbance at night caused by the printing works. In 1904 defts. took the house next door to pltf.'s house & erected a printing machine of modern improved type in the basement, which was worked, when necessary, at night. In an action for an injunction:—*Held:* the working of the machine at night caused a serious additional disturbance to pltf. & his family, so as to constitute a nuisance, & pltf. was entitled to an injunction.—POLSUE & ALFIERI, LTD. *v.* RUSHMER, [1907] A. C. 121; 76 L. J. Ch. 365; 96 L. T. 510; 23 T. L. R. 362; *sub nom.* RUSHMER *v.* POLSUE & ALFIERI, LTD., 51 Sol. Jo. 324, H. L.

Annotations:—**Apld.** Bosworth-Smith *v.* Gwynnes (1920), 89 L. J. Ch. 368. **Refd.** Heath *v.* Brighton Corpn. (1908), 98 L. T. 718.

406. —— ——.]—Pltfs. were the incumbent & trustees of a church situated in the non-residential part of a town. Defts., the corpn. of the town, erected in close proximity to the church an electrical generating & transforming station, the machinery of which, as pltfs. alleged, caused a humming or buzzing sound in the church & certain buildings used in connection therewith, such as seriously to annoy & disturb persons using the same. In an action for an injunction:—*Held:* (1) pltfs. were not, because their premises were used as a place of worship, entitled to anything more than the ordinary amount of quiet in a town, the character of the neighbourhood & the surrounding circumstances must be considered, the law did not regard trifling inconveniences, & everything of the sort must be looked at from a reasonable point of view; (2) on the evidence, though the sound might cause irritation & annoyance to sensitive persons it did not amount to a legal nuisance, & no injunction ought to be granted.—HEATH *v.* BRIGHTON CORPN. (1908), 98 L. T. 718; 72 J. P. 225; 24 T. L. R. 414.

407. —— ——.]—Where pltf. proved a case of substantial injury to her business & to her health by the noise occasioned by the way in which deft.'s business was carried on, the ct. granted an injunction against the continuance of the nuisance, & also gave pltf. damages in respect of past injury.—GILLING *v.* GRAY (1910), 27 T. L. R. 39.

408. What amounts to material interference—Question of fact.]—CRUMP *v.* LAMBERT, No. 21, *ante*.

——.]—*See* Sub-sects. 3–5, *post*.

(b) Temporary Interference.

409. Gives no cause of action.]—Indictment for a nuisance, laying it to be committed near the

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PART III. SECT. 3, SUB-SECT. 1.—B. (a).

t. *What amounts to material interference.*]—Action by trustees of a church to restrain the playing of a band in an adjoining skating rink, which had the effect of disturbing the services:—*Held:* the inconvenience to them & the congregation by defts.' mode of using their property, was such as to materially interfere with the use & enjoyment of pltfs.' property, & to constitute a nuisance.—ST. MARGARET'S (CHURCHWARDENS) *v.* STEPHENS (1898), 29 O. R. 185.—**CAN.**

a. ——.]—Where the branches of a tree growing on defts.' land extended over pltfs.' land & brushed against pltfs.' house & so disturbed them in their sleep, & the leaves from the branches also blocked the downpipe from gutters on the roof of pltfs.' house:—*Held:* pltfs. had a good cause of action.—ROSE *v.* EQUITY BOOT CO., LTD. & HANNAFIN (1913), 32 N. Z. L. R. 677.—**N.Z.**

PART III. SECT. 3, SUB-SECT. 1.—B. (b).

b. *Whether gives a cause of action.*]—The rule that a building owner who pulls down his house for the purpose of erecting a new one, & thereby

highway, & also near several dwelling-houses, etc., is sufficient. Where a nuisance is temporary, as the steeping stinking hides, etc., there need not be judgment that it be abated.—R. *v.* PAPPINEAU (1726), 2 Stra. 686; 2 Sess. Cas. K. B. 34; 93 E. R. 784.

Annotations:—**Consd.** R. *v.* Stead (1799), 8 Term Rep. 142. **Refd.** Cooper *v.* Marshall (1757), 1 Burr, 259; R. *v.* White & Ward (1757), 1 Burr. 333; R. *v.* West Riding of Yorkshire JJ. (1798), 7 Term Rep. 467; Wednesbury Corpn. *v.* Lodge Holes Colliery Co., [1907] 1 K. B. 78.

410. ——.]—GAUNT *v.* FYNNEY, No. 416, *post.*

411. ——.]—FRITZ *v.* HOBSON, No. 48, *ante.*

412. ——.]—HARRISON *v.* SOUTHWARK & VAUXHALL WATER CO., No. 44, *ante.*

413. ——.]—An electric light co. will be restrained by injunction from so using their generating station as to cause serious annoyance, by vibration, noise & smell, to occupiers of adjoining premises. Such an annoyance is not to be excused on the ground that deft. is making an ordinary & reasonable use of the land, nor on the ground that the annoyance is temporary occasional.—KNIGHT *v.* ISLE OF WIGHT ELECTRIC LIGHT & POWER CO. (1904), 73 L. J. Ch. 299; 90 L. T. 410; 68 J. P. 266; 20 T. L. R. 173; 2 L. G. R. 390.

414. ——.]—Defts. demised to pltf. a block of freehold business premises in Aldermanbury, in the City of London, excepting out of the demise "the way or passage & basement under the same" shown on the plan & leading from Aldermanbury through the ground floor & underneath the first floor of the demised building to property of defts.' in rear of the block. The passage was entered from Aldermanbury through double doors, the floor was of concrete carried on iron girders & covered with mosaic & "Terrazzo," the walls were faced with glazed bricks, & there was a fireproof division between the passage & the first floor above it. Seventeen years after the grant of the lease defts. proceeded to demolish the floor of the passage & remove the "tie" girders in order to make a timber cartway from the entrance in Aldermanbury down to the level of the basement in the rear of the building for the purpose of carting building materials & debris to & from the Guildhall across their property in rear of the demised premises. In an action by pltf. to restrain these proceedings & the resultant nuisance from noise:—*Held:* there had been no breach of defts.' covenant for quiet enjoyment, & the annoyance, being temporary, did not constitute a cause of action.—PHELPS *v.* LONDON CORPN., [1916] 2 Ch. 255; 85 L. J. Ch. 535; 114 L. T. 1200; 14 L. G. R. 746.

415. Intermittent interference.]—Where the thing done is a nuisance *per intervalla*, as a cock, or pipe, or gutter, an action lies against the lessee, because every fresh running is a fresh nuisance (*per* CUR.).—ARNOLD *v.* JEFFERSON (1697), 3 Salk. 247; Holt, K. B. 498; 91 E. R. 804.

Annotation:—**Refd.** Hannam *v.* Mockett (1824), 2 B. & C. 934.

C. Reasonable User.

416. Whether liability excluded.]—A nuisance by noise, supposing malice to be out of the question, is emphatically a question of degree. If my neighbour builds a house against a party wall, next to my own & I hear through the wall more than is agreeable to me of the sounds from his nursery or his music room, it does not follow, even if I am nervously sensitive or in infirm health, that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as excessive & unreasonable (LORD SELBORNE, C.).—GAUNT *v.* FYNNEY (1872), 8 Ch. App. 8; 42 L. J. Ch. 122; 27 L. T. 569; 37 J. P. 100; 21 W. R. 129, L. C.

Annotations:—**Consd.** Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685. **Apld.** Christie *v.* Davey, [1893] 1 Ch. 316. **Consd.** Gosnell *v.* Aerated Bread Co. (1894), 10 T. L. R. 661. **Apld.** Sanders-Clark *v.* Grosvenor Mansions Co. & D'Allessandri (1900), 82 L. T. 758. **Consd.** Heath *v.* Brighton Corpn. (1908), 98 L. T. 718. **Refd.** Byass *v.* Bettam (1885), 2 T. L. R. 88; Rogers *v.* G. N. Ry. (1889), 53 J. P. 484. **Mentd.** Fullwood *v.* Fullwood (1878), 9 Ch. D. 176.

417. ——.]—BALL *v.* RAY, No. 354, *ante.*

418. ——.]—BRODER *v.* SAILLARD, No. 321, *ante.*

419. ——.]—REINHARDT *v.* MENTASTI, No. 117, *ante.*

D.

420. Must be considered.]—ST. HELEN'S SMELTING CO. *v.* TIPPING, No. 115, *ante.*

421. ——.]—STURGES *v.* BRIDGMAN, No. 30, *ante.*

422. ——.]—BYASS *v.* BETTAM, No. 401, *ante.*

423. ——.]—FANSHAWE *v.* LONDON & PROVINCIAL DAIRY CO. (1888), 4 T. L. R. 694.

Annotation:—**Distd.** Tinkler *v.* Aylesbury Dairy Co. (1888), 5 T. L. R. 52.

424. ——.]—HEATH *v.* BRIGHTON CORPN., No. 406, *ante.*

425. —— **Nature of local trades in particular.**]—POLSUE & ALFIERI, LTD. *v.* RUSHMER, No. 405, *ante.*

426. Pre-existing nuisances.]—CRUMP *v.* LAMBERT, No. 21, *ante.*

427. ——.]—POLSUE & ALFIERI, LTD. *v.* RUSHMER, No. 405, *ante.*

SUB-SECT. 2.—POLLUTION OF AIR.

See Part II., Sect. 13, *ante.*

SUB-SECT. 3.—NOISE AND VIBRATION.

See Part II., Sect. 9, *ante.*

SUB-SECT. 4.—THEATRES AND AMUSEMENTS.

See Part II., Sect. 17, *ante.*

SUB-SECT. 5.—BYE-LAWS OF LOCAL AUTHORITIES.

See Part II., Sect. 2, sub-sect. 2, *post;* &, *generally*, PUBLIC HEALTH.

SECT. 4.—INJURY TO BUSINESS.

428. Whether ground of action—Trade of specially delicate nature.]—ROBINSON *v.* KILVERT, No. 357, *ante.*

429. —— **Business of auctioneer — Nuisance from singing lessons.**]—There must therefore be

produces inconvenience to his neighbours by causing dust to enter their premises during the demolition is not responsible as for a nuisance if he uses all reasonable skill & care to avoid annoyance, does not apply where the dust causes actual injury to property.—HARRIS *v.* CARNEGIE'S PTY., LTD., [1917] V. L. R. 95.—**AUS.**

PART III. SECT. 4.

c. *Whether ground of action.*]—Defts. were tenants of the cellar under pltf.'s shop & stored there vegetables. A strong & offensive odour came from the cellar into the premises of pltf. above, which caused pltf. & some of her employees to become ill, & the business carried on in the shop was seriously injured in consequence:—

Sect. 4.—*Injury to business. Part IV. Sect.* 1: *Sub-sects.* 1 *&* 2, *A. & B.* (*a*).]

an injunction to restrain defts., their servants & agents, from allowing singing lessons to be given or singing practice to go on . . . in such a manner as to cause annoyance or injury to pltfs. in their business of auctioneers & valuers (KEKEWICH, J.).—MOTION *v.* MILLS (1897), 13 T. L. R. 427.

430. —— Building operations — When conducted in reasonable manner.]—STUMP *v.* BYWATER & SONS, LTD. (1907), The Builder, July 20, p. 91.

Annotation:—**Folld.** Clark *v.* Lloyd's Bank (1910), 79 L. J. Ch. 645.

431. —— —— ——.]—An injunction will not be granted to restrain building operations, if they are conducted in a reasonable manner, from commencing at 6.30 in the morning, even though the noise occasioned thereby causes loss of business to the owners of adjacent property.—CLARK *v.* LLOYD'S BANK, LTD. (1910), 79 L. J. Ch. 645; 103 L. T. 211; 74 J. P. 429; 54 Sol. Jo. 704.

432. —— Conduct of other business.]—GILLING *v.* GRAY, No. 407, *ante*.

—— Obstruction of access by crowd.]—*See* HIGHWAYS, Vol. XXVI., p. 428, Nos. 1475, 1478.

Part IV.—Remedies.

SECT. 1.—ABATEMENT.

SUB-SECT. 1.—IN GENERAL.

433. Doctrine of abatement of nuisance—Exception to general law.]—The whole doctrine of abatement is a sort of infringement on the rule that a man is not to take the law into his own hands (WILDE, B.).—JONES *v.* JONES (1862), 1 H. & C. 1; 31 L. J. Ex. 506; 8 Jur. N. S. 1132; 158 E. R. 777.

Annotation:—**Mentd.** R. *v.* French, [1902] 1 K. B. 637.

434. How right of abatement acquired—Whether by prescription.]—Parishioners cannot allege a right by prescription to abate nuisances & obstructions to their perambulation in Rogation week.—GOODDAY *v.* MICHELL (1595), Cro. Eliz. 441; Owen, 71; 78 E. R. 681.

Annotations:—**Consd.** Taylor *v.* Devey (1837), 7 Ad. & El. 409. **Mentd.** Brocklebank *v.* Thompson, [1903] 2 Ch. 344.

435. Abatement a bar to action for damages.]—In *quod permittat* to prostrate a house built to the nuisance of the frank tenement lately P.'s & now pltfs.', the declaration stated that deft. wrongfully, etc., erected upon his freehold a house so near the messuage lately P.'s & now pltfs.', that part of the said house juts over the said messuage, lately, etc., to the nuisance of the frank tenement of pltfs.', & to their damage, etc., deft. demurred:—*Held:* (1) was not necessary to show how pltfs. had the estate of P.; (2) It was no variance between the writ & the declaration, that the former stated the erection to be to the nuisance of the frank tenement lately P.'s now pltfs.', & that the latter averred it to be to the nuisance of pltfs., for pltfs. showed in their declaration that the erection was in the time of P.; (3) Pltfs. in their declaration in this case, need not assign any nuisance in certain, as that the rain fell from the said house newly built, upon pltfs.' house, for as the declaration showed that deft.'s house overhangs pltfs.', such must be the necessary consequence.

(4) A nuisance may be redressed by action, or by the party grieved entering & abating the nuisance, but in this latter case he shall not have an action nor recover damages.—BATEN'S CASE (1610), 9 Co. Rep. 53 b; 77 E. R. 810.

Annotations:—*As to* (3) **Consd.** Fay *v.* Prentice (1845), 1 C. B. 828. *As to* (4) **Consd.** Lane *v.* Capsey, [1891] 3 Ch. 411. **Refd.** James *v.* Hayward (1629), W. Jo. 221; R. *v.* Pappineau (1726), 2 Stra. 686; Colls *v.* Home & Colonial Stores, [1904] A. C. 179. *Generally*, **Refd.** Perry *v.* Fitzhowe (1846), 7 L. T. O. S. 180. **Mentd.** Jeveson *v.* Moor (1698), 12 Mod. Rep. 262.

436. When abatement allowed—Only in clear cases of nuisance.]—Abatement ought only to be allowed in clear cases of nuisance where the injury is apparent on the first view of the matter. The abater makes himself his own judge, & proceeds at his own hazard to destroy the thing which he considers as an infringement of his right; whereas in an action, the invasion of his property meets with a fair discussion, & obtains for him a proper recompense without the previous destruction of the thing in dispute (EYRE, C.J.).—KIRBY *v.* SADGROVE (1797), 1 Bos. & P. 13; 3 Anst. 892; 145 E. R. 1073.

437. Abater proceeds at own risk.]—KIRBY *v.* SADGROVE, No. 436, *ante*.

Abatement of disturbance of easement.]—*See* EASEMENTS, Vol. XIX., pp. 115, 182, 183, Nos. 755–758, 1323–1336.

SUB-SECT. 2.—BY PRIVATE PERSONS.

A. In General.

438. Not regarded with favour.]—A person who is merely entitled as one of the public to use a bridge carrying the highway over a river is not justified in entering on another person's land, & re-erecting the bridge which has been allowed to fall into a state of decay. An operation of this nature cannot properly fall under the term "abatement," even if the right to "abate" can be said to exist at all in the case of a nuisance arising from mere non-feasance.

The right of abatement by individuals is not regarded with favour by the law (COLLINS, L.J.).—CAMPBELL DAVYS *v.* LLOYD, [1901] 2 Ch. 518; 70 L. J. Ch. 714; 85 L. T. 59; 49 W. R. 710; 17 T. L. R. 678; 45 Sol. Jo. 670, C. A.

439. When abatement allowed — Nuisance arising from act of omission—Only in cases of emergency.]—(1) The security of lives & property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of LORD HALE & appeal to a ct. of justice (BEST, J.).

Held: the exercise of defts.' right to use the cellar for storing vegetables was limited by the general right of the public, & they had no right to infringe upon or interfere with the enjoyment of pltf.'s premises, & pltf. was entitled to recover for the damages sustained in the business, & those incurred in consequence of the illness.—MALCOLM *v.* BROWN, 16 C. L. T. Occ. N. 198.—**CAN.**

(2) Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, & the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them (BEST, J.).—LONSDALE (EARL) *v.* NELSON (1823), 2 B. & C. 302; [illegible] Ry. K. B. 556; 2 L. J. O. S. K. B. 28; 107 E. R. 396.

Annotations:—*As to* (1) **Consd.** Jones *v.* Williams (1843), 11 M. & W. 176; Noble *v.* Harrison, [1926] 2 K. B. 332. **Refd.** Campbell Davys *v.* Lloyd, [1901] 2 Ch. 518. *As to* (2) **Consd.** Lemmon *v.* Webb, [1895] A. C. 1; Campbell Davys *v.* Lloyd, [1901] 2 Ch. 518; Noble *v.* Harrison, [1926] 2 K. B. 332. *Generally*, **Refd.** Lyme Regis Corpn. [illegible] **Mentd.** Gwynne *v.*

440. —— Nuisance arising from act of commission.]—LONSDALE (EARL) *v.* NELSON, No. 439, *ante*.

441. When power may be exercised — Before injury suffered.]—PENRUDDOCK'S CASE (1598), 5 Co. Rep. 100 b; Jenk. 260; 77 E. R. 210.

Annotations:—**Distd.** Lemmon *v.* Webb, [1895] A. C. 1; Croydon R. D. C. *v.* Crowley (1909), 100 L. T. 441. **Refd.** [illegible] Co. Rep. 53 b; James *v.* Hayward 29), W. Jo. 221; Bliss *v.* Hall (1838), 5 Scott, 500; [illegible]n *v.* Gibson (1841), 7 M. & W. 456; Jones *v.* (1843), 11 M. & W. 176; Fay *v.* Prentice (1845), 14 L. J. C. P. 298; Perry *v.* Fitzhowe (1846), 8 Q. B. 757; Saxby *v.* M. S. & L. Ry. (1869), 38 L. J. C. P. 153; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341. **Mentd.** Lambert *v.* Bessey (1680), T. Raym. 421; Philips *v.* Bury (1694), Skin. 447; Winsmore *v.* Greenbank (1745), Willes, 577; Cooper *v.* Law (1859), 6 C. B. N. S. 502; Dawson *v.* G. N. & City Ry., [1904] 1 K. B. 277.

B. Public Nuisances.

(a) In General.

442. Whether private person may abate.]—(1) If a new gate be erected across a public highway, it is a common nuisance, although it be not fastened; & any of the King's subjects passing that way may cut it down & destroy it.

(2) A public nuisance may be abated by a private individual.—JAMES *v.* HAYWARD (1630), Cro. Car. 184; W. Jo. 221; 79 E. R. 761.

Annotations:—*As to* (1) **Refd.** Lodie *v.* Arnold (1697), 2 Salk. 458; Campbell Davys *v.* Lloyd, [1901] 2 Ch. 518. *Generally*, **Refd.** Perry *v.* Fitzhowe (1846), 8 Q. B. 757. **Mentd.** Mercer *v.* Woodgate (1869), 34 J. P. 261; Pettey *v.* Parsons, [1914] 1 Ch. 704.

443. ——.]—R. *v.* WILCOX, No. 806, *post*.

444. —— Special injury necessary.]—(1) In the case of the latter [private nuisances] the individual aggrieved may abate so as he commits no riot in doing it (LORD DENMAN, C.J.).

(2) An individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public.—COLCHESTER CORPN. *v.* BROOKE (1846), 7 Q. B. 339; 15 L. J. Q. B. 59; 5 L. T. O. S. 192; 10 J. P. 217; 9 Jur. 1090; 115 E. R. 518.

Annotations:—*As to* (2) **Refd.** Dimes *v.* Petley (1850), 15 Q. B. 276; Tuff *v.* Warman (1857), 2 C. B. N. S. 740; Evison *v.* Marshall (1868), 32 J. P. 691; Campbell Davys *v.* Lloyd, [1901] 2 Ch. 518. *Generally*, **Refd.** R. *v.* Betts (1850), 16 Q. B. 1022; Morant *v.* Chamberlin (1861), 6 H. & N. 541. **Mentd.** Potter *v.* Berry (1857), 21 J. P. Jo. 756; Gann *v.* Whitstable Free Fishers (1865), 11 H. L. Cas. 192; Whitstable Fishers *v.* Foreman (1867), L. R. 2 C. P. 688; Northumberland *v.* Houghton (1870), L. R. 5 Exch. 127; Jolliffe *v.* Wallasey L. B. (1873), L. R. 9 C. P. 62; McCarthy *v.* Metropolitan Board of Works (1873), L. R. 8 C. P. 191; Hawkins *v.* Rutter, [1892] 1 Q. B. 668; Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334; The Swift, [1901] P. 168; Barnes U. D. C. *v.* London General Omnibus Co. (1908), 7 L. G. R. 359; Liverpool & North Wales S.S. Co. *v.* Mersey Trading Co., [1908] 2 Ch. 460; The Bion, [1911] P. 40.

445. —— ——.]—A private individual cannot justify damaging the property of another, on the ground that it is a nuisance to a public right, unless it does him a special injury.—DIMES *v.* PETLEY (1850), 15 Q. B. 276; 19 L. J. Q. B. 449; 16 L. T. O. S. 1; 14 J. P. 653; 14 Jur. 1132; 117 E. R. 462.

Annotations:—**Consd.** Campbell Davys *v.* Lloyd, [1901] 2 Ch. 518. **Refd.** Bateman *v.* Bluck (1852), 18 Q. B. 870; Wyatt *v.* G. W. Ry. (1865), 6 B. & S. 709; Evison *v.* Marshall (1868), 32 J. P. 691; Arnold *v.* Holbrook (1873), L. R. 8 Q. B. 96. **Mentd.** Abraham *v.* G. N. Ry. (1851), 15 Jur. 855; Dowell *v.* General Steam Navigation Co. (1855), 5 E. & B. 195; Sub-Marine Telegraph Co. *v.* Dickson (1864), 15 C. B. N. S. 759; Liverpool & North Wales S.S. Co. *v.* Mersey Trading Co., [1908] 2 Ch. 460.

446. —— ——.]—Trespass for entering pltf.'s close & pulling down a wall therein. Plea that the close was a public pavement within Metropolitan Paving Act, 1917 (cxxix), that pltf. unlawfully & contrary to the Act erected thereon the said wall & because the wall encumbered the pavement & pltf. refused on deft.'s request to remove the same deft. entered & pulled it down:—*Held:* the plea was bad for not showing that it was absolutely necessary for deft. in order to exercise the alleged right of passage to remove the wall.—BATEMAN *v.* BLUCK (1852), 18 Q. B. 870; 21 L. J. Q. B. 406; 17 J. P. 4; 17 Jur. 386; 118 E. R. 329.

Annotations:—**Refd.** Bagshaw *v.* Buxton L. B. of Health (1875), 34 L. T. 112. **Mentd.** Sub-Marine Telegraph Co. *v.* Dickson (1864), 15 C. B. N. S. 759; Bailey *v.* Jamieson (1876), 34 L. T. 62; Vernon *v.* St. James, Westminster Vestry (1880), 16 Ch. D. 449; A.-G. & London Property Investment Trust *v.* Richmond Corpn. & Gosling (1903), 89 L. T. 700; A.-G. *v.* Sewell (1918), 88 L. J. K. B. 425.

447. —— ——.]—(1) *Semble:* a wall inclosing part of a street is an obstruction to the "safe & convenient passage along" the street within Towns Improvement Clauses Act, 1847 (c. 34), whatever may be the width of the uninclosed portion of the street; &, after it has been judicially determined that a particular object is an obstruction to a public highway, the surveyors of highways may remove the obstruction.

(2) It is clear, on the authorities, that any individual who is specially injured by the obstruction has by common law a right to remove that which unlawfully causes a special injury to him. But a private individual has no right to remove an obstruction which causes no special injury to him, but which is simply an obstruction to the road as regards the public in general as distinguished from the individual (JESSEL, M.R.).—BAGSHAW *v.* BUXTON LOCAL BOARD OF HEALTH (1875), 1 Ch. D. 220; 45 L. J. Ch. 260; 34 L. T. 112; 40 J. P. 197; 24 W. R. 231.

Annotations:—*As to* (1) **Refd.** Denny *v.* Thwaites (1876), 2 Ex. D. 21; Harris *v.* Northamptonshire County Council (1897), 61 J. P. 599.

448. How right of abatement to be exercised—Degree of care required.]—In justification by abatement of a nuisance, it need not be shown that he did it, doing as little hurt as could be.

When H. has a right to abate a public nuisance,

PART IV. SECT. 1, SUB-SECT. 2.—B. (a).

442 i. *Whether private person may abate.*]—It is competent to any one of the public to take proceedings to abate a nuisance of a public nature.—DELL *v.* CAPE TOWN TOWN COUNCIL (1879), Buch. 2.—**S. AF.**

448 i. *How right of abatement to be exercised—Degree of care required.*]—A person who takes upon himself to abate a nuisance, *e.g.*, a mill dam, may be called upon to pay damage for any injury done to pltf.'s property beyond what is necessary for removing the public inconvenience.—TRUESDALE *v.* MCDONALD (1824), Tay. 121.—**CAN.**

448 ii. —— ——.]—JOHNSTON & CARSWELL CO. *v.* DESPARD (B. C.) (1912), 19 W. L. R. 802; 1 W. W. R. 722.—**CAN.**

d. —— *Public peace must not be disturbed.*]—The law only justifies the abatement of a nuisance by a party aggrieved where the right to abate can be exercised without disturbing the public peace.—LORRAINE *v.* NORRIE (1912), 11 E. L. R. 384; 46 N. S. R. 177; 6 D. L. R. 122.—**CAN.**

Sect. 1.—*Abatement: Sub-sect.* 2, *B.* (*a*) *&* (*b*), *& C.* (*a*) *&* (*b*); *sub-sect.* 3.]

he is not bound to do it orderly & with as little hurt, in abating it, as can be.—LODIE *v.* ARNOLD (1697), 2 Salk. 458; 91 E. R. 396.

449. —— —— Obstruction to highway.]—The right of the co. to obstruct the road is only conditional, &, on their default in performance of their statutory duty, the person obstructed in his use of the road may remove the obstruction, using all proper care in so doing (BLACKBURN, J.).—WYATT *v.* GREAT WESTERN RY. CO. (1865), 6 B. & S. 709; 6 New Rep. 259; 34 L. J. Q. B. 204; 12 L. T. 568; 29 J. P. 630; 11 Jur. N. S. 825; 13 W. R. 837; 122 E. R. 1356.

Annotations:—**Mentd.** Skelton *v.* L. & N. W. Ry. (1867), L. R. 2 C. P. 631; Dublin, Wicklow & Wexford Ry. *v.* Slattery (1878), 3 App. Cas. 1155; Lax *v.* Darlington Corpn. (1879), 5 Ex. D. 28; R. *v.* Strange (1889), 16 Cox, C. C. 552.

(b) Particular Instances.

450. Whether private person may abate—Obstruction of church way.]—ANON. (1312), Y. B. 6 Edw. 2 fo. 198; Fitz. Nat. Brev. 185 B.

Annotations:—**Refd.** Goodday *v.* Michell (1595), Cro. Eliz. 441; Taylor *v.* Devey (1837), 7 Ad. & El. 409.

451. —— Obstruction of way to common.]—If one make a ditch, or raise up a bank to hinder my way to my common, I may justify the throwing of it down, & the filling of it up (GLYN, C.J.).—WILLIAMSON *v.* COLEMAN (1655), Sty. 470; 82 E. R. 870.

—— Nuisances to commons generally.]—*See* COMMONS, Vol. XI., pp. 46, 48–52, Nos. 642, 694–715, 720–730, 738–741, 750–763.

452. —— Libellous picture.]—*Qu.:* if to trespass for destroying a picture, deft. may plead, that it was a scandalous libel upon individuals, & that being publicly exhibited, he cut it to pieces by way of abating a nuisance.—DU BOST *v.* BERESFORD (1810), 2 Camp. 511; 170 E. R. 1235, N. P.

Annotations:—**Refd.** Dobree *v.* Napier (1836), 3 Scott, 201; Austria (Emperor) *v.* Day (1861), 3 De G. F. & J. 217; Mulkern *v.* Warn (1872), L. R. 13 Eq. 619; Prudential Life Insce. Assocn. *v.* Knott (1875), 23 W. R. 249.

453. —— Obstruction to highway—Overhanging trees.]—LONSDALE (EARL) *v.* NELSON, No. 439, *ante*.

454. —— —— Railway crossing gates.]—*Semble:* if the fence of a railway obstructs a way, it is the duty of persons having a right to use the way not to prostrate the gates in order to abate the obstruction, but to seek their remedy in a ct. of law.—ELLIS *v.* LONDON & SOUTH WESTERN RY. CO. (1857), 2 H. & N. 424; 26 L. J. Ex. 349; 29 L. T. O. S. 389; 21 J. P. 791; 3 Jur. N. S. 1008; 5 W. R. 682; 157 E. R. 175.

Annotations:—**Refd.** Wyatt *v.* G. W. Ry. (1865), 13 W. R. 837. **Mentd.** Sneesby *v.* L. & Y. Ry. (1874), L. R. 9 Q. B. 263.

455. —— —— Default in performance of statutory powers.]—WYATT *v.* GREAT WESTERN RY. CO., No. 449, *ante*.

456. —— —— Wall enclosing part of street.]—BAGSHAW *v.* BUXTON LOCAL BOARD OF HEALTH, No. 447, *ante*.

Nuisances to highways generally.]—*See* HIGHWAYS, Vol. XXVI., pp. 448, 449, Nos. 1639–1651.

Nuisances to navigation.]—*See* SHIPPING.

—— Nuisances to fisheries.]—*See* FISHERIES, Vol. XXV., p. 37, No. 356.

C. Private Nuisances.

(a) In General.

457. Right to enter on land—General rule.]—If a man in his own soil erect a thing which is a nuisance to another, as by stopping a rivulet, & so diminishing the water used by him for his cattle; the party injured may enter on the soil of the other & abate the nuisance, & justify the trespass; & this right of abatement is not confined merely to nuisances to a house, to a mill, or to land.—RAIKES *v.* TOWNSEND (1804), 2 Smith, K. B. 9.

458. —— Nuisance to ancient watercourse.]—HOWARD *v.* FRITH (1666), 2 Keb. 58; 84 E. R. 37.

459. —— ——.]—RAIKES *v.* TOWNSEND, No. 457, *ante*.

460. —— To save life.]—HOWARD *v.* FRITH (1666), 2 Keb. 58; 84 E. R. 37.

461. —— Nuisance caused by building house.]—If H. builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil & pull it down; & for this reason only a small fine was set upon deft. in an indictment for a riot in pulling down some part of a house, it being a nuisance to his lights, & the right found for him in an action for stopping his lights.—R. *v.* ROSEWELL (1699), 2 Salk. 459; 91 E. R. 397.

Annotations:—**Refd.** Perry *v.* Fitzhowe (1846), 8 Q. B. 757. **Mentd.** Solomon *v.* Vintners' Co. (1859), 4 H. & N. 585.

462. —— ——.]—The general rule that an individual may abate a nuisance by which he suffers injury, applies where the nuisance complained of is a house or other permanent building. A person deprived of the enjoyment of a right of common by an unlawful erection or obstruction, may abate it. But such a right cannot be exercised when the house is in the actual occupation of any person, as such a proceeding would have a direct tendency to cause a breach of the peace.—PERRY *v.* FITZHOWE (1846), 8 Q. B. 757; 15 L. J. Q. B. 239; 7 L. T. O. S. 180; 10 J. P. 600; 10 Jur. 799; 115 E. R. 1057.

Annotations:—**Distd.** Burling *v.* Read (1850), 11 Q. B. 904; Davies *v.* Williams (1851), 16 Q. B. 546. **Folld.** Jones *v.* Jones (1862), 1 H. & C. 1. **Consd.** Lane *v.* Capsey, [1891] 3 Ch. 411. **Refd.** Lascelles *v.* Onslow (1877), 2 Q. B. D. 433. **Mentd.** Harvey *v.* Bridges (1847), 1 Exch. 261; Davison *v.* Wilson (1848), 11 Q. B. 890.

463. —— To extinguish fire.]—If a man makes a bonfire upon his premises dangerous to the neighbourhood, it amounts in law to a nuisance, & it will be lawful to enter upon the premises & abate it; & for this purpose to use such amount of violence as may be necessary to overcome any resistance which may be offered to the endeavour to put it out.—R. *v.* GREEN (1847), 11 J. P. 246, N. P.

—— Disturbance of easement.]—*See* EASEMENTS, Vol. XIX., pp. 182, 183, Nos. 1324–1330.

—— Necessity for notice.]—*See* Sub-sect. 2, C. (*b*), *post*.

464. How right of abatement to be exercised—Right to interfere with property of wrongdoer—Only so far as necessary to abate nuisance.]—Pltf., who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, & occasionally a board or fender, fastened the board by means of two stakes, which had never been done by his predecessors. Deft., who had rights on the same stream, removed the stakes & the board also. A verdict having been given for pltf. in an action for such removal, the ct. refused to set it aside; holding, that deft. had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency incompatible with her own rights.—GREENSLADE *v.* HALLIDAY (1830), 6 Bing. 379; 4 Moo. & P. 71; 8 L. J. O. S. C. P. 124; 130 E. R. 1326.

465. —— —— —— By least injurious means.]—In abating a nuisance to his property, a man

may be justified in interfering, so far as is necessary, with the property of the wrongdoer, but not in interfering with the property of innocent third persons; &, consequently, where there are alternative modes of abating the nuisance, he is bound to choose that mode which may inflict damage, however great, on the wrongdoer, rather than that which would be productive of mischief, however small, to innocent third persons or to the public.—ROBERTS *v.* ROSE (1865), L. R. 1 Exch. 82; 4 H. & C. 103; 35 L. J. Ex. 62; 13 L. T. 471; 30 J. P. 5; 12 Jur. N. S. 78; 14 W. R. 225, Ex. Ch.

466. —— —— Duty when alternative way—Involving interference with property of innocent person.]—ROBERTS *v.* ROSE, No. 465, *ante*.

467. —— ——.]—Where a party has a limited right, & exercises that limited right in excess so as to produce a nuisance, the only remedy & the only way the party can protect himself is by stopping the whole. That is so very plain & clear upon the good sense of the matter, that it hardly wants an authority, that if a man has a limited right to the use of a window, & he enlarges it considerably, the only way that the person who is annoyed by the enlargement of the window & can prevent that nuisance is, by erecting a barrier & stopping the hole up if a party is in that way prevented from the exercise of a limited right, because he has turned it into a larger claim, all he can do is to reduce the window to its proper size, & insist on having it in the altered condition tolerated, & overlooking the surrounding tenements in the neighbourhood (POLLOCK, C.B.).—COCKWELL *v.* RUSSELL (1856), 28 L. T. O. S. 105.

468. —— No riot to be committed.]—COLCHESTER CORPN. *v.* BROOKE, No. 444, *ante*.

469. —— Right to overcome resistance—Dangerous fire.]—R. *v.* GREEN, No. 463, *ante*.

—— Disturbance of easement.]—*See* EASEMENTS, Vol. XIX., p. 183, Nos. 1331–1334.

—— Tree growing against wall.]—*See* AGRICULTURE, Vol. II., p. 65, No. 411.

Abatement amounting to malicious damage.]—*See* CRIMINAL LAW, Vol. XV., pp. 1023–1026, Nos. 11,506–11,527.

Right to abate nuisance on party wall.]—*See* BOUNDARIES, Vol. VII., p. 299, No. 229.

(*b*) *Necessity for Notice.*

470. After transfer of property causing nuisance—Nuisance continued by transferee.]—PENRUDDOCK'S CASE (1598), 5 Co. Rep. 100 b; Jenk. 260; 77 E. R. 210.

Annotations:—**Distd.** Lemmon *v.* Webb, [1895] A. C. 1; Croydon R. D. C. *v.* Crowley (1909), 100 L. T. 441. **Refd.** Baten's Case (1610), 9 Co. Rep. 53 b; James *v.* Hayward (1629), W. Jo. 221; Bliss *v.* Hall (1838), 5 Scott, 500; Thompson *v.* Gibson (1841), 7 M. & W. 456; Jones *v.* Williams (1843), 11 M. & W. 176; Fay *v.* Prentice (1845), 14 L. J. C. P. 298; Perry *v.* Fitzhowe (1846), 8 Q. B. 757; Saxby *v.* M. S. & L. Ry. (1869), 38 L. J. C. P. 153; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341. **Mentd.** Lambert *v.* Bessey (1680), T. Raym. 421; Philips *v.* Bury (1694), Skin. 447; Winsmore *v.* Greenbank (1745), Willes, 577; Cooper *v.* Law (1859), 6 C. B. N. S. 502; Dawson *v.* G. N. & City Ry., [1904] 1 K. B. 277.

471. —— New nuisances.]—PENRUDDOCK'S CASE (1598), 5 Co. Rep. 100 b; Jenk. 260; 77 E. R. 210.

Annotations:—**Distd.** Lemmon *v.* Webb, [1895] A. C. 1; Croydon R. D. C. *v.* Crowley (1909), 100 L. T. 441. **Refd.** Baten's Case (1610), 9 Co. Rep. 53 b; James *v.* Hayward (1629), W. Jo. 221; Bliss *v.* Hall (1838), 5 Scott, 500; Thompson *v.* Gibson (1841), 7 M. & W. 456; Jones *v.* Williams (1843), 11 M. & W. 176; Fay *v.* Prentice (1845), 14 L. J. C. P. 298; Perry *v.* Fitzhowe (1846), 8 Q. B. 757; Saxby *v.* M. S. & L. Ry. (1869), 38 L. J. C. P. 153; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341. **Mentd.** Lambert *v.* Bessey (1680), T. Raym. 421; Philips *v.* Bury (1694), Skin. 447; Winsmore *v.* Greenbank (1745), Willes, 577; Cooper *v.* Law (1859), 6 C. B. N. S. 502; Dawson *v.* G. N. & City Ry., [1904] 1 K. B. 277.

472. Before entry on land—General rule.]—It is true that where a person desires to abate a nuisance, which can only be abated by going on the land of the person from whom the nuisance proceeds, he must usually give notice of his intention to do so. . . . But in the cases . . . where a man proposes to abate a nuisance exclusively by doing acts upon his own land without going upon the land of his neighbour from whom the nuisance proceeds, the same reasoning does not seem to me to apply (LORD DAVEY).—LEMMON *v.* WEBB, [1895] A. C. 1; 64 L. J. Ch. 205; 71 L. T. 647; 59 J. P. 564; 11 T. L. R. 81; 11 R. 116, H. L.

Annotations:—**Refd.** Reynolds *v.* Prestcign U. D. C., [1896] 1 Q. B. 604; Campbell Davys *v.* Lloyd, [1901] 2 Ch. 518; Smith *v.* Giddy, [1904] 2 K. B. 448; Cheater *v.* Cater, [1918] 1 K. B. 247; Collis *v.* Amphlett (1919), 89 L. J. Ch. 101; Mills *v.* Brooker, [1919] 1 K. B. 555; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341; Noble *v.* Harrison, [1926] 2 K. B. 332.

473. —— Where owner original wrongdoer.]—A party has no right to enter upon the land of another in order to abate a nuisance of filth, without previous notice or request to the owner of the land to remove it, unless it appear that the latter was the original wrongdoer, by placing it there, or that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health.—JONES *v.* WILLIAMS (1843), 11 M. & W. 176; 12 L. J. Ex. 249; 152 E. R. 764.

Annotations:—**Distd.** Lemmon *v.* Webb, [1894] 3 Ch. 1. **Refd.** Lemmon *v.* Webb, [1894] 71 L. T. 647; Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341.

474. —— Where breach of duty by owner.]—JONES *v.* WILLIAMS, No. 473, *ante*.

475. —— Where nuisance dangerous to life or health.]—JONES *v.* WILLIAMS, No. 473, *ante*.

476. —— Obstruction of rights of common.]—Where a house obstructs the exercise of a right of common, the commoner may, after notice & request to pltf. to remove the house, pull it down, though pltf. is actually inhabiting & present in the house.—DAVIES *v.* WILLIAMS (1851), 16 Q. B. 546; 20 L. J. Q. B. 330; 15 J. P. 550; 15 Jur. 752; 117 E. R. 988.

Annotations:—**Consd.** Lane *v.* Capsey, [1891] 3 Ch. 411. **Refd.** Presland *v.* Bingham (1889), 41 Ch. D. 268.

477. Abatement without entry on land.]—LEMMON *v.* WEBB, No. 472, *ante*.

478. Nuisances of commission.]—LONSDALE (EARL) *v.* NELSON, No. 439, *ante*.

Overhanging trees.]—*See* AGRICULTURE, Vol. II., p. 64, Nos. 403–406.

SUB-SECT. 3.—BY LOCAL AUTHORITIES.

479. Power to abate—Pollution by sewage.]—Under an agreement between A. & a sanitary board, A. was entitled to discharge surface water from his land into a ditch which ran past B.'s house. A. afterwards, without the leave or licence of the board, or of the local board which succeeded it, & contrary to the plan which had been approved by the board when the agreement was entered into, began to discharge sewage into the ditch through the same pipe by which his surface water

e. *Necessity for notice.*]—SUTTLES *v.* CANTIN (1915), 32 W. L. R. 101; 24 D. L. R. 1; 22 B. C. R. 139.—CAN.

Sect. 1.—*Abatement: Sub-sect.* 3. *Sect.* 2: *Sub-sect.* 1, *A.* (*a*) *i. & ii.*]

was discharged. B. moved for an injunction to restrain the local board, as sole defts., from allowing the sewage to pass into the ditch, & so causing a nuisance :—*Held :* (1) the local board had power, both at common law & also under Public Health Act, 1875 (c. 55), to stop physically the flow of sewage through the pipe, even though in so doing they might also stop the flow of surface water, since A. was exercising his limited right in excess so as to produce a nuisance ; (2) it being therefore possible for the board to abate the nuisance without instituting legal proceedings, or devising a new system of drainage, or creating a greater nuisance than that which was to be abated, B. was entitled to compel the board to do so. — CHARLES *v.* FINCHLEY LOCAL BOARD (1883), 23 Ch. D. 767 ; 52 L. J. Ch. 554 ; 48 L. T. 569 ; 47 J. P. 791 ; 31 W. R. 717.

Annotations :—As to (1) **Distd.** A.-G. *v.* Clerkenwell Vestry, [1891] 3 Ch. 527 ; Ogilvie *v.* Blything Union R. S. A. (1891), 65 L. T. 338. **Dbtd.** Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378.

—— ——.]—*See, generally,* SEWERS & DRAINS.

Under Public Health Acts.]—*See* PUBLIC HEALTH.

—— **Nuisances on highways.**]—*See* HIGHWAYS, Vol. XXVI., pp. 449, 450, Nos. 1652–1662.

Estoppel by failure to object.]—*See* ESTOPPEL, Vol. XXI., p. 376, No. 1493.

SECT. 2.—CIVIL PROCEEDINGS.

SUB-SECT. 1.—WHO MAY SUE.

A. Private Nuisances.

(*a*) *Reversioners.*

i. *In General.*

480. Must be damage to reversion.]—BEDINGFIELD *v.* ONSLOW (1685), 3 Lev. 209 ; 83 E. R. 654.

Annotation :—**Refd.** Panton *v.* Isham (1693), 3 Lev. 359.

481. ——.]—If pltf. declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion ; otherwise the want of such allegation will be cause for arresting the judgment.

Where pltf. declared as reversioner of a yard & part of a wall which W. occupied as tenant to him, & that deft. on, etc., & on divers days, etc., wrongfully placed on the said part of the wall quantities of bricks & mortar, etc., & thereby raised it to a greater height than before, & placed pieces of timber, etc., on the said wall, overhanging the yard, *per quod* pltf. during all the time lost the use of the said part of the wall, & also by means of the timber, etc., overhanging the wall, quantities of rain & moisture flowed from the wall upon the yard & thereby the yard & said part of wall have been injured, to the damage of pltf., etc., without stating that his reversion was prejudiced ; the ct. arrested judgment.—JACKSON *v.* PESKED (1813), 1 M. & S. 234 ; 105 E. R. 88.

Annotations :—**Apld.** Hopwood *v.* Schofield (1837), 2 Mood. & R. 34. **Consd.** Kidgill *v.* Moor (1850), 9 C. B. 364. **Apld.** Cooper *v.* Crabtree (1881), 19 Ch. D. 193. **Refd.** Baxter *v.* Taylor (1832), 4 B. & Ad. 72 ; Bathishill *v.* Reed (1856), 25 L. J. C. P. 290 ; Johnstone *v.* Hall (1856), 2 K. & J. 414 ; Metropolitan Assocn. for Improving Dwellings of Industrious Classes *v.* Petch (1858), 5 C. B. N. S. 504 ; Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508. **Mentd.** Sweetapple *v.* Jesse (1833), 5 B. & Ad. 27 ; Lyme Regis Corpn. *v.* Henley (1834), 1 Bing. N. C. 222 ; Davis *v.* Black (1841), 1 Q. B. 900 ; Holford *v.* Hankinson (1844), 5 Q. B. 584 ; *Re* Hunter (1860), 8 Cox, C. C. 352 ; R. *v.* Goldsmith (1873), 28 L. T. 881.

482. ——.]—DOBSON *v.* BLACKMORE, No. 498, *post.*

483. —— **Of permanent character.**]—To entitle a reversioner to maintain an action for an injury to his reversion, the injury must be of a permanent character.

Deft. erected buildings & furnaces adjoining premises occupied by a tenant of pltf., & caused fires, smoke & noises, to the great annoyance of the tenant, & so as to lessen the marketable value of pltf.'s reversion :—*Held :* the causing the noise, fires & smoke, being acts of a temporary character, & such as may be discontinued at any time before the end of the tenant's term, were not sufficient to enable pltf., the landlord, to maintain an action for injury to his reversion, the marketable value being lessened not by reason of what had been done, but of what it was apprehended might be done at a future time.—SIMPSON *v.* SAVAGE (1856), 1 C. B. N. S. 347 ; 26 L. J. C. P. 50 ; 28 L. T. O. S. 204 ; 21 J. P. 279 ; 3 Jur. N. S. 161 ; 5 W. R. 147 ; 140 E. R. 143.

Annotations :—**Extd.** Jones *v.* Chappell (1875), L. R. 20 Eq. 539. **Apld.** Mott *v.* Shoolbred (1875), L. R. 20 Eq. 22 ; White *v.* London General Omnibus Co. (1914), 58 Sol. Jo. 339. **Refd.** Metropolitan Assocn. for Improving Dwellings of Industrious Classes *v.* Petch (1858), 5 C. B. N. S. 504 ; Bell *v.* Mid. Ry. (1861), 30 L. J. C. P. 273 ; Cooper *v.* Crabtree (1881), 19 Ch. D. 193 ; Byass *v.* Bettam (1885), 2 T. L. R. 88 ; Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508 ; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393. **Mentd.** Rust *v.* Victoria Graving Dock Co. & London & St. Katharine Dock Co. (1887), 36 Ch. D. 113.

484. —— ——.] — In order to entitle a reversioner to maintain an action for injury to his reversion it is necessary that the wrong complained of should be in its nature permanent :—*Held :* a reversioner could not maintain an action against a railway co. for making loud hammering noises in a shed adjoining his house by reason whereof the tenant quitted though it appeared that he was afterwards unable to let the house except at a lower rent.—MUMFORD *v.* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO. (1856), 1 H. & N. 34 ; 25 L. J. Ex. 265 ; 27 L. T. O. S. 58 ; 156 E. R. 1107 ; *sub nom.* MOUNTFORD *v.* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., 4 W. R. 457.

Annotations :—**Apld.** Simpson *v.* Savage (1856), 1 C. B. N. S. 347 ; Mott *v.* Shoolbred (1875), L. R. 20 Eq. 22. **Refd.** Cooper *v.* Crabtree (1881), 19 Ch. D. 193 ; Byass *v.* Bettam (1885), 2 T. L. R. 88 ; Rust *v.* Victoria Graving Dock Co. & London & St. Katharine Dock Co. (1887), 36 Ch. D. 113. **Mentd.** Tancred *v.* Allgood (1859), 4 H. & N. 438.

PART IV. SECT. 2, SUB-SECT. 1.—A. (a) i.

480 i. *Must be damage to reversion.*]—Although a reversioner must wait until his interest falls into possession before he can complain of a temporary nuisance, yet he is entitled to complain at once of an injury of a permanent character, &, if he makes out a *primâ facie* case for relief, or shows that he has substantial grounds for seeking relief, he may apply to the ct. for an interlocutory injunction to keep matters *in statu quo* until his rights can be ascertained at the hearing of the suit.—MCCARTY *v.* NORTH SYDNEY COUNCIL OF MUNICIPALITY (1918), 18 S. R. N. S. W. 210.—**AUS.**

480 ii. ——.] — DREW *v.* BABY (1841), 1 U. C. R. 438.—**CAN.**

480 iii. ——.]—The owner of a house of which he is not in the actual occupation, may recover from a person who has placed an offensive nuisance on adjoining premises damages for the injury sustained in not being able to let the house advantageously in consequence of the nuisance.—SMITH *v.* HUMBERT (1845), 4 N. B. R. (2 Kerr), 602.—**CAN.**

480 iv. ——.]—HUMPHREY *v.* BANFIL (1884), N. B. Dig. 655.—**CAN.**

480 v. ——.]—The owner of houses occupied by tenants can maintain an action in his own name for damages & to restrain the continuance of a nuisance arising from privy pits on the land of an adjoining owner, if the nuisance is of such a nature as to be practically continuous & permanent. —PARK *v.* WHITE (1893), 23 O. R. 611.—**CAN.**

485. —— ——.] — Where a public street was improperly used as a stable yard :—*Held :* the nuisance to the neighbouring houses was not so permanent as to entitle a reversioner to an injunction.—MOTT *v.* SHOOLBRED (1875), L. R. 20 Eq. 22 ; 44 L. J. Ch. 380 ; 23 W. R. 545.

Annotations :—**Refd.** Leader *v.* Moody (1875), 44 L. J. Ch. 711 ; Broder *v.* Saillard (1876), 2 Ch. D. 692 ; Fritz *v.* Hobson (1880), 14 Ch. D. 542 ; Cooper *v.* Crabtree (1881), 19 Ch. D. 193 ; Byass *v.* Bettam (1885), 2 T. L. R. 88 ; House Property & Investment Co. *v.* H. P. Horse Nail Co. (1885), 29 Ch. D. 190. **Mentd.** Smith *v.* Smith (1875), 44 L. J. Ch. 630.

486. —— ——.]—The owner or lessee of houses let or sub-let to weekly tenants cannot maintain a suit to restrain a temporary nuisance such as the noise of machinery in adjacent premises, but *semble :* such a suit could be maintained by a weekly tenant if the nuisance were of such a nature as to be injurious to his health, or comfort.

The owner of a house occupied by weekly tenants is within the rule that a reversioner cannot maintain an action in respect of a temporary nuisance. —JONES *v.* CHAPPELL (1875), L. R. 20 Eq. 539 ; 44 L. J. Ch. 658.

Annotations :—**Refd.** Broder *v.* Saillard (1876), 2 Ch. D. 692 ; Cooper *v.* Crabtree (1881), 19 Ch. D. 193 ; Byass *v.* Bettam (1885), 2 T. L. R. 88 ; House Property & Investment Co. *v.* H. P. Horse Nail Co. (1885), 29 Ch. D. 190 ; Shelfer *v.* London Electric Lighting Co., Meux's Brewery Co. *v.* London Electric Lighting Co., [1895] 1 Ch. 287 ; West Ham Central Charity Board *v.* East London Waterworks Co., [1900] 1 Ch. 624. **Mentd.** Tucker *v.* Linger (1882), 21 Ch. D. 18 ; Dashwood *v.* Magniac, [1891] 3 Ch. 306 ; Meux *v.* Cobley, [1892] 2 Ch. 253.

487. —— ——.]—COOPER *v.* CRABTREE, No. 496, *post.*

488. —— ——.]—JONES *v.* LLANRWST URBAN COUNCIL, No. 320, *ante.*

Action for disturbance of easement.]—*See* EASEMENTS, Vol. XIX., pp. 121, 185, 186, Nos. 808–810, 1349–1371.

Action for obstruction of roadway.]—*See* HIGHWAYS, Vol. XXVI., p. 454, No. 1695.

ii. *What Constitutes Damage to Reversion.*

489. Question for jury.]—Building a roof with eaves which discharge rain water by a spout into adjoining premises, is an injury for which the landlord of such premises may recover, as reversioner while they are under demise, if the jury think there is a damage to the reversion.—TUCKER *v.* NEWMAN (1839), 11 Ad. & El. 40 ; 3 Per. & Dav. 14 ; 9 L. J. Q. B. 1 ; 3 Jur. 1145 ; 113 E. R. 327.

Annotations :—**Distd.** Mumford *v.* Oxford, Worcester & Wolverhampton Ry. (1856), 1 H. & N. 34. **Refd.** Simpson *v.* Savage (1856), 1 C. B. N. S. 347 ; Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508.

490. ——.] — JONES *v.* LLANRWST URBAN COUNCIL, No. 320, *ante.*

491. Land flooded by obstruction of stream.]—BEDINGFIELD *v.* ONSLOW (1685), 3 Lev. 209 ; 83 E. R. 654.

Annotation :—**Folld.** Panton *v.* Isham (1701), 3 Lev. 359.

492. Property damaged by fire.]—PANTON *v.* ISHAM (1701), 3 Lev. 359 ; 1 Salk. 19 ; 83 E. R. 729.

493. Discharge of rain water from roof—Adjoining building.]—TUCKER *v.* NEWMAN, No. 489, *ante.*

494. Dust & dirt—Erection of station by railway company.]—The co., in the execution of the powers of their Act, had erected a railway station & embankment near a house used as a starch manufactory, & had thereby obstructed its lights & caused damage to it by the dust & dirt drifted from the station, etc. The house was erected before Nov. 30, 1835, had not been specified in the schedule, nor omitted therefrom by mistake, & no consent in writing to the construction of the station or embankment had been obtained from the owner or any other person interested in the house :—*Held :* the co. were liable in an action on the case at the suit of the reversioner for such damage, & pltf. was not confined to the remedy provided by the Act for compensation.—TURNER *v.* SHEFFIELD & ROTHERHAM RY. CO. (1842), 10 M. & W. 425 ; 3 Ry. & Can. Cas. 222 , 152 E. R. 536.

Annotations :—**Refd.** Brine *v.* G. W. Ry. (1862), 2 B. & S. 402 ; Brand *v.* Hammersmith & City Ry. (1867), L. R. 2 Q. B. 223.

495. Obstruction of light—Erection of station & embankment by railway company.]—TURNER *v.* SHEFFIELD & ROTHERHAM RY. CO., No. 494, *ante.*

496. —— **Erection of hoarding.**]—Pltf. was the owner in fee of a cottage, deft. owned some land immediately adjoining. Pltf. alleged that deft. had erected on pltf.'s land a hoarding on poles in order to block out the access of light to a window in the cottage, & had in so doing committed a trespass. Pltf. also alleged that the poles & hoarding produced a rattling & creaking noise which was an intolerable nuisance to pltf. & his tenants. Pltf. claimed an injunction to restrain the trespass & the nuisance. At the trial it was proved that the cottage was in the occupation of a weekly tenant of pltf., who was not a party to the action. There was no evidence that the acts of deft. had caused any diminution of value of, or other injury to, the reversion :—*Held :* the poles & hoarding not being of such a permanent character as to injure the reversion, pltf. could not maintain an action for trespass ; & the erection of the poles on pltf.'s land was too trifling an injury to entitle pltf. to an injunction.

Where a reversioner's possessory rights are being seriously injured by an act for which he would obtain very trifling damages at law, an injunction, being his only adequate remedy, may be granted.—COOPER *v.* CRABTREE (1882), 20 Ch. D. 589 ; 51 L. J. Ch. 544 ; 47 L. T. 5 ; 46 J. P. 628 ; 30 W. R. 649, C. A.

Annotations :—**Refd.** Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508 ; Meux's Brewery *v.* City of London Electric Lighting Co., Shelfer *v.* City of London Electric Lighting Co. (1894), 42 W. R. 644.

497. —— **Erection of building.**] — JONES *v.* LLANRWST URBAN COUNCIL, No. 320, *ante.*

498. Obstruction of navigable river.]—(1) A count in case, stating that pltf., was possessed of a messuage abutting on a public navigable river, & by reason thereof was accustomed & of right entitled to have free use & navigation of the river, for the purpose of passing in boats & conveying goods to the messuage, & convenient access to the messuage from the river, but that deft. fixed barges, planks, etc., in the part of the river near the messuage, & kept & continued the same, & thereby hindered pltf. from having the free use of the river, & passing in boats & conveying goods to & from the messuage, & pltf. was thereby put to expense in endeavouring to remove the obstructions, & was obliged to convey the goods in a longer & more inconvenient route, is good, as sufficiently showing a particular injury to the individual. But, if the jury negative actual damage, pltf. cannot have judgment.

PART IV. SECT. 2, SUB-SECT. 1.—A. (a) ii.

f. *Erection of stable.*]—Deft. having erected a stable on his own ground, adjoining a dwelling house owned by pltf. & rented to W. :—*Held :* not such a nuisance as would support an action by pltf. as reversioner, though it was shown that he had been obliged in consequence of it to accept a lower rent for his house.—LAWRASON *v.* PAUL (1854), 11 U. C. R. 534.—**CAN.**

Sect. 2.—*Civil proceedings: Sub-sect.* 1, *A.* (*a*) *ii.*, (*b*).]

(2) A count stating pltf. to be reversioner of premises, occupied by his tenants, & abutting on a public navigable river, & that pltf. & all the liege, etc., were accustomed of right to have free navigation & passage on the river for boats, etc., & pltf. was accustomed of right to have, for the enjoyment of the premises by his tenants, free use & navigation of that part of the river near to the same, & free passage for all persons in boats to approach the same, & pass to the premises from the river, & unload the boats on the premises, without obstruction; but that deft. fixed barges, planks, etc., in the part of the river near the premises, & thereby obstructed the use & navigation of that part, & hindered persons from passing to the premises from the river, & hindered the unloading of boats on the premises, & by means thereof pltf. was injured in his reversionary interest, is bad in arrest of judgment, as not showing a damage to the reversionary interest.—DOBSON *v.* BLACKMORE (1847), 9 Q. B. 991; 16 L. J. Q. B. 233; 11 J. P. 601; 11 Jur. 556; 115 E. R. 1554.

Annotations:—*As to* (1) **Refd.** Chamberlain *v.* West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605. *As to* (2) **Refd.** Kidgill *v.* Moore (1850), 9 C. B. 364

499. Obstruction of right of way.]—A declaration in case by a reversioner alleged that pltf. was entitled to a right of way for his tenants over a certain close of deft.; & charged that deft. wrongfully locked, chained, shut, & fastened a certain gate standing in & across the way, & wrongfully kept the same so locked, etc., & thereby obstructed the way; & that, by means of the premises, pltf. was injured in his reversionary estate:—*Held:* the declaration was sufficient, inasmuch as such an obstruction might occasion injury to the reversion, & it must be assumed, after verdict, that evidence to that effect had been given.—KIDGILL *v.* MOOR (1850), 9 C. B. 364; 1 L. M. & P. 131; 19 L. J. C. P. 177; 14 L. T. O. S. 443; 14 Jur. 790; 137 E. R. 934.

Annotations:—**Apld.** Metropolitan Assocn. for Improving Dwellings of Industrious Classes *v.* Petch (1858), 5 C. B. N. S. 504. **Consd.** Bell *v.* Mid. Ry. (1861), 10 C. B. N. S. 287. **Refd.** Simpson *v.* Savage (1856), 1 C. B. N. S. 347; Leader *v.* Moody (1875), 44 L. J. Ch. 711; Mott *v.* Shoolbred (1875), 44 L. J. Ch. 380; Norwich Corpn. *v.* Brown (1883), 48 L. T. 898; Noble *v.* Harrison (1892), 37 Sol. Jo. 131; Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508.

500. Obstruction of access to wharf.]—Pltf., in 1839, with the assent of co., made a siding on his land connecting the railway with a wharf, part of which was in his own occupation & other part in that of certain tenants; & down to the year 1857 the co. carried coals & other goods for pltf. & his tenants, placing the trucks on the siding & so sending them down to the wharf. In the course of that year, however, the co., with a view, as the jury thought, of diverting the trade from pltf.'s wharf to another wharf in which they were interested, gave pltf. notice, under another sect. of their Act, that, after Sept. 30, they would no longer provide him with locomotive power for the conveyance of his goods along their line: & on Oct. 1, they placed carriages & other things across the junction, for the purpose, as the jury found, of permanently obstructing & preventing pltf. & his tenants having access to the wharf by means of their railway. Neither pltf. nor his tenants had availed themselves at this time of the authority given to them by the Act of Parliament to provide locomotive power of their own, & consequently they were not in a position to be actually obstructed. The tenants, however, finding their trade destroyed, removed from pltf.'s wharf, & carried their business to the co.'s wharf:—*Held:* these wrongful acts of the co. constituted such a permanent obstruction & injury to pltf.'s right to the use of his siding as to entitle him as reversioner to maintain an action.—BELL *v.* MIDLAND RY. CO. (1861), 10 C. B. N. S. 287; 30 L. J. C. P. 273; 4 L. T. 293; 7 Jur. N. S. 1200; 9 W. R. 612; 142 E. R. 462.

Annotations:—**Consd.** Beckett *v.* Mid. Ry. (1867), L. R. 3 C. P. 82; Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508. **Refd.** Mott *v.* Shoolbred (1875), 44 L. J. Ch. 380. **Mentd.** Thompson *v.* Hill (1870), L. R. 5 C. P. 564; Powell Duffryn Steam Coal Co. *v.* Taff Vale Ry. (1873), 29 L. T. 575; Addis *v.* Gramophone Co., [1909] A. C. 488.

501. Removal of support by mining.]—In an action on the case by pltfs. as reversioners, the declaration alleged, amongst other things, that deft. wrongfully, carelessly, negligently, & improperly, & without leaving any proper or sufficient support in that behalf, worked the mines, & dug & got the minerals out of the mines, near to the said messuage, the reversion of which was pltfs.' whereby the foundations of the messuages, etc., were greatly injured, & the ground on which the building stood swagged:—*Held:* this part of the declaration was good, notwithstanding there was no allegation that pltfs. had any right to have the messuage supported by the soil under which deft. got the mines. If it had appeared in the declaration in this case that the soil in which the mines were was deft.'s, or that deft. had all the right to get the mines which the owners of the adjoining soil had, the objection would have been fatal.—JEFFRIES *v.* WILLIAMS (1850), 5 Exch. 792; 20 L. J. Ex. 14; 16 L. T. O. S. 196; 155 E. R. 347.

Annotations:—**Apld.** Bibby *v.* Carter (1859), 4 H. & N. 153. **Refd.** Laing *v.* Whaley (1858), 3 H. & N. 675; Rogers *v.* Taylor (1858), 2 H. & N. 828; Richards *v.* Jenkins (1868), 18 L. T. 437.

502. Manufacture of bricks—On adjoining land.]—WALTER *v.* SELFE, No. 1, *ante*.

503. Smoke.]—SIMPSON *v.* SAVAGE, No. 483, *ante*.

504. Noise.]—SIMPSON *v.* SAVAGE, No. 483, *ante*.

505. —— Causing loss of tenants.]—MUMFORD *v.* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., No. 484, *ante*.

506. —— ——.]—A loss of tenants by their leaving a house, in consequence of disturbing noises, & inability to relet, is not a permanent injury, so as to support an action by the reversioner.—WEBB *v.* BARKER (1864), 5 New Rep. 110.

507. ——.]—JONES *v.* CHAPPELL, No. 486, *ante*.

508. —— Of stable.]—BRODER *v.* SAILLARD, No. 321, *ante*.

509. —— Noisy trade.]—JONES *v.* LLANRWST URBAN COUNCIL, No 320, *ante*.

510. —— Of garage.]—A nuisance of noise & smell from a garage is not a "permanent" injury to the reversion within the definition given by PARKER, J., in *Jones* v. *Llanrwst Urban District Council*, No. 320, *ante*, & accordingly an action brought by the reversioners alone is not maintainable.—WHITE *v.* LONDON GENERAL OMNIBUS CO. (1914), 58 Sol. Jo. 339.

511. Leakage of stable drainage.]—BRODER *v.* SAILLARD, No. 321, *ante*.

512. Vibration—Electric generating station.]—Deft. council, under the powers of a provisional order, erected an electric generating station in proximity to houses of which pltfs. were lessees or occupiers. The order provided that nothing therein should exonerate the undertakers from an action for nuisance in the event of any being occasioned by them. In an action for an injunction it was admitted by defts. that the vibration

of their machinery created an actionable nuisance unless such nuisance was excusable as being of a merely temporary nature, but they alleged that after experiments & alterations of the machinery the nuisance would abate, & that as the machinery was not yet completed in its final form, but only in course of construction, an action would not lie against them. One of pltfs. having sub-let for all his term less the last three days :—*Held :* entitled to an injunction in respect of damage to his reversion.—COLWELL *v.* ST. PANCRAS BOROUGH COUNCIL, [1904] 1 Ch. 707 ; 73 L. J. Ch. 275 ; 90 L. T. 153 ; 68 J. P. 286 ; 52 W. R. 523 ; 20 T. L. R. 236 ; 2 L. G. R. 518.

513. Pollution of river water.] — JONES *v.* LLANRWST URBAN COUNCIL, No. 320, *ante.*

514. Exercise of alleged right of way.]—JONES *v.* LLANRWST URBAN COUNCIL, No. 320, *ante.*

515. Smell—From garage.]—WHITE *v.* LONDON GENERAL OMNIBUS CO., No. 510, *ante.*

Disturbance of easements.]—*See* EASEMENTS, Vol. XIX., pp. 185, 186, Nos. 1349–1371.

(*b*) *Occupiers.*

516. General rule.]—In an action for diverting a watercourse from one of three mills, on not guilty, the *venire facias* shall be where the nuisance was done, *sed aliter* on a prescription ; but a seisin of the mill at the time of the nuisance must be shown.—LEEDS *v.* SHAKERLEY (1600), Cro. Eliz. 751 ; 78 E. R. 983.

Annotations :—**Mentd.** Bellasis *v.* Burbriche (1696), 1 Ld. Raym. 170 ; R. *v.* Wyatt (1705), 2 Ld. Raym. 1189.

517. ——.]—NUNN *v.* PARKES & CO. (1924), 59 L. Jo. 806.

518. Tenants in common—Whether one may sue alone.]—Tenants in common must join in an action for a nuisance to their lands. So must the devisee for a nuisance continued from the time of the devisor.—SOME *v.* BARWISH (1609), Cro. Jac. 231 ; 79 E. R. 200.

Annotations :—**Refd.** Thompson *v.* Gibson (1841), 7 M. & W. 456. **Mentd.** R. *v.* Wyat (1705), Fortes. Rep. 127.

519. —— —— Obstruction to private road.]—A. demised to B., who was alleged to be an uncertified bkpt., a wharf, with the use of a road, in common with the occupiers of adjoining wharfs. C. obstructed the road. B. filed a bill against him to restrain the nuisance :—*Held :* neither A. nor the occupiers of the adjoining wharfs, nor the assignees of B., were necessary parties to the bill.—SEMPLE *v.* LONDON & BIRMINGHAM RY. CO. (1838), 9 Sim. 209 ; 1 Ry. & Can. Cas. 480 ; 2 Jur. 296 ; 59 E. R. 338.

Annotation :—**Mentd.** Pickford *v.* Grand Junction Ry. (1845), 3 Ry. & Can. Cas. 538.

520. Uncertificated bankrupt — Assignee not necessary party.]—SEMPLE *v.* LONDON & BIRMINGHAM RY. CO., No. 519, *ante.*

521. Occupiers of several properties—Cannot sue as co-plaintiffs—Though affected by same nuisance.]—A bill was filed by five several occupiers of houses in a town, to restrain the erection of a steam engine which would be a nuisance to each of them :—*Held :* each occupier had a distinct right of suit, &, therefore, they could not sue as co-pltfs.—HUDSON *v.* MADDISON (1841), 12 Sim. 416 ; 11 L. J. Ch. 55 ; 5 Jur. 1194 ; 59 E. R. 1192.

Annotation :—**Refd.** Soltau *v.* De Held (1851), 2 Sim. N. S. 133.

522. Yearly tenant — Temporary nuisance — Noise caused by circus.]—INCHBALD *v.* ROBINSON, INCHBALD *v.* BARRINGTON, No. 290, *ante.*

523. —— Where risk of permanent damage—Removal of bank by highway authority.]—Where road scrapings had been accumulated at the side of the highway so as to form a bank, & the local authority removed part of the bank in order to repair the road surface, & the yearly tenant of an adjoining cottage, took proceedings against the local authority for rendering his wall, which adjoined the bank, unsafe :—*Held :* no material support to the wall had been removed ; the local authority had acted within their rights ; & pltf. having suffered no material damage, & having no substantial interest in the property, his action was useless & an abuse of process.—WEBSTER *v.* BAKEWELL RURAL COUNCIL (1916), 86 L. J. Ch. 89 ; 115 L. T. 678 ; 80 J. P. 437 ; 14 L. G. R. 1109.

524. Weekly tenant — Nuisance injurious to health or comfort—Noise of machinery.]—JONES *v.* CHAPPELL, No. 486, *ante.*

525. Party in possession—Nuisance affecting local authority—Deposit of earth on sea shore.]—Deft. claimed the right to deposit earth on the sea beach of a town between high & low water mark as against the corpn., who claimed the right to the whole beach, & proved various acts of ownership done by them. The corpn. claimed under a grant from Queen Elizabeth. Various acts inconsistent with their claim were from time to time done by the corpn., one of which was that they accepted a grant of part of the beach from a private individual as late as 1832. On bill filed to restrain the depositing the earth :—*Held :* the acts, inconsistent with the title they claimed, done by the corpn., though they might be of great importance in a question between the Crown & the corpn., could not be set up by deft. against the admitted acts of ownership done by them.—HASTINGS CORPN. *v.* IVALL (1874), L. R. 19 Eq. 558.

526. Tenant under building agreement—Giving right of entry only—Removal of shingle from & placing bathing machines on sea shore.]—In an action to restrain the removal of shingle from, & the placing of bathing machines upon, a part of the foreshore of the sea at M., pltf. claimed to be tenant in possession of the *locus in quo* under a building agreement granted him by the lord of the manor of M., who was tenant for life of the property under a settlement. By his statement of defence deft. set up a forty years' uninterrupted user & enjoyment of the *locus in quo* by himself & his predecessors in title for the purposes complained of, & denied that pltf. was or ever had been in possession of the *locus in quo* " save subject to the right of deft." :—*Held :* on the true construction of the building agreement pltf. had no estate whatever in the *locus in quo*, but only a right of entry thereon for the purposes of that agreement, & therefore could not maintain the action.—LAIRD *v.* BRIGGS (1881), 19 Ch. D. 22 ; 45 L. T. 238, C. A.

Annotations :—**Mentd.** Symons *v.* Leaker (1885), 15 Q. B. D. 629 ; Frampton *v.* White (1896), 40 Sol. Jo. 275 ; Roberts & Lovell *v.* James (1903), 89 L. T. 282.

527. Licencee—Wife of manager of company—Nuisance by vibration.]—Defts., who were the owners of considerable house property, let a house to a tenant who subsequently sub-let it to a co. whose manager resided on the premises with his wife, pltf., & his family ; defts. were not liable to do any repairs to the house. In the lavatory of the house was a water tank, which became

Sect. 2.—Civil proceedings: Sub-sect. 1, A. (b), B. (a), (b) & (c) i.]

insecure, owing, as was alleged, to the vibration caused by an engine & machinery upon adjoining premises of defts., which were used by them for the purpose of generating electricity for the lighting of their property. Complaints of the insecurity of the water tank were made by pltf. & her husband to the tenant, who forwarded them to defts. Ultimately defts. sent two workmen, who were their own servants, to do the necessary repairs, & an iron bracket was fixed underneath the tank to support it. Three months afterwards the bracket fell upon pltf. & seriously injured her. The jury found that the bracket fell by reason of the working of defts.' engine, that the working of the engine amounted to a nuisance, & that the work of repair in putting up the bracket was done in an improper & negligent manner & the apparatus left in a condition dangerous to persons properly using the lavatory:—*Held:* pltf. had no cause of action against defts. on the ground of nuisance, because she had no interest in the premises or right of occupation in the proper sense of the term.

A person in the position of pltf., who was in the premises as a mere licensee, had no right to dictate to Witherby & Co. which course they should take . . . it was a matter entirely for the tenant & a person who is merely present in the house cannot complain of a nuisance, which has in it no element of a public nuisance (FLETCHER MOULTON, L.J.).—MALONE *v.* LASKEY, [1907] 2 K. B. 141; 76 L. J. K. B. 1134; 97 L. T. 324; 23 T. L. R. 399; 51 Sol. Jo. 356, C. A.

Annotations:—**Mentd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; White *v.* Steadman (1913), 109 L. T. 219.

528. —— Husband of owner—Nuisance by obstruction of ditches—Damage to chattels of licensee.]—NUNN *v.* PARKES & CO. (1924), 59 L. Jo. 806.

Tenant of pasturage on highway.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 103, No. 2400.

Proceedings against landlord.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 347, 348, Nos. 4892–4905.

Proceedings in respect of oyster fishery.]—*See* FISHERIES, Vol. XXV., p. 35, No. 333.

B. Public Nuisances.

(a) General Rule.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 481–491, Nos. 3632–3736; INJUNCTION, Vol. XXVIII., pp. 494–498, Nos. 968–1000.

529. Attorney-General.]—(1) A bill in this ct. to restrain nuisances extends to such only as are nuisances at law, & the fears of mankind, though reasonable ones, will not create a nuisance.

(2) If a public nuisance, it should be an information in the name of the A.-G. (LORD HARDWICKE, C.).—BAINES *v.* BAKER (1752), Amb. 158; 27 E. R. 105; *sub nom.* ANON., 3 Atk. 750, L. C.

Annotations:—*As to* (1) **Consd.** Vernon *v.* St. James, Westminster Vestry (1880), 16 Ch. D. 449; Metropolitan Asylum District *v.* Hill (1881), 6 App. Cas. 193. **Refd.** A.-G. *v.* Manchester Corpn., [1893] 2 Ch. 87; A.-G. *v.* Nottingham Corpn., [1904] 1 Ch. 673. *As to* (2) **Consd.** Soltau *v.* De Held (1851), 2 Sim. N. S. 133. **Refd.** A.-G. *v.* Cleaver (1811), 18 Ves. 211.

530. ——.]—Injunction granted, on information & bill, upon the ground of public nuisance, to restrain the magistrates of a county from cutting the timbers supporting the roadway of a bridge, which timbers & roadway, at the place proposed to be cut, were within their jurisdiction, but of which the other extremity was within the jurisdiction of a different county.

Principles on which cts. of equity interfere by injunction, in cases of apprehended nuisance to the public.

In informations & proceedings for the purpose of preventing public nuisances, the ordinary course is for the A.-G. to take it on himself to sue, as representing the public, but it is equally certain that individuals, who conceive themselves aggrieved, may come forward & ask the assistance of the ct. to prevent a public nuisance, from which they have individually sustained damage (LORD COTTENHAM, C.).—A.-G. *v.* FORBES (1836), 2 My. & Cr. 123; 40 E. R. 587, L. C.

Annotations:—**Consd.** Soltau *v.* De Held (1851), 2 Sim. N. S. 133. **Refd.** Thorne *v.* Taw Vale Ry. & Dock Co. (1850), 13 Beav. 10. **Mentd.** Blakemore *v.* Glamorganshire Canal Navigation (1832), 1 My. & K. 154.

531. ——.]—Where there has been an excess of the statutory powers granted to a co., but no injury has been occasioned to any individual, & there is none which is imminent or of irreparable consequence, the A.-G. alone can obtain an injunction to restrain the exorbitance.—WARE *v.* REGENT'S CANAL CO. (1858), 3 De G. & J. 212; 28 L. J. Ch. 155; 32 L. T. O. S. 136; 23 J. P. 3; 5 Jur. N. S. 25; 7 W. R. 67; 44 E. R. 1250, L. C.

Annotations:—**Refd.** A.-G. *v.* G. E. Ry. (1879), 11 Ch. D. 449; Lawrence *v.* West Somerset Mineral Ry., [1918] 2 Ch. 250. **Mentd.** A.-G. *v.* Frimley & Farnborough District Water Co., [1908] 1 Ch. 727; A.-G. *v.* Barnet District Gas & Water Co. (1909), 101 L. T. 651.

532. —— At instance of local authority.]—An annual highway board, constituted under Highway Act, 1835 (c. 50), acting as a local authority, under the Nuisances Removal Act, 1855 (c. 121), constructed in 1859 a system of sewers, which conveyed the sewage of their district into a stream, & thus occasioned a nuisance in the adjoining district:—*Held:* (1) the Highway Board of 1865 could not be compelled to take any steps to remedy the existing nuisance, but they could be restrained from exercising their statutory powers so as to increase the nuisance; (2) the local board of health of the district injured had *no locus standi* as pltfs. in a suit in which the injunction above mentioned was the only proper relief, & such suit ought to be by the A.-G. alone.—A.-G. *v.* RICHMOND (1866), L. R. 2 Eq. 306; 35 L. J. Ch. 597; 14 L. T. 398; 30 J. P. 708; 12 Jur. N. S. 544; 14 W. R. 686.

Annotations:—*As to* (1) **Distd.** A.-G. & Dommes *v.* Basingstoke Corpn. (1876), 45 L. J. Ch. 726. **Refd.** A.-G. *v.* Dorking Grdns. (1882), 20 Ch. D. 595.

533. —— —— Proceedings under Public Health Act, 1875 (c. 55.) s. 107.]—Above sect. enacts that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior ct. of law or equity to enforce the abatement or prohibition of any nuisance under the above Act:—*Held:* such proceedings must be ordinary proceedings known to the law, & in the absence of special damage a local authority cannot sue in respect of a public nuisance except with the sanction of the A.-G. by action in the nature of an information.—WALLASEY LOCAL BOARD *v.* GRACEY (1887), 36 Ch. D. 593;

529 i. *Attorney-General.*]—All actions in respect of public nuisances must be brought in the name of the A.-G.—OAK BAY DISTRICT CORPN. *v.* GARDNER (1914), 27 W. L. R. 960; 6 W. W. R. 1023; 17 D. L. R. 802; 19 B. C. R. 391.—**CAN.**

56 L. J. Ch. 739; 57 L. T. 51; 51 J. P. 740; 35 W. R. 694.

Annotations:—**Apprvd.** Tottenham U. D. C. *v.* Williamson, [1896] 2 Q. B. 353. **Apld.** Stoke Parish Council *v.* Price, [1899] 2 Ch. 277. **Distd.** Sheringham U. D. C. *v.* Holsey (1904), 91 L. T. 225.

534. —— —— ——.]—Above sect. enacts that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior ct. of law or equity to enforce the abatement or prohibition of any nuisance:—*Held:* such proceedings must be ordinary proceedings known to the law, & in the absence of special damage, a local authority cannot sue in respect of a public nuisance except by action in the nature of an information with the sanction of the A.-G.—TOTTENHAM URBAN DISTRICT COUNCIL *v.* WILLIAMSON & SONS, [1896] 2 Q. B. 353; 65 L. J. Q. B. 591; 75 L. T. 238; 60 J. P. 725; 44 W. R. 676, C. A.

Annotations:—**Apld.** Stoke Parish Council *v.* Price, [1899] 2 Ch. 277. **Distd.** Sheringham U. D. C. *v.* Holsey (1904), 91 L. T. 225.

535. —— ——.]—A parish council cannot in their own name without the A.-G. maintain an action to enforce a right of the inhabitants of the parish to the use of a well or spring of water.—STOKE PARISH COUNCIL *v.* PRICE, [1899] 2 Ch. 277; 68 L. J. Ch. 447; 80 L. T. 643; 63 J. P. 502; 47 W. R. 663.

Annotations:—**Refd.** Sheringham U. D. C. *v.* Holsey (1904), 91 L. T. 225; A.-G. & Spalding R. D. C. *v.* Garner, [1907] 2 K. B. 480.

536. —— ——.]—*Held:* the local authority could maintain the action in their own name.

If proceedings were taken for a nuisance & no special damage was alleged, they ought to be brought in the name of the A.-G.; but pltfs. not only alleged an improper use of the storm-water gullies, but claimed a declaration (LORD ALVERSTONE, C.J.).—HARWICH CORPN. *v.* BREWSTER (1901), 17 T. L. R. 274.

—— **Nuisances in regard to highways.**] — *See* HIGHWAYS, Vol. XXVI., pp. 450, 451, Nos. 1663–

(*b*) *Relators.*

See, generally, CROWN PRACTICE, Vol. XVI., pp. 481, 482, Nos. 3632–3646.

537. Who may be relator—Party interested.]—An information & bill was filed by pltf., a riparian proprietor on a tidal navigable river, to restrain deft., an opposite riparian proprietor, from constructing a jetty in the alveus of the river so as to injure pltf.'s property & interfere with the navigation:—*Held:* the suit being by information & bill was properly framed in respect of the private & public wrong complained of.—A.-G. *v.* LONSDALE (EARL) (1868), L. R. 7 Eq. 377; 38 L. J. Ch. 335; 20 L. T. 64; 33 J. P. 435; 17 W. R. 219.

Annotations:—**Refd.** A.-G. *v.* Terry (1873), 9 Ch. App. 425, n.; Orr-Ewing *v.* Colquhoun (1877), 2 App. Cas. 839; Lawes *v.* Turner & Frere (1892), 8 T. L. R. 584.

538. —— **Any person.**] — A.-G. & DOMMES *v.* BASINGSTOKE CORPN., No. 573, *post.*

539. —— **Local authority.**] — A.-G. *v.* LOGAN, No. 263, *ante.*

(*c*) *Exceptions to General Rule.*

i. *Private Individuals.*

540. When special damage sustained.] — No action lies for a nuisance, unless the person bringing it hath sustained some particular injury.—WILLIAMS'S CASE (1592), 5 Co. Rep. 72 b; 77 E. R. 163.

Annotations:—**Apld.** Fowler *v.* Sanders (1617), Cro. Jac. 446; Jeveson *v.* Moor (1699), 12 Mod. Rep. 262. **Refd.** Marys's Case (1612), 9 Co. Rep. 111 b; Dewell *v.* Sanders (1618), Cro. Jac. 490; Ashby *v.* White (1703), 2 Ld. Raym. 938; Kendall *v.* John (1708), Fortes. Rep. 104. **Mentd.** Jones *v.* Stone (1700), 1 Ld. Raym. 578.

541. ——.] — A prescription to lay logs of wood for fuel in the highways before the doors of ancient houses leaving sufficient room to pass is bad, & though it is a public nuisance yet a person deriving any special damage may have a private action.—FOWLER *v.* SANDERS (1617), Cro. Jac. 446; 79 E. R. 382.

Annotations:—**Refd.** Dewell *v.* Sanders (1618), Cro. Jac. 490; Jeveson *v.* Moor (1699), 12 Mod. Rep. 262. **Mentd.** R. *v.* Bell (1822), 1 L. J. O. S. K. B. 42; Elwood *v.* Bullock (1844), 13 L. J. Q. B. 330.

542. ——.] — IVESON *v.* MOORE (1699), 1 Ld. Raym. 486; Carth. 451; Comb. 480; 1 Com. 58; Holt, K. B. 10; 1 Salk. 15; Willes, 74, n.; 91 E. R. 1224; *sub nom.* JEVESON *v.* MOOR, 12 Mod. Rep. 262.

Annotations:—**Consd.** Wilkes *v.* Hungerford Market Co. (1835), 2 Bing. N. C. 281. **Apld.** Rose *v.* Groves (1843), 1 Dow. & L. 61; Dobson *v.* Blackmore (1847), 9 Q. B. 991. **Expld.** Soltau *v.* De Held (1851), 2 Sim. N. S. 133. **Apld.** Chamberlain *v.* West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605; Winterbottom *v.* Derby (1867), L. R. 2 Exch. 316. **Consd.** Higgins *v.* O'Donnell (1870), 18 W. R. 378; Metropolitan Board of Works *v.* McCarthy (1874), L. R. 7 H. L. 243. **Apld.**

PART IV. SECT. 2, SUB-SECT. 1.—B. (b).

537 i. *Who may be relator—Party interested.*]—A.-G. *v.* KIELY (1875), 22 Gr. 458.—**CAN.**

539 i. —— *Local authority.*]—A.-G. *v.* TORONTO STREET RY. Co. (1868), 14 Gr. 673.—**CAN.**

h. *Object of relators.*]—The object in having a relator is for the protection of the Crown against costs, not for the protection of deft.—A.-G. FOR MANITOBA *v.* WINNIPEG ELECTRIC RY. Co. (1912), 21 W. L. R. 908; 22 Man. L. R. 761; 5 D. L. R. 823; 2 W. W. R. 854.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 1.—B. (c) i.

540 i. *When special damage sustained.*]—A person throwing noxious matter into Lake Ontario, or any other navigable water, is liable both to an indictment & to a private action at the suit of any individual distinctly & peculiarly injured thereby.—WATSON *v.* CITY OF TORONTO GAS LIGHT & WATER CO. (1847), 4 U. C. R. 158.—**CAN.**

540 ii. ——.]—BRITISH CANADIAN SECURITIES, LTD. *v.* CITY OF VICTORIA CORPN. (1911), 19 W. L. R. 242; 16 B. C. R. 441.—**CAN.**

540 iii. ——.]—MINTZ *v.* HAMILTON RADIAL ELECTRIC RY. CO., [1923] 1 D. L. R. 268; 53 O. L. R. 171.—**CAN.**

540 iv. ——.]—TURTLE *v.* TORONTO CORPN. (1924), 56 O. L. R. 252.—**CAN.**

540 v. ——.]—SATKU VALAD KADIR *v.* IBRAHIM VALID MIRZA AGA (1877), I. L. R. 2 Bom. 457.—**IND.**

540 vi. ——.]—The rule of English law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any member of the public, does not apply to a zamindar who or whose predecessor in title had dedicated to the public the road over his zamindari land.—TOTA *v.* SARDUL SINGH (1888), I. L. R. 10 All. 553.—**IND.**

540 vii. ——.]—Public nuisance is actionable only at the suit of a party who has sustained special damage, & the case law of British India in this respect is the same as the rule of English law on the subject.—RAMPHAL RAI *v.* RAGHUNANDAN PRASAD (1888), I. L. R. 10 All. 498.—**IND.**

540 viii. ——.]—A private action cannot be maintained in respect of a public nuisance save by a person who suffers particular damage beyond what is suffered by him in common with all other persons affected by the nuisance.—BHAWAN SINGH *v.* NAROTTOM SINGH (1909), I. L. R. 31 All. 444.—**IND.**

540 ix. ——.]—O'SHEA *v.* CORK RURAL DISTRICT COUNCIL, [1914] 1 I. R. 16.—**IR.**

540 x. ——.]—In order to maintain an action for damage resulting from a public nuisance, pltf. must aver, & prove, some particular, actual, & direct (& not consequential only) injury to himself, differing, not merely in degree, from that which the public has sustained.—KAIAPOI (MAYOR, ETC.) *v.* BESWICK (1869), 1 C. A. 192.—**N.Z.**

540 xi. ——.]—MADIGAN *v.* WELLINGTON & MANAWATER RY. CO., MADIGAN *v.* SAUNDERS (1883), 2 N. Z. L. R. 209 (S. C.).—**N.Z.**

540 xii. ——.] — GREEN & SEA POINT MUNICIPALITY *v.* EGNAL & CO. (1902), 19 S. C. 376.—**S. AF.**

Sect. 2.—Civil proceedings: Sub-sect. 1, B. (c) i. & ii.; sub-sect. 2, A.]

Fritz *v.* Hobson (1880), 14 Ch. D. 542. **Refd.** Cameron *v.* Charing Cross Ry. (1865), 13 W. R. 390; Beckett *v.* Mid. Ry. (1867), L. R. 3 C. P. 82; Ricket *v.* Met. Ry. (1867), L. R. 2 H. L. 175; Benjamin *v.* Storr (1874), 30 L. T. 362; Lyon *v.* Fishmongers Co. & Thames Conservators (1875), 44 L. J. Ch. 408; Cale. Ry. *v.* Walker's Trustees (1882), 7 App. Cas. 259; Ratcliffe *v.* Evans, [1892] 2 Q. B. 524; Boyce *v.* Paddington B. C., [1903] 1 Ch. 109; Campbell *v.* Paddington Corpn., [1911] 1 K. B. 869. **Mentd.** Walmsley *v.* Russel (1704), 6 Mod. Rep. 200; Buccleugh & Queensberry *v.* Metropolitan Board of Works (1868), 18 L. T. 906.

543. ——.]—A.-G. *v.* FORBES, No. 530, *ante*.

544. ——.]—Where an individual sustains special damage from a nuisance, he may file a bill to restrain it without making the A.-G. a party.—SAMPSON *v.* SMITH (1838), 8 Sim. 272; 7 L. J. Ch. 260; 2 Jur. 563; 59 E. R. 108.

Annotations:—**Refd.** Lond *v.* Murray (1851), 17 L. T. O. S. 248; Soltau *v.* De Held (1851), 2 Sim. N. S. 133. **Mentd.** London Assocn. of Shipowners & Brokers *v.* London & India Docks Joint Committee, [1892] 3 Ch. 242.

545. ——.]—Where an injury is done to the public generally by a nuisance, & to persons individually, the latter may maintain a bill, without making the A.-G. a party thereto.—SPENCER *v.* LONDON & BIRMINGHAM RY. CO. (1836), 8 Sim. 193; 1 Ry. & Can. Cas. 159; 7 L. J. Ch. 281; 59 E. R. 77.

Annotations:—**Consd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377. **Folld.** Cook *v.* Bath Corpn. (1868), L. R. 6 Eq. 177. **Refd.** Lond *v.* Murray (1851), 17 L. T. O. S. 248; Soltau *v.* De Held (1851), 2 Sim. N. S. 133. **Mentd.** Thorne *v.* Taw Vale Ry. & Dock Co. (1850), 13 Beav. 10; London Assocn. of Shipowners & Brokers *v.* London & India Docks Joint Committee, [1892] 3 Ch. 242.

546. ——.]—An action will lie at the suit of a private individual who actually sustains an injury by reason of a public nuisance, which may possibly affect the public, & for which the person committing the nuisance would be indictable.—ROSE *v.* GROVES (1843), 5 Man. & G. 613; 1 Dow. & L. 61; 6 Scott, N. R. 645; 12 L. J. C. P. 251; 1 L. T. O. S. 146; 7 Jur. 951; 134 E. R. 705.

Annotations:—**Consd.** Dobson *v.* Blackmore (1847), 9 Q. B. 991; Kearns *v.* Cordwainers Co. (1859), 6 C. B. N. S. 388. **Expld.** A.-G. *v.* Thomas Conservators (1862), 1 Hem. & M. 1; Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662. **Apld.** Fritz *v.* Hobson (1880), 14 Ch. D. 542. **Consd.** Lingke *v.* Christchurch Corpn. (1912), 10 L. G. R. 773. **Refd.** Chamberlain *v.* West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605; Macey *v.* Metropolitan Board of Works (1864), 33 L. J. Ch. 377; Winterbottom *v.* Derby (1867), 16 L. T. 771. **Mentd.** Buccleuch & Queensberry *v.* Metropolitan Board of Works (1868), 37 L. J. Ex. 177; Ratcliffe *v.* Evans, [1892] 2 Q. B. 524.

547. ——.]—DOBSON *v.* BLACKMORE, No. 498, *ante*.

548. ——.]—SOLTAU *v.* DE HELD, No. 66, *ante*.

549. ——.]—A private injury arising from a public nuisance is the subject matter of an action for damages.—HARDCASTLE *v.* SOUTH YORKSHIRE RY. & RIVER DUN CO. (1859), 4 H. & N. 67; 28 L. J. Ex. 139; 32 L. T. O. S. 297; 23 J. P. 183; 5 Jur. N. S. 150; 7 W. R. 326; 157 E. R. 761.

Annotations:—**Consd.** Hounsell *v.* Smyth (1860), 7 C. B. N. S. 731. **Refd.** Binks *v.* South Yorkshire Ry. & River Dun Co. (1862), 3 B. & S. 244; Bolch *v.* Smith (1862), 10 W. R. 387. **Mentd.** R. *v.* Dant (1865), Le. & Ca. 567; Pearson *v.* Cox (1877), 2 C. P. D. 369; Latham *v.* Johnson & Nephew (1912), 82 L. J. K. B. 258; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253.

550. ——.]—To entitle a private person to maintain an action for a thing which amounts to a public nuisance, he must show that he has sustained a particular damage or injury other than & beyond the general injury to the public, & that such damage is direct & substantial. Pltf. kept a coffee house in a narrow street near Covent Garden. Defts. carried on an extensive business as auctioneers in the same neighbourhood, having an outlet at the rear of their premises next adjoining pltf.'s house, where they were constantly loading & unloading goods into & from vans. The vans intercepted the light from pltf.'s coffee shop to such an extent that he was obliged to burn gas nearly all day, & access to the shop was obstructed by the horses standing in front of the door, & the stench arising from their frequent staling there rendered pltf.'s dwelling incommodious & uncomfortable:—*Held:* the evidence disclosed such a direct & substantial private & particular damage to pltf. beyond that suffered by the rest of the public, as to entitle him to maintain an action.

The injury must be shown to be of a substantial character, not fleeting or evanescent . . . in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct & substantial (BRETT, J.).—BENJAMIN *v.* STORR (1874), L. R. 9 C. P. 400; 43 L. J. C. P. 162; 30 L. T. 362; 22 W. R. 631.

Annotations:—**Consd.** Fritz *v.* Hobson (1880), 14 Ch. D. 542; Barber *v.* Penley, [1893] 2 Ch. 447; Martin *v.* L. C. C. (1899), 80 L. T. 866. **Distd.** Malone *v.* Laskey, [1907] 2 K. B. 141. **Refd.** Lyon *v.* Fishmongers' Co. (1875), 10 Ch. App. 681, n.; Boyce *v.* Paddington B. C., [1903] 2 Ch. 556; Heath's Garage *v.* Hodges (1915), 14 L. G. R. 195.

551. ——.]—FRITZ *v.* HOBSON, No. 48, *ante*.

552. ——.]—A shopkeeper sued a local authority for damages caused by loss of business at his shop through the road which gave access to the shop being unnecessarily & negligently obstructed by them. Under an Act of Parliament defts. were empowered to obstruct the road temporarily while making a new street:—*Held:* there being no evidence before the ct. of any damage to pltf. arising out of any excess by defts. of their statutory powers, defts. were entitled to judgment.

Qu.: whether, assuming a loss of business through such an excess, the injury to pltf. would have been actionable.—MARTIN *v.* LONDON COUNTY COUNCIL (1899), 80 L. T. 866; 15 T. L. R. 431, C. A.

——.]—*See, generally*, CROWN PRACTICE, Vol. XVI., p. 488, No. 3701; INJUNCTION, Vol. XXVIII., pp. 497, 498, Nos. 990–1000.

—— **Nuisances in regard to highways.**]—*See* HIGHWAYS, Vol. XXVI., pp. 452–454, Nos. 1670–1708.

553. Where private right also interfered with.]—Where pltf. declared that before & at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, & that deft. wrongfully moored a barge across, & kept the same so moored, from thence hitherto, & thereby obstructed the public navigable creek, & prevented pltf. from navigating his barges so laden, *per quod* pltf. was obliged to convey his goods a great distance over land, & was put to trouble & expense in the carriage of his goods over land:—*Held:* this was such a special damage for which an action upon the case would lie.—ROSE *v.* MILES (1815), 4 M. & S. 101; 105 E. R. 773; *affg.* S. C. *sub nom.* MILES *v.* ROSE (1814), 5 Taunt. 705.

Annotations:—**Apld.** Greasly *v.* Codling (1824), 2 Bing. 263. **Consd.** Wilkes *v.* Hungerford Market Co. (1835), 2 Bing. N. C. 281. **Apld.** Rose *v.* Groves (1843), 1 Dow. & L. 61. **Distd.** Ricket *v.* Met. Ry. (1865), 5 B. & S. 156. **Apld.** Lyon *v.* Fishmongers' Co. & Thames Conservators (1875), 44 L. J. Ch. 408. **Refd.** R. *v.* Montague (1825), 4 B. & C. 598; Anglo-Algerian S.S. Co. *v.* Houlder Line, [1908] 1 K. B. 659. **Mentd.** Buccleugh & Queensberry *v.* Metropolitan Board of Works (1868), 18 L. T. 906.

554. ——.]—SOLTAU *v.* DE HELD, No. 66, *ante*.

——.]—*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 488, 489, Nos. 3701, 3712, 3713;

INJUNCTION, Vol. XXVIII., pp. 496, 497, Nos. 982–989.

Where special protection under private Act.]—*See, generally*, CROWN PRACTICE, Vol. XVI., p. 489, No. 3714.

Representative action.]—*See, generally*, CROWN PRACTICE, Vol. XVI., p. 489, No. 3718.

ii. *Local Authorities.*

555. Nuisance affecting property owned by authority.]—A.-G. *v.* LOGAN, No. 263, *ante*.

556. ——.]—A lane in the seaside town of S., which ran from the High Street to the top of the cliff, & varied from 6 feet to 4 feet 4 inches in width, had in 1811 been set out under an award by the Inclosure Comrs. under the S. Inclosure Act, 1809, as a public footpath. In 1903 the S. Urban District Council erected in the centre of the footpath an iron post to prevent the lane being used for wheeled vehicles. Deft. having overthrown the post, the district council brought an action against him in respect of the alleged trespass, claiming damages & an injunction; & claiming further a declaration that the lane was a public footpath vested in the council & under the council's control, & that it was not a carriageway. Deft. contended that the land was a public highway for all persons to go & return on foot, & with all manner of beasts & vehicles, & alleged that since the award of the comrs. there had been a dedication of the way as a cart road. Alternatively, he contended that before or since the award there had been a private right for the class consisting of the owners & occupiers of S. to use the way for carts. The evidence showed, on the one hand, that when carts were driven through the lane the foot passengers were obstructed, & had to wait until the carts had completed their passage, &, on the other hand, that for more than forty years past barrow carts, sometimes drawn by donkeys or ponies, had been continuously used in the lane:—*Held:* (1) the action, being in substance one for damages for interference with pltf.'s property, could be maintained without the A.-G. being made a party; (2) the user for wheeled traffic was in its inception & all along a public nuisance, & no length of time could legalise it, &, as regards dedication, no one had the power to dedicate even with the consent of the local authority.—SHERINGHAM URBAN DISTRICT COUNCIL *v.* HOLSEY (1904), 91 L. T. 225; 68 J. P. 395; 20 T. L. R. 402; 48 Sol. Jo. 416; 2 L. G. R. 744.

Annotation:—*As to* (1) **Refd.** A.-G. & Spalding R. C. *v.* Garner, [1907] 2 K. B. 480.

557. Joinder of claim for declaration.]—HARWICH CORPN. *v.* BREWSTER, No. 536, *ante*.

Proceedings under private Act.]—*See* CROWN PRACTICE, Vol. XVI., p. 489, No. 3715.

SUB-SECT. 2.—WHO MAY BE SUED.

A. In General.

558. Churchwardens—At instance of single parishioner.]—WOODMAN *v.* ROBINSON, No. 299, *ante*.

559. Person creating nuisance.]—Pltf. claimed an injunction to restrain defts. from discharging or permitting to pass sewage or other offensive matter through or over their sewage farm, or through the outfalls under their control, into a certain brook, so as to cause a nuisance to pltf.'s premises, & for damages:—*Held:* deft.'s farm produced the nuisance complained of, & pltf. was entitled to an injunction & an inquiry as to damages.—TAYLOR *v.* EAST BARNET VALLEY LOCAL BOARD (1885), 1 T. L. R. 257.

560. ——.]—The declaration in effect states that an anchor, the property of defts., somehow got into a part of the river where it became a nuisance to the navigation. The circumstance of the anchor being the property of defts. does not make defts. liable for the consequences of the nuisance, unless it is shown that defts. were the persons who committed the nuisance. Here it is alleged that the anchor was in a place so as to be a nuisance to the navigation, but not that defts. committed the nuisance. It is not alleged that the obstruction was in a navigable part of the river, or that the anchor was negligently placed there, but merely that it was removed somehow or other (*per* CUR.).—HANCOCK *v.* YORK, NEWCASTLE & BERWICK RY. CO. (1850), 10 C. B. 348; 14 L. T. O. S. 467; 138 E. R. 140.

561. Person permitting nuisance—Nuisance already existing.]—Defts., a canal co., incorporated by Act of Parliament in 1772, & empowered by their Act to take water for the purposes of their undertaking from a stream then pure, but since become polluted by the proximity of numerous dwellings, was, with its lessees, whose lease was about to expire, indicted for a nuisance, in allowing the foul water to stagnate in the basin of their canal; & judgment for the Crown was entered up against the lessees, who, at the instance of the co., had given notice of appeal. Upon an information being filed against the co. & their lessees, the co. by their answer admitting the polluted state of the water, but insisting on a right to use it, however foul, & saying they should probably continue to draw the water into their canal upon the expiration of the lease in April, 1866:—*Held:* it was no answer to the prayer for an injunction to say that the co. did not pollute the water, they having the power to draw it or not into their canal, as they pleased.—A.-G. *v.* BRADFORD CANAL PROPRIETORS (1866), L. R. 2 Eq. 71; 35 L. J. Ch. 619; 14 L. T. 248; 15 L. T. 9; 14 W. R. 579.

Annotations:—**Consd.** A.-G. *v.* Tod-Heatley, [1897] 1 Ch. 560. **Refd.** Saxby *v.* Manchester & Sheffield Ry. (1869), L. R. 4 C. P. 198; Hill *v.* Metropolitan Asylum Managers (1879), 4 Q. B. D. 433; A.-G. *v.* Wimbledon House Estate Co., [1904] 2 Ch. 34.

562. —— **Duty to prevent.**]—A.-G. *v.* TOD HEATLEY, No. 221, *ante*.

563. —— **Nuisance natural & probable effect of permission.**]—An owner of a public-house erected an urinal in a private passage leading out of the street, & enclosed it between doors which he kept locked at night. There was a space between the line of area railings in the street & the urinal door nearest to the street, which space he shut off from the street with an iron gate placed flush with the line of railings. This gate was never locked. It being proved that persons habitually used the space between the door & the gate in such a manner as to cause to the neighbours a nuisance,

PART IV. SECT. 2, SUB-SECT. 1.—B. (c) ii.

k. *Nuisance affecting property not owned by authority.*]—A municipal corpn. established under Municipal Corpns. Act, 1863, has no right to institute on behalf of the public or any private individual proceedings to restrain the continuance of a nuisance.—BALLARAT EAST CORPN. *v.* SMITH (1864), 1 W. W. & A'B. 52.—**AUS.**

PART IV. SECT. 2, SUB-SECT. 2.—A.

l. *Commonwealth.*]—EVANS *v.* FINN (1904), 4 S. R. N. S. W. 297; 21 N. S. W. W. N. 118.—**AUS.**

m. *Whether Commanding Officer of Curragh Camp.*]—IGOE *v.* EVELEIGH (1870), I. R. 4 C. L. 238.—**IR.**

n. *Occupier.*]—An occupier of land is liable to an action by a private person damaged by a nuisance existing in or coming from the land if, being a successor in title, he took the land from his predecessor with an artificial nuisance upon it.—BOLTON *v.* KNIGHT, [1924] N. Z. L. R. 1043.—**N.Z.**

Sect. 2.—Civil proceedings: Sub-sect. 2, A., B., C. & D.]

which he took no steps to prevent:—*Held:* he was responsible for such user, it being a probable consequence of the manner in which he had arranged the premises.—CHIBNALL *v.* PAUL & SON (1881), 29 W. R. 536.

564. —— Assembly of crowd.]—INCHBALD *v.* ROBINSON, INCHBALD *v.* BARRINGTON, No. 290, *ante*.

565. —— ——.]—CHASE *v.* LONDON COUNTY COUNCIL & LESLIE & CO., LTD. (1898), 62 J. P. 184; 14 T. L. R. 177.

—— ——.]—*See* HIGHWAYS, Vol. XXVI., pp. 427–429, Nos. 1472–1485.

566. —— Nuisance created by licencee.]—Where the occupier of lands grants a licence to another to do certain acts on the land, & the licencee in doing them commits a nuisance, the occupier may be made deft. to a suit to restrain the nuisance.—WHITE *v.* JAMESON (1874), L. R. 18 Eq. 303; 38 J. P. 694; 22 W. R. 761.

Annotations:—**Refd.** Chibnall *v.* Paul (1881), 29 W. R. 536; Winter *v.* Baker (1887), 3 T. L. R. 569; Phillips *v.* Thomas (1890), 62 L. T. 793; A.-G. *v.* Tod-Heatley (1897), 66 L. J. Ch. 275; A.-G. *v.* Cory, Kennard *v.* Cory (1919), 83 J. P. 221; Kennard *v.* Cory, [1922] 1 Ch. 265. **Mentd.** Evans *v.* Davis (1878), 10 Ch. D. 747; Tritton *v.* Bankart (1887), 56 L. T. 306; Jenkins *v.* Jackson (1888), 40 Ch. D. 71.

-.]—*See* No. 585, *post*.

Nuisance arising out of pipe laying operations.]—*See* WATER SUPPLY.

Nuisance arising out of statutory duty.]—*See* Part III., Sect. 2, sub-sect. 2, C. (*c*), *ante*.

B. Continuing Nuisance.

567. Original creator of nuisance — Though no power to remove.]—The original erector of a nuisance is liable in damages to the party injured for every continuing nuisance; & it makes no difference that the injured party has the power himself of abating the nuisance, or that the original erector has no means of removing it.

A building, which was an obstruction to a market, was erected under the superintendence & direction of defts., on land belonging to a corporate body, of which they were members. The then owner of the market afterwards demised it to pltf.:—*Held:* pltf. might maintain an action against defts. as for a continuing nuisance.—THOMPSON *v.* GIBSON (1841), 7 M. & W. 456; 10 L. J. Ex. 330; 151 E. R. 845.

Annotations:—**Refd.** Russell *v.* Shenton (1842), 3 Q. B. 449; Clegg *v.* Dearden (1848), 12 Q. B. 576; Battishill *v.* Reed (1856), 18 C. B. 696; Whitehouse *v.* Fellowes (1861), 10 C. B. N. S. 765; Dawson *v.* G. N. & City Ry., [1904] 1 K. B. 277; Theyer *v.* Purnell, [1918] 2 K. B. 333; Kennard *v.* Cory, [1922] 1 Ch. 265. **Mentd.** Bennett *v.* Bayes (1860), 5 H. & N. 391.

568. Owner of source of nuisance — Nuisance created by previous owner.]—ROLFE *v.* ROLFE (1582), Moore, K. B. 353; 72 E. R. 624.

Annotation:—**Refd.** Beswick *v.* Combdon (1596), Moore, K. B. 353.

569. —— ——.]—BESWICK *v.* COMBDON (1596), Moore, K. B. 353; Cro. Eliz. 402, 520; 72 E. R. 624; *sub nom.* BESWICK *v.* OMUDEN, Moore, K. B. 599.

Annotations:—**Refd.** Penruddock's Case (1598), 5 Co. Rep. 100 b; Palmer *v.* Poulteney (1695), 2 Salk. 458; Shalmer *v.* Pulteney (1696), 1 Ld. Raym. 276.

570. —— Nuisance in existence before possession by plaintiff.] — WESTBOURNE *v.* MORDANT (1590), Cro. Eliz. 191; 78 E. R. 447; *sub nom.* WESHBOURN & MORDANT'S CASE, 2 Leon. 103; 3 Leon. 174.

Annotation:—**Refd.** Thompson *v.* Gibson (1841), 7 M. & W. 456.

571. ——.] — BRODER *v.* SAILLARD, No. 321, *ante*.

572. Person allowing continuance—Though no benefit derived.]—A stream, the soil, but not the banks, of which belonged to defts., & to the use of which pltf. had a right for the working of his mill, was obstructed by some person without the consent of defts. Defts. gained no benefit thereby, & declined to incur any expense, or take any steps in removing the obstruction. In an action for obstructing & diverting the stream:—*Held:* there was no such wrongful continuance of the obstruction on defts.' part as to render them liable.—SAXBY *v.* MANCHESTER & SHEFFIELD RY. CO. (1869), L. R. 4 C. P. 198; 38 L. J. C. P. 153; 19 L. T. 640; 17 W. R. 293.

Annotations:—**Consd.** Barker *v.* Herbert, [1911] 2 K. B. 633. **Apprvd.** Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341.

573. —— ——.]—A corpn. which became the sanitary authority in their town in 1873, suffered sewage to continue to run from a drain in the town into pltf.'s canal, by a culvert running through pltf.'s property, which created some nuisance & some damage to pltf.:—*Held:* an information would lie, & the corpn. were liable to be restrained by injunction from continuing such nuisance & damage, though they derived no profit from the works causing the nuisance.

In the case of a public nuisance, the A.-G. is justified in taking proceedings at the relation of any person, whether residing near the nuisance or not, & whether interested in the property on which the nuisance exists or not.—A.-G. & DOMMES *v.* BASINGSTOKE CORPN. (1876), 45 L. J. Ch. 726; 24 W. R. 817.

Annotation:—**Refd.** Glossop *v.* Heston & Isleworth L. B. (1879), 12 Ch. D. 102.

574. —— Duty to prevent.] — A.-G. *v.* TOD HEATLEY, No. 221, *ante*.

575. —— ——.]—A canal co. owned a canal bank & some land beyond it. Adjoining this land was a piece of land belonging to certain mineowners which, having been acquired by their predecessors in title for mining but found useless for that purpose, had been left unused & unoccupied by its owners. For some years a third person in return for payment purported to allow others to discharge refuse at first on the canal co.'s land & afterwards, without the knowledge or assent of the mineowners, upon their land also. The refuse was carried over the canal co.'s embankment & land & the co. charged a wayleave rent for allowing this. Early in 1920 the refuse on the mineowners' land was found to be on fire; in May, 1920, the fire was approaching the canal co.'s land, & the co., fearing that it might reach to & injure the canal, called upon the mineowners to extinguish it. Thereupon by agreement between the canal co. & the mineowners the canal co. entered upon the mineowners' land & extinguished the fire, & the mineowners paid to the canal co. half the expense of so doing, without prejudice to the legal position of the parties. In an action by the mineowners for a declaration that they were not liable to pay any part of the cost of the works undertaken & for an order for repayment of the sum paid

PART IV. SECT. 2, SUB-SECT. 2.—B.

574 i. *Person allowing continuance—Duty to prevent.*]—EWING *v.* HEWITT (1900), 20 C. L. T. 202; 27 A. R. 296.—CAN.

574 ii. —— ——.]—As a general rule, an action will lie against a person who continues a nuisance which he did not create, if he has power to prevent its continuance.—WHITLOCK *v.* PARSONS (1875), 3 C. A. 184; 1 J. R. N. S. 46.—N.Z.

by them in respect thereof:—*Held:* pltfs. were entitled to succeed on the ground that there was no public nuisance, & no evidence that they either caused or continued the fire or were guilty if any negligence in relation to it.—JOB EDWARDS, LTD. *v.* BIRMINGHAM NAVIGATIONS, [1924] 1 K. B. 341; 93 L. J. K. B. 261; 130 L. T. 522; 40 T. L. R. 88; 68 Sol. Jo. 501, C. A.

Annotations:—**Reld.** Ilford U. D. C. *v.* Beal, [1925] 1 K. B. 671; Smith *v.* G. W. Ry. (1926), 135 L. T. 112.

C. Joint Nuisance.

576. Single act not nuisance—Nuisance by combined acts.]—The acts of several persons may together constitute a nuisance, which the ct. will restrain though the damage occasioned by the acts of any one, if taken alone, would be inappreciable.—THORPE *v.* BRUMFITT (1873), 8 Ch. App. 650; 37 J. P. 742, L. JJ.

Annotations:—**Apld.** Lambton *v.* Mellish, Lambton *v.* Cox, [1894] 3 Ch. 163. **Consd.** Sadler *v.* G. W. Ry., [1895] 2 Q. B. 688. **Refd.** Fritz *v.* Hobson (1880), 42 L. T. 225; Blair & Sumner *v.* Deakin, Eden & Thwaites *v.* Deakin (1887), 57 L. T. 522; A.-G. *v.* Scott, [1905] 2 K. B. 160.

577. —— —— Single contributor liable.]—Where several manufacturers, having their works upon a stream, cause a nuisance to a riparian owner below them by discharging offensive matter into the stream, it is no answer, in an action for nuisance brought by the riparian owner against one of those manufacturers, for such manufacturer to say that the share he contributed to the nuisance is infinitesimal & unappreciable. The riparian owner is entitled to have the water of the stream sent down to him in its original pure condition, & has a right to take the manufacturers in detail & prevent each one of them from discharging into the stream his contribution to that which becomes in the aggregate a grievous nuisance, & which causes the damage complained of.—BLAIR & SUMNER *v.* DEAKIN, EDEN & THWAITES *v.* DEAKIN (1887), 57 L. T. 522; 52 J. P. 327; 3 T. L. R. 757.

578. —— —— ——.]—Where an injury has been done to the private rights of a person, whether tenant or landlord, that person is entitled to damages, although only nominal, & where in such a case an injury is apprehended an injunction will be granted as against the party in default. In an action by N., tenant of a certain farm for damages, & an injunction against T., a sanitary authority, for polluting pltf.'s stream:—*Held:* pltf.'s private right having been injured he was entitled to nominal damages & an injunction against T., although T. had only polluted the stream in conjunction with others.—NIXON *v.* TYNEMOUTH UNION RURAL SANITARY AUTHORITY (1888), 52 J. P. 504, D. C.

579. —— —— ——.]—The acts of two or more persons may, taken together, constitute such a nuisance that the ct. will restrain all from doing the acts constituting the nuisance although the annoyance occasioned by the act of any one of them if taken alone would not amount to a nuisance.—LAMBTON *v.* MELLISH, LAMBTON *v.* COX, [1894] 3 Ch. 163; 63 L. J. Ch. 929; 71 L. T. 385; 58 J. P. 835; 43 W. R. 5; 10 T. L. R. 600; 38 Sol. Jo. 647; 8 R. 807.

Annotations:—**Consd.** Sadler *v.* G. W. Ry., [1895] 2 Q. B. 688. **Refd.** Husey *v.* Bailey (1895), 11 T. L. R. 221; A.-G. *v.* Scott, [1905] 2 K. B. 160.

579a. —— —— ——.]—SADLER *v.* GREAT WESTERN RY. CO., No. 644, *post.*

D. Landlords and Tenants.

See, generally, LANDLORD & TENANT, Vol. XXX., pp. 342 *et seq.*; Vol. XXXI., pp. 1 *et seq.*

580. Liability of tenant—Nuisance created by landlord.]—If a man erect a mill to the nuisance of another, an action will lie against his lessee.—BRENT *v.* HADDON (1619), Cro. Jac. 555; 79 E. R. 476.

Annotations:—**Reld.** Rosewell *v.* Prior (1701), 2 Salk. 460; Russell *v.* Shenton (1842), 3 Q. B. 449; Rich *v.* Basterfield (1847), 16 L. J. C. P. 273; Job Edwards *v.* Birmingham Canal Navigations (1923), 93 L. J. K. B. 261.

581. —— —— Alternative liability of landlord.]—If tenant for years erect a nuisance, for which damages are recovered, & the nuisance is continued in the lands of his lessee, an action for the continuance of it may be against either.—ROSWELL *v.* PRIOR (1701), Holt, K. B. 500; 12 Mod. Rep. 635; 90 E. R. 1175; *sub nom.* ROSEWELL *v.* PRIOR, 1 Ld. Raym. 713; 2 Salk. 460; 6 Mod. Rep. 116.

Annotations:—**Expld.** Cheetham *v.* Hampson (1791), 4 Term Rep. 318; Bush *v.* Steinman (1799), 1 Bos. & P. 404. **Apld.** R. *v.* Pedley (1834), 3 L. J. M. C. 119. **Consd.** Thompson *v.* Gibson (1841), 7 M. & W. 456; Rich *v.* Basterfield (1847), 4 C. B. 783. **Distd.** Smith *v.* Kenrick (1849), 7 C. B. 515. **Consd.** Gandy *v.* Jubber (1864), 5 B. & S. 78. **Refd.** Todd *v.* Flight (1860), 9 C. B. N. S. 377; Mason *v.* Shrewsbury & Hereford Ry. (1871), L. R. 6 Q. B. 578; West Ham Central Charity Board *v.* East London Waterworks Co., [1900] 1 Ch. 624; Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487. **Mentd.** Scott *v.* Shepherd (1773), 2 Wm. Bl. 892; Swansborough *v.* Coventry (1832), 9 Bing. 305: Wheeldon *v.* Burrows (1879), 12 Ch. D. 31.

582. —— Nuisance created by tenant.]—(1) A person who lets premises with a nuisance upon them, & subsequently receives rent, is liable for the continuance of the nuisance.

(2) A landlord is not liable in respect of a new nuisance created by his tenant during the term.

(3) When a landlord lets premises, the natural consequence of the regular use of which is that they will become a nuisance unless properly attended to, he is liable if they afterwards become a nuisance by such regular use.

(4) The landlord ought, in such case, either to stipulate with his tenants that they will do that which is necessary to prevent the premises from becoming a nuisance, or to reserve to himself the power of entering for the purpose.—R. *v.* PEDLY (1834), 1 Ad. & El. 822; 3 Nev. & M. K. B. 627; 3 L. J. M. C. 119: 110 E. R. 1422.

Annotations:—*As to* (1) **Consd.** Russell *v.* Shenton (1842), 3 Q. B. 449; Rich *v.* Basterfield (1847), 4 C. B. 783; R. *v.* Stephens (1866), L. R. 1 Q. B. 702. **Distd.** Titterton *v.* Kingsbury Collieries (1911), 104 L. T. 569. **Refd.** R. *v.* Bradford Navigation Co. (1865), 6 B. & S. 631; Hall *v.* Norfolk, [1900] 2 Ch. 493. *As to* (2) **Consd.** Gandy *v.* Jubber (1864), 5 B. & S. 78. **Refd.** Francomb *v.* Freeman (1868), 9 B. & S. 8; Gwinnell *v.* Eamer (1875), L. R. 10 C. P. 658; *As to* (3) **Refd.** Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487. *Generally.* **Reld.** Todd *v.* Flight (1860), 9 C. B. N. S. 377.

583. —— Nuisance arising from user by tenant—Premises let with source of nuisance.]—In case for a nuisance occasioned by drains on the premises belonging to deft. & adjoining the premises of pltf., the declaration alleged that deft. was the owner & proprietor of the drains, & that he ought to have kept them cleansed, & have prevented the accumulation of filth from running into the dwelling-house of pltf., but neglected to do so, whereby. etc.:—*Held:* the declaration was bad, as it did not show that deft. was the occupier of

PART IV. SECT. 2, SUB-SECT. 2.—D. ——— *ability of tenant—Nuisance tenant.*]—If the nuisance ——— ... the time of letting, both tenant & owner are liable. If it arises after the tenancy is created, the tenant only is responsible.—R. *v.* OSLER (1872), 32 U. C. R. 324.—CAN.

582 ii. —— ——.]—HOME *v.* KELSO LOCAL AUTHORITY (1876), 3 Couper, 239.—SCOT.

o. —— *Nuisance created by stranger.*]—A lessee is liable for a nuisance created on his land, although he s not in actual occupation of it, &

Sect. 2.—Civil proceedings: Sub-sect. 2, D., E. & F.; sub-sect. 3, A.]

the drains, & the nuisance was not shown to be of a permanent or continuing character.—RUSSELL *v.* SHENTON (1842), 3 Q. B. 449; 2 Gal. & Dav. 573; 11 L. J. Q. B. 289; 6 Jur. 1083; 114 E. R. 579.

Annotations:—**Apld.** Chauntler *v.* Robinson (1849), 4 Exch. 163. **Refd.** Todd *v.* Flight (1860), 9 C. B. N. S. 377; Gwinnell *v.* Eamer (1875), L. R. 10 C. P. 658; Humphries *v.* Cousins (1877), 2 C. P. D. 239; Nelson *v.* Liverpool Brewery Co. (1877), 2 C. P. D. 311.

584. —— —— ——.] — Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession.

Where an action was brought against A., the owner of premises, for a nuisance arising from smoke issuing out of a chimney, to the prejudice of pltf. in his occupation of an adjoining messuage, on the ground that A., having erected the chimney, & let the premises with the chimney so erected, had impliedly authorised the lighting of a fire therein:—*Held:* (1) the action would not lie; (2) inasmuch as the premises were in the occupation of B. a tenant, at the time the fires were lighted, A. was entitled to a verdict on a plea of "not possessed," the allegation as to possession, having reference to the time when the nuisance complained of was committed, & not to the time at which the chimney was erected.—RICH *v.* BASTERFIELD (1847), 4 C. B. 783; 16 L. J. C. P. 273; 9 L. T. O. S. 77, 356; 11 Jur. 696; 136 E. R. 715.

Annotations:—*As to* (1) **Consd.** Todd *v.* Flight (1860), 9 C. B. N. S. 377; Brown *v.* Bussell, Francomb *v.* Freeman (1868), L. R. 3 Q. B. 251; Barker *v.* Herbert, [1911] 2 K. B. 633. **Refd.** Simpson *v.* Savage (1856), 1 C. B. N. S. 347; Gandy *v.* Jubber (1864), 5 B. & S. 78; Winter *v.* Baker (1887), 3 T. L. R. 569. *As to* (2) **Distd.** Harris *v.* James (1876), 45 L. J. Q. B. 544. **Refd.** R. *v.* Bradford Navigation Co. (1865), 6 B. & S. 631; Hall *v.* Norfolk, [1900] 2 Ch. 493; Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465. *Generally,* **Refd.** A.-G. *v.* Cory, Kennard *v.* Cory (1919), 83 J. P. 221. **Mentd.** Reedie *v.* L. & N. W. Ry., Hobbit *v.* Same (1849), 4 Exch. 244; Hole *v.* Barlow (1858), 4 Jur. N. S. 1019; Bamford *v.* Turnley (1862), 3 B. & S. 66; White *v.* Jameson (1874), L. R. 18 Eq. 303; Hope *v.* Walter, [1900] 1 Ch. 257.

585. —— **Nuisance authorised by landlord's licence.**]—A.-G. *v.* KIRK (1896), 12 T. L. R. 514, C. A.

586. Liability of landlord — Premises let with nuisance.]—R. *v.* PEDLY, No. 582, *ante.*

587. —— ——.] — RICH *v.* BASTERFIELD, No. 584, *ante.*

588. —— ——.]—The owner of property who constructs a sewer upon it in an imperfect manner, & who afterwards lets part of the property to another person, continuing the sewer in its imperfect state, is liable for damage occurring to the property so let, from the insufficient construction of the work.—ALSTON *v.* GRANT (1854), 3 E. & B. 128: 2 C. L. R. 933; 23 L. J. Q. B. 163; 22 L. T. O. S. 221; 18 Jur. 332; 2 W. R. 161; 118 E. R. 1089.

Annotation:—**Refd.** Hargroves, Aronson *v.* Hartop (1905), 74 L. J. K. B. 233.

589. —— **Nuisance created by tenant—Authorised by lease.**]—A. let to B. a field for the purpose of its being worked as a lime quarry. The ordinary way of getting the limestone was by means of blasting, & A. authorised the quarrying of the stone & the erection of lime kilns in the field. A nuisance was caused to the adjoining occupier by the blasting & by the smoke from the kilns, & he brought an action against both A. & B. On demurrer by A.:—*Held:* the landlord was liable, although the nuisance was actually created by the act of his tenant, because the terms of the demise were an authority from him to B. to create the nuisance, which was therefore the necessary consequence of the mode of occupation contemplated in the demise.—HARRIS *v.* JAMES (1876), 45 L. J. Q. B. 545; 35 L. T. 240; 40 J. P. 663.

Annotations:—**Refd.** Phillips *v.* Thomas (1890), 62 L. T. 793; A.-G. *v.* Cory, Kennard *v.* Cory (1919), 83 J. P. 221; Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465.

590. —— —— ——.]—In a lease of two rooms in a building there was a covenant in the usual terms by the lessor for quiet enjoyment. The lessor subsequently let a large room above these two rooms to S. for thirty shillings a week, for the purpose of being used for dancing classes & entertainments. The lessee of the two rooms below complained of a nuisance occasioned by this user of the room in respect of (*a*) noise & vibration, & (*b*) offensive behaviour on the staircase by persons who frequented the room, & brought an action against his lessor & S., claiming an injunction:—*Held:* (1) neither of defts. were legally liable for the nuisance upon the staircase; & neither of the nuisances rendered the lessors liable as for a breach of the covenant for quiet enjoyment; (2) both defts. were liable under the general law for the nuisance as to noise, in respect of which pltf. was entitled, under the circumstances, to nominal damages, but not to an injunction.—JENKINS *v.* JACKSON (1888), 40 Ch. D. 71; 58 L. J. Ch. 124; 60 L. T. 105; 37 W. R. 253; 4 T. L. R. 747.

Annotations:—*As to* (2) **Refd.** Barber *v.* Penley, [1893] 2 Ch. 447; Jaeger *v.* Mansions Consolidated (1902), 87 L. T. 690; Williams *v.* Gabriel, [1906] 1 K. B. 155; Phelps *v.* City of London Corpn., [1916] 2 Ch. 255; A.-G. *v.* Cory, Kennard *v.* Cory (1919), 83 J. P. 221.

591. —— **Lease with knowledge of probable nuisance.**]—A man is not in general liable for nuisances committed by his tenant, but B. [the landlord] was a party to these nuisances in the sense that he had let the yard knowing that it was to be used for these shows, & after it had been let for one week he had again let it, knowing well what had been done in the meantime. The injunction must therefore go against both defts. (KEKEWICH, J.).—WINTER *v.* BAKER (1887), 3 T. L. R. 569.

Annotation:—**Refd.** Jenkins *v.* Jackson (1888), 40 Ch. D. 71.

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although the nuisance is created by strangers, if he allows or assents to it.—ELLIOTT *v.* BRENCHLEY, 3 J. R. N. S. 9.—**N.Z.**

586 i. *Liability of landlord—Premises let with nuisance.*]—MCEWAN *v.* MILLS (1865), 4 W. W. & A'B. 118.—**AUS.**

586 ii. —— ——.]—An owner of premises subject to a term with a nuisance upon them is liable for such nuisances only (1) where the nuisance was in existence at the time when he let the premises; or (2) where he continued the nuisance; or (3) where he is under a covenant to repair the premises causing the nuisance.—WILLIAMSON *v.* FRIEND (1901), 1 S. R. N. S. W. 133; 18 N. S. W. W. N. 32.—**AUS.**

586 iii. —— ——.]—CULL *v.* GREEN (1924), 27 W. A. L. R. 62.—**AUS.**

586 iv. —— ——.]—R. *v.* OSLER (1872), 32 U. C. R. 324.—**CAN.**

586 v. —— ——.]—CROWELL *v.* ARCHBOLD (1906), 1 E. L. R. 169.—**CAN.**

586 vi. —— ——.]—If land is let with a nuisance on it, known, or which ought to have been known, to the landlord to be in existence at the time of the letting, & there is no contract between the landlord & tenant that the tenant is to get rid of the nuisance, then the landlord as well as the tenant is liable for the continuance of the nuisance during the tenancy.—WINTRUP *v.* MITCHELL (1895), 15 N. Z. L. R. 232.—**N.Z.**

See, also, LANDLORD & TENANT, Vol. XXX., 510, No. 1656; Vol. XXXI., pp. 344 *et seq.*; HIGHWAYS, Vol. XXVI., pp. 413 *et seq.*; BOUNDARIES, Vol. VII., pp. 281 *et seq.*

E. Contractors and their Servants.

See MASTER & SERVANT, Vol. XXXIV., pp. 155–167, Nos. 1216–1298.

F. Public Bodies.

See, generally, CORPORATIONS, Vol. XIII., pp. 398–408, Nos. 1216–1285; LOCAL GOVERNMENT, Vol. XXXIII., pp. 21–28, Nos. 88–132.

See HIGHWAYS, Vol. XXVI., pp. 398–410, Nos. 1239–1310; pp. 571–588, Nos. 2631–2782; PUBLIC AUTHORITIES & PUBLIC OFFICERS; PUBLIC HEALTH; SEWERS & DRAINS.

SUB-SECT. 3.—DEFENCES.

A. In General.

592. Abatement before action brought.]—In an action on the case for a nuisance, it is no plea to say that it was removed by pltf. before action brought.—KENDRICK *v.* BARTRAM (1677), Freem. K. B. 230; 2 Mod. Rep. 253; 89 E. R. 164.

593. Acquiescence by plaintiff.]—ANON. (1709), 2 Eq. Cas. Abr. 522; 22 E. R. 441.

Annotations:—**Apld.** Williams *v.* Jersey (1841), Cr. & Ph. 91. **Refd.** McManus *v.* Cooke (1887), 35 Ch. D. 681.

594. ——.]—A party may so encourage another in the erection of a nuisance as to give the adverse party an equity to restrain him from recovering damages at law for such nuisance when completed.—WILLIAMS *v.* JERSEY (EARL) (1841), Cr. & Ph. 91; 10 L. J. Ch. 149; 5 Jur. 426; 41 E. R. 424, L. C.

Annotations:—**Mentd.** Smith *v.* Kay (1859), 7 H. L. Cas. 751; Osborne *v.* Bradley, [1903] 2 Ch. 446.

595. Caused by plaintiff's own act.]—An action for a nuisance to a house cannot be maintained for that which was no nuisance to the house before a new window was opened in it by pltf., & which becomes a nuisance only by that act.—LAWRENCE *v.* OBEE (1814), 3 Camp. 514; 170 E. R. 1465, N. P.

596. Accident.]—HIGGINS *v.* BURMAN (1837), 1 Jur. 217.

597. Default of third party—No defence to action.]—Declaration in case, alleging that pltf. was reversioner of a house, garden, & premises, then occupied by his tenant B.; that deft. was possessed & in the occupation of a close near to the house, etc.; & that before & at the time, etc., there was a watercourse in the close, & deft., by reason of his possession of the close, ought to have scoured & kept open the watercourse so often as was necessary, to prevent the water from being obstructed, & from running out of the watercourse unto, into, & under the house, etc. Breach, deft., during the tenant's occupation, wrongfully permitted the watercourse to be obstructed for want of proper cleansing, insomuch that the water was penned back, & ran into & damaged the said house, to the injury of pltf.'s reversion. Plea, that a wall, parcel of pltf.'s said premises, was situate near to the said watercourse & to deft.'s close; &, by reason of the said wall being, through the neglect of B., the tenant in that behalf, ruinous, etc., part of the said wall, near to the said watercourse, before & at the times, etc., fell down, &, by means thereof, rubbish, etc., being part of the materials, fell into the watercourse, & the same was thereby choked up as in the declaration, & the water for a short time unavoidably was penned back, etc., & ran out, as in the declaration mentioned. Averment, that deft., in a short & reasonable time, after he had notice that the watercourse was so choked up, etc., & before action was brought, viz. on, etc., cleansed out the same, so that the water flowed as it ought to do:—*Held:* the alleged default of the tenant was no answer, the plea not showing that the owners & occupiers of the estate for the time being were bound to repair the wall which fell, & deft. could not excuse himself by averring that he repaired as soon as he had notice of the injury, for he became liable at the time when the injury occurred. So if he had alleged that he repaired as soon as possible after the injury.—BELL *v.* TWENTYMAN (1841), 1 Q. B. 766; 1 Gal. & Dav. 223; 10 L. J. Q. B. 278; 6 Jur. 366; 113 E. R. 1324.

Annotations:—**Consd.** Carstairs *v.* Taylor (1871), L. R. 6 Exch. 217. **Refd.** Taylor *v.* Stendall (1845), 5 L. T. O. S. 214; Humphries *v.* Cousins (1877), 2 C. P. D. 239. **Mentd.** Goodhart *v.* Hyett (1883), 25 Ch. D. 182.

——.]—*See* BOUNDARIES, Vol. VII., p. 284, No. 141; HIGHWAYS, Vol. XXVI., p. 430, No. 1498; SEWERS & DRAINS; WATERS & WATERCOURSES; WATER SUPPLY.

598. Leave & licence.]—In case, for an injury to pltf.'s reversion, by destroying a chimney, etc., parcel of pltf.'s messuage, pltf. was allowed, after the expiration of the term following the appearance of deft. to add counts . . . for removing deft.'s messuage without shoring up pltf.'s messuage, whereby pltf.'s chimney, which was entitled to the support of deft.'s messuage, was damaged, & for unskilfully pulling down deft.'s messuage, whereby the chimney of pltf.'s messuage was injured. Deft. was allowed to plead to the whole declaration, leave & licence.—LANGFORD *v.* WOODS (1844), 7 Man. & G. 625; 8 Scott, N. R. 369; 3 L. T. O. S. 182; 135 E. R. 251.

599. Act done to prevent unlawful act by plaintiff.]—The declaration stated that pltf. had land on which there were grouse, & that deft., with intent to frighten them, & to prevent pltf. from shooting them, unlawfully fired guns so as to be a nuisance, & thereby frightened away & prevented pltf. from shooting them. Deft. pleaded that the Duke of R. possessed land adjoining pltf., & that pltf. had fraudulently enticed the grouse off the land, by placing corn on his own land, & deft., as the servant of the Duke of R., committed the grievances to prevent pltf. enticing other grouse from the Duke of R.'s land:—*Held:* declaration was good, & the plea bad.—IBOTTSON *v.* PEAT (1865), 3 H. & C. 644; 159 E. R. 684; *sub nom.* IBBOTSON *v.* PEAT, 6 New Rep. 124; 34 L. J. Ex. 118; 12 L. T. 313; 29 J. P. 344; 11 Jur. N. S. 394; 13 W. R. 691.

Annotation:—**Refd.** Allen *v.* Flood, [1898] A. C. 1.

600. Act authorised by local authority—No defence to action.]—A corpn. being the conservators of a river, & owners of the soil between high & low water mark, cannot authorise a lessee to erect a wharf there, which produced inconvenience to the public in the use of the river for the purposes of navigation.—R. *v.* GROSVENOR (LORD) (1819), 2 Stark. 511, N. P.

Annotations:—**Refd.** R. *v.* Shepard (1822), 1 L. J. O. S. K. B. 45; R. *v.* Ward (1836), 4 Ad. & El. 384.

PART IV. SECT. 2, SUB-SECT. 3.—A.

593 i. *Acquiescence by plaintiff.*] PEMBROKE TOWNSHIP CORPN. *v.* CANADA CENTRAL RY. CO. (1882), 3 O. R. 503.—**CAN.**

593 ii. ——.]—SANSON *v.* NORTHERN RY. CO. (1882), 29 Gr. 459.—**CAN.**

593 iii. ——.]—DICKISON *v.* MORNINGTON TRAMWAY CO., LTD. (1887), 6 N. Z. L. R. 126.—**N.Z.**

Sect. 2.—*Civil proceedings: Sub-sect.* 3, *A., B., C., D.*

601. —— ——.]—The mere consent of a highway authority to an obstruction or encroachment upon the highway is ineffectual for the purpose of legalising that obstruction or encroachment.—HARVEY *v.* TRURO RURAL COUNCIL, [1903] 2 Ch. 638; 72 L. J. Ch. 705; 89 L. T. 90; 68 J. P. 51; 52 W. R. 262; 19 T. L. R. 576; 1 L. G. R. 758.

Annotation:—**Mentd.** Chippendale *v.* Pontefract R. D. C. (1907), 71 J. P. 231.

——.]—*See* HIGHWAYS, Vol. XXVI., pp. 440, 441, Nos. 1572–1576.

Reasonable user of property.]—*See* Part II., Sect. 11, sub-sect. 3, *ante.*

Permission of lord of manor.]—*See* COPYHOLDS, Vol. XIII., p. 147, No. 1880.

B. Statutory Authority.

See PUBLIC AUTHORITIES; STATUTES & Titles *passim.*

C. Prescriptive Right.

See EASEMENTS, Vol. XIX., pp. 57, 59, 63, 69, 70, 73, 146, 147, 155–159, 178, 179, 186, Nos. 323, 324, 335, 361, 402–406, 430, 999, 1004, 1071–1101, 1289–1297, 1364.

602. No defence to public nuisance.]—It is an indictable offence for stage coaches to stand plying for passengers in the public streets.

"The King's highway is not to be used as a stable yard. It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance" (LORD ELLENBOROUGH, C.J.).—R. *v.* CROSS (1812), 3 Camp. 224; 170 E. R. 1362, N. P.

Annotations:—**Consd.** Barber *v.* Penley, [1893] 2 Ch. 447. **Refd.** R. *v.* Carlile (1834), 6 C. & P. 636; Rich *v.* Basterfield (1847), 16 L. J. C. P. 273; Walker *v.* Brewster (1867), L. R. 5 Eq. 25; Brackenborough *v.* Thorseby (1869), 33 J. P. 565; Mercer *v.* Woodgate (1869), 34 J. P. 261; Harris *v.* Mobbs (1878), 3 Ex. D. 268; Fritz *v.* Hobson (1880), 14 Ch. D. 542; Wilkins *v.* Day (1883), 12 Q. B. D. 110; A.-G. *v.* Brighton & Hove Co-op. Supply Assocn., [1900] 1 Ch. 276; Butterworth *v.* Yorkshire (W. R.) Rivers Board (1908), 78 L. J. K. B. 203.

603. ——.]—A.-G. *v.* BARNSLEY CORPN., [1874] W. N. 37, L. C. & L. JJ.

——.]—*See, also,* HIGHWAYS, Vol. XXVI., p. 441, Nos. 1580–1587.

D. Crown Grant.

604. No defence to public nuisance.]—Where a part of the sea coast or shore, being the property of the Crown, & giving *jus privatum* to the King, is granted to a subject for uses, or to be enjoyed so as to be detrimental to the *jus publicum* therein, such grant is void as to such parts as are open to such objection, if acted upon so as to effect nuisance by working injury to the public right; or it is a grant which does not divest the Crown or invest the grantee. *Semble:* grants of the Crown for the benefit of the King, by augmenting the revenue, founded on inquisition *ad quod bonum*, must be conformable with the finding, must be for the advantage of the Crown, must be acted upon promptly, must be upheld by possession & enjoyment, & the grantees must fulfil all continuing considerations, or the right of possession will not pass thereby from the Crown. Buildings, erections, & inclosures between the high & low water marks in the harbour of Portsmouth, interrupting the flux & reflux of the tide, abated by decree of the Ct. of Exch. as a nuisance, where made under the sanction & authority of the corpn. having a grant from the Crown by charter.—A.-G. *v.* PARMETER (1811), 10 Price, 378; 147 E. R. 345; *affd. sub nom.* PARMETER *v.* A.-G. (1813), 10 Price, 412, H. L.

Annotations:—**Refd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377. **Mentd.** A.-G. to Prince of Wales *v.* St. Aubyn (1811), Wight. 167; Jowison *v.* Dyson (1842), 6 State Tr. N. S. 1; A.-G. *v.* Chambers (1854), 4 De G. M. & G. 206; R. *v.* Cunningham, Brown & Sumners (1859), 28 L. J. M. C. 66; A.-G. *v.* Simpson, [1901] 2 Ch. 671.

605. ——.]—A.-G. *v.* BURRIDGE, PORTSMOUTH HARBOUR CASE, No. 16, *ante.*

606. ——.]—A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the Crown before the commencement of the reign of Edward I. Such a grant may be inferred from evidence of its having existed before that time. If the weir, when so first granted, obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Trespass for breaking down a weir appurtenant to a fishery. Justification, that the weir was wrongfully erected across part of a public & navigable river, the Severn, where the King's subjects had a right to navigate, & that the rest of the river was choked up so that defts. could not navigate without breaking down the weir. Replication, that the part where the weir stood was distinct from the channel where the right of navigation existed, & was not a public navigable river. Rejoinder, that the part was a part of the Severn, & the King's subjects had a right to navigate there when the rest was choked up, & that the rest was choked up. Surrejoinder, traversing the right:—*Held:* where the Crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir, obstructing a part, except subject to the rights of the public; & therefore, in such a case, the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere.—WILLIAMS *v.* WILCOX (1838), 8 Ad. & El. 314; 3 Nev. & P. K. B. 606; 1 Will. Woll. & H. 477; 7 L. J. Q. B. 229; 112 E. R. 857.

Annotations:—**Refd.** Free Fishers & Dredgers Whitstable Co. *v.* Gann (1863), 13 C. B. N. S. 853; A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377; Simpson *v.* A.-G., [1904] A. C. 476. **Mentd.** R. *v.* United Kingdom Electric Telegraph Co. (1862), 2 B. & S. 647, n.; Rolle *v.* Whyte (1868), 8 B. & S. 116.

607. ——.]—The bed of all tidal navigable rivers & of all arms of the sea is in the Crown, but is so for the benefit of the subjects. The right of navigation belongs, by law, to all the subjects of the realm, & the right to anchor is a necessary part of the right to navigate. This right never could have been interfered with by grant from the Crown.

The grant of an oyster bed in an arm of the sea below low water mark, must have been taken by the grantee, subject to the public right of navigation; & he cannot now, in respect of his ownership of the soil, make any demand, even if expressly granted to him, which in any way

PART IV. SECT. 2, SUB-SECT. 3.—C.

602 i. *No defence to public nuisance.*]—No length of enjoyment can legalise a public nuisance.—CALCUTTA SUBURBS MUNICIPAL COMRS. *v.* MAHOMED ALI (1871), 7 B. L. R. 499; 16 W. R. 6.—**IND.**

602 ii. ——.]—HARI KRISHNA JOSHI *v.* SHANKAR VITHAL (1894), I. L. R. 19 Bom. 420.—**IND.**

602 iii. ——.]—HARDIE *v.* ROBERTSON (1903), 5 F. (Ct. of Sess.) 338.—**SCOT.**

602 iv. ——.]—GIFFORD *v.* HARE (1897), 14 S. C. 255.—**S. AF.**

PART IV. SECT. 2, SUB-SECT. 3.—D.

604 i. *No defence to public nuisance.*]—A.-G. *v.* HARRISON (1866), 12 Gr. 466.—**CAN.**

interferes with the enjoyment of this public right.—GANN *v.* WHITSTABLE FREE FISHERS (1865), 11 H. L. Cas. 192; 20 C. B. N. S. 1; 5 New Rep. 432; 35 L. J. C. P. 29; 12 L. T. 150; 29 J. P. 243; 13 W. R. 589; 2 Mar. L. C. 179; 11 E. R. 1305, H. L.; *revsg.* S. C. *sub nom.* WHITSTABLE FREE FISHERS *v.* GANN (1863), 13 C. B. N. S. 853, Ex. Ch.

Annotations:—**Reld.** Jolliffe *v.* Wallasey L. B. (1873), L. R. 9 C. P. 62; Denaby & Cadeby Main Collieries *v.* Anson, [1911] 1 K. B. 171. **Mentd.** Bridgwater's Trustees *v.* Bootle Surveyors (1866), 7 B. & S. 348; Holford *v.* George (1868), L. R. 3 Q. B. 639; Foreman *v.* Whitstable Free Fishers & Dredgers (1869), L. R. 4 H. L. 266; R. *v.* Keyn (1876), 2 Ex. D. 63; Sutton Harbour Improvement Co. *v.* Plymouth Town Grdns. (1890), 63 L. T. 772; The Bien, [1911] P. 40.

E. Self Protection against Extraordinary Danger.

608. Defence to action — Mischief caused to neighbour's property—Protection against anticipated flood.]—Where comrs. of sewers acting *bonâ fide* for the benefit of the levels for which they were appointed, erected certain defences against the inroads of the sea, which caused it to flow with greater violence against, & injure the adjoining land not within the levels:—*Held:* they could not be compelled to make compensation to the owner of the land, or to erect new works for his protection; for all owners of land exposed to the inroads of the sea, or comrs. of sewers acting for a number of landowners, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others. R. *v.* PAGHAM, SUSSEX SEWERS COMRS. (1828), 8 B. & C. 355; 2 Man. & Ry. K. B. 468; 108 E. R. 1075; *sub nom.* R. *v.* BOGNOR SEWERS COMRS., 6 L. J. O. S. K. B. 338.

Annotations:—**Apld.** Maxey Drainage Board *v.* G. N. Ry. (1912), 106 L. T. 429. **Reld.** R. *v.* Trafford (1831), 1 B. & Ad. 874; Smith *v.* Kenrick (1849), 7 C. B. 515; Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131; Gerrard *v.* Crowe, [1921] 1 A. C. 395. **Mentd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377; Hudson *v.* Tabor (1877), 2 Q. B. D. 290.

609. —— —— ——.]—Defts., owners of a canal, being threatened by an overflow of flood water from a neighbouring river, & fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, & opposite to pltf.'s premises, which were also situated on the banks of the canal above the premises of defts., &, being penned back by the planks, the water rose in the canal until it flooded pltf.'s premises. In an action brought to recover damages for the injury so caused:—*Held:* defts. were not liable, on the ground that the water which did the mischief was not brought there by them, & there is no duty on the owners of a canal analogous to that on the owners of a natural watercourse, not to impede the flow of water down it.—NIELD *v.* LONDON & NORTH WESTERN RY. CO. (1874), L. R. 10 Exch. 4; 44 L. J. Ex. 15; 23 W. R. 60.

Annotations:—**Apld.** Maxey Drainage Board *v.* G. N. Ry. (1912), 106 L. T. 429. **Reld.** Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131; Gerrard *v.* Crowe, [1921] 1 A. C. 395.

610. —— —— ——.]—RIDGE *v.* MIDLAND RY. CO., No. 394, *ante*.

611. —— —— ——.]—Defts., a railway co., were the owners of a piece of land which was situated near their line & was liable to flooding in wet weather. In order to prevent this they raised an embankment round two sides of the land which had the effect of diverting the water from coming upon it. As a result of deft.'s works flood water which would otherwise have flowed on to their land but which never in fact came upon it flowed on to land of pltfs. & injured their property. In an action to recover damages for the injury so caused:—*Held:* defts. as owners of the land were entitled provided they used reasonable care & skill & adopted reasonable & usual means for the purpose to do what was necessary to protect their land from damage by anticipated flood, & these conditions having been fulfilled the damage sustained by pltfs. was *damnum absque injuriâ* for which no action would lie.—MAXEY DRAINAGE BOARD *v.* GREAT NORTHERN RY. CO. (1912), 106 L. T. 429; 76 J. P. 236; 10 L. G. R. 248; *sub nom.* MASSEY DRAINAGE BOARD *v.* GREAT NORTHERN RY. CO., 56 Sol. Jo. 275, D. C.

Annotation:—**Reld.** Gerrard *v.* Crowe, [1921] 1 A. C. 395.

612. —— —— ——.]—Applt. & resps. owned lands upon opposite sides of a river. When the river was in flood & rose higher than its bank some of the flood water used to flow over resps.' land, ultimately finding its way back to the river. Resps. erected an embankment from a point on their land about half a mile from the river diagonally to its bank, with the object of protecting their lands behind the embankment. The water flowing over applts.' land in time of heavy flood was thereby increased. Applt. sued resps. for damages & an injunction. It was not proved that any flood channel was obstructed, or existed, or that there was any ancient or rightful course for the flood waters across resps.' land:—*Held:* the action could not be maintained.—GERRARD *v.* CROWE, [1921] 1 A. C. 395; 90 L. J. P. C. 42; 124 L. T. 486; 37 T. L. R. 110, P. C.

613. —— —— ——.]—The abatement of a nuisance by a private individual is a remedy which the law does not favour.

By a local Act of 1843 a canal constructed under previous local Acts by canalising a river was vested in applts., who were required by the Act to keep the navigation & locks, & all works to be thereafter executed for the improvement thereof, in an efficient state for the traffic thereon. In 1912 applts. raised the coping on both sides of one of their locks & the banks behind it to prevent the lock from being flooded. Resps., adjacent landowners, objected that the effect of these works was to pen back the water in the part of the canal above the lock & to occasion the flooding of their lands, & in consequence of these objections applts. removed the coping without prejudice to their rights, but they did not reduce the height of the banks. In 1924 during a heavy flood resps., without notice to applts., cut away a portion of these banks to allow the flood water to escape. In an action by applts. for an injunction to restrain resps. from interfering with the banks, resps. justified their acts as having been done in the abatement of a nuisance caused by applts. in raising the banks:—*Held:* there being no evidence of negligence, applts., in constructing works in the exercise of their statutory powers for the protection of their navigation, were not

PART IV. SECT. 2, SUB-SECT. 3.—E.

608 i. ***Defence to action—Mischief caused to neighbour's property—Protection against anticipated flood.***]—Where the owner of land is threatened with damage by water used for irrigation purposes coming from a higher level he has a right to protect himself, against such injury by all lawful means without regard to any damage that may result to land of his neighbour from the measures he adopts.—MCBRYAN *v.* CANADIAN PACIFIC RY. CO. (1899), 29 S. C. R. 359.—CAN.

Sect. 2.—*Civil proceedings: Sub-sect.* 3, *E., F., G., H. & I.; sub-sect.* 4.]

liable for the flooding of resp.'s lands; &, assuming that the raising of the banks & the resultant flooding constituted a nuisance, the course pursued by resps. was not justified.—LAGAN NAVIGATION CO. *v.* LAMBEG BLEACHING, DYEING & FINISHING CO., [1927] A. C. 226; 96 L. J. P. C. 25; 136 L. T. 417; 91 J. P. 46, H. L.

Driving away locust swarm.]—In an action by applt. (*inter alia*), for damage caused by resps., who were adjoining proprietors, in that they drove from without his boundary fence a swarm of locusts away from their own lands & in the direction of his cultivated lands:—*Held:* resps. were entitled to drive the locusts away as a measure of self-protection & were not responsible for the consequences.—GREYVENSTEYN *v.* HATTINGH, [1911] A. C. 355; 80 L. J. P. C. 158; 104 L. T. 360; 27 T. L. R. 358, P. C.

Annotations:—**Refd.** Gerrard *v.* Crowe, [1921] 1 A. C. 395. **Mentd.** Singleton Abbey (Owners) *v.* Paludina (Owners), The Paludina (1926), 95 L. J. P. 135.

—— **Escape of water—Principle of Rylands *v.* Fletcher.**]—*See* Part III., Sect. 2, sub-sect. 2, A. (*e*), *ante*.

F. Act of God.

615. Defence to action.]—Case on the custom of the realm lies against a man for damage done by a fire he has lighted in his field; unless such damage was occasioned by the act of God.—TURBERVILLE *v.* STAMPE (1697), 1 Ld. Raym. 264; 1 Com. 32; Comb. 459; Holt, K. B. 9; 12 Mod. Rep. 152; 1 Salk. 13; Skin. 681; Carth. 425; 91 E. R. 1072.

Annotations:—**Apld.** Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468. **Refd.** Canterbury *v.* A.-G. (1843), 1 Ph. 306; Filliter *v.* Phippard (1847), 11 Q. B. 347; Smith *v.* Kenrick (1849), 7 C. B. 515; Vaughan *v.* Taff Vale Ry. (1860), 2 L. T. 394; Williams *v.* Jones (1865), 13 L. T. 300; R. *v.* Stephens (1866), 7 B. & S. 710; Jones *v.* Festiniog Ry. (1868), L. R. 3 Q. B. 733; Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5; Musgrove *v.* Pandelis, [1919] 2 K. B. 43. **Mentd.** Brucker *v.* Fromont (1796), 6 Term Rep. 659; McManus *v.* Crickett (1800), 1 East, 106; Huzzey *v.* Field (1835), 2 Cr. M. & R. 432; Lyons *v.* Martin (1838), 1 Will. Woll. & H. 500; Patten *v.* Rea (1857), 2 C. B. N. S. 606; Limpus *v.* London General Omnibus Co. (1862), 1 H. & C. 526; Burns *v.* Poulson (1873), 29 L. T. 329; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489.

616. ——.]—Defts., under the powers conferred upon them by Metropolis Management Act, 1855 (c. 120), ss. 135, 136, constructed, & properly contructed, a sewer having its outfall at Deptford Creek, a little above pltf.'s coal wharf, with water gates which it was the duty of the person in charge of them to open when the water within them became eight feet deep, a depth which was reached only in heavy rainfalls. On Aug. 29, 1879, there was an exceptionally heavy rainfall, & it became necessary to open the water gates to prevent a large district from being flooded. This having been done, & the rain increasing in violence, the rush of water from the sewer carried away a portion of pltf.'s wharf, with a barge moored thereto & a quantity of coals deposited therein & thereon:—*Held:* the injury complained of was occasioned by the opening of the water gates, & not by the act of God, & therefore defts. were *primâ facie* liable for the damage done.—DIXON *v.* METROPOLITAN BOARD OF WORKS (1881), 7 Q. B. D. 418; 50 L. J. Q. B. 772; 45 L. T. 312; 46 J. P. 4; 30 W. R. 83.

Annotations:—**Consd.** Price's Patent Candle Co. *v.* L. C. C., [1908] 2 Ch. 526. **Refd.** A.-G. *v.* Cory, Kennard *v.* Same (1919), 88 L. J. Ch. 410.

As excluding principle of Rylands *v.* Fletcher.]—*See* Part III., Sect. 2, sub-sect. 2, C. (*e*), *ante*.

G. Act of Stranger.

617. Whether defence to action.]—A tramway co. after a heavy fall of snow cleared their track by means of a snow plough & heaped up the snow upon the sides of the streets: they then scattered salt upon the rails & in the vicinity; the town council did not take any immediate steps to remove the briny slush so produced, & it was left upon the streets:—*Held:* a legal nuisance had been committed which was not sanctioned by either the special or the general Tramways Acts, & the default, if any, of the town council did not affect the primary liability of the tramway co.—OGSTON *v.* ABERDEEN DISTRICT TRAMWAYS CO., [1897] A. C. 111; 66 L. J. P. C. 1; 75 L. T. 633; 61 J. P. 436, H. L.

Annotations:—**Distd.** Montreal City *v.* Montreal Street Ry., [1903] A. C. 482. **Refd.** Acton U. D. C. *v.* London United Tramways (1901), Ltd. (1908), 100 L. T. 80.

618. ——.]—BARKER *v.* HERBERT, No. 374, *ante*.

.]—*See* AGRICULTURE, Vol. II., p. 65, No. 414; HIGHWAYS, Vol. XXVI., p. 417, No. 1362.

As excluding principle of Rylands *v.* Fletcher.]—*See* Part III., Sect 2, sub-sect. 2, C. (*f*), *ante*.

H. Similar Nuisance Already Existing in Locality.

619. No defence to action.]—R. *v.* NEIL, No. 106, *ante*.

620. ——.]—ST. HELEN'S SMELTING CO. *v.* TIPPING, No. 115, *ante*.

621. ——.]—ADAMS *v.* URSELL, No. 194, *ante*.

622. —— **If act complained of increases nuisance.**]—In a suit between neighbouring manufacturers, to restrain deft. from carrying on his manufactory in such a way as to injure pltf.'s property by the emission of noxious gases:—*Held:* (1) deft. whose manufactory was lawful in itself, but required the greatest precaution to prevent therefrom the escape of noxious gases, would not be restrained from carrying on his manufactory because occasionally, through the occurrence of accidents in the manufactory, pltf. was injured, but the ct. would only interfere where the injury was grave or frequent; (2) pltf.'s right to have his property protected from injury could not be enlarged by the fact that in his manufactory he used a peculiar process of great delicacy.

As regards the state of the law upon the question, whether or not a person is entitled, because there are noxious vapours existing already in the neighbourhood, to add to that accumulation by creating additional noxious vapours, & pouring them in upon his neighbour's property, it is sufficient to say that it is well settled by the case of *St. Helen's Smelting Co. v. Tipping*, No. 115, *ante*, where the summing up of MELLOR, J., was approved by the House of Lords, & must be taken to have laid down the correct law on the subject. . . . If there be no right asserted by deft. to injure his neighbour; if, on the contrary, the assertion by him is that he

PART IV. SECT. 2, SUB-SECT. 3.—F.

615 i. *Defence to action.*]—CARDSTON DRUG & BOOK CO. *v.* CARDSTON TOWN (N. W. T.) (1906), 3 W. L. R. 64.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 3.—G.

617 i. *Whether defence to action.*]—GIBBINGS *v.* HUNGERFORD & CORK CORPN., [1904] 1 I. R. 211.—**IR.**

PART IV. SECT. 2, SUB-SECT. 3.—H.

619 i. *No defence to action.*]—The establishment of an industrial process in such proximity to another's property as to interfere with the com-

does not do it, or that, if he does, it is simply from accidental circumstances, which from time to time happen, & for which pltf. may have a remedy in damages; & if it appears that that is what the case amounts to upon the evidence, it does not seem to me that the proper remedy is by injunction in this ct. (PAGE WOOD, V.-C.).—COOKE *v.* FORBES (1867), L. R. 5 Eq. 166; 37 L. J. Ch. 178; 17 L. T. 371.

Annotations:—*As to* (1) **Apld.** Gaunt *v.* Fynney (1872), 8 Ch. App. 8. **Consd.** M'Murray *v.* Cadwell (1889), 6 T. L. R. 76. *As to* (2) **Consd.** Robinson *v.* Kilvert (1889), 41 Ch. D. 88. *Generally*, **Refd.** Aldin *v.* Latimer, Clark, Muirhead (1894), 63 L. J. Ch. 601.

623. —— ——.]—A nuisance cannot be justified by the existence of other nuisances of a similar character, if it can be shown that the inconvenience is increased by the nuisance complained of.—CROSSLEY & SONS, LTD. *v.* LIGHTOWLER (1867), 2 Ch. App. 478; 36 L. J. Ch. 584; 16 L. T. 438; 15 W. R. 801, L. C.

Annotations:—**Consd.** Blair & Sumner *v.* Deakin, Eden & Thwaites *v.* Deakin (1887), 57 L. T. 522. **Refd.** Cook *v.* Bath Corpn. (1868), L. R. 6 Eq. 177; A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301; Rushmer *v.* Polsue & Alfieri, [1906] 1 Ch. 234; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393; Hulley *v.* Silversprings Bleaching & Dyeing Co. (1921), 126 L. T. 499. **Mentd.** Glover *v.* Coleman (1874), 44 L. J. C. P. 66; Wheeldon *v.* Burrows (1879), 12 Ch. D. 31; Russell *v.* Watts (1883), 25 Ch. D. 559; Mouson *v.* Boehm (1884), 26 Ch. D. 398; Scott *v.* Pape (1886), 31 Ch. D. 554; James *v.* Stevenson, [1893] A. C. 162; Union Lighterage Co. *v.* London Graving Dock Co., [1902] 2 Ch. 557; Swan *v.* Sinclair, [1925] A. C. 227.

I. Plaintiff Coming to Nuisance.

See EASEMENTS, Vol. XIX., pp. 178, 179, Nos. 1289–1297.

624. Whether defence to action.]—If a party set up a noxious trade [slaughter-house] remote from habitations, & public roads, & after that new houses are built, & new roads constructed near it, the party may continue his trade, although it be a nuisance to persons inhabiting such houses or passing along such roads.—R. *v.* CROSS (1826), 2 C. & P. 483.

625. ——.]—BLISS *v.* HALL, No. 25, *ante*.

626. ——.]—The old notion of people losing their rights of complaint because they come to a nuisance, has been long since exploded. . . . There may be at present no adjoining owners who would be disturbed in their occupation by the establishment of a cattle dock, but hereafter houses may be built, &, unless some new principle of law is to excuse the railway co. from liability for the existence of the nuisance, I am at a loss to understand why the future neighbours will not have as good a right to restrain the co. as the present occupiers (LORD HALSBURY, C.).—LONDON, BRIGHTON & SOUTH COAST RY. CO. *v.* TRUMAN (1885), 11 App. Cas. 45; 55 L. J. Ch. 354; 54 L. T. 250; 50 J. P. 388; 34 W. R. 657, H. L.; *revsg.* S. C. *sub nom.* TRUMAN *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., 29 Ch. D. 89, C. A.

Annotations:—**Refd.** National Telephone Co. *v.* Baker, [1893] 2 Ch. 186; Rapier *v.* London Tram. Co., [1893] 2 Ch. 588; A.-G. *v.* Met. Ry., [1894] 1 Q. B. 384; Canadian Pacific Ry. *v.* Parke, [1899] A. C. 535; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Goldberg *v.* Liverpool Corpn. (1900), 82 L. T. 362; Batcheller *v.* Tunbridge Wells Gas Co. (1901), 65 J. P. 680; A.-G. *v.* Dorchester Corpn. (1905), 93 L. T. 290; Demerara Electric Co. *v.* White, [1907] A. C. 330; English *v.* Metropolitan Water Board, [1907] 1 K. B. 588; R. *v.* Brighton Corpn., *Ex p.* Shoosmith (1907), 96 L. T. 762; West *v.* Bristol Tram. Co. (1908), 99 L. T. 264; McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118. **Mentd.** Evans *v.* M. S. & L. Ry. (1887), 36 Ch. D. 626; East Fremantle Corpn. *v.* Annois, [1902] A. C. 213; Rattee *v.* Norwich Electric Tram. Co. (1902), 18 T. L. R. 562; Westminster Corpn. *v.* L. & N. W. Ry., [1905] A. C. 426.

627. ——.]—FLEMING *v.* HISLOP, No. 23, *ante*.

628. ——.]—A.-G. *v.* MANCHESTER CORPN., No. 681, *post*.

SUB-SECT. 4.—DAMAGES.

See, generally, DAMAGES, Vol. XVII., pp. 78 *et seq*

629. Compensation for natural consequences.]—In an action by lessor against lessee for rent, the lessee counterclaimed for damages from a nuisance caused by the lessor. It appeared that the lessor during the lease had pumped water from land adjacent to the demised premises by means of powerful engines, & that the lessee's house was damaged by the vibration caused by the working of such engines, to such an extent that the premises became useless to him, & that he was obliged to remove his business to another house, & in consequence incurred expense. There was evidence that the house at the commencement of the term was old & unstable, & that a house of ordinary stability would not have been injured by the vibration:—*Held:* the damages recoverable by deft. were not confined to the value of the term which he had lost, but included all loss which had happened to him as a natural consequence of the wrongful acts of pltf., such as the expense of removing his business to other premises.—GROSVENOR HOTEL CO. *v.* HAMILTON, [1894] 2 Q. B. 836; 63 L. J. Q. B. 661; 71 L. T. 362; 42 W. R. 626; 10 T. L. R. 506; 9 R. 819, C. A.

Annotations:—**Refd.** Browne *v.* Flower, [1911] 1 Ch. 219; Malzy *v.* Eichholz, [1916] 2 K. B. 308; Hoare *v.* McAlpine, [1923] 1 Ch. 167. **Mentd.** Markham *v.* Paget, [1908] 1 Ch. 697.

630. ——.]—In May & Oct. 1922, some dead fish were observed in the River Wye, Derbyshire, at a spot below that from which a drain pipe leading from certain gasworks entered the river. Samples of the effluent from this pipe were taken on each occasion, which, on analysis, were found to contain matter highly poisonous to fish. The owner of the fishing rights over that part of the river affected commenced an action for an injunction & damages against the owners of the gasworks:—*Held:* on the evidence, it was satisfactorily proved that the effluent from the gasworks was, on each occasion, the cause of the death of the fish, & pltf. was entitled to an injunction & damages.

The damages to which pltf. is entitled are limited to such damages as are the natural & probable consequence of the defts.' wrongful acts, & are not in any way extended beyond such limit because such acts were illegal *per se*. In calculating these damages the ct. has to consider what is the pecuniary sum which will make good to pltf., so far as money can do so, the loss which he has suffered as the natural result of the wrong done to him (P. O. LAWRENCE, J.).—GRANBY (MARQUIS) *v.* BAKEWELL URBAN DISTRICT COUNCIL (1923), 87 J. P. 105; 21 L. G. R. 329.

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fortable occupation of it may amount to a nuisance, notwithstanding that similar processes are characteristic of the locality.—MAGUIRE *v.* M'NEIL (CHARLES), LTD., [1922] S. C. 174.—**SCOT.**

PART IV. SECT. 2, SUB-SECT. 3.—I.

624 i. *Whether defence to action.*]—If in this colony a noxious trade is established in a place & people afterwards come to reside in the neighbourhood or a road be brought to it, the public are entitled to complain, for judicial notice must be taken that this country is in a state of progressive location & is only being inhabited by degrees.—R. *v.* MCMEIKAN (1869), 6 W. W. & A'B. 68.—**AUS.**

624 ii. ——.]—Persons having come to live within the scope of a nuisance after its creation, does not prevent their complaining of it as a public nuisance.—R. *v.* BREWSTER (1859), 8 C. P. 208.—**CAN.**

624 iii. ——.]—HISLOP *v.* FLEMING (1882), 10 R. (Ct. of Sess.) 426.—**SCOT.**

Sect. 2.—*Civil proceedings: Sub-sects.* 4, 5 & 6, *A.* (*a*).]

631. —— Sufficient to ensure abatement.]—In an action by a reversioner for the removal of the eaves from his house, & the erection of a building with eaves & a gutter overhanging his wall, evidence of diminution of the saleable value of pltf.'s premises in consequence of the nuisance was rejected & it appearing that the cost of replacing the tiles which had been removed would not exceed 30*s.* & deft. having paid 40*s.* into ct. on account thereof the jury were directed to find for deft. if they thought the sum paid in was sufficient to cover the actual damages sustained by pltf:—*Held:* the evidence tendered was properly rejected, & the direction right, the true measure of damages in such a case being, not the diminution in the saleable value although the nuisance might be of a permanent character but such damages as the jury might think sufficient to compel deft. to abate the nuisance.—BATTISHILL *v.* REED (1856), 18 C. B. 696; 20 J. P. 775; 4 W. R. 603; 139 E. R. 1544; *sub nom.* BATHISHILL *v.* REED, 25 L. J. C. P. 290.

Annotations:—**Refd.** Tunnicliffe & Hampson *v.* West Leigh Colliery Co., [1905] 2 Ch. 390. **Mentd.** Whitehouse *v.* Fellowes (1861), 10 C. B. N. S. 765; Hollins *v.* Verney (1884), 13 Q. B. D. 304; Damper *v.* Bassett, [1901] 2 Ch. 350; Hyman *v.* Van den Bergh, [1907] 2 Ch. 516.

632. —— Some damage not attributable to nuisance.]—In consequence of a railway embankment the flood waters of a river were pent back & flowed over land of the pltf., doing injury to a certain amount; had the embankment not been constructed the waters would have flowed a different way, but would have reached pltf.'s land, & would have done damage to a less amount:—*Held:* the measure of damages recoverable by pltf. against the railway co. was the difference only between the two amounts.—WORKMAN *v.* GREAT NORTHERN RY. CO. (1863), 32 L. J. Q. B. 279.

Damages in lieu of or in addition to injunction.]—*See* INJUNCTION, Vol. XXVIII., pp. 412 *et seq.*

633. Whether proof of actual damage essential.]—Although the erection of an obstruction causes no immediate injury to pltf. in his use of a right of way, in consequence of his own laches, yet if its existence puts the title into hazard & prevents him from exercising his right whenever he thinks fit to resume it:—*Held:* an action on the case may be maintained.—BOWER *v.* HILL (1835), 1 Bing. N. C. 549; 1 Hodg. 45; 1 Scott, 526; 4 L. J. C. P. 153; 131 E. R. 1229.

Annotations:—**Consd.** Metropolitan Assocn. for Improving Dwellings of Industrious Classes *v.* Petch (1858), 5 C. B. N. S. 504. **Refd.** Jacomb *v.* Knight (1863), 8 L. T. 412; Harrop *v.* Hirst (1868), L. R. 4 Exch. 43; Goodhart *v.* Hyett (1883), 25 Ch. D. 182. **Mentd.** Swan *v.* Sinclair, [1925] A. C. 227.

634. ——.]—Sewage escaped from deft.'s drain in pltf.'s land at a point where it drained deft.'s houses only, but no damage was thereby caused to pltf.:—*Held:* pltf. was entitled to nominal damages, but as pltf. had in effect failed in all the issues in the action, he must pay all the costs of the action, except such, if any, as were incurred in respect of the nominal damages.—HOLLAND *v.* LAZARUS (1897), 66 L. J. Q. B. 285; 61 J. P. 262; 13 T. L. R. 207; 41 Sol. Jo. 275.

Annotations:—**Refd.** Geen *v.* St. Mary, Newington, Vestry, [1898] 2 Q. B. 1; Greater London Property Co. *v.* Foot (1899), 68 L. J. Q. B. 628; Bullock *v.* Reeve (1900), 84 L. T. 55; Gorringe *v.* Shoreditch Corpn. (1902), 86 [illegible] 695; Heaver *v.* Fulham B. C., [1904] 2 K. B. 383; Kershaw *v.* Paine (1913), 78 J. P. 149. **Mentd.** Woodthorp *v.* Spencer & Husbands (1899), 63 J. P. 246.

——.]—*See* DAMAGES, Vol. XVII., pp. 84–86, Nos. 37, 42–44, 46; WATERS & WATERCOURSES.

Continuing damage.]—*See* DAMAGES, Vol. XVII., pp. 90, 91, Nos. 76, 78, 82, 90; LIMITATION OF ACTIONS, Vol. XXXII., pp. 340, 341, Nos. 237–240.

Damage through exercise of compulsory powers.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 106, 132–150, Nos. 28, 201–327.

Damage difficult to ascertain.]—*See* DAMAGES, Vol. XVII., p. 92, No. 97.

635. Exemplary damages.]—A building owner who pulls down a party wall under the authority of 18 & 19 Vict. c. 122, is not bound to protect by a hoarding or otherwise the rooms of the adjoining owner which are left exposed to the weather during the time that the wall is being pulled down & rebuilt.

Independently of the loss of business sustained by pltf., there was the fact that defts., who had no right to turn pltf. out of his house, made it inconvenient for him to live in it & an act of that kind, done with a high hand, is not to be paid for by a mere calculation of how many shillings or pence pltf. would have otherwise earned (WILLES, J.).—THOMPSON *v.* HILL (1870), L. R. 5 C. P. 564; 39 L. J. C. P. 264; 22 L. T. 820; 18 W. R. 1070.

—.]—*See* DAMAGES, Vol. XVII., p. 123, No. 315.

SUB-SECT. 5.—PRACTICE.

636. Necessity for proof—Existence of nuisance—Identity of person causing.]—In an action for a nuisance, where deft. pleads not guilty, pltf. must not only prove the existence of the nuisance, but that deft. was the person who caused it.—DAWSON *v.* MOORE (1835), 7 C. & P. 25, N. P.

637. Statement of immediate cause of injury.]—In declaring for a nuisance, the immediate cause of the injury must be stated; & under an averment of the remote cause, & an allegation that by means of the premises the noxious matter annoyed pltf.'s house, it is not competent to give evidence of the intermediate causes.

The declaration stated that deft. wrongfully placed & continued a heap of earth, whereby the refuse water was prevented from flowing away from his house, down a ditch at the back thereof. The evidence was, that the heap was not originally placed so as to obstruct the water, but that in process of time earth from the heap was trodden, & fell, into the ditch, & obstructed it:—*Held:* this was a fatal variance.—FITZSIMONS *v.* INGLIS (1814), 5 Taunt. 534; 128 E. R. 798.

Annotation:—**Distd.** Jones *v.* Bird (1822), 1 Dow. & Ry. K. B. 497.

638. Notice to remove—Evidence against subsequent occupier.]—In case for a nuisance, notice to remove the nuisance left at the premises is evidence against a subsequent occupier.—SALMON *v.* BENSLEY (1825), RY. & M. 189, N. P.

639. Inspection by judge.]—MANSER *v.* BOWERS, [1872] W. N. 163.

640. Trial by jury—R. S. C., Ord. 16, r. 6.]—Pltf. who had commenced an action in the Ch. Div. for nuisance, applied for an order transferring it to the Q. B. Div., that it might be tried by a judge

PART IV. SECT. 2, SUB-SECT. 5.

637 f. *Statement of immediate cause of injury.*]—BARLOW *v.* KINNEAR (1843), 2 Kerr, 94.—**CAN.**

p. *Trial by jury.*]—ARNOT *v.* BROWN (1852), 15 Dunl. (Ct. of Sess.) (H. L.) 10; 1 Macq. 229; 24 Sc. Jur. 421; 1 Stuart, 694.—**SCOT.**

q. *Pleading—Necessity for pleading—Facts amounting to nuisance.* THURLOW TOWNSHIP *v.* BOGART (1864), 15 C. P. 9, 601.—**CAN.**

r. —— *Certainty required.*]—A.-G. *v.* BOULTON (1873), 20 Gr. 402.—**CAN.**

with a jury. NORTH, J., before whom the case had been twice on motion for injunction, was of opinion that it had better be tried with a jury, & made the order. Defts. appealed:—*Held:* as NORTH, J., had made the order after considering the circumstances of the case, the Ct. of Appeal ought not to interfere with the exercise of his discretion, there being no reason for expecting a failure of justice from the action being tried in the way he directed.—MANGAN *v.* METROPOLITAN ELECTRIC SUPPLY CO., [1891] 2 Ch. 551; 65 L. T. 202; 7 T. L. R. 553, C. A.

641. Pleading—Denial of plaintiff's title coupled with payment into court.]—R. S. C., Ord. 30, r. 1, does not permit deft. in an action for nuisance, raising a question of title, to plead payment into ct. & to deny pltf.'s right of action in respect of the same part of the statement of claim: & if he so pleads, the statement of defence will be amended as embarrassing under R. S. C., Ord. 37, r. 1. *Qu*: whether in any kind of action deft. can in respect of the same portion of the statement of claim pay money into ct. & deny pltf.'s right to sue.—SPURR *v.* HALL (1877), 2 Q. B. D. 615; 46 L. J. Q. B. 693; 37 L. T. 313; 41 J. P. 805; 26 W. R. 78, D. C.

Annotation:—**Refd.** Berdan *v.* Greenwood (1878), 3 Ex. D. 251.

—— **Inevitable nuisance.**]—*See* EVIDENCE, Vol. XXII., p. 157, No. 1335.

642. Action for continuing nuisance—Declaration of origin.]—A declaration in case for a continuing nuisance, need not state when the cause of the first nuisance was erected.—WESTBOURNE *v.* MORDANT (1590), Cro. Eliz. 191; 78 E. R. 447; *sub nom.* WESHBOURN & MORDANT'S CASE, 2 Leon. 103; 3 Leon. 174.

Annotation:—**Refd.** Thompson *v.* Gibson (1841), 7 M. & W. 456.

643. Condition precedent to action—Request to remove nuisance.]—Against the beginner [of a nuisance] an action may be brought without laying a request to remove the nuisance, but . . . against the continuer [of a nuisance] a request is necessary (WILLES, C. J.).—WINSMORE *v.* GREENBANK (1745), Willes, 577; 125 E. R. 1330.

Annotations:—**Mentd.** Lumley *v.* Gye (1853), 2 E. & B. 216; Lynch *v.* Knight (1861), 5 L. T. 291; Evans *v.* Walton (1867), L. R. 2 C. P. 615; Mogul S.S. Co. *v.* McGregor (1888), 21 Q. B. D. 544; Allen *v.* Flood, [1898] A. C. 1; Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126; Manton *v.* Brocklebank, [1923] 1 K. B. 406.

644. Joinder of defendants.]—Where a nuisance has been caused by the concurrent acts of two independent persons, there is no joint cause of action, but two independent causes of action, against the tort feasors. These, therefore, cannot be jointly sued in a common law action (*i.e.* an action in which damages are claimed), whether or not an injunction is also asked for.—SADLER *v.* GREAT WESTERN RY. CO., [1895] 2 Q. B. 688; 65 L. J. Q. B. 26; 73 L. T. 385; 44 W. R. 50; 12 T. L. R. 1; 14 R. 774, C. A.; *affd.*, [1896] A. C. 450, H. L.

Annotations:—**Consd.** Thompson *v.* L. C. C., [1899] 1 Q. B. 840. **Folld.** Munday *v.* South Metropolitan Electric Light Co. & New Gutta Percha Co. (1913), 29 T. L. R. 346. **Refd.** Gower *v.* Couldridge, [1898] 1 Q. B. 348; Oxford & Cambridge Universities *v.* Gill (1898), 79 L. T. 338; Taylor *v.* Cambridge Gazette Co. & Kilner (1899), 43 Sol. Jo. 604; Walters *v.* Green, [1899] 2 Ch. 696; Pope *v.* Hawtrey (1901), 85 L. T. 263; Bullock *v.* London General Omnibus Co., [1907] 1 K. B. 264; Greenwood *v.* Greenwood & Armitage (1908), 100 L. T. 68; Companía Sansinena De Carnes Congeladas *v.* Houlder, [1910] 2 K. B. 354; Times Cold Storage Co. *v.* Lowther & Blankley, Lowther & Blankley *v.* Times Cold Storage Co. & New Zealand Shipping Co., [1911] 2 K. B. 100; *Re* Beck, Attia *v.* Seed (1918), 87 L. J. Ch. 335; Thomas *v.* Moore, [1918] 1 K. B. 555; Hare Spinning Co. *v.* Leigh, [1919] 1 Ch. 260; Payne *v.* British Time Recorder Co. & Curtis, [1921] 2 K. B. 1; The Koursk, [1923] P. 206. **Mentd.** Oesterreichische Export A.-G. vorm A. Janowitzer *v.* British Indemnity Insce. & Scottish Indemnity Co. (1914), 110 L. T. 955.

645. ——.]—Pltf. had a right of way over a certain lane. Defts. were severally the occupiers of two sets of premises approached by the lane, & pltf. alleged that the heavy traffic brought by them along the lane caused vibration which caused cracks to appear in his house, that the noise of the wagons creaking & grating on his garden wall constituted a nuisance, that the surface of the lane was cut up & his right of way interfered with, & that on two occasions his wall had been knocked down by the wagons. Pltf. claimed an injunction & damages against both defts:—*Held:* the action could not be maintained in this form, & one of defts. must be struck out.—MUNDAY *v.* SOUTH METROPOLITAN ELECTRIC LIGHT CO., LTD. & NEW GUTTA PERCHA CO., LTD. (1913), 29 T. L. R. 346; 57 Sol. Jo. 427.

·]—*See* R. S. C., Ord. 16, rr. 1, 4.

646. Adding parties—R. S. C., Ord. 16, r. 11.]—In an action by a co. lessees for a long term of eleven houses, of which ten were unlet & in their possession when the writ was issued & by their tenant of the remaining house as co-pltf. for an injunction & damages in respect of an alleged nuisance from noise; the tenant after delivery of the statement of claim & notice of trial, refused to go on with the action as co-pltf. The other ten houses having in the meantime been let, pltf. co. applied at the trial for leave to amend by adding as co-pltfs. two of the new tenants who consented to be added. Application granted as being within the discretion given by above rule of allowing the names of any parties whether pltfs. or defts. "whose presence before the ct. may be necessary in order to enable the ct. effectually & completely to adjudicate upon & settle all the questions involved in the cause or matter," to be added.—HOUSE PROPERTY & INVESTMENT CO. *v.* H. P. HORSE NAIL CO. (1885), 29 Ch. D. 190; 54 L. J. Ch. 715; 52 L. T. 507; 33 W. R. 562.

647. Grant of injunction — With inquiry as to damages—Costs of inquiry.]—When an injunction is granted to restrain the committing of a nuisance, & an inquiry as to damages is directed in Chambers, though pltf. is entitled to the general costs of the action, the costs of the inquiry will be reserved in order that the judge may have complete control over them, & be able to see that they are not unreasonably exaggerated.—SLACK *v.* MIDLAND RY. CO. (1880), 16 Ch. D. 81; 50 L. J. Ch. 196; 43 L. T. 434; 29 W. R. 302.

Annotation:—**Refd.** Ewart *v.* Fryer (1902), 86 L. T. 676.

SUB-SECT. 6.—INJUNCTION.

A. Grounds for Granting or Refusing.

(a) In General.

See, generally, INJUNCTION, Vol. XXVIII pp. 371–411.

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644 i. *Joinder of defendants.*]—In a case of nuisance the several sufferers may combine & bring a joint action against the several authors of the nuisance.—COWAN *v.* BUCCLEUCH (DUKE) (1876), 2 App. Cas. 344.—SCOT.

t. *Action for continuing nuisance—Limitation of time for bringing action.*]—CHAUDIÈRE MACHINE & FOUNDRY CO. *v.* CANADA ATLANTIC RY. CO. (1902), 33 S. C. R. 11.—CAN.

a. *Joinder of plaintiffs.*]—SMYTH *v.* HARRIS (1912), 23 O. W. R. 145; 4 O. W. N. 168; 6 D. L. R. 866.—CAN.

Sect. 2.—Civil proceedings: Sub-sect. 6, A. (b), (c) (d).]

(b) *Material Injury.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 372–383, 389–395, 398–400, 404–411.

648. Injury must be substantial.]—LUSCOMBE *v.* STEER, No. 149, *ante.*

649. ——.]—In order to succeed in an action for an injunction to abate a nuisance pltf. must prove such a substantial & material inconvenience to or interference with the legitimate & full enjoyment of his property as would justify a reasonable man in considering himself substantially damaged. Pltf.'s case is weakened by the absence of corroborative evidence of near neighbours.—BAKER *v.* WHITE (1885), 1 T. L. R. 536; *previous proceedings* (1884), 1 T. L. R. 64, C. A.

650. ——.]—REINHARDT *v.* MENTASTI, No. 117, *ante.*

651. ——.]—Pltfs. were the local authority of L., & the seashore at L. between high & low watermark was vested in them under a lease from the Crown. W., a clergyman of the Church of England, held services & delivered addresses on the seashore without the consent of pltf., & asserted that the seashore was a highway & that he had a right to do so. Pltfs. brought an action against W., claiming a declaration that he was not entitled to hold services, etc., on the seashore without their consent, & an injunction to restrain him from so doing. There was no evidence that the acts of W. caused an obstruction or led to a breach of the peace; nor did W. adduce any evidence of a prescriptive right or custom in support of his contention:—*Held:* pltfs. were entitled to the declaration for which they asked; but the matter was too trivial for an injunction, which must be refused.—LLANDUDNO URBAN COUNCIL *v.* WOODS, [1899] 2 Ch. 705; 68 L. J. Ch. 623; 81 L. T. 170; 63 J. P. 775; 48 W. R. 43; 43 Sol. Jo. 689.

Annotations:—**Refd.** Brinckman *v.* Matley, [1904] 2 Ch. 313; Behrens *v.* Richards, [1905] 2 Ch. 614; A.-G. *v.* Sewell (1918), 88 L. J. K. B. 425. **Mentd.** Yeatman *v.* Homberger (1912), 107 L. T. 742.

652. —— Such as would have entitled party to damages.]—A ct. of equity will not exercise its jurisdiction by injunction at the instance of an individual against an alleged nuisance, without a previous trial at law, or without its being clearly proved that pltf. has sustained such substantial injury as would have entitled him to a verdict for damages in an action at law.

Deft. diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channel before it reached the premises of pltf.: deft. also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached pltf.'s lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated; & it did not appear that any actual damage was sustained by pltf. Under these circumstances, the Lord Chancellor dissolved an injunction, which had been granted by the Vice-Chancellor, restraining deft. from diverting & using the water.—ELMHIRST *v.* SPENCER (1849), 2 Mac. & G. 45; 14 L. T. O. S. 433; 42 E. R. 18, L. C.

Annotations:—**Expld.** Rochdale Canal Co. *v.* King (1851), 2 Sim. N. S. 78. **Consd.** Soltau *v.* De Held (1851), 2 Sim. N. S. 133. **Distd.** Goldsmid *v.* Tunbridge Wells Improvement Comrs. (1866), 1 Ch. App. 349. **Apld.** A.-G. *v.* Cambridge Consumers Gas Co. (1868), 4 Ch. App. 71. **Consd.** Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566.

653. —— —— Though damages trifling—Injury to reversioner's rights.]—COOPER *v.* CRABTREE, No. 496, *ante.*

654. —— Prospective effect of nuisance.]—GOLDSMID *v.* TUNBRIDGE WELLS IMPROVEMENT COMRS., No. 685, *post.*

655. —— Trifling inconvenience capable of compensation.]—Bill filed to restrain a local board of health from discharging sewage into their river so as to be a nuisance and injury to pltf. The ct., finding that pltf. sustained no material injury & that the nuisance, if any, had been to a great extent abated since the filing of the bill, refused the injunction & dismissed the bill, but without costs, pltf. appearing to have had some justification for instituting the suit. In cases of this class, where important public interests are involved, such as the improvement of the drainage of a town, the ct. will protect the private rights of the individual if affected in any material degree, but will at the same time have regard to the nature & extent of the alleged injury or nuisance & to the balance of inconvenience.—LILLYWHITE *v.* TRIMMER (1867), 36 L. J. Ch. 525; 16 L. T. 318; 15 W. R. 763.

Annotations:—**Refd.** A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 19 L. T. 44; A.-G. *v.* Gee (1870), L. R. 10 Eq. 131.

——.]—*See* HIGHWAYS, Vol. XXVI., p. 439, No. 1566.

·.]—*See* INJUNCTION, Vol. XXVIII., pp. 399, 400, 408, Nos. 274–280, 339–343.

Disturbance of easements.]—*See* EASEMENTS, Vol. XIX., pp. 133, 134, 187, 188, 192, Nos. 904–910, 1381–1387, 1434–1439.

Nuisance arising from user of electricity works.]—*See* ELECTRIC LIGHTING, Vol. XX., pp. 209, 210, Nos. 66–70.

(c) *Continuing Injury.*

656. Injunction granted.]—This ct. will not grant an injunction to restrain a person from committing a trespass, where it is temporary only; otherwise where it has continued so long as to become a nuisance.—COULSON *v.* WHITE (1743), 3 Atk. 22; 26 E. R. 816. L. C.

Annotation:—**Refd.** Blakemore *v.* Glamorganshire Canal Navigation (1832), 1 My. & K. 154.

657. ——.]—Injunction granted; in a case where deft., the owner of an adjoining coal mine, had committed a trespass on the property of the adjoining owner of the land by abstracting coal from under the surface of such adjoining land.

In cases of trespass, not in one of a single but of a continuous kind, & especially in cases of mines, the ct. would grant an injunction, the case being in the nature of a nuisance (KINDERSLEY, V.-C.).—HOPKINS *v.* CADDICK (1851), 18 L. T. O. S. 236.

658. ——.]—Pltf. was the owner & occupier of a dwelling-house & park which adjoined defts.' gasworks. The house was situated at a distance of between 400 & 500 yards from the gasworks. Immediately adjoining defts.' premises was a plantation of trees 16 yards in width & 75 yards

PART IV. SECT. 2, SUB-SECT. 6.—A. (b).

648 i. *Injury must be substantial.*]—WEST *v.* NICHOLAS (1915), 17 W. A. L. R. 49.—AUS.

i. ——.]—PITTAR *v.* ALVAREZ (1916), 16 S. R. N. S. W. 618; 34 N. S. W. W. N. 2.—AUS.

PART IV. SECT. 2, SUB-SECT. 6.—A. (c).

656 i. *Injunction granted.*]—MIDDLETON *v.* HUMPHRIES (1913), 47 I. L. T. 160.—IR.

656 ii. ——.]—HOLLAND *v.* SCOTT (1892), 2 E. D. C. 307.—S. AF.

656 iii. ——.]—BLACKER *v.* CARTER (1905), 19 E. D. C. 223.—S. AF.

in length which had been planted by pltf. to screen off the gasworks. The fumes & smoke from the gasworks were carried by the prevailing wind across the plantation for a distance of 100 to 200 yards on to pltf.'s premises & had destroyed & injuriously affected them to such an extent that the tops of some of the trees were dying whilst others were dead. There was no house on pltf.'s property within the affected area. In an action brought by pltf. for an injunction to restrain defts. from carrying on their works so as to cause a nuisance or injury to pltf. or his property:—*Held:* the fumes & smoke discharged by defts.' gasworks over pltf.'s premises caused a serious, growing, & permanent injury to pltf.'s property; the injury being of a continuous nature it was impossible to measure the damage thereby occasioned with any certainty; & the pltf. was therefore entitled to the injunction he asked.

If the owner of property, be it a house, or a garden, or a park, or anything else, not necessarily a house or structure, is so substantially injured in the reasonable enjoyment of his property as that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction to restrain the continuance of the nuisance (BUCKLEY, L.J.).—WOOD *v.* CONWAY CORPN., [1914] 2 Ch. 47; 83 L. J. Ch. 498; 110 L. T. 917; 78 J. P. 249; 12 L. G. R. 571, C. A.

659. ——.]—MORROW *v.* STEPNEY CORPN. (1920), 18 L. G. R. 458.

660. —— To avoid multiplicity of actions.]—If pltf. finds the river so polluted as to be a continuous injury to him, if, in order to assert his right, he would be obliged to bring a series of actions . . . then the ct. will properly exercise its discretion by granting an injunction, to relieve him from the necessity of bringing a series of actions, in order to obtain the damages to which such continual . . . annoyance entitles him (PAGE WOOD, V.-C.).—A.-G. *v.* BIRMINGHAM BOROUGH COUNCIL (1858), 4 K. & J. 528; 22 J. P. 561; 6 W. R. 811; 70 E. R. 220.

Annotations:—**Refd.** A.-G. *v.* Metropolitan Board of Works (1863), 9 L. T. 139; A.-G. *v.* Kingston-on-Thames Corpn. (1865), 34 L. J. Ch. 481; Spokes *v.* Banbury Board of Health (1865), L. R. 1 Eq. 42; Lillywhite *v.* Trimmer (1867), 36 L. J. Ch. 525; A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146; A.-G. *v.* Dorking Grdns. (1882), 20 Ch. D. 595; Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695; Hove Corpn. *v.* Brighton Intercepting & Outfall Sewers Board (1903), 67 J. P. 335; Price's Patent Candle Co. *v.* L. C. C., [1908] 2 Ch. 526.

661. —— ——.]—Deft. co. had statutory power to take water from the river C. In order to obtain a larger supply they purchased land, but not in exercise of any statutory power, for the purpose of storing the flood waters. The consequence of defts.' works was to foul the water running past pltfs.' mills, & to render it less fitted for their dye works:—*Held:* (1) pltf. was entitled to an injunction, & was not obliged to seek compensation under the general compensation clause of Waterworks Clauses Act, 1847 (c. 17); (2) although pltf. might obtain damages at law, yet she was entitled, in order to avoid multiplicity of actions, to an injunction to restrain the fouling of the water.

Would this ct. have sent her away & said that she should bring action after action, instead of having her remedy by injunction? I cannot think that would have been so. . . . It is because it is most inconvenient to leave the rights of parties to be determined in that way [by bringing successive actions] . . . that this ct. has always in such cases given relief (MELLISH, L.J.).—CLOWES *v.* STAFFORDSHIRE POTTERIES WATERWORKS CO. (1872), 8 Ch. App. 125; 42 L. J. Ch. 107; 27 L. T. 521; 36 J. P. 760; 21 W. R. 32, L. JJ.

Annotations:—*As to* (1) **Consd.** Metropolitan Asylum District *v.* Hill (1881), 6 App. Cas. 193; Truman *v.* L. B. & S. C. Ry. (1883), 25 Ch. D. 423. **Apld.** Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287. *As to* (2) **Consd.** Pennington *v.* Brinsop Hall Coal Co. (1877), 5 Ch. D. 769. *Generally*, **Refd.** Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1898] 2 Ch. 614.

(*d*) *Temporary or Occasional Injury.*

662. Not sufficient ground.]—A bill was filed by a married woman in respect of her separate property, alleging a nuisance by reason of a noisy trade which destroyed her rest, & depreciated the value of her property. The evidence as to the nuisance was conflicting, & no action had been brought:—*Held:* the nuisance, if there was one, was not irremediable, but capable of compensation by damages; & there could be no injunction till the right was established at law.—WHITE *v.* COHEN (1852), 1 Drew. 312; 61 E. R. 471.

Annotation:—**Distd.** Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109.

663. ——.]—(1) Where the nuisance arising from brick burning was temporary only, the ct. refused to grant an *interim* injunction to enable pltf. to bring his action at law.

(2) The question whether brick burning is a nuisance must depend upon circumstances, & no general rule as to distance can be laid down.

The burning of bricks is an annoyance, & in that sense a nuisance to those within reach of the stifling vapour produced by the burning: but the distance within which this is a nuisance must depend upon circumstances of which the ct. is not in a position to judge . . . a thousand things may alter the case, such as the nature of the ground & the presence of intervening objects (KINDERSLEY, V.-C.).—CLEEVE *v.* MAHANY (1861), 25 J. P. 819; 9 W. R. 882.

664. ——.]—Where a public highway was, by Act of Parliament, vested in a district board of works, & a railway co., in widening their bridge over the road, under the powers of their Act of Parliament, would cause a temporary inconvenience to the public passing along the highway, the ct. refused to interfere at the instance of the board, on the ground that the inconvenience would be only temporary, while a permanent advantage would result to the public by the carrying out of the proposed works.—WANDSWORTH BOARD OF WORKS *v.* LONDON & SOUTH-WESTERN RY. CO. (1862), 31 L. J. Ch. 854; 26 J. P. 821; 8 Jur. N. S. 691; 10 W. R. 814.

Annotations:—**Consd.** Wandsworth Board of Works *v.* United Telephone Co. (1884), 53 L. J. Q. B. 449. **Refd.** St. Mary, Battersea, Vestry *v.* County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31; Hyde Corpn. *v.* Oldham, Ashton & Hyde Electric Tramways (1900), 64 J. P. 596.

665. ——.]—LILLYWHITE *v.* TRIMMER, No. 655, *ante*.

666. ——.]—The improvement comrs. of the town of C., in whom the pavements of all thoroughfares were vested, contracted with defts. to light the town with gas. Defts., a co. incorporated under Cos. Act, 1862 (c. 89), & without Parliamentary powers, proceeded to break up the pavements in order to lay their pipes, & continued to do so after the rescission of the contract in

660 i. —— *To avoid multiplicity of actions.*]—The probability of a series of actions in the event of a nuisance being continued, is a factor which assists the ct. in determining whether or not to grant an injunction.—WILKINSON *v.* CO-OPERATIVE ESTATES, LTD. (1919), 15 Tas. L. R. 22.—**AUS.**

Sect. 2.—Civil proceedings: Sub-sect. 6, A. (d), (e) & (f).]

consequence of their default. A bill & information, in which a rival gas co. which had for many years lighted the town were pltfs. & informants, was during the existence of the contract filed to restrain them from doing so:—*Held:* in the absence of all proof of injury to the property of pltfs., & of all evidence that injury was sustained by the public, the nuisance was of too temporary & trivial a character to justify the interference of this ct. by injunction.—A.-G. *v.* CAMBRIDGE CONSUMERS GAS CO. (1868), 4 Ch. App. 71; 38 L. J. Ch. 94; 19 L. T. 508; 33 J. P. 147; 17 W. R. 145, L. JJ.

Annotations:—**Consd.** A.-G. *v.* Preston Corpn. (1896), 13 T. L. R. 14. **Refd.** Preston Corpn. *v.* Fullwood L. B. (1885), 53 L. T. 718; St. Mary, Battersea, Vestry *v.* County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31. **Mentd.** Pudsey Coal Gas Co. *v.* Bradford Corpn. (1873), L. R. 15 Eq. 167.

667. ——.]—In questions of public nuisance, the ct. will not interfere by injunction when the injury is merely temporary & trifling but only when it is permanent & serious.—A.-G. *v.* GEE (1870), L. R. 10 Eq. 131; 23 L. T. 299; 34 J. P. 596.

Annotation:—**Refd.** Clowes *v.* Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 129, n.

668. —— **Except in extreme cases.**]—SWAINE *v.* GREAT NORTHERN RY. CO., No. 196, *ante*.

669. —— ——.]—The general rule applicable in such cases has been stated by TURNER, L.J., in *Swaine* v. *Great Northern Ry. Co.*, No. 196, *ante*, where he said that "occurrences of nuisances, if temporary & occasional only, are not grounds for the interference of this ct. by injunction, except in extreme cases. . . ." Defts. were doing nothing which was in itself unlawful. They were merely making alterations in their premises. There was no evidence of malice or design to cause annoyance, & no case was made for the granting of an injunction (STIRLING, J.).—GOSNELL *v.* AERATED BREAD CO., LTD. (1894), 10 T. L. R. 661.

670. —— ——.]—In cases of nuisance, if temporary & occasional only, the ct. will not interfere by injunction except in extreme cases.—A.-G. *v.* PRESTON CORPN. (1896), 13 T. L. R. 14.

671. —— **Injuries not irreparable—Damages adequate compensation.**]—COOKE *v.* FORBES, No. 622, *ante*.

672. —— **Act done for lawful object.**]—HARRISON *v.* SOUTHWARK & VAUXHALL WATER CO., No. 44, *ante*.

——.]—*See* HIGHWAYS, Vol. XXVI., p. 454, Nos. 1706, 1707.

Remedies of commoners.]—*See* COMMONS, Vol. XI., p. 51, No. 749.

(e) *Probability of Injury.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 405–408, Nos. 322–343.

673. Whether ground for injunction.]—BAINES *v.* BAKER, No. 529, *ante*.

674. ——.]—A. being the owner of two adjoining houses, demises one of them to B., & afterwards demises the other to C.; neither A. nor C. can make such alterations on the premises demised to the latter, as will prevent the comfortable enjoyment of the house demised to B. If C. threatens & begins to make alterations, which, the ct. is satisfied, will prevent the comfortable enjoyment of B.'s house, an injunction will be granted.—PALMER *v.* PAUL (1824), 2 L. J. O. S. Ch. 154.

675. —— **Probable effect of act not repairable afterwards.**]—If there is ground to believe injury will result from certain acts, this ct. will not permit those acts to be done, if it sees that the probable effect of them cannot afterwards be repaired. . . . In the case of an individual & owner of lands merely exercising his common legal right over his own property, the ct. can compel him at any time to set the matter right (WIGRAM, V.-C.).—DAWSON *v.* PAVER (1845), 4 Ry. & Can. Cas. 81; *subsequent proceedings* (1847), 5 Hare, 415.

676. —— **Probability of real danger.**]—Where the evidence in a cause showed that ball practice at a rifle range was accompanied by imminent danger to the lessee of property adjoining the range, an injunction was granted to restrain the practice until the range was made "free from danger to the lessee, his family & workmen."—BANISTER *v.* BIGGE (1865), 34 Beav. 287; 13 W. R. 379: 55 E. R. 646; *sub nom.* BANNISTER *v.* BIGGE, 11 L. T. 760; 29 J. P. 531; 11 Jur. N. S. 276.

677. —— ——.]—If I found any real apprehension of serious & immediate injury to health or of any pressing character of the like nature, such as the cases of stench or of apprehended inundation, I would interfere to prevent such irreparable injury in the meantime (PAGE WOOD, V.-C.).—EADEN *v.* FIRTH (1863), 1 Hem. & M. 573; 71 E. R. 251.

Annotations:—**Refd.** Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109; Barcham *v.* Hall (1870), 22 L. T. 116; Roskell *v.* Whitworth (1870), 5 Ch. App. 459.

678. —— ——.]—Defts. established within 685 yards of pltf.'s house a camp for smallpox patients. Pltf. alleged that the health of the neighbourhood had been endangered by the camp, & that the camp was a nuisance, & claimed an injunction to restrain defts. from maintaining the same:—*Held:* pltf. had failed to prove that there was any danger to him or his property, & the action must be dismissed.

Pltf. had undertaken to show that there was what LORD COCKBURN, C.J., called "a well founded & reasonable apprehension of danger." . . . There was in fact no evidence whatever of danger (*per* CUR.).—FLEET *v.* METROPOLITAN ASYLUMS BOARD, DARENTH SMALLPOX CAMP CASE (1886), 2 T. L. R. 361, C. A.

Annotations:—**Folld.** Bendelow *v.* Wortley Union Grdns. (1887), 57 L. J. Ch. 762; Matthews *v.* Sheffield Corpn. (1887), 31 Sol. Jo. 773. **Consd.** A.-G. *v.* Corpn., [1893] 2 Ch. 87; A.-G. *v.* Nottingham Corpn., [1904] 1 Ch. 673.

679. —— ——.]—Pltfs. were the owners of houses in proximity to which defts., a rural sanitary authority, had established a smallpox hospital. In an action to restrain the user of the hospital on the ground of nuisance, the ct. being satisfied on the evidence that pltfs. had made out a case of real appreciable injury, though not a great one, granted an *interim* injunction.—BENDELOW *v.* WORTLEY UNION GUARDIANS (1887), 57 L. J. Ch. 762; 57 L. T. 849; 36 W. R, 168; 4 T. L. R. 67.

680. —— ——.]—That there was apprehension

ART IV. SECT. 2, SUB-SECT. 6.—A. (e).

673 i. *Whether ground for injunction.*]—MAGEE *v.* LONDON & PORT STANLEY RY. CO. (1857), 6 Gr. 170.—**CAN.**

673 ii. ——.]—BRITISH CANADIAN SECURITIES, LTD. *v.* CITY OF VICTORIA CORPN. (1911), 16 B. C. R. 441.—**CAN.**

673 iii. ——.]—The right of a mtgee. to an injunction to restrain a threatened nuisance, if it exists at all, is to cases where it is clearly sho the alleged nuisance will in mtgee.'s security.—PRESTON *v.* HILTO (1920), 48 O. L. R. 172; 19 O. W. N 7.—**CAN.**

I have no doubt but whether the apprehension was well founded I am not satisfied. Until I am sure that the apprehension was well founded I shall not be justified in granting an interlocutory injunction (CHARLES, J.).—MATTHEWS *v.* SHEFFIELD CORPN. (1887), 31 Sol. Jo. .]—An injunction will not be granted in a *quia timet* action unless pltf. makes out a strong case of probability that the apprehended mischief will, in fact, arise.

The site of a proposed small-pox hospital was 200, 240 & 450 yards respectively from the three adjacent public roads, 90 yards from a much frequented cemetery, 256 yards from the nearest house, & 500 yards from a hotel, there being only fifteen houses within a half-mile radius. In actions by the secretary of the hotal & the A.-G., on the grounds of private & public nuisance respectively, the medical evidence being conflicting:—*Held:* in the absence of strong medical evidence that the proposed hospital would be a nuisance to the hotel or the public respectively, no injunction could be granted.

The doctrine of coming to a nuisance has long since been excluded (CHITTY, J.).—A.-G. *v.* MANCHESTER CORPN., [1893] 2 Ch. 87; 62 L. J. Ch. 459; 68 L. T. 608; 41 W. R. 459; 9 T. L. R. 315; 37 Sol. Jo. 325; 3 R. 427; *sub nom.* CROFTON *v.* MANCHESTER CORPN., WITHINGTON LOCAL BOARD *v.* SAME, A.-G. *v.* SAME, 57 J. P. 340.

Annotations:—**Consd.** A.-G. *v.* Nottingham Corpn., [1904] 1 Ch. 673. **Refd.** Pethick *v.* Plymouth Corpn. (1894), 70 L. T. 304; East London Ry. *v.* Thames Conservators (1904), 68 J. P. 302; Mudge *v.* Penge U. D. C. (1916), 80 J. P. 441; A.-G. *v.* Cory, Kennard *v.* Same (1919), 88 L. J. Ch. 410; Litchfield-Speer *v.* Queen Anne's Gate Syndicate (No. 2), [1919] 1 Ch. 407.

682. —— ——.]—A.-G. *v.* GUILDFORD, GODALMING & WOKING JOINT HOSPITAL BOARD, No. 211, *ante*.

683. —— ——.]—RAPLEY *v.* SMART, No. 176, *ante*.

684. —— ——.]—The Conservators of the Thames, in whom the rights of the Crown in the soil of the Thames are vested, & who have statutory powers to dredge the Thames, & to alter, deepen, restrict, enlarge & improve its bed & channel, proposed to dredge the river in a manner likely to endanger the Thames tunnel, a work constructed under the river by statutory authority:—*Held*: the Conservators must exercise their rights subject to the statutory rights of the owners of the tunnel, & must be restrained by injunction from carrying out any dredging works likely to endanger the tunnel.

In *quia timet* actions it is impossible to expect any witness to commit himself to the statement that the danger will ensue, nor is it absolutely necessary. All that is necessary is . . . that there must be a strong case of probability that the apprehended mischief will arise (FARWELL, J.).—EAST LONDON RY. CO. *v.* RIVER THAMES CONSERVATORS (1904), 90 L. T. 347; 68 J. P. 302; 20 T. L. R. 378.

Annotation:—**Mentd.** Fowke *v.* Berington, [1914] 2 Ch. 308.

See INJUNCTION, Vol. XXVIII., pp. 407, 408, Nos. 333, 336.

685. —— **Some degree of present nuisance existing—Which may continue or increase.**]—The sewage of a town had for many years been drained by comrs. acting under a local Act of Parliament into a stream passing through the pltf.'s land, which was beyond their district, without perceptibly polluting it. But for some years before the filing of the bill, in consequence of the increase of the town, the stream became perceptibly polluted, & continued to increase in impurity. Decree of the Master of the Rolls restraining the comrs. from draining the town into the stream so as to pollute the water to the injury of pltf. affirmed. Although the fact of prospective nuisance is not in itself a ground for the interference of the ct., yet if some degree of present nuisance exists, the ct. will take into account its probable continuance & increase.

If the fouling of the stream by defts. amounts to a nuisance at law, & if this nuisance seriously affects the estate, this ct. ought to interfere to prevent it (TURNER, L.J.).—GOLDSMID *v.* TUNBRIDGE WELLS IMPROVEMENT COMRS. (1866), 1 Ch. App. 349; 35 L. J. Ch. 382; 14 L. T. 154; 30 J. P. 419; 12 Jur. N. S. 308; 14 W. R. 562, L. JJ.

Annotations:—**Consd.** Lillywhite *v.* Trimmer (1867), 36 L. J. Ch. 525; A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146; A.-G. *v.* Gee (1870), L. R. 10 Eq. 131; A.-G. & Dommes *v.* Basingstoke Corpn. (1876), 45 L. J. Ch. 726; Glossop *v.* Heston & Isleworth L. B. (1879), 12 Ch. D. 102. **Distd.** A.-G. *v.* Dorking Grdns. (1882), 20 Ch. D. 595. **Apld.** Nixon *v.* Tynemouth Union R. S. A. (1888), 52 J. P. 504. **Refd.** Charles *v.* Finchley L. B. (1883), 52 L. J. Ch. 554; Fletcher *v.* Bealey (1885), 28 Ch. D. 688; Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287; Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695; Liverpool Corpn. *v.* Coghill, [1918] 1 Ch. 307.

686. —— **Threat to continue nuisance.**]—Action against a lieutenant-general in command of troops to restrain an alleged nuisance to a neighbouring proprietor caused by the noise & vibration of rifle practice by the troops under his command. The land on which the practice took place was vested in the Secretary of State for War, & by various Acts of Parliament authority was given to use the land for military purposes. There was no allegation in the statement of claim that deft. threatened to continue the nuisance, or that the military use of the land was unreasonable. It appeared also by the statement of claim that deft. was not the owner of the land:—*Held:* a threat to continue the nuisance was necessary in order to obtain an injunction; the Secretary of State for War was a necessary party; & as the land was vested in the Secretary of State for War for military purposes by Act of Parliament, the ct. had no authority to interfere with his discretion, unless it could be proved that the use to which the land was put was, even for military purposes, unreasonable.—HAWLEY *v.* STEELE (1877), 6 Ch. D. 521; 46 L. J. Ch. 782; 37 L. T. 625.

Annotation:—**Consd.** Hill *v.* Metropolitan Asylum Managers (1879), 4 Q. B. D. 433.

Disturbance of easements.]—*See* EASEMENTS, Vol. XIX., pp. 188, 189, Nos. 1391–1400.

Nuisance arising from user of electricity works.]—*See* ELECTRIC LIGHTING, Vol. XX., p. 210, No. 71.

(f) Conduct of Parties.

See, generally, INJUNCTION, Vol. XXVIII., pp. 408–411, 419–435.

687. Defendant insisting on right to do act — Injunction granted.]—A canal co. was established by certain Acts of Parliament. The Acts gave the canal proprietors rights as to taking water from streams within the distance of two thousand yards, for the purpose of making & maintaining the canal. They purchased a mill on a stream, from which stream they had the right to take water. In this way they became riparian owners. As such they were entitled to the flow of water from brooks & streams running into that stream, subject only to the rights which other riparian owners at the upper part of the stream might lawfully exercise. The directors of a waterworks

Sect. 2.—*Civil proceedings: Sub-sect.* 6, *A.* (*f*) *& C.; sub-sect.* 7. *Sect.* 3: *Sub-sect.* 1.]

co. purchased a mill on the upper part of the same stream, & so became riparian owners as the owner of that mill had been. They not only used the water for the purposes & in the manner allowed by law to every riparian owner, but collected it into a permanent reservoir for the supply of an adjacent town, & claimed, as their legal right, such a user of it:—*Held:* this use of the water by the directors of the waterworks co. was not a reasonable use of the stream, such as could justifiably be made by an upper riparian owner, & the canal proprietors, who were also riparian owners, whose flow of water was thereby affected, were entitled to come into equity, & obtain an injunction to restrain this use of the water.—SWINDON WATERWORKS CO. *v.* WILTS & BERKS CANAL NAVIGATION CO. (1875), L. R. 7 H. L. 697; 45 L. J. Ch. 638; 33 L. T. 513; 40 J. P. 804; 24 W. R. 284, H. L.; *varying*, S. C. *sub nom.* WILTS & BERKS CANAL NAVIGATION CO. *v.* SWINDON WATERWORKS CO. (1874), 9 Ch. App. 451, L. JJ.

Annotations:—**Consd.** Roberts *v.* Gwyrfai District Council, [1899] 2 Ch. 608; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301. **Refd.** Owen *v.* Davies, [1874] W. N. 175; Bonner *v.* G. W. Ry. (1883), 24 Ch. D. 1; Attwood *v.* Llay Main Collieries, [1926] Ch. 444. **Mentd.** Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155.

688. —— ——.]—The owner in fee of a garden over which the tenants of his adjoining houses had rights of enjoyment & management:—*Held:* entitled to an injunction to restrain continuing trespasses involving nuisances in the garden committed by a person acting under colour of a contract to improve the garden entered into between him & the tenants.—ALLEN *v.* MARTIN (1875), L. R. 20 Eq. 462; 32 L. T. 750; 23 W. R. 904.

689. —— —— **In absence of proof of substantial damage.**]—Injunction granted in the absence of proof of substantial damage, on the ground that defts. by their pleading claimed a right to continue doing that which the ct. held they were not entitled to do.

In an action by a sanitary authority to restrain the sanitary authority of a neighbouring district from authorising or directing sewage from their district to flow into the sewers of pltfs., the ct. granted an injunction as to the future, but refused to grant a mandatory injunction to compel the stopping up of existing drains; (*a*) because to do so would cause serious inconvenience to the district, & (*b*) because it is doubtful whether a local board have power to stop up drains which they have once authorised to be connected with their sewers. Inasmuch as the injunction granted applied only to the future, the ct. refused to suspend its operation.—A.-G. *v.* ACTON LOCAL BOARD (1882), 22 Ch. D. 221; 52 L. J. Ch. 108; 47 L. T. 510; 31 W. R. 153.

Annotations:—**Refd.** Charles *v.* Finchley L. B. (1883), 23 Ch. D. 767; A.-G. *v.* Clerkenwell Vestry, [1891] 3 Ch. 527; Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378; Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695. **Mentd.** L. C. C. *v.* Acton U. D. C. (1902), 18 T. L. R. 689.

690. —— —— ——.]—By so altering the flow of water the local authority are, within Public Health Act, 1875 (c. 55), s. 332, "injuriously affecting" the common law right of such a riparian proprietor, & they will be restrained from so doing without any proof of sensible damage caused to him.—ROBERTS *v.* GWYRFAI DISTRICT COUNCIL, [1899] 2 Ch. 608; 68 L. J. Ch. 757; 81 L. T. 465; 64 J. P. 52; 48 W. R. 51; 16 T. L. R. 2; 44 Sol. Jo. 10, C. A.

Delay no bar to relief.]—*See* INJUNCTION, Vol. XXVIII., p. 423, No. 476.

Effect of acquiescence.]—*See* INJUNCTION, Vol. XXVIII., pp. 428, 431, Nos. 526, 546–550.

(*g*) *Nuisance Ceasing since Action Brought.*

691. Whether injunction granted.] —CRUMP *v.* LAMBERT, No. 21, *ante.*

692. ——.]—Pltfs. claimed damages in respect of injury caused to their trees & crops by smoke & effluvia from deft.'s works. They also claimed an injunction to restrain continuance of the nuisance. The nuisance had ceased owing to defts. having stopped work after action brought:—*Held:* pltfs. were entitled to an injunction & an inquiry as to damages.—CHESTER (DEAN & CHAPTER) *v.* SMELTING CORPN., LTD. (1901), 85 L. T. 67; 17 T. L. R. 743.

——.]—*See* INJUNCTION, Vol. XXVIII., p. 540, Nos. 1477–1480.

B. Damages in lieu of or in addition to Injunction.

See INJUNCTION, Vol. XXVIII., pp. 412 *et seq.*

C. Practice, Procedure and Costs.

See, generally, INJUNCTION, Vol. XXVIII., pp. 493–523, 539–551.

SUB-SECT. 7.—EVIDENCE.

693. How nuisance proved — Necessity for external evidence.]—There is no necessity specifically to pray for liberty to inspect premises, it being a species of discovery which the ct. has jurisdiction to grant if the nature of the case requires it; but, where pltfs. applied for liberty to inspect defts.' works to ascertain the particular products used in the manufacture of chemicals which occasioned a nuisance the motion was refused, on the ground that proof of the nuisance could be obtained from external sources.—BARLOW *v.* BAILEY (1870), 22 L. T. 464; 18 W. R. 783.

694. Admissibility—Evidence of expert—Architect acquainted with neighbourhood—Evidence as to effect of nuisance on value of neighbouring property.]—In an action for a nuisance, an architect acquainted with the locality may be asked if the nuisance depreciated the value of the houses in the neighbourhood.—GAUNTLETT *v.* WHITWORTH (1849), 2 Car. & Kir. 720.

695. —— **Nuisance caused by construction & maintenance of small-pox hospital—Evidence of effect of similar hospitals in surrounding neighbourhood.**]—In an action brought in respect of a nuisance alleged to be caused by the construction & maintenance of a hospital for infectious diseases [small-pox] pltfs. proposed to call evidence as to the effect of other similar hospitals in the surrounding neighbourhoods:—*Held:* evidence of facts by which the effect, or absence of effect, of such hospitals could be either positively or approximately ascertained, would be admissible & material.—METROPOLITAN ASYLUM DISTRICT MANAGERS *v.* HILL (APPEAL NO. 1) (1882), 47 L. T. 29; 47 J. P. 148, H. L.; *revsg.* on other grounds S. C. *sub nom.* HILL *v.* METROPOLITAN ASYLUMS DISTRICT MANAGERS (1879), 49 L. J. Q. B. 228, C. A.

Annotation:—**Consd.** A.-G. *v.* Nottingham Corpn., [1904] 1 Ch. 673.

696. —— —— ——.]—A.-G. *v.* NOTTINGHAM CORPN., No. 212, *ante.*

697. Rebuttal of positive evidence as to a nuisance—Whether merely negative evidence sufficient.]—GREAT CENTRAL RY. CO. *v.* DONCASTER RURAL COUNCIL, No. 202, *ante.*

SECT. 3.—SUMMARY PROCEEDINGS.

SUB-SECT. 1.—PERSONS LIABLE TO BE PROCEEDED AGAINST.

698. Person by whose act, default, or sufferance nuisance arises or continues—Owner—Nuisance committed in market—Nuisances Removal Act, 1855 (c. 121), ss. 2, 12.]—DRAPER *v.* SPERRING, No. 237, *ante*.

699. —— —— Nuisance on adjoining land—No nuisance appearing on owner's land.]—(1) By Nuisances Removal Act, 1855 (c. 121), s. 12, in any case where a nuisance, a term, which includes ditches & drains injurious to health, is ascertained by the local authority to exist, they shall cause complaint thereof to be made before a justice of the peace, & the justice shall thereupon issue a summons requiring the person whose act, default, permission or sufferance the nuisance arises or is continued, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices who shall proceed to inquire into the complaint, & if it be proved to their satisfaction that the nuisance exists, shall make an order on such person, owner or occupier, for the abatement, discontinuance & prohibition of the nuisance. By sect. 13 the justices may require the person upon whom the order is made to drain, empty, cleanse, fill up, amend or remove the injurious ditch, drain, etc. The occupiers of a brewery had for upwards of twenty years discharged the refuse from it into a barrel drain, which, after passing along a turnpike road, entered land belonging to another proprietor. The proprietor of this land did not get rid of the refuse as his predecessors had done, & it became after it had reached his land a nuisance:—*Held:* the occupier of the brewery was a person by whose act, default, permission or sufferance the nuisance was caused, & an order of justices directing him to abate the nuisance by cutting off all communication between the drains of his premises & the barrel drain was valid.

(2) Deft., having obtained the necessary consent, made a drain leading from his own premises through adjoining land. This drain, which received the refuse from several houses & pigties belonging to deft., & let to yearly tenants, polluted the water of neighbouring streams, & became a nuisance:—*Held:* deft. must be taken to be a person by whose act, etc., the nuisance was caused, & might be ordered to abate & discontinue the nuisance.—BROWN *v.* BUSSELL, FRANCOMB *v.* FREEMAN (1868), L. R. 3 Q. B. 251; B. & S. 1; 37 L. J. M. C. 65; 18 L. T. 19; 32 J. P. 196; 16 W. R. 511.

Annotations:—*As to* (1) **Consd.** Wycombe Union *v.* Parsons (1894), 71 L. T. 428. **Refd.** St. Helens Chemical Co. *v.* St. Helens Corpn. (1876), 1 Ex. D. 196; Scarborough Corpn. *v.* Scarborough R. S. A. (1876), 1 Ex. D. 344. *As to* (2) **Refd.** Riddell *v.* Spear (1879), 40 L. T. 130. *Generally*, **Consd.** Fordom *v.* Parsons, [1894] 2 Q. B. 780. **Refd.** Richmond Union Grdns. *v.* St. Paul's (Dean & Chapter) (1868), 18 L. T. 522.

—— —— ——.]—*See, also*, No. 730, *post*.

—— **Failure to find such person—Owner or occupier.**]—*See* Public Health Act, 1875 (c. 55), s. 94; Public Health (London) Act, 1891 (c. 76), s. 4.

700. —— —— —— Necessity for proof that nuisance continues by owner's default.]—Applts. were a public body having certain jurisdiction & powers over the River Thames, the bed & soil thereof & of the shores within the flux & reflux of the tides were vested in them by statute. The Acts by which their duties were regulated gave them various powers for the improvement of the navigation of the river, but gave them no power of scavenging or removing nuisances in the portion of the river hereafter referred to, & their power of raising funds, & the application of the funds when raised, were strictly limited by statute & did not include a power of raising money for the sanitary improvements of such portion of the river. A nuisance injurious & dangerous to health existed between high & low water marks in a tidal creek running inland about 400 to 500 feet from the line of the river; it consisted of an accumulation of foul mud, which was largely composed of decomposing organic matter, & was chiefly derived from matter held in suspension in the water or floating on its surface & left when the tide receded; it was impossible to fix upon any persons as having caused the accumulation. An order having been made upon applts. as owners of the premises upon which the nuisance existed for its abatement:—*Held:* Public Health (London) Act, 1891 (c. 76), s. 4 (1), must be read with the proviso in sub-sect. 3 (*b*); where the person causing the nuisance could not be found, the liability of the owner of the premises to abate it only arose where it was shown that it continued by his act, default, or sufferance, & the order upon applts. was therefore wrongly made.—THAMES CONSERVATORS *v.* PORT OF LONDON SANITARY AUTHORITY, [1894] 1 Q. B. 647; 63 L. J. M. C. 121; 69 L. T. 803; 58 J. P. 335; 10 T. L. R. 160; 38 Sol. Jo. 153,

Annotations:—**Consd.** Clayton *v.* Sale U. C., [1926] 1 K. B. 415. **Mentd.** Westminster Corpn. *v.* Johnson, Westminster Corpn. *v.* Fuller (1904), 68 J. P. 549.

701. —— —— ——.]—The drain connecting a house occupied by a tenant, with the sewer became clogged so that the sewage would not pass through. There was nothing to show what caused the stoppage. The local authority served a notice to abate the nuisance upon the owner of the house under Public Health Act, 1875 (c. 55), s. 94, & took proceedings against him for non-compliance therewith. The magistrate found as a fact that the person by whose act, default, or sufferance the nuisance arose could not "be found," & held that the local authority could proceed against the owner:—*Held:* there being nothing to show what caused the stoppage of the drain & the consequent nuisance, the magistrate could properly find that the person by whose act, default, or sufferance the nuisance arose could not "be found," within Public Health Act, 1875 (c. 55), s. 94, & the local authority were therefore entitled to serve the notice upon the owner of the premises & to proceed against him.—RHYMNEY IRON CO. *v.* GELLIGAER DISTRICT COUNCIL, [1917] 1 K. B. 589; 86 L. J. K. B. 564; 116 L. T. 339; 81 J. P. 86; 33 T. L. R. 185; 15 L. G. R. 240, D. C.

702. —— —— No contractual obligation to prevent nuisance.]—The owner or occupier of land on which a nuisance exists owing to the flooding of the land through a breach in a flood bank, may be liable under Public Health Act, 1875 (c. 55), s. 94, to abate the nuisance on the ground that it arises or continues through his act, default or sufferance, even though he is under no contractual obligation to repair or maintain the flood bank.—CLAYTON *v.* SALE URBAN DISTRICT COUNCIL, [1926] 1 K. B. 415; 95 L. J. K. B. 178; 134 L. T. 147; 90 J. P. 5; 42 T. L. R. 72; 24 L. G. R. 34, D. C.

703. —— Lessee—Construction of sewer under land without lessee's consent—Stoppage of sewer by lessee on failure to obtain compensation.]—Applt. rented land of the owner of houses & other

Sect. 3.—*Summary proceedings: Sub-sects.* 1, 2 &

land in the neighbourhood; & about two years ago the landowner, without applt.'s consent, made a sewer under the land he occupied. Pecuniary compensation was claimed at the time, but during the two years the sewage of several houses passed through the sewer; applt., being unable to get satisfaction from his landlord, at length stopped up the sewer, & the local board obtained a conviction against him under Public Health Act, 1875 (c. 55), ss. 94 & 96, although no nuisance existed on his land:—*Held:* upon a case stated, applt. was a person by whose act the nuisance arose or continued; & that he was rightly convicted.—RIDDELL *v.* SPEAR (1879), 40 L. T. 130; 43 J. P. 317, D. C.

704. —— Local authority undertaking to do work from default in which nuisance arises—Whether owner liable.]—Applt. was the owner of certain cottages which were built in 1888, & which he purchased in May, 1897. Between the months of Mar. & Oct. 1896, typhoid fever occurred in some of these cottages, which were fitted with double privy middens. During the time that elapsed between the time that the patients were attacked & the notification to the authorities, the excreta of the patients were put in the privy middens to the knowledge of the authorities, which authorities had undertaken the cleansing of these privy middens under Public Health Act, 1875 (c. 55), s. 42. Upon the notification of the disease the authorities supplied covered pails, & superintended the disinfecting of the places infected by such excreta, but these measures failed to get rid of & destroy the typhoid germs, & would never do so, though they might have been destroyed when the excreta were first placed there. The presence of these germs constituted a nuisance, & the authorities then caused a notice to be served upon applt., under Public Health Act, 1875 (c. 55), s. 94, to abate this nuisance. Upon non-compliance with this notice, an order was made by the petty sessions requiring applt. to comply with the notice. Applt. appealed to quarter sessions who upheld the order:—*Held:* applt. was not liable under the Public Health Act, 1875 (c. 55), to abate this nuisance, & the complaint therefore must be discharged.—BARNETT *v.* LASKEY (1898), 68 L. J. Q. B. 55; 79 L. T. 408; 63 J. P. 5, D. C.

705. —— Person sending sewage down pipe—Act sole cause of nuisance.]—The fact that a pipe which has no lawful outlet for sewage receives sewage from a house as well as surface water from a highway is not of itself proof that the pipe is a sewer. If a nuisance arises solely in consequence of a person's own act in sending sewage down such a pipe, he is responsible under Public Health Act, 1875 (c. 55), ss. 94 & 95, as a person causing or continuing the nuisance by his "act, default or sufferance."—WINCANTON RURAL COUNCIL *v.* PARSONS, [1905] 2 K. B. 34; 74 L. J. K. B. 533; 93 L. T. 13; 69 J. P. 242; 3 L. G. R. 771, D. C.

706. Who is "owner"—Thames conservators—Whether owners of soil & subsoil of river—For purposes of statute.]—THAMES CONSERVATORS *v.* PORT OF LONDON SANITARY AUTHORITY, No. 700, *ante*.

707. —— Reversioner.]—Pltfs., after receiving a notice under the Public Health Act, 1875 (c. 55), from the urban sanitary authority of a nuisance existing on certain premises in 1909, carried out the repairs required by the notice at their own expense & sued deft. as for money paid by them at deft.'s request. Pltfs. put in admissions by deft. (*a*) that the reversion expectant upon a lease, dated Jan. 3, 1883, was vested in deft., & (*b*) that the premises were held by pltfs. as tenants of deft. under the said lease. Pltfs. put in the lease, by which a Mr. & Mrs. H. demised the premises which were at Bournemouth, to one D. for the remainder of a term of eighty years from Sept. 29, 1840, less the last seven days thereof, at a rent of £60 *per annum*. On this evidence the county ct. judge held that deft. was the owner of the premises within Public Health Act, 1875 (c. 55). Deft. appealed on the ground that there was no evidence of such ownership:—*Held:* there was some evidence of such ownership, & therefore the appeal must be dismissed. The ct. themselves would have required further & better evidence of ownership.—WAREHAM & DALE, LTD. *v.* FYFFE (1910), 74 J. P. 249; 8 L. G. R. 620, D. C.

708. —— Person in receipt of rack rent.]—Resp. was lessee of a house in the county of London, which he let to one A. at a rental of 15*s.* a week, subsequently raised to £1 0*s.* 9¾*d.* a week. A. occupied the basement himself & sublet the three upper floors, each to a different tenant. The total rent paid by the three tenants to A. was £1 2*s.* a week. There was no water supply on two of the upper floors, & the sanitary authority by virtue of the Public Health (London) Act, 1891 (c. 76), ss. 4 & 48, amended by the London County Council (General Powers) Act, 1907 (c. clxxv), s. 78, served notice on resp. as "owner of the premises" to abate the nuisance & provide a proper water supply upon these floors. Resp. failed to comply with the notice, & upon a complaint against him the justices refused to convict on the ground that he was not "owner" as defined by the Public Health (London) Act, 1891 (c. clxxv), s. 141:—*Held:* the justices had wrongly decided, & the case must be remitted to them with a direction to make the order asked.

"Owner" for the purposes of the above statutory provisions means the person who for the time being receives the rack rent of the whole of the premises.

A mesne tenant who receives subsidiary rents from parts of the premises less than the whole is not "owner of the premises," even though the rents which he receives make up two thirds of the full annual value of the premises & so exceed that which would constitute a rack rent of the whole premises.—KENSINGTON BOROUGH COUNCIL *v.* ALLEN, [1926] 1 K. B. 576; 95 L. J. K. B. 481; 134 L. T. 665; 90 J. P. 105; 42 T. L. R. 449; 24 L. G. R. 254, D. C.

.]—*See, also*, Nos. 731, 732, *post*.

709. Inability to "find" person responsible—What constitutes—Inability to discover cause of nuisance.]—RHYMNEY IRON CO. *v.* GELLIGAER DISTRICT COUNCIL, No. 701, *ante*.

SUB-SECT. 2.—WHO MAY COMPLAIN.

See Public Health Act, 1875 (c. 55), s. 105; Public Health (London) Act, 1891 (c. 76), s. 12.

710. Party contributing to nuisance.]—By a local Act resps. were bound to flush, cleanse, & trap the sewers in the town of H. Applts. were possessed of chemical works at H., & were entitled to discharge refuse by two separate drains, into a public sewer. By the one drain liquid impregnated with muriatic acid was discharged, & by the other liquid impregnated with sulphur. Upon their combination in the sewer sulphuretted hydrogen gas was produced, which escaped in

sufficient quantities to be injurious to the public health. No nuisance existed in applts.' drains. Resps. had not properly flushed, cleansed, & trapped the sewer. Complaint having been made by resps. of the escape of the sulphuretted hydrogen gas, an order for the abatement thereof was made by justices upon applts. :—*Held :* the escape of sulphuretted hydrogen gas from the sewer was a nuisance within the meaning of Nuisances Removal Act, 1855 (c. 121), s. 8, it arose from the act of applts., & resps. could lawfully make complaint thereof, although they themselves might have contributed to the existence of the nuisance.—ST. HELENS CHEMICAL CO. *v.* ST. HELENS CORPN. (1876), 1 Ex. D. 196 ; 45 L. J. M. C. 150 ; 34 L. T. 397 ; 40 J. P. 471, D. C.

Annotation :—**Refd.** A.-G. *v.* Scott, [1905] 2 K. B. 160.

711. Person aggrieved—Must be "aggrieved" on date of nuisance complained of.]—HILTON *v.* HOPWOOD (1899), 44 Sol. Jo. 90, D. C.

SUB-SECT. 3.—INTIMATION OF NUISANCE.

A. Costs of Abatement in Compliance with Intimation.

See Public Health (London) Act, 1891 (c. 76), s. 3 ; LANDLORD & TENANT, Vol. XXXI., pp. 301–304, Nos. 4461, 4464–4469, 4474–4477.

712. Occupier voluntarily executing necessary works — Recovery of expenses from owner.]—Under the Public Health (London) Act, 1891 (c. 76), a sanitary authority served on certain premises an intimation or warning, addressed to the owners, that, if certain necessary works were not completed within a specified time, they would commence proceedings against them "by the service of a statutory notice." Thereupon, the occupier, without forwarding the document to the owners, or informing them of it, caused the work to be executed, & then sought to recover the amount expended thereon from the owners :—*Held :* the occupiers, not being compellable to execute the work, had acted as mere volunteers in doing so, & had no claim to be reimbursed by the owners.—THOMPSON & NORRIS MANUFACTURING CO., LTD. *v.* HAWES (1895), 73 L. T. 369 ; 59 J. P. 580, C. A.

Annotations :—**Consd.** Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807. **Apld.** Oliver *v.* Camberwell B. C. (1904), 90 L. T. 285. **Distd.** Wilson's Music & General Printing Co. *v.* Finsbury B. C., [1908] 1 K. B. 563.

713. —— ——.]—Defts. served a notice on pltf. that certain drains on his premises were in a defective condition. Pltf. in consequence made good the defects. The repairs turned out to be repairs to a sewer which it was defts.' duty to maintain. In an action to recover from defts. the expenses so incurred as money paid to their use :—*Held :* pltf. could not recover.—PROCTOR *v.* ISLINGTON CORPN. (1902), 18 T. L. R. 505 ; 1 L. G. R. 652, n. ; *on appeal* (1903), 67 J. P. 164, C. A.

Annotations :—**Refd.** Silles *v.* Fulham B. C. (1903), 1 L. G. R. 643 ; Oliver *v.* Camberwell B. C. (1904), 90 L. T. 285.

714. Owner executing work before service of notice of abatement—Covenant by tenant of premises to pay "outgoings"—Whether expenditure an "outgoing."]—*Re* BETTINGHAM, MELHADO *v.* WOODCOCK (1892), 9 T. L. R. 48.

Annotation :—**Consd.** Smith *v.* Robinson, [1893] 2 Q. B. 53.

715. —— —— ——.]—The owners of a house let it to deft. for a term of three years at a rent of £70, deft. agreeing to pay "all rates, taxes, assessments, & outgoings whatsoever in respect of the premises." After the expiry of the term deft. continued in occupation of the house without any fresh agreement, & paid rent for it at the same rate. Subsequently, & whilst deft. was still in occupation, the sanitary inspector of the district served upon the owners of the house an intimation under Public Health (London) Act, 1891 (c. 76), s. 3, that the house was in such a state as to be a nuisance owing to the drain being defective. The owners gave notice to deft., & required him to do the work necessary to abate the nuisance. Upon deft. refusing to do so, the owners proceeded to do the work themselves at once without waiting to be served by the sanitary authority with a notice under sect. 4 of the Act requiring them to do the work. The expense incurred by them in doing the work amounted to £70 1*s.* 6*d.* In an action by the owners to recover that sum from deft. under his covenant to pay all outgoings :—*Held :* the action could not be maintained upon the grounds—(*a*) The owners having done the work immediately upon receipt of the intimation of the existence of the nuisance & before service of any notice requiring them to abate it, did it voluntarily, & not under any obligation, & the expenditure was consequently not an "outgoing" within the meaning of the covenant : & (*b*) Even if a covenant to pay outgoings would cover such an expenditure, it was not, having regard to the proportion which the expenditure bore to the yearly rent, a covenant which was applicable to a yearly tenancy, & deft. in holding over after the expiry of his term & paying rent could not be presumed to have intended to become a yearly tenant on the terms of such an obligation.—HARRIS *v.* HICKMAN, [1904] 1 K. B. 13 ; 73 L. J. K. B. 31 ; 89 L. T. 722 ; 68 J. P. 65 ; 20 T. L. R. 18 ; 48 Sol. Jo. 69 ; 2 L. G. R. 1.

Annotations :—**Consd.** Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807 ; Oliver *v.* Camberwell B. C. (1904), 90 L. T. 285. **Mentd.** Greaves *v.* Whitmarsh, Watson (1906), 95 L. T. 425 ; Lowther *v.* Clifford, [1926] 1 K. B. 185.

716. —— Work which sanitary authority ought to have done—Right of recovery from authority.]—Pltf. was tenant from year to year to defts. of a house in London, in which a nuisance arose by reason of water & sewage collecting in the cellar owing to a stoppage in the drains. The sanitary authority, acting under Public Health (London) Act, 1891 (c. 76), s. 4 (1), served a notice at the premises directed to the owner or occupier, & requiring the nuisance to be abated ; they did not serve on the owner a notice under sect. 4, sub-sect. 3, which provides for the service on the owner of a notice to abate in cases where the nuisance arises from any want or defect of a structural character. Pltf., who under sect. 4, sub-sect. 4, was liable to a penalty of £10 if he made default in complying with the requisitions of the notice, did the necessary work, in the course of which it was discovered that the nuisance arose from a structural defect in the drains :—*Held :* (1) pltf. was entitled under sect. 11, sub-sect. 1, of the Act to recover from defts. the costs & expenses incurred in abating the nuisance as money paid by him for the use & at the request of defts., although no notice under sect. 4, sub-sect. 3, had been served upon defts. as owners of the premises ; (2) the costs & expenses incurred in carrying "the order" into effect must be taken to include the costs & expenses of carrying into effect the "notice" from the sanitary authority, although no "nuisance order" under sect. 5 had been obtained by the sanitary authority upon complaint to a petty sessional division.

(3) Without having recourse to sect. 11 pltf. is entitled to recover from defts. as having been legally compelled to incur expense in abating a nuisance which defts. themselves ought to have

Sect. 3.—*Summary proceedings: Sub-sect.* 3, *A. B.; sub-sect.* 4, *A., B. & C. (a) & (b).*]

abated (CHARLES, J.).—GEBHARDT *v.* SAUNDERS, [1892] 2 Q. B. 452; 67 L. T. 684; 56 J. P. 741; 40 W. R. 571; 36 Sol. Jo. 524, D. C.

Annotations:—*As to* (1) **Folld.** Thompson & Norris Manufacturing Co. *v.* Hawes (1895), 73 L. T. 369; Andrew *v.* St. Olave's Board of Works, [1898] 1 Q. B. 775. **Consd.** North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972. **Distd.** Reeve *v.* Sadler (1903), 67 J. P. 63. *As to* (2) **Folld.** Andrew *v.* St. Olave's Board of Works, [1898] 1 Q. B. 775. **Consd.** Cree *v.* St. Pancras Vestry, [1899] 1 Q. B. 693. *As to* (3) **Consd.** North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972; Ellis *v.* Bromley R. D. C. (1899), 81 L. T. 224. *Generally*, **Refd.** Rhymney Iron Co. *v.* Gelligaer District Council, [1917] 1 K. B. 589. **Mentd.** Hope *v.* Walter, [1900] 1 Ch. 257.

717. —— —— ——.]—An owner of premises received a written intimation under Public Health (London) Act, 1891 (c. 76), s. 3, duly signed by the officer of the sanitary authority, making known to him the existence of a nuisance at his premises & requesting him to abate the same within seven days otherwise the sanitary authority would commence proceedings against him by the service of a statutory notice. The owner, without waiting for the service of the statutory notice under sect. 4 of the Act requiring him to abate the nuisance, did the necessary works to abate the nuisance, in the course of which he discovered that the work was a sewer & not a drain, but without communicating with the sanitary authority he completed the work, & brought an action against the sanitary authority to recover the expenses as for work done by him under compulsion which the sanitary authority were legally compellable to do:—*Held:* work done under an "intimation" given under sect. 3, is not work done under compulsion, & as the owner had not waited for the statutory notice under sect. 4 but had done the work under the "intimation" notice, the work was not done by him under compulsion, & he was not entitled to recover the expenses of the work.—OLIVER *v.* CAMBERWELL BOROUGH COUNCIL (1904), 90 L. T. 285; 68 J. P. 165; 52 W. R. 511; 48 Sol. Jo. 208; 2 L. G. R. 617, D. C.

Annotations:—**Distd.** Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807; Wilson's Music & General Printing Co. *v.* Finsbury B. C., [1908] 1 K. B. 563.

718. Work done under protest by person not liable—Right of recovery from person liable.]—A nuisance having arisen from the obstruction of a pipe which carried off the drainage from pltf.'s premises, defts.' sanitary inspector served on pltfs. an "intimation" notice under the Public Health (London) Act, 1891 (c. 76), requiring them to abate the nuisance. Pltfs. contended, & it was the fact, that the pipe was a sewer, & therefore repairable, not by them, but by defts.; but pltfs. did the work necessary to abate the nuisance under protest, & sued defts. to recover the expense incurred by them in so doing as money paid by them under compulsion which defts. were compellable to pay:—*Held:* pltfs. were entitled to recover.—WILSON'S MUSIC & GENERAL PRINTING CO. *v.* FINSBURY BOROUGH COUNCIL, [1908] 1 K. B. 563; 77 L. J. K. B. 471; 98 L. T. 574; 72 J. P. 37; 6 L. G. R. 349.

Annotation:—**Refd.** Kershaw *v.* Smith, [1913] 2 K. B. 455.

See, further, SEWERS & DRAINS.

B. Non-Compliance.

See Sub-sect. 4, E., *post.*

SUB-SECT. 4.—NOTICE TO ABATE.

A. In General.

See Public Health Act, 1875 (c. 55), ss. 94–96; Public Health (London) Act, 1891 (c. 76), s. 4.

719. Nature & extent of works to be executed—Power to determine—In whom vested—Jurisdiction of justices to review determination.]—By the Public Health Act, 1848 (c. 63), s. 54, the surveyor of the Local Board of Health may examine any drain, water closet, privy, cesspool, or ash pit, & if it is in bad order & condition the Board shall cause notice in writing to be given to the owner or occupier of the premises, requiring him to do the necessary works; & if such notice be not complied with, the party shall be liable to a penalty for every day during which he makes default:—*Held:* the discretion to determine what works are necessary to be done is vested in the Board, &, on a proceeding before justices to recover the penalty under sect. 129, they have no jurisdiction to review its determination.—HARGREAVES *v.* TAYLOR (1863), 3 B. & S. 613; 1 New Rep. 472; 32 L. J. M. C. 111; 8 L. T. 149; 27 J. P. 325; 9 Jur. N. S. 1053; 11 W. R. 562; 122 E. R. 230.

720. Necessity for—On condition precedent to summons.]—Under 23 & 24 Vict. c. 77, s. 13, amended by Sanitary Act, 1866 (c. 90), part 2, a justice of the peace upon the complaint of any inhabitant of any parish or place of the existence of any nuisance on any private premises in the same parish or place, may issue a summons requiring the person by whose act, default, permission, or sufferance, the nuisance arises, etc., or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before justices, etc., without proof of the service of a previous notice to abate the nuisance.—COCKER *v.* CARDWELL (1869), L. R. 5 Q. B. 15; 10 B. & S. 797; 39 L. J. M. C. 28; 21 L. T. 457; 34 J. P. 516; 18 W. R. 212.

721. —— —— **Trade nuisance.**]—BIRD *v.* ST. MARY ABBOTTS, KENSINGTON VESTRY, No. 132, *ante.*

722. —— ——.]—A statement of claim, alleging that a notice purporting to be given under Public Health Act, 1875 (c. 55), s. 36, was given without any previous report of the inspector of nuisances, & that a trespass is threatened & intended by the local authority in default of compliance with such notice, & praying an injunction, discloses a reasonable cause of action.—ROBINSON *v.* SUNDERLAND CORPN. (1898), 63 J. P. 19, C. A.; *subsequent proceedings*, [1899] 1 Q. B. 751, D. C.

B. Form of Notice.

723. Definition of time for abatement—"Forthwith"—Whether sufficient.]—N. was duly served with notice under Public Health Act, 1875 (c. 63), s. 94, to abate forthwith a nuisance arising from filth:—*Held:* the word "forthwith" meant within a reasonable time, & sufficiently defined the time for doing the work.—THOMAS *v.* NOKES (1894), 58 J. P. 672, D. C.

724. —— —— ——.]—A notice under Public Health Act, 1875 (c. 55), s. 94, requiring the abatement of a nuisance forthwith after the service of the notice sufficiently specifies the time, as required by that sect., within which the nuisance must be abated.—THOMAS *v.* WESTERN STEAM TRAWLING CO. (1894), 59 J. P. 232, D. C.

725. Necessity for specification of works to be done.]—By Public Health Act, 1875 (c. 55), s. 94, the notice required under sect. 91 to abate a nuisance shall be a notice requiring the person causing the nuisance "to abate the same within a time to be specified in the notice, & to execute such works & do such things as may be necessary

for that purpose." Resp. W. was summoned before the justices, under sect. 91 & subsequent sects., for permitting black smoke to be discharged from a chimney not being a chimney belonging to a private dwelling-house in such quantity as to be a nuisance. A preliminary objection was taken that the notice under the Act was bad on the ground that it did not set out the works required to be done in order to remedy the nuisance. The justices upheld the objection & dismissed the summons:—*Held:* the notice was quite sufficient, as no works were required to be done, but only the black smoke stopped.—MILLARD *v.* WASTALL, [1898] 1 Q. B. 342; 67 L. J. Q. B. 277; 77 L. T. 692; 62 J. P. 135; 46 W. R. 258; 14 T. L. R. 172; 42 Sol. Jo. 215; 18 Cox, C. C. 695, D. C.

Annotation:—**Refd.** C. L. Ry. *v.* Hammersmith B. C. (1904), 73 L. J. K. B. 623.

726. ——.]—A notice was served on the owner of certain premises under Public Health Act, 1875 (c. 55), s. 94, requiring him to abate a nuisance arising from his allowing water to rise & accumulate in his cellar. The water came from a spring in the cellar. The notice continued: "& for that purpose to drain off the water, & to fill up the cellar, & to execute all such other works. & do all such other things as may be necessary for the abatement of the said nuisance":—*Held:* the notice was bad (RIDLEY, J.), on the ground that, although it need not set out the work to be done in detail, it ought to set out the character of the work to be done—namely, pumping, & not draining; (AVORY, J., & LUSH, J.), on the ground that it was ambiguous in that it might mean either that the owner was to effectively drain the water from the cellar or only to pump out the water then in the cellar.—WHATLING *v.* REES (1914), 84 L. J. K. B. 1122; 112 L. T. 512; 79 J. P. 209; 13 L. G. R. 274, D. C.

727. Effect of ambiguity.]—WHATLING *v.* REES, No. 726, *ante*.

C. Service of Notice.

(a) Who may Serve.

728. By, or by direction of, the sanitary authority—Notice given by inspector on his own initiative—Insufficient.]—A., the sanitary inspector of S., a metropolitan parish, gave a notice in his own name as inspector to H., an owner of a house, to reconstruct drains, etc., in three days, & afterwards, on default, A. did the work, & the S. vestry took out a summons against H. to recover the expenditure. No resolution of the vestry or of any committee thereof to give the notice was proved, but only a meeting of three members of a sub-committee who were proved to have met & resolved that the inspector should enter & execute the works himself:—*Held:* the notice given by the inspector was bad, & the statute not being complied with, the summons against H. was properly dismissed.—ST. LEONARD VESTRY *v.* HOLMES (1885), 50 J. P. 132, D. C.

Annotations:—**Distd.** R. *v.* Chapman, *Ex p.* Arlidge, [1918] 2 K. B. 298. **Consd.** Bowyer, Philpott & Payne *v.* Mather, [1919] 1 K. B. 419.

729. Power of metropolitan committee to act by agent—In vacation.]—The public health committee of a sanitary authority under Public Health (London) Act, 1891 (c. 76), appointed their chairman to deal with urgent matters during the vacation, & this act was approved by the sanitary authority. During the vacation the medical officer of health reported to the chairman the existence of a nuisance, & the chairman directed that under sect. 4 a notice to abate the nuisance should be served on the owner of the premises. The action of the chairman was approved by the committee at their first meeting after the vacation & likewise by the sanitary authority at their first meeting after the vacation. Subsequently to the last-mentioned meeting a complaint under sect. 5 was made against the owner by an inspector acting on behalf of the sanitary authority, & the magistrate made an order for the abatement of the nuisance. A bye-law of the sanitary authority provided that a chairman of a committee might, when the sanitary authority was in vacation, give instructions with respect to urgent matters, provided that such acts should be reported to the sanitary authority:—*Held:* the effect of the bye-law & of the ratification by the sanitary authority of the act of the committee in appointing the chairman to act in urgent matters was to constitute him their agent for the purpose of directing service of the notice to abate the nuisance, & as the act of the chairman had been ratified by the committee & the sanitary authority before the making of the complaint, the ratification related back to the time when the chairman directed the notice to be served & therefore the magistrate had jurisdiction to make the order.—R. *v.* CHAPMAN, *Ex p.* ARLIDGE, [1918] 2 K. B. 298; 87 L. J. K. B. 1142; 119 L. T. 59; 82 J. P. 229; 16 L. G. R. 525, D. C.

Annotation:—**Refd.** Bowyer Philpott & Payne *v.* Mather, [1919] 1 K. B. 419.

(b) Who may be Served.

730. Person by whose act default or sufferance nuisance arises—Owner—Nuisance occurring in pipe draining several houses—Whether notice to one owner sufficient.]—A drain pipe passing through private property, & receiving & conveying to a public sewer the drainage of several houses belonging to different owners, is a "single private drain" within Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19. A notice to the owner of one of the houses on whose land a nuisance, arising from the defective state of such a drain pipe, is found to exist, to abate the same & to execute certain works for that purpose, is a sufficient notice to throw upon him the duty of abating the nuisance, &, upon his default, to entitle the local authority to recover from him the expenses incurred by them in so doing. In such a case no notice need be given to the other owners, & the provisions of Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19, as to apportionment of the expenses incurred by the local authority in executing the necessary works are not applicable. THOMPSON *v.* ECCLES CORPN., HAEDICKE *v.* FRIERN BARNET URBAN COUNCIL, [1905] 1 K. B. 110; 74 L. J. K. B. 130; 91 L. T. 750; 69 J. P. 45; 53 W. R. 211; 21 T. L. R. 49; 3 L. G. R. 20, C. A.

Annotations:—**Refd.** Jackson *v.* Wimbledon U. C., [1905] 2 K. B. 27; Wood Green U. C. *v.* Joseph, [1907] 1 K. B. 182.

731. Who is "owner"—Person in receipt of rack rent.]—Proceedings were taken against applt. under Nuisances Removal Act, 1855 (c. 121), & Sanitary Act, 1866 (c. 90), for a nuisance caused by the defective construction of a privy. It appeared that the house to which the privy belonged was let by A. to H., for a term of years at a rack rent, & that applt. received the rent reserved by the lease as agent for the representatives of A. H. occupied the entrance or shop floor only, having underlet the residue of the premises, including the privy to a yearly tenant at a rack rent:—*Held:* applt. was not "owner" of the premises within the statutes as he did not receive

Sect. 3.—*Summary proceedings: Sub-sect.* 4, *C.* (*b*), *D. & E.; sub-sect.* 5, *A. & B.*]

the rent paid by the occupier of the premises in which the nuisance arose.—COOK *v.* MONTAGU (1872), L. R. 7 Q. B. 418; 41 L. J. M. C. 149; 26 L. T. 471; 37 J. P. 53; *sub nom.* R. *v.* BATH JJ., COOK *v.* MONTAGU, 20 W. R. 624.

732. —— ——.]—T., a lessee of premises in the metropolis, sub-let the premises on the same covenants, for the whole term, less a few days, to A., & A. assigned to B., who was in possession. A notice to abate a nuisance was served on T. as the owner, within Public Health (London) Act, 1891 (c. 76), s. 141:—*Held:* the notice ought to have been served on B., who alone was in a position to receive a rack rent.—TRUMAN, HANBURY, BUXTON & CO. *v.* KERSLAKE, [1894] 2 Q. B. 774; 63 L. J. M. C. 222; 58 J. P. 766; 43 W. R. 111; 10 T. L. R. 668; 10 R. 489, D. C.

D. Costs of Abatement in Compliance with Notice.

See Public Health Act, 1875 (c. 55).

733. Owner compellable to execute work under Public Health Act, 1890 (c. 59), s. 19—Local authority adopting Act—Recovery of expenditure by owner.]—Two houses belonging to different owners were connected with a public sewer by a single private drain. The local authority of the district, who had adopted Public Health Act, 1890 (c. 59), served upon one of the owners a notice, under Public Health Act, 1875 (c. 55), addressed to both, requiring them to abate a nuisance arising from the drain by doing certain works, & stating that, unless the nuisance were abated, the local authority would proceed to enforce the abatement & to recover costs & penalties. The owner upon whom such notice was served accordingly did the work, & brought an action against the local authority to recover the cost as money paid by her at their request:—*Held:* the notice given by defts. to pltf. was not a request to do the work which would support the action; no such request could be implied, because defts. were not themselves compellable to do the work, & under Public Health Act, 1875 (c. 55), s. 41, & Public Health Act, 1890 (c. 59), s. 19, could have compelled the owners to do it, & therefore that defts. were not liable.—SELF *v.* HOVE COMRS., [1895] 1 Q. B. 685; 64 L. J. Q. B. 217; 72 L. T. 234; 59 J. P. 103; 43 W. R. 300; 39 Sol. Jo. 265; 15 R. 283, D. C.

Annotations:—**Distd.** Hill *v.* Hair, [1895] 1 Q. B. 906. **Consd.** Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205. **Dbtd.** North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972. **Consd.** Thompson *v.* Eccles Corpn., Haedicke *v.* Friern Barnet U. C., [1905] 1 K. B. 110. **Refd.** R. *v.* Hastings Corpn., [1897] 1 Q. B. 46; Seal *v.* Merthyr Tydfil U. D. C. (1897), 77 L. T. 303; Proctor *v.* Islington Corpn. (1902), 18 T. L. R. 505; Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807.

734. —— **Reversioner.**]—WAREHAM & DALE, LTD. *v.* FYFFE, No. 707, *ante*.

735. Work done by one owner—Right to recover share of expenses from adjoining owner.]—Where an adjoining owner does work on a common drain on his premises in pursuance of a sanitary notice, he cannot recover a proportion of the expenses of such work from his adjoining owner, although the drainage of such last-mentioned owner passes through such common drain & another notice has been served upon him in respect thereof.—REEVE *v.* SADLER (1903), 88 L. T. 95; 67 J. P. 63; 51 W. R. 603; 1 L. G. R. 441, D. C.

736. —— ——.] — Defts.' premises were drained through a drain running under pltf.'s premises, which drain for part of its length carried only defts.' drainage, & for the rest of its length carried the drainage of both premises. Defts. had a right so to use the drain. A nuisance having arisen on pltf.'s premises owing to the whole of the drain being defective & permitting sewage to escape, the sanitary authority took proceedings against him, under Public Health (London) Act, 1891 (c. 76), ss. 4 & 5, & obtained an order upon him to do the work necessary to abate the nuisance. The pltf. did the work & abated the nuisance, all the work being done upon his own premises:—*Held:* pltf. could not recover from defts. a proportionate part of the costs of abating the nuisance as being one of two or more persons "by whose act or default" the nuisance had been caused, within Public Health (London) Act, 1891 (c. 76), s. 120.—NATHAN *v.* ROUSE, [1905] 1 K. B. 527; 74 L. J. K. B. 285; 92 L. T. 321; 69 J. P. 135; 21 T. L. R. 222; 3 L. G. R. 354, D. C.

737. Sanitary authority liable to do necessary works—Recovery of expenditure by person not liable.]—The drainage of two adjoining houses situate in the metropolis being so defective as to be a nuisance, the sanitary authority served a notice under Public Health (London) Act, 1891 (c. 76), s. 4 (1), upon the owner of the houses requiring him to abate the nuisance. The drainage of the houses was carried away by means of a single pipe, & the owner, being under the belief that this combined system of drainage had been authorised by an order of the sanitary authority, & that the liability to repair the pipe consequently lay upon him under the provisions of the Metropolis Management Act, 1855 (c. 120), executed the works prescribed by the notice. In fact, the combined plan of drainage had not been authorised by any such order, & the liability to repair the pipe was by that Act imposed upon the sanitary authority. On discovery of the mistake he sought to recover from the sanitary authority the expense he had incurred:—*Held:* (1) as non-compliance with the notice would have rendered him *primâ facie* liable to a penalty under Public Health (London) Act, 1891 (c. 76), s. 4 (4), he was practically compelled to do the work, & he could consequently recover the expense as money paid at the sanitary authority's request; (2) the "expenses of carrying the order into effect" mentioned in Public Health (London) Act, 1891 (c. 76), s. 11, include the expenses of doing work in obedience to an abatement notice, & consequently the owner, whether he was compelled to do the work or not, could under that sect. recover the expense from the sanitary authority as the persons by whose default the nuisance was caused.—ANDREW *v.* ST. OLAVE'S BOARD OF WORKS, [1898] 1 Q. B. 775; 67 L. J. Q. B. 592, 78 L. T. 504; 62 J. P. 328; 46 W. R. 424; 42 Sol. Jo. 381, D. C.

Annotations:—*As to* (1) **Apld.** North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972. **Consd.** Cree *v.* St. Pancras Vestry, [1899] 1 Q. B. 693. **Distd.** Harris *v.* Hickman, [1904] 1 K. B. 13. **Refd.** Ellis *v.* Bromley R. D. C. (1899), 81 L. T. 224; Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807; Rhymney Iron Co. *v.* Gelligaer District Council, [1917] 1 K. B. 589.

738. —— ——.]—Where a person is called upon by the sanitary authority to abate, & does abate, a nuisance by doing work which the sanitary authority themselves are liable to do, & where that person afterwards seeks to recover from them the cost of the work, upon the principle that, where one person is compelled to do work which another is legally compellable to do, the cost of the work may be recovered by the one as money paid at the other's request, regard must be had to the fact that in the case of a nuisance prompt action by some one is imperative; & because of that fact it is not necessary to show that

there was actual, direct, or irresistible compulsion in order to bring the case within the principle above enunciated. It is sufficient to show that the sanitary authority took steps which practically amounted to compulsion.—NORTH *v.* WALTHAMSTOW URBAN COUNCIL (1898), 67 L. J. Q. B. 972 ; 62 J. P. 836 ; 15 T. L. R. 6.

Annotations :—**Consd.** Ellis *v.* Bromley R. D. C. (1899), 81 L. T. 224 ; Silles *v.* Fulham B. C. (1903), 67 J. P. 273. **Refd.** Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807 ; Oliver *v.* Camberwell B. C. (1904), 90 L. T. 285 ; Wilson's Music & General Printing Co. *v.* Finsbury B. C., [1908] 1 K. B. 563.

As between landlord & tenant.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 301, 302, 304, 305, 307, 308, Nos. 4464–4469, 4485, 4494, 4495, 4514–4525.

See, further, SEWERS & DRAINS.

E. Non-Compliance.

See Sub-sect. 6, *post.*

SUB-SECT. 5.—PROCEEDINGS IN DEFAULT OF COMPLIANCE.

A. In General.

See Public Health Act, 1875 (c. 55), s. 95 ; Public Health London Act, 1891 (c. 76), s. 5 (1).

739. Summons to answer complaint — What court has jurisdiction to hear—Justices for area of origin of nuisance.]—Under Nuisances Removal Act, 1855 (c. 121), s. 12, the power of a local authority to prefer, & the jurisdiction of justices to determine, a complaint in respect of a nuisance existing within the area of that local authority, arises only where the cause of such nuisance is also within that area. I. C. & co., brewers of R., a parish within the area of a local board of health, drained their brewery into the river there, & thereby caused a nuisance lower down in the river, at D., a parish within the jurisdiction of another local authority. The local authority for D. having preferred a complaint before justices against I. C. & co. in respect of such nuisance :—*Held :* the justices had no jurisdiction, the origin of the nuisance not being within the area of the local authority for D.—R. *v.* COTTON (1858), 1 E. & E. 203 ; 28 L. J. M. C. 22 ; 23 J. P. 532 ; 5 Jur. N. S. 311 ; 7 W. R. 62 ; 120 E. R. 885 ; *sub nom.* R. *v.* COTTON, *Ex p.* THOMPSON, 32 L. T. O. S. 125.

740. —— Form of summons—Addressed to "owner" of described premises.]—(1) Where a complaint to a petty sessional ct. is made by a sanitary authority under the Public Health (London) Act, 1891 (c. 76), s. 4 (2), alleging that a nuisance exists on premises caused by the act, default, or sufferance of the owner, a summons to answer the matter of such complaint is good in form, though it be addressed to the "owner" of the premises, describing them, merely, without further name or description.

(2) Such a summons is a "document" within the meaning of the words "notice, order, or other document" in Public Health (London) Act, 1891 (c. 76), s. 128, & may therefore be properly served by delivering it to some person on the premises.—R. *v.* MEAD, [1894] 2 Q. B. 124 ; 58 J. P. 448 ; 42 W. R. 442 ; 10 T. L. R. 413 ; 38 Sol. Jo. 400 ; 10 R. 217 ; *sub nom.* R. *v.* MEAD, *Ex p.* ANTHONY, 63 L. J. M. C. 128 ; 70 L. T. 766, D. C.

Annotation :—*As to* (2) **Apld.** R. *v.* Braithwaite, [1918] 2 K. B. 319.

741. —— Delivery—To some person on premises.]—R. *v.* MEAD, No. 740, *ante.*

—— **Whether a prosecution.**]—*See* MALICIOUS PROSECUTION, Vol. XXXIII., p. 470, No. 37.

B. Defences.

742. Nuisance contributed to by other persons.]—BROWN *v.* BUSSELL, FRANCOMB *v.* FREEMAN, No. 699, *ante.*

743. ——.]—RIDDELL *v.* SPEAR, No. 703, *ante.*

744. —— Local authority.] — ST. HELENS CHEMICAL CO. *v.* ST. HELENS CORPN., No. 710, *ante.*

745. Inability to execute abatement order without committing trespass.] — The S. corpn. contracted with some farmers to sell their ashes & manure, the same to be delivered at a field of which W. was occupier. The manure when deposited, being near a highway, caused a stench, & was a nuisance, In proceedings against the S. corpn., the justices made an order on them to abate the nuisance, & also to prohibit them from repeating it :—*Held :* the order prohibiting the nuisance was right, but not the order to abate it, because the manure having ceased to be the property of the corpn., they had no right to enter W.'s field to abate the nuisance.—SCARBOROUGH CORPN. *v.* SCARBOROUGH SANITARY AUTHORITY (1876), 1 Ex. D. 344 ; 34 L. T. 768 ; 40 J. P. 726, D. C.

Annotations :—**Distd.** Parker *v.* Inge (1886), 17 Q. B. D. 584. **Refd.** R. *v.* Cumberland JJ., *Ex p.* Trimble (1877), 41 J. P. 454. **Mentd.** Woburn Union *v.* Newport Pagnell Union (1887), 51 J. P. 694.

746. ——.]—By an order of justices under the Public Health Act, 1875 (c. 55), it was found that on land the property of a certain person named a nuisance existed, viz., a foul ditch, caused by refuse water & offensive liquid from an adjoining brewery, & that this nuisance was caused by the act or default of deft. as owner & occupier of the brewery, & it was ordered that deft., within three months, should abate the nuisance, & for that purpose should execute such works & do all such things as might be necessary so that the same should no longer be a nuisance or injurious to health. Upon a rule for *certiorari*, on the ground that deft. was not the occupier of the premises on which the nuisance was proved to exist, & that he had no power or authority from the owner to enter on the premises for any purpose whatever :—*Held :* the order must be quashed.—R. *v.* TRIMBLE (1877), 36 L. T. 508 ; *sub nom.* R. *v.* CUMBERLAND JJ., *Ex p.* TRIMBLE, 41 J. P. 454, D. C.

Annotation :—**Distd.** Woburn Union *v.* Newport Pagnell Union (1887), 51 J. P. 694.

747. ——.]—A local authority served the owner of premises with a notice, under Public Health Act, 1875 (c. 55), s. 94, requiring him within seven days to abate a nuisance arising from the defective construction of a structural convenience, & for that purpose to execute certain specified works. Having failed to comply with the notice, the owner was summoned under Public Health Act, 1875 (c. 55), s. 95, before a ct. of summary jurisdiction, & on the hearing it was proved that the premises in question were occupied by a tenant to the owner under a lease for twenty-one years containing the usual covenants :—*Held :* the owner, even although he could not enter upon the premises & execute the works without the tenant's permission, had "made default" in

5 I. *Inability to execute abatement order without committing trespass.*]—LETTERKENNY TOWN COMRS. *v.* COLLINS (1891), 28 R. Ir. 235.—**IR.**

Sect. 3.—*Summary Proceedings: Sub-sect.* 5, *B. & C.* (*a*) *&* (*b*).]

complying with the requisitions of the notice within Public Health Act, 1875 (c. 85), s. 95, & therefore the justices had jurisdiction to make an order, under Public Health Act, 1875 (c. 55), s. 96, requiring him to abate the nuisance.—PARKER *v.* INGE (1886), 17 Q. B. D. 584; 55 L. J. M. C. 149; 55 L. T. 300; 51 J. P. 20, D. C.

748. ——.]—Five houses of which three belonged to one owner & two to another were connected with the public sewer by a single private drain. The drain being a nuisance & injurious to health, the local authority served on each of the two owners a notice under Public Health Act, 1875 (c. 55), s. 41, & Public Health Act, 1890 (c. 59), s. 19, addressed to them jointly requiring them to relay the whole of the drain:—*Held:* the fact that neither of the owners could relay the part of the drain situate in the other's premises without committing a trespass was no objection to the validity of the notice & on non-compliance with the notice the local authority might execute the work & recover the expenses from the owners under the last-mentioned sect.—LANCASTER *v.* BARNES DISTRICT COUNCIL, [1898] 1 Q. B. 855; 67 L. J. Q. B. 744; 78 L. T. 355; 62 J. P. 405; 46 W. R. 623, D. C.

Annotation:—**Mentd.** Reeve *v.* Sadler (1903), 1 L. G. R. 441.

749. Neglect of sanitary authority to do its duty—Nuisance from sewer vested in local authority.]—KIRKHEATON LOCAL BOARD *v.* BEAUMONT (1888), 52 J. P. Jo. 68, D. C.

750. —— **Failure to provide sufficient sewers for the district.**]—For twenty years some owners had sent their sewage into a sewer of the sanitary authority, which was quite insufficient for the district. The authority sought, under the Public Health Act, 1875 (c. 55), ss. 94–96, to make P., one of the owners, liable for causing a nuisance, but did not prove that P.'s sewage, of itself, amounted to a nuisance:—*Held:* the sanitary authority, having failed to provide sufficient sewers, could not get rid of their neglect by devolving their duty on the owners who used the insufficient sewer.—FORDOM *v.* PARSONS, [1894] 2 Q. B. 780; 64 L. J. M. C. 22; 58 J. P. 765, D. C.

See, also, SEWERS & DRAINS.

C. Orders.

(*a*) *In General.*

See Public Health Act, 1875 (c. 55), s. 96; Public Health London Act, 1891 (c. 76), s. 5.

751. Specification of works to be executed—Abatement order—Power of justices.]—A nuisance existed consisting of a privy & ashpit in such a state as to be a nuisance, & the local sanitary authority gave notice to the owner under the Public Health Act, 1875 (c. 55). s. 94, to abate the same, & for that purpose to fill up the ashpit, abandon the privy, & build a pail closet. The owner failed to do so, & the justices thereupon, under Public Health Act, 1875 (c. 55), s. 96, ordered the owner to fill up the ashpit, to abandon the privy, & to construct a proper & sufficient pail closet in lieu thereof. On a rule for a *certiorari* to quash the order of justices:—*Held:* the order was bad, as the justices had no power under Public Health Act, 1875 (c. 55), s. 96, to order the erection of the pail closet.—*Ex p.* WHITCHURCH (1881), 6 Q. B. D. 545; 29 W. R. 507; *sub nom. Re* NOTTINGHAM JJ., *Ex p.* WHITCHURCH, 50 L. J. M. C. 41; *sub nom.* WHITCHURCH *v.* NOTTINGHAM JJ., 45 J. P. 392, D. C.; *affd. sub nom.* R. *v.* WHITCHURCH, 7 Q. B. D. 534, C. A.

Annotations:—**Distd.** *Ex p.* Saunders (1883), 11 Q. B. D. 191; R. *v.* Llewellyn (1884), 13 Q. B. D. 681. **Consd.** Whitaker *v.* Derby Urban S. A. (1885), 55 L. J. M. C. 8. **Apld.** *Ex p.* Schofield, [1891] 2 Q. B. 428. **Distd.** Derby Corpn. *v.* Derbyshire County Council, [1897] A. C. 550. **Refd.** R. *v.* Kent JJ. (1885), 1 T. L. R. 539; R. *v.* Manchester Profiteering Committee, *Ex p.* L. & Y. Ry. (1920), 89 L. J. K. B. 1089. **Mentd.** A.-G. *v.* Bradlaugh (1885), 14 Q. B. D. 667; Loughborough Highway Board *v.* Curzon (1886), 2 T. L. R. 678; R. *v.* Central Criminal Court JJ. (1886), 18 Q. B. D. 314; R. *v.* Tyler & International Commercial Co., [1891] 2 Q. B. 588; Seaman *v.* Burley, [1896] 2 Q. B. 344; Southport Corpn. *v.* Birkdale U. D. C. (1897), 76 L. T. 318; Wiffen *v.* Bailey & Romford U. C., [1915] 1 K. B. 600.

752. —— —— ——.]—A water closet in the centre of a house being a nuisance, the sanitary authority gave notice to the owner of the house under Public Health Act, 1875 (c. 55), s. 94, to abate the nuisance, & for that purpose to remove the closet from the centre of the house & place the same near an outer wall where there might be efficient ventilation & to fix the soil pipe outside the walls. The owner making default in so doing, justices thereupon, under Public Health Act, 1875 (c. 55), s. 96, ordered him to do the things above specified:—*Held:* they had jurisdiction under Public Health Act, 1875 (c. 55), s. 96, to make the order.—*Ex p.* SAUNDERS (1883), 11 Q. B. D. 191; 52 L. J. M. C. 89; 47 J. P. 584; 31 W. R. 918, D. C.

Annotations:—**Folld.** R. *v.* Llewellyn (1884), 13 Q. B. D. 681; R. *v.* Wheatley (1885), 34 W. R. 257. **Refd.** Whitaker *v.* Derby Urban S. A. (1885), 55 L. J. M. C. 8; Lewis *v.* Weston-Super-Mare L. B. of Health (1888), 59 L. T. 769.

753. —— —— ——.]—A privy openly discharged nightsoil & offensive matter on the bank of a river; the sanitary authority served the owner of the premises with a notice to abate the nuisance, & for that purpose "to remove the present pipes & pan, level the floor under the seat of the privy, & provide a galvanised double-handle pail under the seat, the cover of which said seat to be movable, so that the premises should no longer be a nuisance or injurious to health." The justices at sessions made an order in the terms of the notice:—*Held:* they had jurisdiction to make the order.—R. *v.* LLEWELLYN (1884), 13 Q. B. D. 681; 55 L. J. M. C. 9, n.; 49 J. P. 101; 33 W. R. 150, D. C.

Annotations:—**Refd.** R. *v.* Wheatley (1885), 16 Q. B. D. 34; Whitaker *v.* Derby Urban S. A. (1885), 55 L. J. M. C. 8.

754. —— —— ——.]—R. *v.* KENT JJ. (1885), 1 T. L. R. 539; 49 J. P. Jo. 404; *sub nom.* R. *v.* KENT (INHABITANTS), 55 L. J. M. C. 9, n., D. C.

Annotation:—**Consd.** Whitaker *v.* Derby Urban S. A. (1885), 55 L. J. M. C. 8.

755. —— —— —— **Whether owner entitled to alternative direction.**]—A sanitary authority served the owner of certain houses with a notice to abate a nuisance arising from the drains to them & injurious to health under Public Health Act, 1875 (c. 55), s. 96, & the justices ordered him to execute certain structural alterations as necessary & the only means for abating the nuisance, without adding to their order the words "or otherwise necessary to abate the nuisance":—*Held:* they had jurisdiction to make the order, & they were not bound to make one in the alternative.—WHITAKER *v.* DERBY URBAN SANITARY AUTHORITY (1885), 55 L. J. M. C. 8; 50 J. P. 357; 2 T. L. R. 68.

756. —— —— **Necessity for.**]—An order of justices made under Public Health Act, 1875

t of sanitary authority to do its duty—Nuisance from sewer vested in local authority.]—MOLLOY *v.* GRAY (1889), 24 L. R. Ir. 258.—**IR.**

(c. 55), s. 96, upon the complaint of a local authority, required the owner of premises to abate within a specified time a nuisance arising from untrapped drains, " & to execute such works & do such things as may be necessary for that purpose, so that the same shall no longer be a nuisance or injurious to health " :—*Held :* this order was bad, because it did not specify what works & things the owner should execute for the purpose of abating the nuisance.—R. *v.* WHEATLEY, *Ex p.* COWBURN (1885), 16 Q. B. D. 34 ; 55 L. J. M. C. 11 ; 54 L. T. 680 ; 50 J. P. 424 ; 34 W. R. 257 ; 2 T. L. R. 137, D. C.

Annotations :—**Refd.** R. *v.* Parlby (1889), 22 Q. B. D. 520 ; Millard *v.* Wastall (1898), 77 L. T. 692 ; Whatling *v.* Rees (1914), 84 L. J. K. B. 1122.

757. —— —— —— Complaint by private individual.]—On a complaint against applt. by a private person that a nuisance existed on applt.'s premises by an accumulation of slaughter-house offal & filth, the justices made an order that within one calendar month from the service of the order applt. should take such steps as might be necessary to abate the nuisance, & further prohibited applt. from doing such acts as might lead to a recurrence of the nuisance :—*Held :* (1) though the complaint was made by a private person, the order must specify the works necessary to be done by applt. in order to abate the nuisance ; (2) that part of the order prohibiting applt. from doing such acts as might lead to a recurrence of the nuisance was good, & must be upheld.—R. *v.* HORROCKS, ETC. JJ., *Ex p.* BOUSTEAD (1900), 69 L. J. Q. B. 688 ; 82 L. T. 767 ; 64 J. P. 661 ; 16 T. L. R. 435 ; 44 Sol. Jo. 530 ; 19 Cox, C. C. 529, D. C.

—— —— —— Where no works necessary.]—*See* No. 725, *ante*.

758. —— Prohibition order—Necessity for.]—R. *v.* HORROCKS, ETC. JJ., *Ex p.* BOUSTEAD, No. 757, *ante*.

759. —— —— ——.]—TOUGH *v.* HOPKINS, No. 271, *ante*.

760. —— —— —— Order to prevent recurrence of nuisance.]—Upon the hearing of a summons under Public Health (London) Act, 1891 (c. 76), s. 5, in respect of a nuisance arising from the emission of black smoke from a chimney belonging to applts., the existence of the nuisance was proved, but no evidence was given as to the works required to prevent the issue of black smoke. After respts.' case had been closed, applts. gave evidence that the nuisance might have been due to two furnace doors being open at one time, & required under Public Health (London) Act, 1891 (c. 76), s. 5 (5), that the order should specify the works to be executed by them. They objected, however, to any further evidence being given on the part of resps., on the ground that their case was closed. The magistrate, without hearing further evidence, made a prohibition order directing applts. to fit up apparatus to prevent the doors being left open simultaneously, & to adopt all other means necessary to prevent the emission of black smoke in such quantities as to be a nuisance :—*Held :* the order was good, & it was not necessary, under the circumstances, that it should specify the works to be executed for the purpose of preventing the recurrence of the nuisance.

The law laid down in *Millard* v. *Wastall*, No. 725, *ante*, with reference to Public Health Act, 1875 (c. 55), ss. 94 & 96, that a notice to abate a nuisance caused by quantities of black smoke issuing from a factory chimney need not necessarily specify the works required to be done in order to abate the nuisance, has not been substantially altered by Public Health (London) Act, 1891 (c. 76), s. 5 (5), which requires that a prohibition order shall, if the person on whom the order is made so requires, specify the works to be done.—CENTRAL LONDON RY. CO. *v.* HAMMERSMITH BOROUGH COUNCIL (1904), 73 L. J. K. B. 323 ; 90 L. T. 645 ; 68 J. P. 217 ; 2 L. G. R. 446 ; 20 Cox, C. C. 633, D. C.

Annotation :—**Refd.** Tough *v.* Hopkins (1904), 73 L. J. K. B. 628.

761. —— What may be sufficient specification.—CENTRAL LONDON RY. CO. *v.* HAMMERSMITH BOROUGH COUNCIL, No. 760, *ante*.

762. Order to abate nuisance existing on land of another—Whether valid.]—T., the occupier of a brewery, sent the washings of his beer barrels & offensive liquids into his drains, which conveyed the same to the adjoining field occupied by R., where they formed a large pool, which was a nuisance & injurious to health. There was no nuisance on T.'s premises :—*Held :* the justices had no power under Public Health Act, 1875 (c. 55), to order T. to abate the nuisance in R.'s field, & order quashed accordingly.—R. *v.* CUMBERLAND JJ., *Ex p.* TRIMBLE (1877), 41 J. P. 454, D. C.

Annotation :—**Refd.** Woburn Union *v.* Newport Pagnell Union (1887), 51 J. P. 694.

763. In respect of what matters court has jurisdiction—Complaints against local authority—Nuisance committed by sewage works of authority.]—R. *v.* PARLBY, No. 231, *ante*.

764. —— —— ——.]—FULHAM VESTRY *v.* LONDON COUNTY COUNCIL, No. 236, *ante*.

765. Against whom order may be made—Agent of owner—At time of commission of nuisance.]—Where there has been failure to comply with a notice to abate a nuisance served under Public Health Act, 1875 (c. 55), s. 94, the object of proceedings, under Public Health Act, 1875 (c. 55), s. 95, to obtain an order to abate the nuisance is to found the right of a local authority to enter the premises, do the work, & if necessary recover the expenses from the responsible person ; & as the word " owner " in Public Health Act, 1875 (c. 55), s. 95, includes the person who is the agent of the owner at the time when the offence is committed, an order to abate the nuisance can be made against such agent at an adjourned hearing of a summons taken out against him in respect of such failure, although during the interval between the original & adjourned hearing of the summons he ceases to be such agent.—BROADBENT *v.* SHEPHERD, [1901] 2 K. B. 274 ; 70 L. J. K. B. 628 ; 84 L. T. 844 ; 65 J. P. 499 ; 49 W. R. 521 ; 17 T. L. R. 460 ; 45 Sol. Jo. 486, D. C. ; *previous proceedings* (1900), 65 J. P. 70, D. C.

766. Order must be signed by two justices.]—An order of a ct. of summary jurisdiction under Public Health Act, 1875 (c. 55), s. 96, must be signed by two justices.—WING *v.* EPSOM URBAN DISTRICT COUNCIL, [1904] 1 K. B. 798 ; 73 L. J. K. B. 389 ; 90 L. T. 543 ; 68 J. P. 259 ; 52 W. R. 461 ; 20 T. L. R. 310 ; 48 Sol. Jo. 313 ; 2 L. G. R. 714, D. C.

767. Order partly good & partly bad—Good part will be upheld.]—R. *v.* HORROCKS, ETC. JJ., *Ex p.* BOUSTEAD, No. 757, *ante*.

Non-compliance with orders—Effect of.]—*See* Sub-sect. 6, *post*.

(*b*) *Appeals from Orders.*

See Public Health Act, 1875 (c. 55), ss. 99, 269 ; Public Health London Act, 1891 (c. 76), ss. 6,

Sect. 3.—*Summary proceedings: Sub-sect.* 5, *C.* (*b*); *sub-sect.* 6, *A., B. & C.; sub-sects.* 7 & 8.]

125, &, *generally*, MAGISTRATES, Vol. XXXIII., pp. 390 *et seq.*

768. Whether appeal lies — From abatement order—Not being an order to do structural works.]—The drainage from a gaol in the township of W., which is out of the borough of L., built there by the corpn. of L., & duly declared to be the common gaol of that borough, was carried thence by open drains over land in the township of B. not belonging to the corpn., & caused a nuisance in B. The corpn. of L. was thereupon summoned by the nuisances removal committee of B. under Nuisances Removal Act, 1855 (c. 121):—*Held:* the corpn. of L., & not the justices having the management of the gaol, were the proper persons to be summoned & ordered to do what was necessary under that Act.

It appeared before the magistrates at the return of the summons that the nuisance could only be abated by constructing a covered drain of some length through the township of B.; & thereupon the magistrates ordered the corpn. "within three months to abate & discontinue the nuisance, & to do such works & acts as are necessary to abate the same, & to pay £20 costs":—*Held:* the order was one to abate the nuisance under Nuisances Removal Act, 1855 (c. 121), ss. 12 & 13, & not an order to do structural works, & therefore, that it could not be appealed against under Nuisances Removal Act, 1855 (c. 121), s. 16.

The order, not having been obeyed, & the quarter sessions having dismissed an appeal against it, on the ground that no appeal lay, the nuisances removal committee obtained a second order under Nuisances Removal Act, 1855 (c. 121), ss. 14 & 20, for penalties for not obeying the first order, & for the costs adjudged by the first order:—*Held:* a valid order.—*Ex p.* LIVERPOOL CORPN. (1857), 8 E. & B. 537; 27 L. J. M. C. 89; 22 J. P. 562; 4 Jur. N. S. 333; 120 E. R. 201.

Annotation:—**Refd.** R. *v.* Wheatley (1885), 16 Q. B. D. 34.

—— **Appeal to Court of Criminal Appeal—From order of Divisional Court—Made on appeal from justices.**]—*See* CRIMINAL LAW, Vol. XIV., p. 551, Nos. 6274, 6275.

769. Notice of appeal—Fourteen days — From what date counted.]—Where the justices, at the instance of one sanitary authority, have made an order, after hearing the adjoining sanitary authority, as to a ditch on the common boundary requiring cleansing, & a person aggrieved wishes to appeal:—*Held:* the fourteen days' notice by applt. must be counted from the date of the order, & not from the date when the order was served on applt. — R. *v.* BARNET SANITARY AUTHORITY (1876), 1 Q. B. D. 558; 45 L. J. M. C. 105; *sub nom.* R. *v.* ST. ALBANS SANITARY AUTHORITY, 35 L. T. 362; 41 J. P. 6, D. C.

Annotation:—**Mentd.** R. *v.* Carnarvonshire JJ., *Ex p.* Carnarvon County Council, [1918] 1 K. B. 280.

SUB-SECT. 6.—NON-COMPLIANCE WITH ORDERS.

A. In General.

770. Necessity for evidence as to cause of repetition of nuisance—As condition precedent to conviction.]—Upon an information against applt. for a nuisance through a chimney sending forth black smoke, an order was made on July 20, 1868, that within two months he should make such alterations in the chimney, etc., so as to consume the smoke arising therefrom. Applt. thereupon made certain alterations & the smoke ceased to issue until the following Feb. 4, when for a certain limited period on that day & following days it again issued. In the following July an information was laid for disobedience to the said order. No evidence was given as to the cause of the issuing of the smoke, & the justices convicted applt.:—*Held:* (1) there was evidence justifying the conviction; (2) as the nuisance was a continuing one Summary Jurisdiction Act, 1848 (c. 43), s. 11, did not apply.—HIGGINS *v.* NORTHWICH UNION GUARDIANS (1870), 22 L. T. 752; 34 J. P. 806.

771. Disobedience to two separate orders—Whether one act of disobedience will support two convictions.]—On Mar. 11, 1871, an order of justices was made on applt. & his partner, in the trade of a dyer, to cease to send forth black smoke from a certain chimney, under Nuisances Removal Act, 1855 (c. 121), s. 12, with liberty to the informant to enter on default & do what was necessary to execute the order. On Mar. 14, 1874, a further order was made under the same section that they should discontinue the nuisance, & that its recurrence should be prohibited. On May 1, 1875, applt. was convicted under Nuisances Removal Act, 1855 (c. 121), s. 13, for disobeying the order of abatement of Mar. 11, 1871, & on the same day was also convicted of disobeying the order of prohibition of Mar. 14, 1874. Both convictions proceeded on the evidence that on a certain day black smoke issued from applt.'s chimney:—*Held:* both convictions could not be maintained.—EDDLESTON *v.* BARNES (1875), 1 Ex. D. 67; *sub nom.* EDLESTON *v.* BARNES, 45 L. J. M. C. 73; 34 L. T. 497; 40 J. P. 88, D. C.

772. Order made under statute — Disobedience after repeal of statute.]—By Public Health Act, 1875 (c. 55), s. 343, which came into force on Aug. 11, 1875, Nuisances Removal Act, 1855 (c. 121), & Sanitary Act, 1866 (c. 90), are repealed with a proviso that "this repeal shall not affect any right or liability acquired, accrued, or incurred under any enactment hereby repealed." An order, under Nuisances Removal Act, 1855 (c. 121), & Sanitary Act, 1866 (c. 90), to discontinue the sending forth of black smoke from a certain chimney in such quantity as to be a nuisance was made by justices & served on resp. on May 24, 1875. On Aug. 12, 1875, black smoke was emitted from the chimney in such quantity as to be a nuisance. Resp. having been summoned before justices for a disobedience of the order, they dismissed the summons upon the ground that the statutes under which the order was made had been repealed on Aug. 11:—*Held:* the order was a "liability" within the proviso in Public Health Act, 1875 (c. 55), s. 343, it continued in force notwithstanding the repeal of the statutes under which it was made, & the decision of the justices was erroneous.—BARNES *v.* EDDLESTON (1876), 1 Ex. D. 102; 45 L. J. M. C. 162; 33 L. T. 822; 40 J. P. 663, D. C.

B. Penalties.

See Public Health Act, 1875 (c. 55), s. 98; Public Health (London) Act, 1891 (c. 76), s. 5 (9).

773. Order to local authority to abate on default of abatement by owner—Failure of local authority to carry out order—Whether owner exempted from penalty.]—An order to abate a nuisance by removing offensive privies, etc., was directed to "the owner or to the nuisance removal committee," the owner being directed to remove the same within seven days, & if such order were not complied with, the committee were authorised & required to enter & remove it. The seven days elapsed, & neither the owner nor committee

removed the nuisance :—*Held :* the justices had power to fine the owner, under Nuisances Removal Act, 1855 (c. 121), s. 14, for disobedience of the order, notwithstanding that it was addressed to the nuisance committee as well as to the owner.—TOMLINS *v.* GREAT STANMORE NUISANCE REMOVAL COMMITTEE (1865), 12 L. T. 118 ; 29 J. P. 117.

774. Penalties for each day of non-compliance—Power of justices to order.]—R. *v.* HOUSE, No. 255, *ante.*

C. Power of Authority to Enter.

Right of local authority to enter & abate.]—*See* Public Health Act, 1875 (c. 55), s. 98 ; Public Health (London) Act, 1891 (c. 76), s. 5 (9).

775. ——.]—BROADBENT *v.* SHEPHERD, No. 765, *ante.*

776. —— Owner's permission must first be obtained.]—Public Health Act, 1875 (c. 55), s. 102, provides that a local authority or any of their officers "shall be admitted into any premises for the purpose of examining as to the existence of any nuisance thereon," & if admission is refused application may be made to a magistrate for an order to admit.

By Public Health Act, 1875 (c. 55), s. 306, any person who wilfully obstructs any member of a local authority in the execution of the Act is liable to a penalty.

Members of applt. council, purporting to act under Public Health Act, 1875 (c. 55), s. 102, entered a yard on resp.'s premises in his absence without having first requested or obtained his permission so to do, &, while there, were locked in by resp. :—*Held :* Public Health Act, 1875 (c. 55), s. 102, does not authorise an entry on private premises without the permission of the occupier being first requested ; the members of applt. council while on the premises of resp. were, therefore, not engaged in the execution of the Act ; & resp. had not committed an offence under Public Health Act, 1875 (c. 55), s. 306.—CONSETT URBAN COUNCIL *v.* CRAWFORD, [1903] 2 K. B. 183 ; 72 L. J. K. B. 571 ; 88 L. T. 836 ; 67 J. P. 309 ; 51 W. R. 669 ; 19 T. L. R. 508 ; 47 Sol. Jo. 549 ; 1 L. G. R. 558 ; 20 Cox, C. C. 481, D. C.

777. Refusal of local authority to enter & abate—Whether mandamus will issue to compel entry.]—By Nuisances Removal Act, 1855 (c. 121), s. 14, any person not obeying an order of two justices for abatement of a nuisance is liable to a penalty : & the local authority may enter the premises & abate the nuisance, & do whatever may be necessary in execution of the order.

The sanitary officer under the local board of health, at the instance of a person aggrieved, obtained an order of justices, requiring P. to cleanse a drain. P. did not obey the order, & the local board refused to take any steps to enforce it :—*Held :* the party aggrieved was not entitled to a *mandamus* to the local board to compel them to abate the nuisance under Nuisances Removal Act, 1855 (c. 121), s. 14.—*Ex p.* BASSETT (1857), 7 E. & B. 280 ; 21 J. P. Jo. 85 ; 119 E. R. 1251 ; *sub nom. Re* HAM LOCAL BOARD OF HEALTH, 26 L. J. M. C. 64 ; *sub nom. Re* HAM LOCAL BOARD OF HEALTH, *Ex p.* BASSETT, 5 W. R. 290 ; 3 Jur. N. S. 136.

Annotations :—**Refd.** A.-G. & Dommes *v.* Basingstoke Corpn. (1876), 45 L. J. Ch. 726. **Mentd.** R. *v.* Marshland Smeeth & Fen District Comrs., [1920] 1 K. B. 155.

Order for entry.]—*See* Nos. 778–780, *post.*

SUB-SECT. 7.—ORDERS FOR ENTRY.

See Public Health Act, 1875 (c. 55), ss. 102, 103 ; Public Health (London) Act, 1891 (c. 76), s. 115.

778. Entry to ascertain whether nuisance exists—Reasonable ground for issue of warrant—Necessity for some evidence of existence of nuisance.]—Evidence that the sanitary inspector is honestly desirous of entering premises for the purpose of ascertaining whether or not any nuisance exists thereon calling for abatement under Public Health (London) Act, 1891 (c. 76), or for the purpose of examining works under Public Health (London) Act, 1891 (c. 76), s. 40, but without any evidence that any nuisance exists on such premises, is not reasonable ground for entry so as to empower a justice to issue a warrant under Public Health (London) Act, 1891 (c. 76), s. 115, authorising an entry on the premises.—VINES *v.* NORTH LONDON COLLEGIATE & CAMDEN SCHOOLS FOR GIRLS (GOVERNORS) (1899), 63 J. P. 244 ; 43 Sol. Jo. 208, D. C.

779. —— What justices may consider an application for order.]—WIMBLEDON URBAN DISTRICT COUNCIL *v.* HASTINGS, No. 245, *ante.*

780. —— Form of order — Must be made in reference to particular subject-matter.]—WIMBLEDON URBAN DISTRICT COUNCIL *v.* HASTINGS, No. 245, *ante.*

SUB-SECT. 8.—COSTS AND EXPENSES OF PROCEEDINGS.

781. Who may be liable — Owner — Ownership of premises disputed—By person from whom expenses claimed.]—An action may be maintained in the county ct. to recover the expenses incurred by a public body in removing a nuisance, by virtue of 11 & 12 Vict. (c. 123), s. 3, against the owner of the premises, even though the ownership of the premises is disputed by the party from whom the expenses are claimed.—R. *v.* HARDEN (1853), 2 E. & B. 188 ; 1 Saund. & M. 135 ; 1 C. L. R. 520 ; 22 L. J. Q. B. 299 ; 21 L. T. O. S. 102 ; 17 J. P. 614 ; 17 Jur. 804 ; 118 E. R. 739.

782. —— Attorney of owner acting under power of attorney—Must be attorney at time liability arises.]—The owner of premises on which a nuisance arose was abroad, & proceedings being taken a summons & order to abate were served on the premises, & at length the local authority commenced the work themselves on July 16, & finished the same on Sept. 7. On May 29 the owner abroad executed a power of attorney to receive the rents to W. in this country, who received it upon July 22 & acted upon it. The local authority sued W. for the above expenses :—*Held :* as W. was not the owner at the time the order was made, he was not liable, for his liability commenced only from the time of receiving & accepting the power of attorney.—BLYTHING UNION GUARDIANS *v.* WARTON (1863), 3 B. & S. 352 ; 32 L. J. M. C. 132 ; 9 Jur. N. S. 867 ; 122 E. R. 133 ; *sub nom.* WARTON *v.* BLYTHING UNION GUARDIANS, 1 New Rep. 272 ; 7 L. T. 672 ; 27 J. P. 87 ; 11 W. R. 306.

—— **Occupier—Right to deduct from rent paid to owner.**]—*See* DISTRESS, Vol. XVIII., pp. 318, 321, Nos. 525, 549.

PART IV. SECT. 3, SUB-SECT. 8.

b. *When refused—Offer made by defendants to abate nuisance.*]—FAIRBANKS *v.* R. (1894), 4 Exch. C. R. 30.

c. *Right to set off.*]—Expenditure by a tenant in abating a structural nuisance, pursuant to a magistrate's order, after notice to abate served on the tenant only, cannot be set off by him against rent due to his landlord.—BUTCHER *v.* RUTH (1887), 22 L. R. Ir. 380.—IR.

Sect. 3.—*Summary proceedings: Sub-sect.* 8. *Sect.* 4: *Sub-sects.* 1, 2, 3 & 4.]

783. Before what court recoverable — County court.]—11 & 12 Vict. c. 123, s. 3, directs that the amount paid for carrying into force an order of two justices under that statute to abate a nuisance, may be recovered from the owner of the premises, where the nuisance existed, either in the county ct., or by proceeding before two justices, & gives those tribunals exclusive jurisdiction, & therefore the county ct. has jurisdiction in such case, although title to the land comes in issue.—HERTFORD UNION GUARDIANS *v.* KIMPTON (1855), 11 Exch. 295; 3 C. L. R. 1377; 25 L. J. M. C. 41; 25 L. T. O. S. 185; 19 J. P. 678; 3 W. R. 521; 156 E. R. 842.

784. How recoverable—By summons.]—It is a condition precedent to service by post under Public Health Act, 1875 (c. 55), s. 267, of a notice disputing an apportionment of expenses for works executed by a sanitary authority, that the letter giving the notice should be prepaid, & where there was no evidence that the letter giving such notice was prepaid:—*Held:* (1) the notice of dispute was bad; (2) pltfs., who had given notice to an owner to do what was necessary to abate a nuisance, were acting within their powers in proceeding by summons under Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19, & Public Health Act, 1875 (c. 55), s. 41, to recover the expenses incurred by them in executing the necessary works.—WALTHAMSTOW URBAN DISTRICT COUNCIL *v.* HENWOOD, [1897] 1 Ch. 41; 66 L. J. Ch. 31; 75 L. T. 375; 61 J. P. 23; 45 W. R. 124; 41 Sol. Jo. 67.

785. Time within which action must be brought.]—The limitation imposed by Summary Jurisdiction Act, 1848 (c. 43), s. 11, of the time within which complaints or informations may be made or laid before justices applies to actions in the county ct., brought under the Public Health (London) Act, 1891 (c. 76), s. 11, to recover costs & expenses incurred in & about obtaining & carrying into effect a nuisance order; so that such actions must be commenced within six months from the time when the costs & expenses were incurred.—HAMMERSMITH VESTRY *v.* LOWENFELD, [1896] 2 Q. B. 278; 65 L. J. Q. B. 662; 75 L. T. 182; 60 J. P. 600; 45 W. R. 60; 12 T. L. R. 459; 40 Sol. Jo. 566, D. C.

Annotations:—**Consd.** Blackburn Corpn. *v.* Sanderson, [1902] 1 K. B. 794. **Refd.** Metropolitan Water Board *v.* Bunn, [1913] 3 K. B. 181.

786. What may be claimed — Costs of successfully defending proceedings—Extra costs.]—"Full compensation" for damage sustained by reason of the exercise of any of the powers of Public Health Act, 1875 (c. 55), under Public Health Act, 1875 (c. 55), s. 308, does not include extra costs of legal proceedings which have been incurred, over & above the taxed party & party costs, by a person against whom the local authority has unsuccessfully proceeded under Public Health Act, 1875 (c. 55).—BARNETT *v.* ECCLES CORPN., [1900] 2 Q. B. 423; 69 L. J. Q. B. 834; 83 L. T. 66; 64 J. P. 692; 16 T. L. R. 463, C. A.; *subsequent proceedings, sub nom. Re* BARNETT & ECCLES CORPN. (1901), 65 J. P. 757.

Annotations:—**Apld.** Wiffen *v.* Bailey & Romford U. C., [1914] 2 K. B. 5. **Refd.** G. W. Ry. *v.* Fisher, [1905] 1 Ch. 316. **Mentd.** Hobbs *v.* Winchester Corpn. (1910), 79 L. J. K. B. 1123.

As to costs of abatement in compliance with notice.]—*See* Sub-sect. 4, D., *ante*.

SECT. 4.—INDICTMENT.

SUB-SECT. 1.—WHO LIABLE TO BE INDICTED.

787. Person doing or authorising act from which nuisance arises.]—A person kept an inclosed ground, near several inhabited houses, for profit, in causing it to be used by others for amusement, in firing at a target & shooting pigeons. This practice collected a number of vagabonds outside, who resorted thither for the purpose of firing at such birds as were missed, or only partially wounded by those who fired in the inclosure. These latter persons fired near the highway in all directions; &, most of them being unskilful, they caused much danger to the passengers & the inhabitants of the adjoining houses:—*Held:* the person who kept the inclosed ground was liable to be indicted for a nuisance, although the persons without had collected against his will; their collecting being a natural, if not an inevitable consequence of his act for his own profit.—R. *v.* MOORE (1832), 3 B. & Ad. 184; 1 L. J. M. C. 30; 110 E. R. 68.

Annotations:—**Apld.** R. *v.* Pedly (1834), 1 Ad. & El. 822. **Consd.** Rich *v.* Basterfield (1847), 4 C. B. 783. **Folld.** Walker *v.* Brewster (1867), L. R. 5 Eq. 25. **Consd.** Inchbald *v.* Robinson, Inchbald *v.* Barrington (1869), 4 Ch. App. 388. **Folld.** Chibnall *v.* Paul (1881), 29 W. R. 536; Bellamy *v.* Wells (1890), 60 L. J. Ch. 156. **Consd.** Barber *v.* Penley, [1893] 2 Ch. 447; Chase *v.* L. C. C. & Leslie (1898), 62 J. P. 184. **Apld.** Lyons *v.* Gulliver, [1914] 1 Ch. 631. **Distd.** Stearn *v.* Prentice, [1919] 1 K. B. 394. **Refd.** R. *v.* Warwick (1837), 6 L. J. M. C. 96; Simpson *v.* Savage (1856), 1 C. B. N. S. 347; R. *v.* Stephens (1866), L. R. 1 Q. B. 702; Haigh *v.* Sheffield Corpn. (1874), L. R. 10 Q. B. 102; A.-G. *v.* Horner (1912), 107 L. T. 547. **Mentd.** Scholes *v.* North London Ry. (1870), 21 L. T. 835; Whitney *v.* Moignard (1890), 24 Q. B. D. 630; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

Master—Nuisance by servant acting within scope of authority.]—*See* CRIMINAL LAW, Vol. XIV., pp. 43, 44, Nos. 124–127.

SUB-SECT. 2.—FORM.

788. Must allege nuisance to the public. Indictment must be to the nuisance of all the King's subjects.—HAYWARD'S CASE (1589), Cro. Eliz. 148; 78 E. R. 405.

Annotation:—**Refd.** R. *v.* Bell (1822), 1 L. J. O. S. K. B. 42.

789. ——.]—J. B. was indicted in two counts for omitting & neglecting to bury certain bodies whereby decomposition set in & "the air was greatly infected & corrupted & was rendered & became for several days offensive, unwholesome, injurious & dangerous to health to the great damage & common nuisance of such of the liege subjects of our lord the King as inhabited in the said house . . . to the evil example of all others in the like case offending & against the peace," etc. Counsel for the defence, before prisoner was called upon to plead, contended that the two counts, as drawn, were bad, as they did not allege a nuisance to the public, but only a private nuisance:—*Held:* the counts were bad.—R. *v.* BYERS (1907), 71 J. P. 205.

790. Whether extent of nuisance must be set out.]—Upon a return of a *certiorari* to remove an indictment, it is not necessary that it should appear by the caption, by what authority the ct.

PART IV. SECT. 4, SUB-SECT. 1.

787 i. *Person doing or authorising act from which nuisance arises.*]—R. *v.* TORONTO RY. CO. (1905), 4 O. W. R. 277; 5 O. W. R. 621; 10 O. L. R. 26.—**CAN.**

PART IV. SECT. 4, SUB-SECT. 2.

d. *Necessity for particularity in indictment.*]—An indictment alleged the nuisance to be near Lot 16, & the evidence showed it to be on it:—*Held:* a fatal variance.—R. *v.* MEYERS (1853), 3 C. P. 305.—**CAN.**

was held, but it must appear that the inferior ct. has jurisdiction. *Qu.:* whether this sufficiently appears in the case at bar; whether numbers may be expressed in common figures in an indictment, & whether want of addition can be taken advantage of on demurrer. An indictment for a nuisance on the Thames need not state the *terminus a quo*, & *ad quem* it flows.— R. v. HADDOCK (1737), Andr. 137; 95 E. R. 2[illegible]

Annotations:—**Consd.** R. *v.* Tyrrell (1843), 2 L. T. O. S. 175. **Mentd.** Rouse *v.* Bardin (1790), 1 Hy. Bl. 351; R. *v.* O'Connell (1844), 5 State Tr. N. S. 1.

791. ——.]—It is not always necessary to set out the length of the nuisance, in an indictment for a nuisance.—R. *v.* BROOKES (1754), Say. 167; 96 E. R. 840.

792. ——.]—It is not necessary to set out the length or breadth of a nuisance, in an indictment for the nuisance.—R. *v.* EAST LIDFORD (INHABITANTS) (1756), Say. 301; 96 E. R. 887.

793. Alternative statement of offence — Sufficiency.]—Where a statute or bye-law creates two distinct offences, & provides the same penalty for both, an information & conviction stating the offence in the alternative, as contrary to the statute, or bye-law, are insufficient. Therefore, where a bye-law provided that "no smoke or steam shall be omitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public," & the penalty was the same whichever class of persons had ground of complaint, & an information & conviction stated that deft. permitted smoke to escape contrary to the bye-law, without stating in terms any reasonable ground of complaint to the passengers or the public, or either of them:—*Held:* such statement was insufficient, & the conviction must be quashed.—COTTERILL *v.* LEMPRIERE (1890), 24 Q. B. D. 634; 59 L. J. M. C. 133; 62 L. T. 695; 54 J. P. 583; 6 T. L. R. 262; 17 Cox, C. C. 97, D. C.

Annotations:—**Distd.** R. *v.* Jones, *Ex p.* Thomas, [1921] 1 K. B. 632. **Refd.** *Ex p.* Norman (1915), 114 L. T. 232.

794. —— ——.] — Appct. was summoned under Motor Car Act, 1903 (c. 36), s. 1, for, & convicted of, driving a motor car on a highway "recklessly & at a speed which was dangerous to the public; having regard to all the circumstances of the case, including the nature, condition & use of the said highway, & to the amount of traffic which actually was at the time, or might reasonably have been expected to be, on the said highway":—*Held:* as the driving of the car was one indivisible act which might constitute both the offences charged, the conviction was not bad for duplicity.—R. *v.* JONES, *Ex p.* THOMAS, [1921] 1 K. B. 632; 90 L. J. K. B. 543; 124 L. T. 668; 85 J. P. 112; 37 T. L. R. 299; 19 L. G. R. 354; 26 Cox, C. C. 706, D. C.

Order for particulars.]—*See* CRIMINAL LAW, Vol. XIV., p. 237, Nos. 2236, 2237.

SUB-SECT. 3.—QUASHING.

See CROWN PRACTICE, Vol. XVI., pp. 412 *et seq.*

795. Whether upon motion.] — An indictment for common nuisance is never quashed upon motion.—ANON. (1698), 12 Mod. Rep. 234; 88 E. R. 1285.

SUB-SECT. 4.—DEFENCES.

796. Benefit to public outweighing inconvenience.]—Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there for loading ships with coals, the jury were directed by the judge to acquit defts. if they thought that the abridgment of the right of passage occasioned by these erections was for a public purpose, & produced a public benefit, & if the erections were in a reasonable situation, & a reasonable space was left for the passage of vessels on the river; & he pointed out to the jury that by means of the staiths coals were supplied at a cheaper rate, & in better condition, than they otherwise could be, which was a public benefit:—*Held:* this direction to the jury was proper.—R. *v.* RUSSELL (1827), 6 B. & C. 566; 9 Dow. & Ry. K. B. 566; 4 Dow. & Ry. M. C. 403; 5 L. J. O. S. M. C. 80; 108 E. R. 560.

Annotations:—**Consd.** R. *v.* Pease (1832), 4 B. & Ad. 30. **Dbtd.** R. *v.* Ward (1836), 4 Ad. & El. 384; R. *v.* Betts (1850), 16 Q. B. 1022; A.-G. *v.* Terry (1873), 9 Ch. App. 425, n. **Consd.** Jolliffe *v.* Wallasey L. B. (1873), L. R. 9 C. P. 62; Denaby & Cadeby Union Collieries *v.* Anson, [1911] 1 K. B. 171. **Refd.** Heginbotham *v.* South-Eastern & Continental Steam-Packet Co. (1849), 8 C. B. 337; R. *v.* Russell (1854), 3 E. & B. 942; Doe d. Seebkristo *v.* East India Co. (1856), 10 Moo. P. C. C. 140; R. *v.* United Kingdom Electric Telegraph Co. (1862), 8 Jur. N. S. 1153. **Mentd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377.

797. ——.]—On the trial of an indictment for a nuisance in a navigable river & common Kings' highway, called the harbour of C., by erecting an embankment in the waterway, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of guilty. It is no defence to such an indictment, that, although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port.—R. *v.* WARD (1836), 4 Ad. & El. 384; 1 Har. & W. 703; 6 Nev. & M. K. B. 38; 5 L. J. K. B. 221; 111 E. R. 832.

Annotations:—**Consd.** A.-G. *v.* Terry (1873), 9 Ch. App. 425, n.; Denaby & Cadeby Main Collieries *v.* Anson, [1911] 1 K. B. 171. **Refd.** R. *v.* Betts (1850), 16 Q. B. 1022; Jolliffe *v.* Wallasey L. B. (1873), L. R. 9 C. P. 62; Wednesbury Corpn. *v.* Lodge Holes Colliery Co., [1907] 1 K. B. 78; R. *v.* Bartholomew, [1908] 1 K. B. 554. **Mentd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377.

798. Wrongful act of third person—Removal of market—Indictment for erecting stall in old market place.]—A person indicted for a nuisance in erecting a stall in the old market place after a wrongful removal of the market, may set up the wrongfulness of the removal as a defence, & need not proceed by *sci. fa.* to repeal the grant of the market.—R. *v.* STARKEY (1837), 7 Ad. & El. 95; 2 Nev. & P. K. B. 169; Will. Woll. & Dav. 502; 6 L. J. K. B. 202; 1 J. P. 265; 1 Jur. 672; 112 E. R. 406.

Annotations:—**Refd.** Ellis *v.* Bridgnorth Corpn. (1863), 15 C. B. N. S. 52. **Mentd.** Gingell *v.* Stepney B. C. (1907), 77 L. J. K. B. 347.

799. Sufficient excuse shown.] — It will be a defence to an indictment if it can be shown that there was a sufficient cause to excuse what is *primâ facie* wrong (LORD BLACKBURN).—METROPOLITAN ASYLUM DISTRICT MANAGERS *v.* HILL (1881), 6 App. Cas. 193; 50 L. J. Q. B. 353; 44 L. T. 653; 45 J. P. 664; 29 W. R. 617, H. L.; *affg.* S. C. *sub nom.* HILL *v.* METROPOLITAN ASYLUMS DISTRICT MANAGERS (1879), 49 L. J. Q. B. 228, C. A.

Annotations:—**Refd.** Vernon *v.* St. James, Westminster Vestry (1880), 16 Ch. D. 449; L. & B. Ry. *v.* Truman (1885), 11 App. Cas. 45; M'Murray *v.* Cadwell (1889), 6 T. L. R. 76; National Telephone Co. *v.* Baker, [1893] 2 Ch. 186; Rapier *v.* London Tram. Co., [1893] 2 Ch. 588; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1898] 2 Ch. 614; Canadian Pacific Ry. *v.* Parke, [1899]

PART IV. SECT. 4, SUB-SECT. 4.

796 i. *Benefit to public outweighing inconvenience.*]—MYRER *v.* CLISH, MYRER *v.* MCDONALD (1885), 40 N. S. R. 1.—CAN.

796 ii. ——.]—R. *v.* HAYNES (1844), 7 I. L. R. 2.—IR.

Sect. 4.—*Indictment: Sub-sects.* 4, 5, 6, 7 & 8.]

A. C. 535; Goldberg *v.* Liverpool Corpn. (1900), 82 L. T. 362; East Fremantle Corpn. *v.* Annois, [1902] A. C. 213; East London Ry. Co. *v.* Thames Conservators (1904), 68 J. P. 302; A.-G. *v.* Dorchester Corpn. (1906), 94 L. T. 682; Demerara Electric Co. *v.* White, [1907] A. C. 330; Prices' Patent Candle Co. *v.* L. C. C., [1908] 2 Ch. 526; Hanley *v.* Edinburgh Corpn. (1913), 77 J. P. 233. **Mentd.** Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418; Lea Conservancy Board *v.* Hertford Corpn. (1884), 48 J. P. 628; Ennew *v.* G. E. Ry. (1885), 1 T. L. R. 519; Gas Light & Coke Co. *v.* St. Mary Abbott's, Kensington Vestry (1885), 15 Q. B. D. 1; Goolden *v.* Thames Conservators (1887), 4 T. L. R. 187; *Re* New River Co. & Metropolitan Water Board (1904), 68 J. P. 329; Metropolitan Water Board *v.* Solomon, [1908] 2 Ch. 214.

Abatement before proceedings.]—*See* HIGHWAYS, Vol. XXVI., p. 457, Nos. 1731–1734.

Defences generally.]—*See* Part IV., Sect. 2, subsect. 3, *post.*

SUB-SECT. 5.—EVIDENCE.

800. Admissibility of evidence—Indictment for burning arsenic.]—In support of an indictment for burning arsenic, whereby noisome & unwholesome smells arose, so that the air was greatly corrupted, to the common nuisance, etc., evidence was received that particles of white arsenic had been deposited on the herbage & the leaves of trees in the neighbourhood; that the trees perished in consequence, & that the cattle which ate the grass on which the particles of arsenic had fallen died poisoned. It appeared also that white arsenic is free from smell:—*Held:* the evidence had been properly received.—R. *v.* GARLAND (1851), 17 L. T. O. S. 39; 15 J. P. 260; 5 Cox, C. C. 165.

——.]—*See, also,* EVIDENCE, Vol. XXII., p. 73, Nos. 435, 436.

SUB-SECT. 6.—JUDGMENT.

801. Order for abatement—Jurisdiction of justices.]—HALL'S CASE, No. 287, *ante.*

802. —— Whether must be included in judgment.]—The ct. will not quash a return to a *mandamus*, which directed an inferior ct. to give judgment on an indictment, merely because it states an erroneous judgment given below. *Semble:* on an indictment for a nuisance in erecting a wall across a road, not for continuing the nuisance, it is not necessary to adjudge that the nuisance be abated.—R. *v.* WEST RIDING OF YORKSHIRE JJ. (1798), 7 Term Rep. 467; 101 E. R. 1080.

Annotations:—**Mentd.** R. *v.* Old Hall (1839), 10 Ad. & El. 248; R. *v.* Gloucester JJ. (1844), 8 Jur. 1069.

803. —— Necessity for presence of accused.]—Where deft. indicted for a nuisance in obstructing a navigable river, allows judgment to go by default, & is under no recognisances to appear in the Q. B. for judgment, the ct. will not in his absence give judgment that the nuisance be abated, though notice has been left at his residence of the intention of the Crown to pray for judgment; the proper course being to sue out a writ of *capias* & proceed to outlawry.—R. *v.* CHICHESTER (1851), 17 Q. B. 504, n.; 2 Den. 458; 18 L. T. O. S. 138; 15 Jur. 1131; 117 E. R. 1375.

Annotation:—**Mentd.** R. *v.* Williams (1870), 18 W. R. 806.

SUB-SECT. 7.—REMOVAL.

Change of venue generally, *see* CRIMINAL LAW, Vol. XIV., pp. 150, 151.

Removal by writ of *certiorari* generally, *see* CROWN PRACTICE, Vol. XVI., pp. 398 *et seq.*

Grounds for granting—Difficult points of law arising.]—*See* CROWN PRACTICE, Vol. XVI., p. 410, Nos. 2640–2642.

—— **Technical nature of evidence.**]—*See* CROWN PRACTICE, Vol. XVI., p. 412, No. 2701.

804. —— —— Necessity for special jury.]—*Certiorari* granted to remove an indictment for a nuisance, where it would be necessary to examine scientific persons at the trial, & to have a special jury.—R. *v.* LONDON GAS CO. (1838), 1 Will. Woll. & H. 419.

805. Costs of party grieved on removal.]—Persons dwelling near to a steam engine, which emitted volumes of smoke, affecting their breath, eyes, clothes, furniture, & dwelling-houses, & prosecuting an indictment for it, are parties grieved, entitled to have their costs taxed under 5 & 6 Will. & Mar. c. 11, s. 3, upon removal of the indictment by *certiorari* from the sessions into this ct. by defts., & their subsequent conviction.—R. *v.* DEWSNAP (1812), 16 East, 194; 104 E. R.

SUB-SECT. 8.—OTHER CASES.

806. Effect of pardon—Punishment & order for abatement—Whether abatement excused.]—Fine pardoned by general pardon, but abatement not excused.

The owner of the glass house at Lambeth was indicted for maintaining that house being a nuisance & was convicted & fined; & now it was moved that by the act of general pardon deft. was excused & discharged both as to the fine & the abatement of the nuisance; but the ct. upon consideration held that he should be discharged only as to the fine & not as to the abatement, for that is not a punishment of the party, but a removal of that which is a grievance to other people, & any person may abate a common nuisance.—R. *v.* WILCOX (1690), 2 Salk. 458; 91 E.

Annotations:—**Refd.** R. *v.* Papinian (1725), Sess. Cas. K. B. 135. **Mentd.** Petrie *v.* Nuttall (1856), 11 Exch. 569.

807. Agreement to compromise indictment—Whether valid.]—An agreement to compromise an indictment for a nuisance is not less illegal than an agreement to compromise a prosecution for any other criminal offence.—WINDHILL LOCAL BOARD OF HEALTH *v.* VINT (1890), 62 L. T. 725; 6 T. L. R. 335; 17 Cox, C. C. 41; *affd.*, 45 Ch. D. 351.

Annotation:—**Refd.** Jones *v.* Merionethshire Permanent Benefit Bldg. Soc., [1891] 2 Ch. 587.

PART IV. SECT. 4, SUB-SECT. 6.

e. *General verdict of acquittal—Question submitted by judge to jury unanswered—Necessity for preferring new indictment.*]—R. *v.* SPENCE (1855), 12 U. C. R. 519.—**CAN.**

PART IV. SECT. 4, SUB-SECT. 8.

f. *Rule nisi for precept to sheriff to abate nuisance—When made absolute—Affidavit that nuisance unabated.*]—R. *v.* HENDRY (1853), James, 105.—**CAN.**

NULLITY OF MARRIAGE.

See CONFLICT OF LAWS; HUSBAND AND WIFE.

NUNCUPATIVE WILLS.

See ROYAL FORCES; WILLS.

OATH AND AFFIRMATION.

See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE; ELECTIONS; EVIDENCE; JURIES; MAGISTRATES; PARLIAMENT; PRACTICE AND PROCEDURE; SOLICITORS.

OATH OF ALLEGIANCE.

See CONSTITUTIONAL LAW; PARLIAMENT.

OBSCENE BOOKS.

See CRIMINAL LAW AND PROCEDURE.

OBSTRUCTING JUSTICE.

See CRIMINAL LAW AND PROCEDURE; CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL.

OFFER AND ACCEPTANCE.

See CONTRACT; LANDLORD AND TENANT; SALE OF GOODS; SALE OF LAND.

OFFICIAL RECEIVER.

See BANKRUPTCY AND INSOLVENCY; COMPANIES; RECEIVERS.

OFFICIAL REFEREE.

See ARBITRATION.

OFFICIAL SECRETS.

See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

OFFICIAL SOLICITOR.

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See CHARITIES.

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See POOR LAW.

OLD METAL DEALERS.

See TRADE AND TRADE UNIONS.

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OPEN SPACES AND RECREATION GROUNDS.

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Roadside Wastes . . „ HIGHWAYS.
Vagrants . . . „ POOR LAW.
Wild Birds' Protection . „ ANIMALS.

Part I.—General Rights of Public.

1. Jus spatiandi—Unknown to English law.]—A *jus spatiandi* is unknown to English law &, as such, cannot be the subject of any possible grant (FARWELL, J.).—A.-G. *v.* ANTROBUS, [1905] 2 Ch. 188; 74 L. J. Ch. 599; 92 L. T. 790; 69 J. P. 141; 21 T. L. R. 471; 49 Sol. Jo. 459; 3 L. G. R. 1071.

Annotations:—**Refd.** Whitehouse *v.* Hugh, [1906] 1 Ch. 253. **Mentd.** A.-G. & Croydon R. D. C. *v.* Moorsom-Roberts (1907), 72 J. P. 123; Robinson *v.* Smith (1908), 24 T. L. R. 573; North Staffordshire Ry. *v.* Hanley Corpn. (1909), 8 L. G. R. 375; Trafford *v.* St. Faiths R. D. C. (1910), 74 J. P. 297; A.-G. *v.* Horner (No. 2), [1913] 2 Ch. 140; Fuller *v.* Chippenham R. D. C. (1914), 79 J. P. 4; A.-G. *v.* Sewell (1918), 88 L. J. K. B. 425; Collis *v.* Amphlett, [1918] 1 Ch. 232; Granby *v.* Bakewell U. D. C. (1925), 69 Sol. Jo. 446; Moser *v.* Ambleside U. D. C. (1925), 89 J. P. 118; Stoney *v.* Eastbourne R. D. C. & Devonshire (1925), 95 L. J. Ch. 312.

2. —— ——.] — Pltfs., the Improvement Comrs. of the river T., acquired certain lands & constructed a pier under statutory powers, the work being done at intervals between the years & 1891. The public were in the habit of using the pier as a promenade & for various purposes of pleasure & recreation, & pltfs. alleged that they never desired nor intended to prevent the public from so using it as a matter of favour. Finding, however, that a claim as of right was being set up, pltfs. on Dec. 21, 1897, placed barriers across the landward end of the pier, & ordered the pier to be closed for twenty-four hours. Thereupon the mayor & other officers of the adjoining borough of S. S., being refused admission, broke down the barriers & also certain permanent gates across the pier. Pltfs. now sued them for the trespass. At the same time an action was brought against the comrs. in the name of the A.-G. alleging that the said pier & the several parts thereof had been from time to time dedicated to the use of & accepted by the public as a common & public highway, & had been & were used by the public for the purposes of bathing, boating, fishing, embarking, disembarking, recreation, & other lawful purposes, with power to stray on & off the sands at the side of the pier, & alleging, in the alternative, a lost grant to the mayor, aldermen & burgesses of S. S. for the benefit of themselves & the inhabitants of S. S., & claiming a declaration that the public & the inhabitants of S. S. were entitled to exercise such right of way & such other rights:—*Held:* (1) an owner might dedicate his land for purposes of recreation; (2) a licence to stray on & off a right of way required such a case to prove it that it could practically never be proved.—TYNE IMPROVEMENT COMRS. *v.* IMRIE, A.-G. *v.* TYNE IMPROVEMENT COMRS. (1899), 81 L. T. 174.

3. —— **Right by grant.**]—A.-G. *v.* ANTROBUS, No. 1, *ante*.

See, also, HIGHWAYS, Vol. XXVI., p. 261, No. 7.

Roadside wastes.]—*See* HIGHWAYS, Vol. XXVI., pp. 323, 324, 391, Nos. 560–578, 1174–1178.

4. How far right may be acquired by custom.]—Evidence that in a place of resort for pleasure, as a wood, or the like, people have gone about wherever they pleased, there being no definite enduring trackway in any particular direction, but merely temporary & transitory tracks, not passable in wet weather & varying every season & never proved to be repaired:—*Held:* not evidence on which a jury could properly find either a public highway or a public right of resort for air & exercise, or a prescriptive right of way.—SCHWINGE *v.* DOWELL (1862), 2 F. & F. 845, N. P.

5. ——.]—Gifts for Churches Act, 1811 (c. 115), s. 2, does not empower the lord of a manor to grant a portion of the waste land of the manor, which is a village green, freed from the parishioners' customary right to the use of it, as such, & a demurrer by the vicar of St. M. E., in the manor of B., the grantee of the ecclesiastical comrs., lords of the manor, to a bill by one of the parishioners of B. to establish their right to the village green, & set aside the grant of it, was overruled.—FORBES *v.* ECCLESIASTICAL COMRS. FOR ENGLAND (1872), L. R. 15 Eq. 51; 42 L. J. Ch. 97; 27 L. T. 511; 21 W. R. 169.

6. —— **Reasonable use only.**] — Under a claim of right by a custom for all the inhabitants of a parish, evidence that a party claiming such right rented a tenement within the parish, which he used occasionally, though he did not actually reside within the parish, will support the custom. Where a party claims a right to use a piece of ground belonging to another for a lawful purpose, he must use it for such purpose in a lawful & proper way, otherwise he will be considered a trespasser.—FITCH *v.* FITCH (1797), 2 Esp. 541; 170 E. R. 449, N. P.

—— ——.]—*See* CUSTOM & USAGES, Vol. XVII., pp. 15, 17, Nos. 128, 129, 160–169.

7. Dedication to public—Evidence of—Mere user.]—The mere fact that the public have for more than thirty years used an open space in a town, surrounded on all sides by highways, by passing over it in all directions, is not conclusive evidence of an intention on the part of the owner of the soil to dedicate such space as a highway.—ROBINSON *v.* COWPEN LOCAL BOARD (1893), 63 L. J. Q. B. 235; 9 R. 858, C. A.

Annotations:—**Apld.** Tyne Improvement Comrs. *v.* Imrie, A.-G. *v.* Tyne Improvement Comrs., [1899] 81 L. T. 174. **Consd.** A.-G. *v.* Antrobus, [1905] 2 Ch. 188.

8. —— ——.]—TYNE IMPROVEMENT COMRS. *v.* IMRIE, A.-G. *v.* TYNE IMPROVEMENT COMRS., No. 2, *ante*.

9. —— ——.]—The ct. will not readily infer dedication to the public. Where a corpn. purchased 53 acres, 40 of which were intended to be used as a public park, the ct. would not infer dedication of the whole of the 53 acres simply because the remaining 13 acres were not fenced off & were used by the public as part of the park.—A.-G. *v.* BRADFORD CORPN. (1911), 75 J. P. 553; 55 Sol. Jo. 715; 9 L. G. R. 1190.

10. Shooting on common — Power of conservator to grant privilege—Putney & Wimbledon Commons Act, 1871.]—CLIFTON *v.* BURY (VISCOUNT) (1887), 4 T. L. R. 8.

Commons & rights of common.]—*See* COMMONS, Vol. XI., pp. 1 *et seq*.

PART I.

a. *Dedication to public.*]—The law of Scotland agrees with the law of England in holding that the right to village greens & playgrounds stands upon a principle of original dedication to the use of the public.—DYCE *v.* HAY (1852), 1 Macq. 305.—SCOT.

b. *Dedication of land held by corporation in fee—Whether irrevocable.*]—The doctrine of irrevocable dedication is not applicable to the case of a park which is established by bye-law out of land belonging to the corpn. as owners in fee.—A.-G. *v.* TORONTO CORPN. (1903), 23 C. L. T. 284; 6 O. L. R. 159; 2 O. W. R. 539.—CAN.

Part II.—Exemption from Rates, Charges, etc.

SECT. 1.—IN GENERAL.

11. Whether open space extra commercium—By dedication to public.]—LONDON COUNTY COUNCIL *v.* WANDSWORTH & CLAPHAM UNION ASSESSMENT COMMITTEE, No. 18, *post*.

12. —— ——.]—A county council, not charged with the duty of providing a park, were empowered by statute to purchase & accordingly purchased premises which by the statute were to be maintained by the county council as a park for the perpetual use thereof by the public for exercise & recreation. The necessary expenses of maintaining the park exceeded any sums which the council could derive from licences for the supply of refreshments therein or for grazing rights or otherwise:—*Held:* the county council were not ratable to the poor rate in respect of the park, both because the park thus dedicated by statute to the use of the public had no ratable value, & also because the county council were not occupiers of the park for rating purposes.—LAMBETH OVERSEERS *v.* LONDON COUNTY COUNCIL, [1897] A. C. 625; 66 L. J. Q. B. 806; 76 L. T. 795; 46 W. R. 79; 13 T. L. R. 527; *sub nom.* ST. MARY, LAMBETH (CHURCHWARDENS & OVERSEERS) *v.* LONDON COUNTY COUNCIL, 61 J. P. 580, H. L.; *affg.* S. C. *sub nom.* LONDON COUNTY COUNCIL *v.* LAMBETH OVERSEERS, [1896] 2 Q. B. 25.

Annotations:—**Apld.** Manchester Corpn. *v.* Chorlton Union Assmt. Com. (1899), 15 T. L. R. 327; Liverpool Corpn. *v.* West Derby Assmt. Com., [1908] 2 K. B. 647. **Distd.** Margate Corpn. *v.* Pettman (1912), 106 L. T. 104. **Refd.** L. C. C. *v.* Wandsworth B. C., [1903] 1 K. B. 797. **Mentd.** Soane's Museum Trustees *v.* St. Giles-in-the-Fields & St. Georges' Bloomsbury, Joint Vestry (1900), 83 L. T. 248; Westminster Corpn. *v.* Johnson, Westminster Corpn. *v.* Fuller, [1904] 2 K. B. 737; Swansea Harbour Trustees *v.* Swansea Union (1907) Konst. Rat. App. 250; Winstanley *v.* North Manchester Overseers, [1910] A. C. 7; London Land Tax Comrs. *v.* C. L. Ry., [1913] A. C. 364; London Corpn. *v.* Associated Newspapers, [1915] A. C. 674; Roberts *v.* Poplar Assmt. Com., [1922] 1 K. B. 25.

13. —— ——.]—MANCHESTER CORPN. *v.* CHORLTON UNION ASSESSMENT COMMITTEE (1899), 15 T. L. R. 327, D. C.

Annotation:—**Apld.** Liverpool Corpn. *v.* West Derby Assmt. Com., [1908] 2 K. B. 647.

14. —— ——.]—What we have to determine is whether or not the dedication of the land to public purposes, so that the use of it for any purpose must be a use subordinate to the public purposes to which the park or recreation ground is in its whole devoted, excludes those in whom the land is legally vested from the category of owners within Metropolis Management Act, 1855 (c. 120), s. 250. The fact that the legal owners have no beneficial ownership, but are merely trustees, does not by the very terms of the sect. exclude them from the category of owners. Does the fact that they are trustees exclude them? I have come to the conclusion that it does (VAUGHAN WILLIAMS, L.J.).—LONDON COUNTY COUNCIL *v.* WANDSWORTH BOROUGH COUNCIL, [1903] 1 K. B. 797; 72 L. J. K. B. 399; 88 L. T. 783; 67 J. P. 215; 51 W. R. 499; 19 T. L. R. 372; 47 Sol. Jo. 405; 1 L. G. R. 462, C. A.

Annotations:—**Distd.** Herne Bay U. C. *v.* Payne & Wood, [1907] 2 K. B. 130. **Mentd.** Hackney Corpn. *v.* Lee Conservancy Corpn. 2 K. B. 737.

15. —— Land acquired under Public Health Act, 1875 (c. 55), s. 164.]—Lands acquired by an urban authority under above sect., to be used as public walks or pleasure grounds are not *extra commercium*.—HERNE BAY URBAN DISTRICT COUNCIL *v.* PAYNE & WOOD, [1907] 2 K. B. 130; 76 L. J. K. B. 685; 96 L. T. 666; 71 J. P. 282; *sub nom.* HERNE BAY URBAN DISTRICT COUNCIL *v.* FARLEY, ETC., 23 T. L. R. 442; 5 L. G. R. 631, D. C.

Annotations:—**Mentd.** Carlisle Corpn. *v.* Saul's Exors. (1907), 5 L. G. R. 1128; R. *v.* Jones, etc. JJ. & Barry U. D. C. (1907), 5 L. G. R. 722; Bridgwater Corpn. *v.* Stone (1908), 99 L. T. 806; Bishop Auckland U. C. *v.* Alderson, [1913] 2 K. B. 324.

As charitable trusts.]—*See* CHARITIES, Vol. VIII., pp. 284, 290, Nos. 604, 673.

Exemption from land duties.]—*See* Finance Act, 1910 (c. 8), ss. 9, 16, 17 (3); REVENUE.

SECT. 2.—RATABILITY.

16. General exemption.]—LAMBETH OVERSEERS *v.* LONDON COUNTY COUNCIL, No. 12, *ante*.

17. Cost of management or maintenance exceeding income—Common vested in local authority as lord of manor—Freeman enjoying rights of pasture.]—The soil of a common is vested in the municipal corpn. of L., as lords of the manor, & each of the freemen, if resident within L., is entitled, as a personal privilege, to turn, at all times, on the common two head of cattle. The corpn. repair the fences of the common, & preserve the rights of the freemen from being infringed; they appoint & pay out of the corporate funds a commons warden to check illegal stocking, & to inflict fines on those who illegally put in stock; part of the fines are paid to the corporate funds, & part to the commons warden; the corpn. derive no benefit whatever from the common, but are losers by appointing & paying the commons warden:—*Held:* the corpn. were not ratable to the poor rate in respect of the common, as, although they were owners & occupiers, it was subject to a *profit à prendre* in the freemen which exhausted the whole value of the occupation.—LINCOLN CORPN. *v.* HOLMES COMMON OVERSEERS (1867), L. R. 2 Q. B. 482; 8 B. & S. 344; 36 L. J. M. C. 73; 16 L. T. 739; 31 J. P. 645; 15 W. R. 786.

Annotations:—**Consd.** R. *v.* Rhymney Ry. (1869), L. R. 4 Q. B. 276. **Refd.** Hare *v.* Putney Overseers (1881), 7 Q. B. D. 223; L. C. C. *v.* Lambeth, [1896] 2 Q. B. 25; Winstanley *v.* North Manchester Overseers, [1910] A. C. 7. **Mentd.** Roberts *v.* Poplar Assmt. Com., [1922] 1 K. B. 25.

18. —— Public park—Income from licence to let boats.]—By London Parks & Works Act, 1887 (c. 34), the control, management, maintenance, & repair of Battersea Park was vested in the Metropolitan Board of Works, to whose rights & duties applts. afterwards succeeded. Applts. granted

PART II. SECT. 2.

c. *Whether exempt—Land not used exclusively for public benefit.*]—Land vested in trustees for public benefit but not used exclusively for public benefit is not exempt from rates.—SYDNEY MUNICIPAL COUNCIL *v.* ROYAL AGRICULTURAL SOCIETY (1905), 3 C. L. R. 298.—**AUS.**

d. ——.]—CARNEGIE DUNFERMLINE TRUSTEES *v.* DUNFERMLINE ASSESSOR, [1909] S. C. 678; 46 Sc. L. R. 451; [1909] 1 S. L. T. 286.—**SCOT.**

e. ——.]—GLASGOW PARISH COUNCIL *v.* GLASGOW ASSESSOR, GLASGOW PARISH COUNCIL *v.* GLASGOW CORPN., [1912] S. C. 818.—**SCOT.**

f. *Land within one municipality—Granted to another municipality—Not*

Sect. 2.—*Ratability. Sect.* 3. *Part III. Sects.* 1, 3: *Sub-sect.* 1.]

to Day & Son, in consideration of an annual payment of £275 *per annum*, the exclusive right to let boats for hire on a lake forming part of the park.

The cost of repairing & maintaining the lake in a condition suitable for boating exceeded the sum of £275, but such expenditure would have been equally necessary, had there been no boats upon the lake in a condition suitable to the use & enjoyment of the park by the public, in accordance with the provisions of the statute. Applts. having been rated in respect of the annual payment made to them :—*Held :* even assuming that applts. could be rated, there was no net ratable value. *Qu. :* whether the expenses of maintaining the entire park, & not merely the lake, ought not to be taken into account, on the ground that the park constituted one indivisible hereditament. *Semble :* the lake was within the principle upon which parks, open for the use of the public & maintained under Parliamentary powers at the public expense, are exempt from ratability.—LONDON COUNTY COUNCIL *v.* WANDSWORTH & CLAPHAM UNION ASSESSMENT COMMITTEE (1890), Ryde, Rat. App. [1886–90] 220.

19. —— —— Income from licences or grazing rights.]—LAMBETH OVERSEERS *v.* LONDON COUNTY COUNCIL, No. 12, *ante.*

20. Power to close park for seven days in the year—& charge for admission.]—The Liverpool Corpn. acquired land & appropriated it to the use of the public as a public park under a local Act, which provided that "the corpn. . . . may purchase by agreement the fee simple of & in any lands they may think suitable for public parks for the inhabitants of the borough, & may lay out & appropriate the same or any part thereof." The same Act empowered the corpn. to sell or demise all or any part of the lands, acquired under the Act which should not be required for the purposes of the Act.

In pursuance of statutory powers to make bye-laws for regulating the times during which the park should be open & the prices of admission on any special occasion provided that the park should not be closed for more than seven days in any year, the corpn. made a bye-law providing that the park might be closed for not more than seven days in any year, & that on such days they might charge any sum not exceeding 5*s.* for each person for admission. On several occasions the park was closed, but the corpn. never made any charge for admission. The average annual cost of maintaining the park was £3,525, & the average annual revenue from letting bowling greens, a boat house, & a refreshment kiosk was £62 10*s.* :—*Held :* the corpn. were not ratable to the poor rate in respect of the park as the occupiers thereof.—LIVERPOOL CORPN. *v.* WEST DERBY ASSESSMENT COMMITTEE, [1908] 2 K. B. 647 ; 77 L. J. K. B. 1032 ; 99 L. T. 435 ; 72 J. P. 397 ; 24 T. L. R. 701 ; 6 L. G. R. 706 ; 2 Konst. Rat. App. 719, C. A.

21. Power to sell land not required.]—LIVERPOOL CORPN. *v.* WEST DERBY ASSESSMENT COMMITTEE, No. 20, *ante.*

22. Exemption by private Act—Portion leased for racecourse.]—A private Act of 1780 vested a piece of land in trustees for certain purposes therein mentioned for the benefit of the inhabitants of a borough & provided that for ever thereafter the land should be deemed & taken as within & parcel of the borough, but should in no wise be assessed to poor rate :—*Held :* the land was exempt for ever from being assessable to poor rate & therefore a race committee, to whom the trustees had leased a portion of the land for a racecourse, were not liable to poor rate by reason of their occupation.—PONTEFRACT ASSESSMENT COMMITTEE *v.* PONTEFRACT PARK TRUSTEES, PONTEFRACT ASSESSMENT COMMITTEE *v.* HARTLEY (1898), 78 L. T. 738, C. A. ; *affg.* S. C. *sub nom.* PONTEFRACT PARK TRUSTEES *v.* PONTEFRACT UNION, HARTLEY *v.* PONTEFRACT UNION (1897), 42 Sol. Jo. 97.

SECT. 3.—LIABILITY AS FRONTAGER.

In London.]—*See* HIGHWAYS, Vol. XXVI., pp. 492, 493, Nos. 2022–2024.

Outside London.]—*See* HIGHWAYS, Vol. XXVI., p. 542, No. 2402.

Part III.—Powers of Regulation and Management.

SECT. 1.—IN GENERAL.

23. Power to levy rates for payment of maintenance expenses.]—The reservation by Metropolis Management Act, 1855 (c. 120), s. 239, of the powers of the trustees under any local Act, who have the control of any enclosed garden or ornamental ground, is confined to the future maintenance & management of such "enclosed garden & ground, & the railing & footway bounding the same," & does not extend to render such trustees liable for any debts incurred by them, or their predecessors under such local Act, nor empower them to levy rates for the payment of such debts, even though such debts may have been incurred in part at least in respect of the enclosed garden or ornamental ground which remains subject to their control ; but the liability in respect of all such debts is transferred to the vestry or district board within which whose parish or district the place in question is situated, & they are empowered to levy rates for the payment thereof.—R. *v.* ST. GEORGE, HANOVER SQUARE VESTRY (1863), 32 L. J. Q. B. 160 ; 27 J. P. 532 ; 11 W. R. 722.

24. Power to take over gardens in London square—Necessity for irrevocable grant of user to inhabitants of square—Town Gardens Protection Act, 1863 (c. 13).]—In 1786, the representatives

exempt from taxation by granting municipality.]—Lands within one municipality granted by the Crown to another municipality upon trust to maintain & preserve the same as a public park or pleasure ground are not exempt from taxation by the municipality within which they are situate.—SAANICH DISTRICT CORPN. *v.* VICTORIA CORPN. (1917), 24 B. C. R. 121.—CAN.

PART III. SECT. 1.

g. *Expropriation of road company's rights.*]—48 Vict. c. 21 (O.) does not empower the comrs. appointed thereunder to expropriate the rights of a road co., or to close up any part of the road for the purposes of the Niagara Falls Park.—*Re* NIAGARA FALLS PARK, FULLER'S CASE (1887), 14 A. R. 65.—CAN.

h. *Purchase of land by park commissioners—Liability of municipality.*]—Where a municipality adopts Public Parks Act, 1887, & proceedings are regularly taken thereunder for the formation of the board of park management, & for the doing of the various matters authorised to be done thereby, including the purchase by the board of lands needful for park purposes, such

of T. & P. respectively, being tenants in common in fee of the land & houses forming a square in London, with the garden in the middle, a decree in Chancery for a partition was obtained, & a commission issued. The Comrs. certified that the land & houses on the north side should be allotted to the P.s in fee, & the land & houses on the other three sides, together with the garden, to the T.s in fee; that the lessees of houses, etc., on the north side should continue to pay to the owners of the second allotment the sum reserved in their leases towards keeping up the square garden; & that the owners of the second allotment should for ever keep & maintain the garden in its then state as a pleasure ground. A decree was then made that the estates should be held in severalty as allotted by the certificate; & mutual conveyances were executed accordingly, which recited the decrees & certificate; but there was no covenant on the part of the owners of the second allotment to keep up the square garden. At the time of the partition most of the leases granted by the original coparceners, under whom T. & P. claimed, were in existence, & the last lease did not expire till 1847, & in the leases there were covenants by the lessees to pay certain small annual sums towards keeping up the square gardens, & covenants on the part of the lessors to apply them to that purpose. In 1807, J., the then tenant for life, & his son, C., the tenant in tail in remainder, of the property in the second allotment, executed a conveyance, which was carried out by a recovery, by which C., the son, took in fee the hereditaments on the east & partly south side of the square & the square garden, & J. took the hereditaments on the west & the the rest of the south side, & C. covenanted for himself, his heirs, etc., with J., his heirs, etc., for ever after to keep the square garden in its then state, & in good repair, etc. In 1808, C. conveyed the square garden in fee to E., who covenanted with C., etc., to keep the garden in its then state, & that it should be lawful for J. & C., & their respective tenants, inhabitants of the square, on payment of a reasonable sum, to have keys & admission at all times into the garden. Up to 1851 the garden was constantly used as a promenade & place of recreation by such of the inhabitants of the square as chose to pay a guinea or a guinea & a half *per annum* to the owners for the time being of the garden, for keys. After several mesne assignments, in 1851, the garden became vested in fee in W., who proposed to erect a building in it. L., the devisee from J. of all his share in the property conveyed to him by the deed of 1807, & the owners of most of the property in the square comprised in that deed, opposed this, & by an agreement between them & W. they granted him a licence to erect & maintain the proposed building for ten years, provided that the licence should not operate as a waiver of the covenants in the deeds of 1807 & 1808; & W. covenanted to restore the garden at the end of the ten years to its former state. At the end of the ten years W. removed the building, & pltf., who was also joint devisee under the will of L. of J.'s share, as heir-at-law of L., exercised an option, given to L. in the agreement of 1851, of purchasing an undivided moiety of the garden; & the garden accordingly, by a deed of 1861, became vested in the pltf. & W. as tenants in common in fee. The owners of the houses on the north side of the square were no parties to any dealing with the garden. In 1865, the garden being in a neglected & dilapidated state, the Metropolitan Board of Works took possession of it, under above Act, s. 1. Pltf. having brought an action of trespass against the Board:—*Held:* whatever might be the rights at law or in equity of the owners & occupiers of the houses round the square, the garden had not been set apart for the use or enjoyment of the inhabitants of the square otherwise than by the revocable permission of the owner, within the meaning of the above sect., & consequently the Board were trespassers. *Qu.:* whether the case was within sect. 2 of the Act.—TULK *v.* METROPOLITAN BOARD OF WORKS (1868), L. R. 3 Q. B. 682; 8 B. & S. 777; 37 L. J. Q. B. 272; 19 L. T. 18; 32 J. P. 548; 16 W. R. 985, Ex. Ch.

SECT. 2.—CLOSING AND CHARGING FOR ADMISSION.

See, generally, Public Health Acts Amendment Act, 1890 (c. 59), ss. 44 (1), (2); Public Health Acts Amendment Act, 1907 (c. 53), s. 76.

25. No general power to close for a single day.]—A.-G. *v.* LOUGHBOROUGH LOCAL BOARD (1881), *Times*, May 31.

26. Public park — Express power reserved by local Act.]—A.-G. *v.* LEEDS CORPN. (1880), 24 Sol. Jo. 539.

27. Pleasure ground—Reservation of part for bandstand—Charge for admission.]—WITHERNSEA URBAN DISTRICT COUNCIL *v.* PYGAS (1911), 75 J. P. Jo. 603.

SECT. 3.—BYE-LAWS.

SUB-SECT. 1.—VALIDITY.

See, generally, Public Health Act, 1875 (c. 55), s. 164; CORPORATIONS, Vol. XIII., pp. 325–338; PUBLIC HEALTH.

28. Whether concurrence of general public necessary—Corporation incorporated by charter in charge of common.]—SUTTON COLDFIELD WARDEN & SOCIETY *v.* MASKALL (1872), 36 J. P. Jo. 388.

29. Validity — Against straying of fowls — No sufficient fence provided.]—A local board made bye-laws for the regulation of a pleasure ground within their jurisdiction, & one was "a person

board becomes the statutory agent of the municipality for such purchase, & the municipality, & not the board, is liable to pay for the lands.—MCVICAR *v.* PORT ARTHUR CORPN. (1895), 26 O. R. 391.—CAN.

k. —— ——.]—OTTAWA CORPN. *v.* KEEFER, OTTAWA CORPN. *v.* CLARK (1896), 23 A. R. 386.—CAN.

l. *Action to set aside resolution by park commissioners—By whom brought.*]—Ratepayers affected only to the same extent as all other ratepayers in the city cannot bring an action against the park comrs. of the city to set aside resolutions as to the management of a city park; such an action must be brought by the A.-G. — HOPE *v.* HAMILTON PARK COMRS. (1901), 21 C. L. T. 230; 1 O. L. R. 477.—CAN.

m. *Erection of fence round park—Whether bye-law necessary.*]—*Held:* a village council acted *intra vires* in spending more than $300 in fencing a park, although it had not submitted a bye-law therefor to the electors for their approval.—IMPERIAL ELEVATOR & LUMBER CO., LTD. *v.* PONTEIX, [1917] 3 W. W. R. 1087; 10 Sask. L. R. 395; 39 D. L. R. 768.—CAN.

PART III. SECT. 3, SUB-SECT. 1.

n. *Validity.*]—The general power given to municipal corpns. to make bye-laws for the good government of the borough includes a power to make bye-laws regulating the conduct of the public in places where the public are accustomed to assemble or resort, & this power extends to places which are of a public nature, although the public may have the right of admission only by payment of a charge.—CHAMPION *v.* FLEETWOOD (1907), 26 N. Z. L. R. 933. N.Z.

—— *Regulating right of public*

Sect. 3.—*Bye-laws: Sub-sects.* 1 & 2. *Part IV. Sect.* 1.]

shall not suffer any fowl, etc., belonging to him to enter or remain in the pleasure ground." The fine for offending was £5. B.'s six fowls strayed inside, there being no fence between, sufficient to prevent them; & the justices declined to convict, holding the bye-law to be repugnant to the law of England, & not warranted by Public Health Act, 1875 (c. 55), s. 146:—*Held:* the justices were right.—TORQUAY LOCAL BOARD *v.* BRIDLE (1882), 47 J. P. 183, D. C.

Annotation:—**Mentd.** R. *v.* Powell (1884), 48 J. P. 740.

30. —— Against motor traffic in park.]—Between the years 1853 & 1861, five lots, part of a larger area of land which had been purchased for providing a public park for the benefit of the inhabitants of Bradford, were sold off for private residences & were conveyed to the respective purchasers "together with a right of carriage, horse & footway" through the park when laid out, but subject to such bye-laws, rules, & regulations as should from time to time be made by those having the control of the park for the purpose of (*inter alia*) "promoting safety & for establishing & maintaining the character of the park as a place of public recreation." Each of the lots had a carriage way entrance on its southern side into the park & on its northern side into a public road. In 1863, the remainder of the land, known as Peel Park, containing fifty-eight acres, was conveyed to the Bradford Corpn. subject to the rights of way so granted. In July, 1907, the corpn. under the powers of a local Act made a bye-law prohibiting motor cars or other similar mechanically drawn vehicles from using the park. In 1920, deft. purchased one of the five lots & then disputed the validity of the bye-law & asserted a right under the grant in the original conveyance of his lot to drive his motor car through the park. Subsequently, in order to obviate any objection that their existing bye-law was only made under their statutory power, the corpn. "as the body having control of Peel Park & for the purpose of promoting safety & for establishing & maintaining the character of the park as a place of public recreation," made a further bye-law prohibiting any motor car or other similar mechanically drawn vehicle from passing through any part of the park to or from any of the houses on the lots in question. Before passing this bye-law the Parks Committee, after consideration, determined that it was necessary in the interests of public safety to prevent the owners of the lots from driving motor vehicles over the roadways of the park. The ct. in granting an injunction against deft.:—*Held:* (1) the right of carriage way was not restricted to carriages impelled by any particular kind of traction, & a motor car was within the meaning of the grant; (2) the bye-laws which had been made by the corpn. in the interests of public safety & in exercise of its two-fold power, under the statute & the deed of conveyance, were not unreasonable but were valid.—A.-G. *v.* HODGSON, [1922] 2 Ch. 429; 91 L. J. Ch. 426; 127 L. T. 329; 87 J. P. 121; 38 T. L. R. 601; 66 Sol. Jo. 538; 20 L. G. R. 425.

Regulating games on Metropolitan Commons.]—*See* COMMONS, Vol. XI., pp. 88, 89, Nos. 1078–80.

Relating to Metropolitan Commons generally.]—*See* COMMONS, Vol. XI., pp. 88, 89, Nos. 1077–1085.

SUB-SECT. 2.—ENFORCEMENT.

See, generally, CORPORATIONS, Vol. XIII., pp. 325–338; PUBLIC HEALTH.

31. Breach an indictable offence.]—The breach of the bye-laws made by the managers & directors of recreation grounds under Open Spaces Act, 1859 (c. 27), is an indictable offence.—R. *v.* HAMBLY (1879), 43 J. P. 495.

32. Bye-law restraining acts without consent—Discretion as to consent to be exercised judicially.]—The London County Council, in exercise of statutory powers, made a bye-law relating to parks, gardens, & open spaces whereby the selling of any article without the consent in writing of the Council was constituted an offence. After granting permission to sell literature at meetings in certain parks, they passed a resolution that the existing permissions should be determined & that no new permission should be granted thenceforth. Acting on this resolution they refused an application made by a certain society for permission to sell pamphlets at its meetings in one of the parks:—*Held:* there was vested in the London County Council by virtue of the bye-law, a discretion similar to that of justices at licensing sessions, & they did not properly exercise that discretion by passing a general resolution to grant no permission & acting on that resolution.—R. *v.* LONDON COUNTY COUNCIL, *Ex p.* CORRIE, [1918] 1 K. B. 68; 87 L. J. K. B. 303; 118 L. T. 107; 82 J. P. 20; 34 T. L. R. 21; 62 Sol. Jo. 70; 15 L. G. R. 889, D. C.

Annotations:—**Mentd.** R. *v.* Port of London Authority, *Ex p.* Kynoch, [1919] 1 K. B. 176; Short *v.* Poole Corpn., [1926] Ch. 66.

Metropolitan Commons.]—*See* COMMONS, Vol. XI., p. 89, Nos. 1083, 1084.

meeting.]—A bye-law provided that no person should take part in any meeting in any of the public parks, except with the written authority of the corpn. or of the superintendent of parks:—*Held:* the bye-law was neither *ultra vires* nor repugnant to the law of Scotland, seeing that it did not abrogate the right of public meeting, but merely regulated its exercise.—ALDRED *v.* MILLER, [1925] S. C. (J.) 21.—SCOT.

p. —— *Against park preaching.*]—*Held:* the municipal council had power to pass a bye-law providing that no person shall on the Sabbath day, in any public park, square, or garden, in the city, publicly preach, lecture, or declaim.—*Re* CRIBBIN & TORONTO CORPN. (1891), 21 O. R. 325.—CAN.

Part IV.—User of Open Spaces.

SECT. 1.—IN GENERAL.

See Public Health Acts Amendment Act, 1890 (c. 59), s. 44 (1).

33. User restricted to recreation.]—Where premises have been provided for the purpose of being used as public walks or pleasure grounds, under 11 & 12 Vict. c. 63, s. 74, it is allowable to erect thereon such buildings as may be conducive to the purpose for which the premises have been acquired. Of such a nature are a conservatory, a museum & a public library, but not a town hall or a school of art.—A.-G. *v.* SUNDERLAND CORPN. (1876), 2 Ch. D. 634; 45 L. J. Ch. 839; 34 L. T. 921; 40 J. P. 564; 24 W. R. 991, C. A.

Annotations:—**Apld.** Williamson *v.* Sunderland Corpn. (1892), 9 T. L. R. 143. **Refd.** A.-G. *v.* Hanwell U. C., [1900] 1 Ch. 51; Herne Bay U. C. *v.* Payne & Wood, [1907] 2 K. B. 130; Stourcliffe Estate Co. *v.* Bournemouth Corpn. (1910), 79 L. J. Ch. 455.

34. ——.]—Grant to defts. of a piece of foreshore "to be by them used for the benefit of the public only for purposes of recreation & health":—*Held:* certain buildings [photographic studio] contemplated would be a breach of such covenant.—WILLIAMSON *v.* SUNDERLAND CORPN. (1892), 9 T. L. R. 143.

35. ——.]—Public Health Act, 1875 (c. 55), s. 175, which empowers the Local Government Board to direct that any lands acquired by a local authority in pursuance of any powers contained in Public Health Act, 1875 (c. 55), & not required for the purpose for which they were acquired, shall not be sold, does not enable the Board to direct that those lands shall be applied permanently to any purpose inconsistent with the original purpose.

A local authority have no power to apply permanently land which they have acquired for one purpose to another purpose inconsistent with the original purpose, even though the land cannot possibly be required for that original purpose, & they will be restrained from so doing at the suit of the A.-G. & the landowner from whom the land not required was purchased.

Suppose a local authority acquired land compulsorily under Public Health Act, 1875 (c. 55), s. 175, for the purpose of a public recreation ground, & within a year afterwards a neighbouring landowner should offer them a free gift of other land equally or more convenient for the purpose of a recreation ground, & they should accept it, so that the land originally purchased would be no longer required for the purpose, & under Public Health Act, 1875 (c. 55), s. 175, they would be obliged to sell it, "Unless the Local Government Board otherwise direct." Can it be suggested that the Board, by relieving them from the obligation to sell the land, could empower them to turn into a sewage farm that land which was bought for the purpose of a recreation ground? So to hold would be to allow a subsidiary clause contained in a parenthesis in Public Health Act, 1875 (c. 55), s. 175, to defeat the whole scheme of Public Health Act, 1875 (c. 55), s. 176 (COLLINS, L.J.).—A.-G. *v.* HANWELL URBAN COUNCIL, [1900] 2 Ch. 377; 69 L. J. Ch. 626; 82 L. T. 778; 48 W. R. 690; 16 T. L. R. 452; 44 Sol. Jo. 572, C. A.

Annotations:—**Consd.** A.-G. *v.* Pontypridd U. C. (1906), 95 L. T. 224. **Refd.** Herne Bay U. C. *v.* Payne & Wood, [1907] 2 K. B. 130.

36. What purposes conducive to recreation—Erection of buildings—Free library, museum & conservatory.]—A.-G. *v.* SUNDERLAND CORPN., No. 33, *ante*.

37. —— **—— Town buildings & school of art.**]—A.-G. *v.* SUNDERLAND CORPN., No. 33, *ante*.

38. —— **Reasonable enjoyment of public—Recreation Grounds Act, 1859 (c. 27), s. 2.**]—A woodland estate to be preserved with its natural aspect & features & in its present state & condition of sylvan beauty for the reasonable enjoyment of the public is not a recreation ground within above Act.—*Re* VERRALL, NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* A.-G., [1916] 1 Ch. 100; 85 L. J. Ch. 115; 113 L. T. 1208; 80 J. P. 89; 60 Sol. Jo. 141; 14 L. G. R. 171.

See, also, No. 40, *post*.

39. Lands acquired under Public Health Act, 1875 (c. 55)—Not required for original purpose—May be used for recreations.]—Where land has been acquired by an urban authority under the powers of above Act, & only part of the land so acquired is immediately required for the purposes for which it was acquired, while the remaining part may be ultimately required for the same purposes, it is not incumbent on the urban authority to sell the vacant land under above Act, sect. 175: but they may retain the same, & use it for some other lawful purpose, such as a recreation ground or the like, provided care is taken to prevent any rights being acquired over it by the public or otherwise which would prevent or interfere with its use whenever required for the ultimate purpose for which it was acquired.—A.-G. *v.* TEDDINGTON URBAN COUNCIL, [1898] 1 Ch. 66; 67 L. J. Ch. 23; 77 L. T. 426; 61 J. P. 825; 46 W. R. 88; 14 T. L. R. 32; 42 Sol. Jo. 46.

Annotations:—**Consd.** A.-G. *v.* Hanwell U. C., [1900] 1 Ch. 51; A.-G. *v.* Pontypridd U. C. (1906), 95 L. T. 224.

40. —— **May be bound by covenant as to user.**]—Deft. corpn., acting under above Act, sect. 164, acquired from pltfs. certain land within their area to be devoted to the purposes of a public garden or pleasure ground, & they covenanted that no buildings or erections of any kind should be put thereon except such structures as summer houses, a band stand, or shelters. Defts. erected public lavatories on the land. In an action for an injunction:—*Held:* (1) public lavatories or urinals were not erections *ejusdem generis* with the structures mentioned in the covenant, & therefore such erections constituted a breach of the covenant; (2) defts. could lawfully enter into such a covenant, & having entered into it & committed a breach thereof pltfs. were entitled

PART IV. SECT. 1.

33 i. *User restricted to recreation.*, SYDNEY MUNICIPAL COUNCIL, NEW SOUTH WALES AGRICULTURAL SOCIETY & SYDNEY DRIVING PARK CLUB, LTD. *v.* A.-G. OF NEW SOUTH WALES & MILROY (1894), 63 L. J. P. C. 116, P. C.—**AUS.**

33 ii. ——.]—A.-G. *v.* TEECE, BOWDEN *v.* TEECE (1904), 4 S. R. N. S. W. 347; 21 N. S. W. W. N. 105.—**AUS.**

33 iii. ——.]—Where land is granted to trustees in trust for cricket & other athletic sports & for no other purpose, the trustees are entitled to permit the use of the land for any lawful purpose not inconsistent with its use when required as a place for holding athletic sports, & in particular for any purpose which, while not interfering with such use, is conducive to the main object of the trust.—DOWN *v.* A.-G. (QUEENSLAND) (1905), 2 C. L. R. 639.—**AUS.**

q. —— *Exhibition of arming implements.*]—The Corpn. of V. was seized of 120 acres, upon trust, to lay out &

Sect. 1.—*In general. Sect.* 2. *Parts V. &*

to an injunction.—STOURCLIFFE ESTATES CO., LTD. *v.* BOURNEMOUTH CORPN., [1910] 2 Ch. 12; 79 L. J. Ch. 455; 102 L. T. 629; 74 J. P. 289; 26 T. L. R. 450; 8 L. G. R. 595, C. A.

41. —— Covenant as to buildings—Construction of covenant.]—STOURCLIFFE ESTATES CO., LTD. *v.* BOURNEMOUTH CORPN., No. 40, *ante*.

42. Custom to use ground as cricket ground—User for cattle-fair—Construction of local Act.]—By a local Act of Parliament, passed for improving the marsh & other common lands, & extending rights of common & recreation within the town of S., reciting that a certain portion of the marsh lands consisting of 4 acres was better adapted for the purposes of recreation than the other portions of the marsh; it was enacted that rights of common & recreation should not be extinguished, & that the said 4 acres should for ever thereafter be subject to such rights of common & of recreation, & other public rights "as had theretofore been exercised & enjoyed thereon." By the same Act it was provided that, "except as therein otherwise provided," all the waste lands which were then vested in the corpn. should remain subject to the existing rights of common & recreation, & such powers were given to the corpn. to fence, drain & manage the said lands as they should think proper for the public advantage of the inhabitants. The corpn. were also empowered to remove a fair to such parts of the waste lands as they should think fit. In the exercise of their discretion the corpn. removed the fair to the 4 acres above-mentioned, which were called "the cricket ground," & had theretofore been used for the purpose of playing cricket:—*Held:* on the construction of the Act, the corpn., by so doing, had contravened the powers of the Act; & perpetual injunction to restrain them from holding the fair on the cricket ground granted, with costs.—A.-G. *v.* SOUTHAMPTON CORPN. (1859), 1 Giff. 363; 29 L. J. Ch. 282; 1 L. T. 155; 24 J. P. 131; 6 Jur. N. S. 36; 65 E. R. 957.

Annotations:—**Consd.** A.-G. *v.* Teddington U. C., [1898] 1 Ch. 66. **Apld.** A.-G. *v.* Hanwell U. C., [1900] 2 Ch. 377.

General rights of public.]—*See* Part I., *ante*.

SECT. 2.—UTILISATION OF DISUSED BURIAL GROUNDS.

See, generally, BURIAL, Vol. VII., pp. 551–557.

Utilisation as open spaces.]—*See* BURIAL, Vol. VII., p. 555, Nos. 319–323.

Part V.—Royal Parks.

See, generally, Parks Regulation Act, 1872 (c. 15), s. 2; Parks Regulation (Amendment) Act, 1926 (c. 36), s. 4.

43. Public have no rights of user—Except by favour of Crown.]—35 & 36 Vict. c. 15, s. 4, gives summary jurisdiction for the conviction of any person doing an act in contravention of any regulation in the schedule. By 35 & 36 Vict. c. 15, s. 9, any rules made in pursuance of the schedule, when Parliament is not sitting, shall be laid before both Houses within three weeks after the beginning of the next Session, & any rules or parts thereof as shall be disapproved shall not be enforced. Regulation 8 of the schedule provides that no person shall deliver or invite any person to deliver any public address in a park except in accordance with the rules of the park; & regulations 19 & 20 provide for the making & issuing rules of the park by the ranger & comrs. Rules of Hyde Park were issued on Oct. 1, 1872, the Act having passed on June 27, & the last Session having concluded on Aug. 10. One of the rules was that no public address of an unlawful character, or for an unlawful purpose, may be delivered; another, that no public address may be delivered except upon certain conditions. Applt. having infringed these conditions in delivering a public address of a lawful character in Hyde Park, was convicted by a magistrate:—*Held:* (1) these rules were in force, although not laid before Parliament; this Act assumes that the parks are the property of the Crown, & the public have no rights of user except by favour of the Crown; the rules were within the authority of the Act; & the conviction was valid; (2) the rules were properly authenticated by the joint signature of two several officials, though each had authority only to make rules on particular points.—BAILEY *v.* WILLIAMSON (1873), L. R. 8 Q. B. 118; 42 L. J. M. C. 49; 28 L. T. 28; 37 J. P. 501; 21 W. R. 404.

Annotations:—*As to* (2) **Refd.** Kruse *v.* Johnson, [1898] 2 Q. B. 91. *Generally*, **Mentd.** R. *v.* Roberts, *Ex p.* Scurr, [1924] 2 K. B. 695.

44. Validity of regulations—Regulation not laid before Parliament.]—BAILEY *v.* WILLIAMSON, No. 43, *ante*.

45. —— ——.] — The comrs. published a notice, which was posted at the park gates, that no car propelled or drawn by mechanical means was to be allowed to proceed at a greater pace than ten miles per hour. This notice was not laid before Parliament:—*Held:* the regulation contained in this notice was good.—MUSGRAVE *v.* KENNISON (1905), 92 L. T. 865; 69 J. P. 341; 21 T. L. R. 600; 49 Sol. Jo. 567; 3 L. G. R. 932; 20 Cox, C. C. 874.

Annotation:—**Refd.** R. *v.* Plowden, *Ex p.* Braithwaite (1909), 78 L. J. K. B. 733.

46. —— Signature.]—BAILEY *v.* WILLIAMSON, No. 43, *ante*.

47. Regulation affecting right to deliver public address.]—BAILEY *v.* WILLIAMSON, No. 43, *ante*.

48. Regulation affecting speed of motor vehicles.]—MUSGRAVE *v.* KENNISON, No. 45, *ante*.

49. —— Power to indorse licence—First or second offence.]—Where the driver of a motor car is convicted of a first or second offence of exceeding a speed limit fixed in a lawful way other than under Motor Car Act, 1903 (c. 36), *e.g.*, under rules made by the Comrs. of Works & Public Buildings in connection with the regulations prescribed by 35 & 36 Vict. c. 15, the ct. before whom the conviction takes place has no power under Motor Car Act, 1903 (c. 36), to indorse on the convicted person's licence particulars of the conviction.—

maintain the same as a public park or pleasure ground for the enjoyment & recreation of the inhabitants:—*Held:* cattle lairs, an agricultural hall for the exhibition of farming implements & products, & an emigrants' home were not within the objects of the trust.—ANDERSON *v.* VICTORIA CORPN. (1884), 1 B. C. R., pt. 2, 107.—CAN.

R. *v.* MARSHAM, *Ex p.* CHAMBERLAIN, [1907] 2 K. B. 638; 76 L. J. K. B. 1036; 97 L. T. 396; 71 J. P. 445; 23 T. L. R. 629; 51 Sol. Jo. 592; 5 L. G. R. 998; 21 Cox, C. C. 510, D. C.
Annotation:—**Consd.** R. *v.* Plowden, [1909] 2 K. B. 269.

50. —— —— Third offence.]—A ct. before whom a person is convicted of a third offence of driving a motor car in a royal park at a speed exceeding the limit prescribed by the parks regulations has power to indorse the driver's licence under Motor Car Act, 1903 (c. 36), s. 4, notwithstanding that the parks regulations prescribing the speed limit were not made until after Motor Car Act, 1903 (c. 36), had come into force.—R. *v.* PLOWDEN, [1909] 2 K. B. 269; *sub nom.* R. *v.* PLOWDEN, *Ex p.* BRAITHWAITE, 78 L. J. K. B. 733; 100 L. T. 856; 73 J. P. 266; 25 T. L. R. 430; 7 L. G. R. 584; 22 Cox, C. C. 114.

——.] — *See generally*, STREET & AERIAL TRAFFIC.

Part VI.—Application of Settled Land Acts.

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See LAND IMPROVEMENT, Vol. XXX., pp. 285, 286, Nos. 111–113.

ORDER AND DISPOSITION

See BANKRUPTCY AND INSOLVENCY.

ORDER OF DISCHARGE.

See BANKRUPTCY AND INSOLVENCY.

ORDERS OF COURT.

See CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL; COUNTY COURTS; CROWN PRACTICE; EXECUTION; JUDGMENTS AND ORDERS; MAYOR'S AND CITY OF LONDON COURT; PRACTICE AND PROCEDURE AND TITLES *passim*.

ORDINARY.

See ECCLESIASTICAL LAW.

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PARENT AND CHILD.

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2. Powers — Alteration of laws.] — STREATERS CASE (1653), 5 State Tr. 366.

Annotation:—**Mentd.** R. *v.* Pintchard (1665), 1 Keb. 871.

3. —— Legislation for foreigners.]—The British Parliament have no power to legislate for foreigners out of the dominions & beyond the jurisdiction of the Crown; yet it can by statute fix the time within which application must be made for redress, to the tribunals of the Empire. This being matter of procedure, becomes the law of the *forum*, by which all mankind are bound.—LOPEZ *v.* BURSLEM, THE GUIANA (1843), 4 Moo. P. C. C. 300; 4 State Tr. N. S. 1331; 7 Jur. 1119; 13 E. R. 318, P. C.

s, Vol. II., pp. 128–130, Nos. 50–60.

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4. Peeress in own right — Whether entitled to receive writ of summons.]—A peeress of the United Kingdom is not entitled by virtue of Sex Disqualification (Removal) Act, 1919 (c. 71), s. 1, to receive a writ of summons to Parliament.—RHONDDA'S (VISCOUNTESS) CLAIM, [1922] 2 A. C. 339; 38 T. L. R. 759; *sub nom. Re* RHONDDA'S (LADY) PETITION, 92 L. J. P. C. 81; 128 L. T. 155; 66 Sol. Jo. 630, H. L.

5. Conduct of debate—Right to speak.]—MOMPESSON'S CASE (1620), 2 State Tr. 1119.

6. Judicial business.] — FERRER'S (EARL) CASE (1760), Fost. 138; 19 State Tr. 885; 168 E. R. 69, H. L.

Annotation:—**Mentd.** R. *v.* Bourdon (1847), 2 Car. & Kir. 366.

7. Officers of the House — Yeoman of the Black Rod—Deputy to Usher of the Black Rod.]—Yeoman of the Black Rod is deputy to the Usher of the Black Rod.—ANON. (1701), 12 Mod. Rep. 607; 88 E. R. 1552.

8. —— Recovery of fees.] — Fees to Usher of Black Rod recovered.—SAUNDERSON *v.* BRIGNALL (1727), 2 Stra. 747; 93 E. R. 824.

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SECT. 2.—APPELLATE JURISDICTION.

SUB-SECT. 1.—IN GENERAL.

See Appellate Jurisdiction Act, 1876 (c. 59); 1887 (c. 70); Standing Orders of the House of Lords (Judicial Business), 1926.

PART I. SECT. 1.

a. *Effect of resolution of the House of Commons.*]—No resolution of the House of Commons can make law.—GALWAY CASE (1872), 2 O'M. & H. 46.—IR.

9. A court of justice.]—The House of Lords, sitting to hear appeals, is a ct. of justice.

The House is at liberty, without regard to the form of an appeal, or the points raised upon it, to put questions of law to the judges.

Although you are bound by your own decisions, as much as any ct. would be bound, so that you could not reverse your own decision in a particular case, yet you are not bound by any rule of law which you could lay down, if, upon a subsequent occasion you find reason to differ from that rule; that is, like every ct. of justice, & I regard this as a ct. of justice, it is inherent in the nature of every ct. of justice, that it should have liberty to correct any error, into which it may have fallen (LORD ST. LEONARDS, C.).—BRIGHT *v.* HUTTON, HUTTON *v.* BRIGHT (1852), 3 H. L. Cas. 341; 7 Ry. & Can. Cas. 325; 19 L. T. O. S. 249; 10 E. R. 133; *sub nom.* BRIGHT *v.* HUTTON, HUTTON *v.* BRIGHT, *Re* DIRECT BIRMINGHAM, OXFORD, READING & BRIGHTON RY. CO., 16 Jur. 695, H. L.; *on appeal from* S. C. *sub nom.* BRIGHT'S CASE (1851), 1 Sim. N. S. 602.

Annotations:—**Apld.** London Tram. Co. *v.* L. C. C. (1898), 78 L. T. 361. **Refd.** Hebbert *v.* Purchas (1871), L. R. 3 P. C. 664; I. R. Comrs. *v.* Harrison (1874), L. R. 7 H. L. 1. **Mentd.** *Re* Rugby, Warwick & Worcester Ry., Preece & Evans' Case (1852), 2 De G. M. & G. 374; *Re* Midland Union, Burton-upon-Trent, Ashby de la Zouch & Leicester Ry., Lucy's Case (1853), 4 De G. M. & G. 356; Quartermaine *v.* Bittleston (1853), 13 C. B. 133; *Re* Direct Birmingham, Oxford, Reading & Brighton Ry., Spottiswoode's Case, Amsinck's Case (1855), 6 De G. M. & G. 345; Paul *v.* Joel (1858), 3 H. & N. 455; Burbidge *v.* Morris (1865), 3 H. & C. 664; The Vera Cruz (No. 2) (1884), 9 P. D. 96.

10. Jurisdiction where member of either House concerned.]—PRIVILEGE OF PARLIAMENT CASE, SHIRLEY *v.* FAGG (1675), 6 State Tr. 1121.

Annotation:—**Refd.** Stockdale *v.* Hansard (1839), 2 Per. & Dav. 1.

11. Appeals from Scottish courts—From Lords of Session.]—GREENSHIELDS *v.* EDINBURGH MAGISTRATES (1710), Colles, 427; 1 E. R. 356, H. L.

12. —— ——.]—In appeals falling within Court of Session Act, 1825 (c. 120), s. 40, the House of Lords has no concern with the proof which has been led in the Sheriff Ct.—MACKAY *v.* DICK (1881), 6 App. Cas. 251; 29 W. R. 541, H. L.

Annotations:—**Apld.** Shepherd *v.* Henderson (1881), 7 App. Cas. 49. **Refd.** Gilroy *v.* Price, [1893] A. C. 56; Butler (or Black) *v.* Fife Coal Co., [1912] A. C. 149; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Mentd.** L. C. & D. Ry. *v.* S. E. Ry., [1893] A. C. 429; Little *v.* Stevenson, [1896] A. C. 108; City of Dublin Steam Packet Co. *v.* R. (1908), 21 T. L. R. 657; Sprague *v.* Booth, [1909] A. C. 576; Kleinert *v.* Abosso Gold Mining Co. (1913), 58 Sol. Jo. 45; Westacott *v.* Hahn, [1917] 1 K. B. 605; Hill *v.* Showell (1918), 87 L. J. K. B. 1106; Harrison *v.* Walker, [1919] 2 K. B. 453; Colley *v.* Overseas Exporters, [1921] 3 K. B. 302; United States Shipping Board *v.* Duffell, [1923] 2 K. B. 739; Cohen *v.* Sellar, [1926] 1 K. B. 536.

13. —— ——.]—SHEPHERD *v.* HENDERSON (1881), 7 App. Cas. 49, H. L.

Annotations:—**Refd.** Blairmore Sailing Ship Co. *v.* Macredie, [1898] A. C. 593; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Mentd.** Langham S.S. Co. *v.* Gallaher (1911), 12 Asp. M. L. C. 109; Moore *v.* Evans, [1918] A. C. 185.

—— ——.]—By the Ct. of Session Act, 1825 (c. 120), s. 40, when an action is commenced in the Sheriff's ct., & there is an appeal to the Ct. of Session, no appeal will lie to the House of Lords except upon matter of law.—MACARTHUR *v.* GAIRDNER (1916), 85 L. J. P. C. 159, H. L.

15. —— —— **Order setting aside verdict of jury.**]—There is a right of appeal to the House of Lords against an interlocutor of one of the Divisions of the Inner House pronounced under 10 Edw. 7 & 1 Geo. 5, c. 31, s. 2, setting aside the verdict of a jury &, in place of granting a new trial, entering judgment for the party unsuccessful at the trial.—LYAL *v.* HENDERSON, [1916] S. C. (H. L.) 167; 53 Sc. L. R. 557.

16. —— —— **From interlocutory order.**]—An interlocutor of one of the Divisions of the Ct. of Session allowing an issue in ordinary form in an action of damages for personal injury held to be an interlocutory judgment within Court of Session Act, 1808 (c. 151), s. 15, & therefore not appealable to the House of Lords, the leave of the Division not having been obtained, & there being no difference of opinion among the Judges of the Division.—FERGUSON (OR BEATTIE) *v.* GLASGOW CORPN., [1917] S. C. (H. L.) 22, H. L.

17. —— —— ——.]—GORDON *v.* LENG (JOHN) & CO., LTD., [1919] 2 S. L. T. 29, H. L.

18. —— **From Court of Justiciary.**]—An appeal to the House of Lords does not lie from any sentence or order of the High Ct. of Justiciary in Scotland.

I am clearly of opinion that this House is not a Ct. of Appeal from the Justiciary Ct. in Edinburgh (LORD HATHERLEY).—MACKINTOSH *v.* LORD ADVOCATE (1876), 2 App. Cas. 41, H. L.

Annotation:—**Mentd.** R. *v.* Parlby (1889), 6 T. L. R. 36.

19. Appeal from Irish Courts.]—No appeal lies from the Ct. of Appeal in Ireland to the House of Lords in any case where before the passing of the Judicature (Ireland) Act, 1877 (c. 57), no appeal lay.—R. *v.* BARTON, [1902] A. C. 268; 71 L. J. P. C. 80; 87 L. T. 82; 18 T. L. R. 574, H. L.

20. ——.]—An appeal lies from the decision of the land judge in Ireland to the Ct. of Appeal in Ireland, & thence to the House of Lords.—DE VESCI (VISCOUNTESS) *v.* O'CONNELL, [1908] A. C. 298; 77 L. J. P. C. 81; 99 L. T. 206; 24 T. L. R. 638, H. L.

21. —— **From interlocutory order.**]—No appeal lies to the House of Lords from an interlocutory order made in Ireland by a common law ct., or by the Ct. of Appeal therefrom.—GOSFORD (EARL) *v.* IRISH LAND COMMISSION, [1899] A. C. 435; 68 L. J. P. C. 69; 81 L. T. 330; 15 T. L. R. 429, H. L.

Annotation:—**Folld.** R. *v.* Barton, [1902] A. C. 268.

22. Jurisdiction as to costs.]—This House has an inherent jurisdiction, independent of statute, over costs in proceedings before itself.—WEST HAM UNION GUARDIANS *v.* ST. MATTHEW, BETHNAL GREEN (CHURCHWARDENS, ETC.), [1896] A. C. 477; 65 L. J. M. C. 201; 75 L. T. 286; 60 J. P. 740; 12 T. L. R. 423; 40 Sol. Jo. 530, H. L.

Annotations:—**Mentd.** M., S. & L. Ry. *v.* Doncaster Union Grdns., [1897] 1 Q. B. 117; St. Olave's Union *v.* Canterbury Union, [1897] 1 Q. B. 438; Sharpington *v.* Fulham Grdns., [1904] 2 Ch. 449; Chester Waterworks Co. *v.* Chester Union Grdns. (1907), 96 L. T. 566; Fulham Parish *v.* Woolwich Union, [1907] A. C. 255; Hampstead Grdns. *v.* West Ham Union (1909), 73 J. P. 492; Braintree Union *v.* Rochford Union (1911), 81 L. J. K. B. 251; Paddington Union *v.* Westminster Union, [1915] 2 K. B. 614; Wycombe Grdns. *v.* Barton-upon-Irwell Grdns. (1926), 43 T. L. R. 89.

23. Guardianship of infants.]—Upon a question which is practically the guardianship of a child there is a right of appeal to the House of Lords which is not affected by the particular form, whether that form is by writ of *habeas corpus* or otherwise, in which the appeal is presented.—BARNARDO *v.* MCHUGH, [1891] A. C. 388; 61 L. J. Q. B. 721; 65 L. T. 423, 55 J. P. 628; 40 W. R. 97; 7 T. L. R. 726, H. L.; *on appeal from* S. C. *sub nom.* R. *v.* BARNARDO, JONES'S CASE, [1891] 1 Q. B. 194, C. A.

Annotations:—**Mentd.** *Re* McGrath, [1892] 2 Ch. 496; R. *v.* Lewis (1893), 9 T. L. R. 226; Humphrys *v.* Polak, [1901] 2 K. B. 385; R. *v.* New (1904), 20 T. L. R. 583; Secretary of State for Home Affairs *v.* O'Brien, [1923] A. C. 603.

24. Criminal appeals.]—R. *v.* BALL, R. *v.* No. 77, *post*.

Sect. 2.—*Appellate jurisdiction: Sub-sects.* 1, 2, 3

Appeals in bankruptcy cases.]—*See* BANKRUPTCY, Vol. IV., pp. 166, 527, 528, 529, Nos. 1552, 4823–4839.

Appeals from Divorce Court.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 488, Nos. 5202–5205.

SUB-SECT. 2.—TIME FOR APPEAL.

See, now, Standing Orders of the House of Lords (Judicial Business), 1926, No. 1.

25. Appeal out of time entertained if connected with subsequent order.]—By the Standing Order of the House of Lords of Mar. 24, 1726 (No. 118), as amended in 1829, no petition of appeal from any decree or sentence of any ct, of equity in England or Ireland, shall be received by the House after two years from the enrolling of the same, & the end of the next session ensuing the said two years, unless the person entitled to such appeal be under the age of twenty-one years, or *covert*, *non compos mentis*, imprisoned, or out of Great Britain or Ireland, in which case such person may bring his appeal within two years after such disability ceased, & the end of the next session of Parliament ensuing the two years, but in no case shall any person be allowed a longer time, on account of mere absence, to lodge an appeal, than five years from the date of the last decree or order appealed against:—*Held:* an appeal lodged Feb. 18, 1836, against a decree dated April 26, & enrolled June 14, 1832, was irregular, as not being within time, although applt. had been absent abroad in consequence of embarrassment & illness of his wife, & was advised & believed he might appeal at any time within five years from the date of the enrolment of the decree, & although his appeal had been received & appointed for hearing; the said appeal was saved by being extended to subsequent orders in the same cause, the appeal from these orders being brought within two years from the enrolling of them.—DE BURGH *v.* CLARKE (1837), 4 Cl. & Fin. 562; 7 E. R. 214, H. L.

Annotation:—**Refd.** Beavan *v.* Mornington (1860), 8 H. L. Cas. 525.

26. ——.]—ATTWOOD *v.* SMALL, No. 83, *post.*

27. ——.]—When there is a competent appeal from an order made within the year, there is nothing in the Standing Orders or in the practice of the House in regard to appeals to prevent the House from entertaining an appeal from a previous order which is so connected with the later order as properly to form the subject of one & the same appeal, if the previous order is in an appealable condition, if it does not belong to a stage in the proceedings which has been definitely passed, or to a chapter in the litigation which may fairly be regarded as closed, & if it is clear that the appeal will not lead to additional inquiries & further expense (LORD MACNAGHTEN). — CONCHA *v.* CONCHA, [1892] A. C. 670; 66 L. T. 303; 8 T. L. R. 460, H. L.; *on appeal from* S. C. *sub nom.* CONCHA *v.* MURRIETA, DE MORA *v.* CONCHA (1889), 40 Ch. D. 543, C. A.

Annotations:—**Mentd.** *Re* De Nicols, De Nicols *v.* Curlier (1898), 67 L. J. Ch. 419; Perlak Petroleum Maatschappij *v.* Deen, [1924] 1 K. B. 111.

28. —— **House may extend time in exceptional cases.**]—It has hardly been contested that the words "last decree, order, judgment or interlocutor appealed from" in the Standing Order of this House cannot enable an applt. practically to commence an appeal after the lapse of twelve months against a party who is wholly unaffected by the subsequent decree or order & the only ground upon which we have been urged to entertain the appeal against Mary Fothergill is that it is a case of hardship & that there are grounds for extending the time. But certainly it would only be on some extremely exceptional & extraordinary ground that the Standing Order would be suspended, if it ever could be suspended at all (*per* CUR).—PHILLIPS *v.* FOTHERGILL (1886), 11 App. Cas. 466; *on appeal from* S. C. *sub nom.* PHILLIPS *v.* HOMFRAY (1883), 24 Ch. D. 439, C. A.

Annotations:—**Mentd.** Batthyany *v.* Walford (1887), 36 Ch. D. 269; Finlay *v.* Chirney (1888), 20 Q. B. D. 494; Concha *v.* Murrieta, De Mora *v.* Concha (1889), 40 Ch. D. 543; The Duke of Buccleuch, [1892] P. 201; Peebles *v.* Oswaldtwistle U. D. C. (1896), 65 L. J. Q. B. 499; *Re* Duncan, Terry *v.* Sweeting, [1899] 1 Ch. 387; Ellis *v.* Wadeson, [1899] 1 Q. B. 714; Jackson *v.* Watson, [1909] 2 K. B. 193; R. *v.* Spokes, *Ex p.* Buckley (1912), 107 L. T. 290; Quirk *v.* Thomas, [1915] 1 K. B. 798; Gelpel *v.* Peach, [1917] 2 Ch. 108; A.-G. *v.* De Keyser's Royal Hotel, [1920] A. C. 508; Brocklebank *v.* R., [1925] 1 K. B. 52.

29. When time begins to run — From enrolment of decree—Not from pronouncement.]—(1) It seems that where the Order of an Appeal Committee is desired to be re-heard, the re-hearing cannot in strictness take place without notice.

(2) Though a party may for convenience sake be allowed to argue against the decision of an Appeal Committee without having given such notice, it must be on the understanding that he is to present a petition to be heard against the allowance of the petition of appeal.

(3) The time limited by the Standing Order Mar. 24, 1726, for the presenting of petitions of appeal, begins to run from the enrolment of a decree of a Ct. of Equity, & not from the period when that decree was pronounced.

The enrolment does not relate backwards so as to prevent, by the effect of relation, this construction of the Standing Order. Where, therefore, a decree which had been pronounced in 1821 was not enrolled till 1836, the Appeal Committee received the petition of appeal, & the House confirmed its decision.—BROOKE *v.* CHAMPERNOWNE (1837), 4 Cl. & Fin. 247; 7 E. R. 95, H. L.

Annotation:—*As to* (3) **Refd.** Beavan *v.* Mornington (1860), 8 H. L. Cas. 525.

30. Statutory appeals — With time limited by statute—Matrimonial cause.]—Since the Judicature Act, 1881 (c. 68), an appeal to the House of Lords in a matrimonial cause, where an appeal lies, can only be from a decision of the Ct. of Appeal; & such an appeal must be brought within one month after the decision appealed against is pronounced by the Ct. of Appeal if the House of Lords is then sitting, or if not, within fourteen days after the House of Lords next sits.

It seems to me that the Standing Order does not apply to the case at all. It says that with that exception mentioned [exception provided by statute] no petition of appeal shall be received unless lodged within a year. It does not say that the petition shall be received if it is presented within a year, in any case in which an Act of Parliament has provided that a petition of appeal shall only be received if it is lodged within a shorter time (LORD SELBORNE, C.).—CLEAVER *v.* CLEAVER (1884), 9 App. Cas. 631, H. L.

31. —— —— **House may extend time—Appeal under Companies Act, 1862 (c. 89), s. 124.**]—Cos. Act, 1862 (c. 89), s. 124, does not compel a suitor to apply to the House of Lords for leave to appeal within three weeks after the date of the order complained of, but the House may extend the time for appeal though no such application has been made.—BANNER *v.* JOHNSTON (1871), L. R. 5 H. L. 157; 40 L. J. Ch. 730; *sub nom.* BARNED'S

BANKING CO. *v.* JOHNSTON 24 L. T. 542, H. L.; *an appeal from* S. C. *sub nom. Re* BARNED'S BANKING CO., LTD., JOHNSTON'S CASE (1869), 20 L. T. 266.

Annotations :—**Mentd.** *Re* Barned's Banking Co., Coupland's Case (1869), 21 L. T. 286; *Re* Jones, *Ex p.* Lovering (1874), 9 Ch. App. 586; *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1875), 31 L. T. 862; *Re* Suse, *Ex p.* Dever (1884), 13 Q. B. D. 766; Fraser *v.* Province of Brescia Steam Tram. Co. (1887), 56 L. T. 771.

SUB-SECT. 3.—WHEN APPEAL LIES.

32. Not on mere point of practice or procedure.]—(1) Where a case has been ordered by the Appeal Committee to be argued before the House upon the question of the competency of the appeal, the House may or not, at its discretion, permit a reply.

(2) An appeal on a mere point of practice is not competent.

(3) Where a ct. has treated one of its own proceedings as merely interlocutory & not final, that circumstance is decisive of the nature of such proceeding.—FERRIER *v.* HOWDEN (1834), 4 Cl. & Fin. 25; 7 E. R. 10, H. L.

33. ——.]—The House of Lords will not regard with favour an appeal on a matter of procedure.—BLAIR *v.* HAYCOCK CADLE CO. (1917), 34 T. L. R. 39; 62 Sol. Jo. 68, H. L.

34. —— **Defect in decree.**]—Such defects in a decree, as the ct. will rectify upon motion, are not sufficient grounds for an appeal.—BUNBURY *v.* BOLTON (1721), 1 Bro. Parl. Cas. 434; 1 E. R. 671.

35. —— **Party improperly made party in court below.**]—ROCHFORT *v.* BATTERSBY, No. 66, *post.*

36. Whether appeal for costs alone.]—HOME *v.* PRINGLE & HUNTER, No. 99, *post.*

37. ——.]—The House of Lords will not entertain an appeal againt costs only.—CALEDONIAN RY. CO. *v.* BARRIE, [1903] A. C. 126.

38. —— **Order as to costs founded on error in law.**]—The rule of the House of Lords as to appeals for costs, while it prevents the House from entertaining an appeal for costs on the mere ground that the discretion of the ct. has been wrongly exercised, does not prevent it from entertaining such appeal on the ground that the order is founded on an error of law.—CAMPBELL (DONALD) & CO., LTD. *v.* POLLAK (1927), 43 T. L. R. 495; 71 Sol. Jo. 450, H. L.

39. —— **Reconsideration of costs if appeal on merits of case.**]—The rule with respect to costs in the House of Lords, as in the Privy Council, & in Chancery, is, that one cannot appeal for costs alone, but if an appeal be brought on the merits, not on colourable grounds of appeal, for the purpose of raising the question of costs, the House will not treat that as an appeal for costs, but will even, in affirming the judgment of the ct. below, consider the question of costs as fairly raised, & where there is hardship on applt., will reverse so much of the judgment of the ct. below as gave costs against him.—INGLIS *v.* MANSFIELD (1835), 3 Cl. & Fin. 362; 6 E. R. 1472.

Annotations :—**Refd.** Reiken *v.* Yorke Peninsular JJ., Keam *v.* Adelaide Licensing JJ., [1908] A. C. 454. **Mentd.** Gordon-Cumming *v.* Houldsworth, [1910] A. C. 537.

40. —— ——.]—An appeal for mere costs does not lie, yet if an appeal is brought on a substantial question, not colourable, the House may deal with the costs awarded by the ct. below. Accordingly, in an appeal which appeared to the House to have been brought for costs, but in which the order appealed from was varied materially, in favour of applt., by the correction of an error, which, however, he might have prevented by a mere suggestion to the ct. below:—*Held:* applt. is not, on the ground of that variation, entitled to be absolved from costs; but, under the circumstances, the appeal was dismissed without costs.—M'AULAY *v.* ADAM (1835), 3 Cl. & Fin. 385; 6 E. R. 1481.

41. —— **Except in case of appeal by officer of Crown.**]—(1) Where the Crown, by any of its officers, is a party resp. in an appeal, it is not the usage of the House of Lords to allow the counsel for the Crown a general reply, after the reply for applt.

(2) The Lord Advocate of Scotland, or other officer of the Crown, suing on behalf of the Crown, or in matters in which the Crown is interested, is not liable to pay costs to the opposite party even though the suit may have been improperly instituted.

(3) Against any judgment awarding such costs an appeal may be brought, notwithstanding the general rule that no appeal lies for costs.—LORD ADVOCATE *v.* DUNGLAS (LORD), DUNGLAS (LORD) *v.* OFFICERS OF STATE FOR SCOTLAND (1841), 9 Cl. & Fin. 173; 4 State Tr. N. S. 737; 8 E. 381, H. L.

Annotations :—*As to* (1) **Mentd.** O'Connell *v.* R. (1844), 11 Cl. & Fin. 155. *As to* (2) **Refd.** The Leda (1862), 32 L. J. P. M. & A. 58. *Generally*, **Mentd.** Secretary of State for India *v.* K. B. Sahaba (1859), 13 Moo. P. C. C. 22; R. *v.* Canterbury (Archbp.), [1902] 2 K. B. 503; *Re* Letters Patent No. 139207, *Re* Carbonit Akt., [1924] 2 Ch. 53.

See, also, Sect. 2, sub-sect. 1, *ante.*

42. Appeal in formâ pauperis — Appellant asserting public right—Assisted by public subscription.]—KINLOCH *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1881), 13 App. Cas 372, n.; 114 Lords Journals, 160.

Annotations :—**Refd.** Bowie *v.* Ailsa (1887), 13 App. Cas. 371; Faulds *v.* Vere, [1888] W. N. 162.

43. —— —— ——.]—Upon a petition for leave to prosecute an appeal *in formâ pauperis* it appeared that petitioner sought as one of the public to establish a right of fishing in a tidal river adjoining land belonging to defender, & that subscriptions had been collected to assist petitioner in the litigation:—*Held:* in the circumstances the application could not be granted.—BOWIE *v.* AILSA (MARQUIS) (1887), 13 App. Cas. 371; 58 L. J. P. C. 7; 60 L. T. 162, H. L.

Annotation :—**Folld.** Faulds *v.* Vere, [1888] W. N. 162.

44. —— ——.]—FAULDS *v.* VERE, [1888] W. N 162, H. L.

45. —— **No foundation for appeal.**]—BLAIR *v.* NORTH BRITISH & MERCANTILE INSURANCE CO. (1890), 15 App. Cas. 495, H. L.

46. Appeal against enrolled decree.]—Neither the vice-chancellors nor the Lord Chancellor have jurisdiction to rehear an order that is enrolled, & the House of Lords can only rehear such an order for the purpose of determining whether it was proper at the time it was made.—FORD *v.* WASTELL (1847), 6 Hare, 229; 16 L. J. Ch. 372; 9 L. T. O. S. 372; 11 Jur. 537; 67 E. R. 1151.

Annotation :—**Mentd.** Thornhill *v.* Manning (1851), 1 Sim. N. S. 451.

From Scottish & Irish Courts.]—*See* Sub-sect. 1, *ante.*

SUB-SECT. 4.—NECESSARY PRELIMINARIES TO APPEAL.

47. Decree appealed from must be enrolled—Lords may consent to hear appeal—Judgment suspended until decree enrolled.]—Where there is an appeal against a decision of a ct. of equity, this House may consent to hear the appeal argued, but

Sect. 2.—*Appellate jurisdiction: Sub-sects.* 4, 5, 6 & 7, *A.*]

will not give judgment till the decree of the ct. has been duly enrolled.—FOSTER *v.* COCKERELL (1835), 3 Cl. & Fin. 456; 9 Bli. N. S. 332; 6 E. R. 1508; *on appeal from* S. C. *sub nom.* FOSTER *v.* BLACKSTONE (1833), 1 My. & K. 297.

Annotations:—**Refd.** Sheehy *v.* Muskerry (1839), 7 Cl. & Fin. 1. **Mentd.** Peacock *v.* Burt (1834), 4 L. J. Ch. 33; Timson *v.* Ramsbottom (1837), 2 Keen, 35; Jones *v.* Jones (1838), 8 Sim. 633; Meux *v.* Bell (1841), 1 Hare, 73; Meek *v.* Kettlewell (1842), 11 L. J. Ch. 293; Bugden *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377; Etty *v.* Bridges (1843), 2 Y. & C. Ch. Cas. 486; Wiltshire *v.* Rabbits (1844), 14 Sim. 76; Wilmot *v.* Pike (1845), 5 Hare, 14; *Re* Plummer, *Ex p.* Plummer's Assignees (1853), 1 Bankr. & Ins. R. 83; Rice *v.* Rice (1853), 2 Drew. 73; Warburton *v.* Hill, Stent *v.* Wickens (1854), Kay, 470; Rooper *v.* Harrison (1855), 2 K. & J. 86; Lee *v.* Howlett (1856), 2 K. & J. 531; Consolidated Investment & Insce. *v.* Riley (1859), 1 Giff. 371; *Re* Hughes Trusts (1864), 2 Hem. & M. 89; Macleod *v.* Buchanan (1864), 4 De G. J. & Sm. 265; Ford *v.* Tynte (1865), 34 L. J. Ch. 452; Arden *v.* Arden (1885), 29 Ch. D. 702; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; English & Scottish Mercantile Investment Trust *v.* Brunton, [1892] 2 Q. B. 1; *Re* Wyatt, White *v.* Ellis, [1892] 1 Ch. 188; Ward *v.* Duncombe, [1893] A. C. 369; *Re* Wasdale, Brittin *v.* Partridge, [1899] 1 Ch. 163; *Re* Lake, *Ex p.* Cavendish, [1903] 1 K. B. 151; Montefiore *v.* Guedalla, [1903] 2 Ch. 26; *Re* Dallas, [1904] 2 Ch. 385.

48. —— Appeal allowed to stand over for purpose of enrolment.]—(1) The House of Lords will not hear an appeal against any decree or order of any branch of the Ct. of Ch., unless it has been enrolled.

(2) Where an appeal against a decree & orders came to be heard, & resps.' counsel took a preliminary objection that they were not enrolled; the House, considering that applt. had been misinformed as to the necessity of enrolment, allowed, with consent of resps., the appeal to stand over for that purpose, without ordering him to pay the costs of the day.—ANDREWES *v.* WALTON (1842), 8 Cl. & Fin. 457; 8 E. R. 180.

49. —— When decree or order stale—Time not given for enrolment unless merits with appellant.]—The House will not hear an appeal against any order or decree of the Ct. of Ch. that is not enrolled, if the objection is taken, & if the appeal be against a stale order or decree, time to enrol it will not be granted unless the merits appear to be with applt.—BROADHURST *v.* TUNNICLIFFE (1842), 9 Cl. & Fin. 71; 8 E. R. 342.

50. Appellant must have taken proper steps below.]—The House of Lords will not give relief to applt. against an order of which he complains by his petition, unless he has taken the proper course to obtain relief in the ct. below.—TOMMEY *v.* WHITE (1839), 6 Cl. & Fin. 786; 7 E. R. 894.

51. Service of copy of appeal—Sufficiency.]—A.-G. *v.* BRAZENOSE COLLEGE (1823), 64 Lords Journals, p. 320.

SUB-SECT. 5.—LODGMENT OF CASE.

See Standing Orders of the House of Lords (Judicial Business), 1926, No. V.

52. What case should contain—All documents relied on unless parties otherwise agree.]—(1) *Semble:* the House of Lords will, under peculiar circumstances, hear two counsel for resp., although to hear but one on each side may be part of the order made on advancing the appeal, on the petition of applt.

(2) *Semble:* also, although it is usual, according to the orders of the House to insert in the printed cases all the documents that are to be relied on, except the parties, to save expense, come to an understanding to refer only to some, yet the House will hear the documents so referred to read at length at the table of the House or by counsel at the bar; the opposite counsel being at liberty to examine & observe upon them.—DILLON *v.* PARKER (1833), 7 Bli. N. S. 325; 1 Cl. & Fin. 303; 5 E. R. 796, H. L.

53. —— —— Discretion to permit reference to document not included.]—The House may, in its discretion, allow a document to be referred to in argument, although it has not been printed in the papers laid before the House, according to the directions of the Standing Order, No. 181 (Feb. 24, 1813).—BEAUFORT (DUKE) *v.* NEELD (1845), 12 Cl. & Fin. 248; 9 Jur. 813; 8 E. R. 1399, H. L.; *affg.* S. C. *sub nom.* NEELD *v.* BEAUFORT (DUKE), BEAUFORT (DUKE) *v.* TAYLOR (1841), 5 Jur. 1123.

Annotations:—**Mentd.** Squire *v.* Whitton (1848), 1 H. L. Cas. 333; Mangles *v.* Dixon (1849), 1 H. & Tw. 542; Wing *v.* Harvey (1854), 5 De G. M. & G. 265; Wheatley *v.* Bastow (1855), 7 De G. M. & G. 261; Wood *v.* Scarth (1855), 2 K. & J. 33; Collen *v.* Gardner (1856), 21 Beav. 540; Towle *v.* National Guardian Assce. Soc. (1861), 30 L. J. Ch. 900; Messageries Imperiales *v.* Baines (1863), 11 W. R. 322; *Re* Scottish Universal Finance Bank, Ship's Case (1865), 12 L. T. 256; Shardlow *v.* Cotterill (1881), 50 L. J. Ch. 613; Barrow *v.* Isaacs, [1891] 1 Q. B. 417.

54. —— Not interrogatories in bill or unnecessary matter.]—(1) It is improper to print in the Appeal Cases, or Appendix, the interrogatories in a bill or other unnecessary matter.

(2) If the second counsel for applt. cannot attend in his turn, the House will hear him afterwards, in reply to resp.'s counsel, but will confine him strictly to the reply.—BOOTH *v.* BANK OF ENGLAND (1840), 7 Cl. & Fin. 509; 6 Bing. N. C. 415; 1 Scott, N. R. 701; West, 298; 4 Jur. 762; 7 E. R. 1163, H. L.; *affg.* S. C. *sub nom.* BANK OF ENGLAND *v.* BOOTH (1837), 2 Keen, 466.

55. Statement in appellant's case objected to—Respondent should apply to strike out.]—Where there is a statement of a fact in the case presented by applt. to this House as the subject of appeal, resp. if he objects to such statement, should apply to have it struck out. If he omits to do so, such fact will be afterwards taken as uncontradicted.—TURNER *v.* DICKENSON (1835), 3 Cl. & Fin. 593; 6 E. R. 1559; *sub nom.* FOURNIER *v.* PAINE, 9 Bli. N. S. 282, H. L.

56. Respondent not appearing until hearing—May lodge case by leave of House.]—Where a resp. has not appeared to an appeal until it is appointed for hearing, he may still, by leave of the House, lodge his printed cases, & at the same time be heard at the bar in support of the decree; but, although he has a clear case on the merits, & the appeal is dismissed, he will not be allowed his costs.—GORDON *v.* CLYNE (1839), 6 Cl. & Fin. 539; 7 E. R. 801; *sub nom.* CLYNE'S TRUSTEES *v.* CLYNE, Macl. & Rob. 72, H. L.

57. Supplemental case need not be lodged—On reviving appeal—Abated after full hearing.]—Supplemental cases need not be lodged upon reviving an appeal which became abated after a full hearing.—HOLLIER *v.* EYRE (1840), 9 Cl. & Fin. 1; 8 E. R. 313, H. L.

Annotations:—**Mentd.** Strong *v.* Foster (1855), 17 C. B. 201; Pooley *v.* Harradine (1857), 7 E. & B. 431; Wythes *v.* Labouchere (1859), 3 De G. & J. 593; Greenough *v.* McClelland (1860), 2 E. & E. 429; Ewin *v.* Lancaster (1865), 6 B. & S. 571; Holme *v.* Brunskill (1878), 3 Q. B. D. 495; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32.

58. Joint appendix to cases—What it should contain—Not unnecessary matter.]—BOOTH *v.* BANK OF ENGLAND, No. 54, *ante.*

59. —— —— Judgment of Court of Appeal—Material provisions of Act concerning appeal.]—The judgments of the Ct. of Appeal, & the material

provisions of any Act of Parliament with which an appeal is concerned, should in all cases be included in the joint appendix.—CLAWLEY *v.* CARLTON MAIN COLLIERY CO. (1918), as reported in 87 L. J. K. B. 920; 62 Sol. Jo. 666, H. L.; *on appeal from* S. C. *sub nom.* CARLTON MAIN COLLIERY CO. *v.* CLAWLEY, [1917] 2 K. B. 691.

Annotations:—**Mentd.** Rawlings *v.* Hodgson (1918), 11 B. W. C. C. 73; Williams *v.* Minister of Munitions (1919), 88 L. J. K. B. 1105; Haydock *v.* Goodier, [1921] 2 K. B. 384; Russell *v.* Rudd, [1923] A. C. 309; Lindsay *v.* Glasgow Iron & Steel Co. (1925), 18 B. W. C. C. 600; Pudney *v.* France, Fenwick, Smith *v.* Leach, [1925] 1 K. B. 346; Williams *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 111.

60. —— Custom of each party printing appendix not approved.]—PIERS *v.* PIERS, No. 151, *post.*

61. Failure to lodge papers—Case dismissed—Reinstatement by special application.]—The rule of the House of Lords being that in default of papers being lodged by applt. "the case stands dismissed," it can only be reinstated in the list by special application to the House of Lords. The High Ct. has no jurisdiction in the matter of a particular issue so disposed of by the rules of the House of Lords, although the original cause of action may still be within the jurisdiction of the High Ct.—MERCIER *v.* WILLIAMS, WILLIAMS *v.* MERCIER (1883), 32 W. R. 152.

62. Private Act referred to in case—Copies should be supplied to House.]—PRACTICE NOTE, [1913] W. N. 367.

63. Printed observations not signed by counsel.]—FISHER *v.* EAMER (1800), cited in 4 Dow, at p. 223; 3 E. R. 1145, H. L.

Annotation:—**Consd.** Stacpoole *v.* Stacpoole (1816), 4 Dow, 209.

SUB-SECT. 6.—PROCEEDINGS BEFORE APPEAL

64. What applications made to committee—New trial by consent.]—Where both parties to an appeal to the House of Lords agree to a new trial the application must be made to the House itself & not to the Appeal Committee, & a proper consent be filed.—HANNAH *v.* HUNTER, [1904] A. C. 379; 73 L. J. P. C. 72, H. L.

65. Notice of appeal from order necessary.]—BROOKE *v.* CHAMPERNOWNE, No. 29, *ante.*

66. Consideration of competency of appeal.]—(1) The circumstance that a person has been made a party to a suit in the ct. below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit.

(2) An objection to the competency of an appeal ought to have been presented to the Appeal Committee, but was not noticed till the case came on for hearing at the bar of this House: the objection was in its nature fatal. The House therefore dismissed the appeal, but, because the objection had not been taken till so late a period, dismissed it without costs.—ROCHFORT *v.* BATTERSBY (1849), 2 H. L. Cas. 388; 14 Jur. 229; 9 E. R. 1139, H. L.

Annotations:—*As to* (1) **Dbtd.** Wearing *v.* Ellis (1856), 6 De G. M. & G. 596. **Refd.** Motion *v.* Moojen (1872), L. R. 14 Eq. 202. *Generally*, **Mentd.** Bute *v.* Mason (1849), 7 Moo. P. C. C. 1; Dyson *v.* Hornby (1855), 7 De G. M. & G. 1; Bradberry *v.* Brooke (1856), 26 L. J. Ch. 74; Crowther *v.* Crowther (1856), 25 L. J. Ch. 511; Troup *v.* Ricardo (1864), 4 De G. J. & Sm. 489; *Re* Leadbitter (1878), 10 Ch. D. 388; Boaler *v.* Power, [1910] 2 K. B. 229.

67. —— Sending case to House.]—FERRIER *v.* HOWDEN, No. 32, *ante.*

68. Inclusion of documents objected to in appendix to case.]—FORD'S HOTEL CO., LTD. *v.* BARTLETT (1895), 127 Lords Journals, 260, H. L.

69. Stay of proceedings pending application to advance cause.]—STUBBS, LTD. *v.* RUSSELL (1908), 140 Lords Journals, 163, H. L.

Counsel's right of audience.]—*See* BARRISTERS, Vol. III., p. 318, Nos. 39–44.

SUB-SECT. 7.—THE HEARING.

A. In General.

70. House may remit for further inquiry—& direct consequential inquiries.]—The House, in remitting a cause for inquiry on a main question, will, to save delay & expense, direct inquiries on other questions consequential on the probable finding on the main question.—JACKSON *v.* JACKSON (1840), 7 Cl. & Fin. 977; West, 575; 7 E. R. 1338, H. L.

71. Case remitted to carry out directions of House—Direction stated on face of order.]—The House, in remitting a cause to the ct. below to carry its directions into effect, will, where necessary, not merely declare the principle of its order, but state those directions fully on the face of the order.—M'CAN *v.* O'FERRALL (1841), 8 Cl. & Fin. 30; West, 593; 8 E. R. 12, H. L.

72. —— ——.]—In an appeal by the workman from an order of the Ct. of Appeal affirming a decision of a county ct. judge, the question was whether a rule made in accordance with General Colliery Regulations, r. 25a, under powers given in Coal Mines Act, 1911 (c. 50), s. 86, "that no person below ground shall ride upon any tub or contrivance drawn by a horse" so affected the miner's employment that disobedience to the rule was an act on his part outside the sphere of his employment, & an accident which was due to that act was one for which the employer was not liable:—*Held:* there should be a fuller & more specific statement of the facts than was contained in the considered judgment of the county ct. judge, & the Ct. of Appeal were wrong in not directing a new trial. The case was accordingly remitted for a new trial with a special direction as to costs.—MAYDEW *v.* CHATTERLEY-WHITFIELD COLLIERIES, LTD. (1918), 88 L. J. K. B. 360; 119 L. T. 262; 11 B. W. C. C. 171, H. L.

73. Direction to try issue of fact—& report to House.]—BUTT (H.) & CO., LTD. *v.* WESTON-SUPER-MARE URBAN DISTRICT COUNCIL, [1920] W. N. 241, H. L.

74. Objection to competency of appeal—Whether entertained—Failure to present objection to appeal committee.]—ROCHFORT *v.* BATTERSBY, No. 66, *ante.*

75. —— —— Maintenance by Crown.]—A preliminary objection to the competency of the appeal based on the fact that the Crown had provided applt. (pltf.) with the means of prosecuting his appeal, in order to get the question of the validity of the regulations finally settled, is untenable.—MACKEY *v.* MONKS (PRESTON), [1918] A. C. 59; 87 L. J. P. C. 28; 118 L. T. 65; 82 J. P. 105, H. L.

76. Conclusion that there was no evidence for jury—Judgment for defendant—Although no cross appeal by defendant.]—Where the House of Lords comes to the conclusion that there is no evidence to go to a jury in an action, they will order judgment to be entered for deft., & not send the case for a new trial; & this will be done though there is no cross appeal on deft.'s part.—IBO SYNDICATE, LTD. *v.* WYLER (1902), 87 L. T. 83; 51 W. R. 320, H. L.

Sect. 2.—*Appellate jurisdiction: Sub-sect.* 7, *A. C., D. & E*

77. Procedure on criminal appeal.] — There being no rules of the House of Lords in respect of criminal appeals, the House on presentation of such an appeal will order the same to be read & prosecuted subject to such standing orders as may be applicable thereto, & to the requirement that resp. to such an appeal " shall lodge a case forthwith in answer thereto " ; & the House will accept typewritten copies of the papers necessary to the disposal of the appeal, the petition of appeal alone being printed.—R. *v.* BALL, R. *v.* BALL, [1911] A. C. 47 ; *sub nom.* PUBLIC PROSECUTIONS DIRECTOR *v.* BALL & BALL, 80 L. J. K. B. 691 ; 103 L. T. 738 ; 75 J. P. 180 ; 55 Sol. Jo. 139 ; 22 Cox, C. C. 366 ; 6 Cr. App. Rep. 32, H. L.

Annotations :—**Mentd.** R. *v.* Stone (1910), 6 Cr. App. Rep. 89 ; R. *v.* Bloodworth (1913), 9 Cr. App. Rep. 80 ; R. *v.* Curtis (1913), 9 Cr. App. Rep. 9 ; R. *v.* Rodley, [1913] 3 K. B. 468 ; R. *v.* Thompson (1913), 78 J. P. 212 ; R. *v.* Cooper (1914), 10 Cr. App. Rep. 195 ; R. *v.* Shellaker, [1914] 1 K. B. 414 ; R. *v.* Thompson, [1917] 2 K. B. 630.

B. Admission of Fresh Evidence.

78. Whether admitted.]—No proofs to be read in the House of Lords which were not made use of in Chancery.—BUTTON *v.* PRICE (1702), as reported in Prec. Ch. 212 ; 24 E. R. 104, H. L.

79. ——.] — The House of Lords will not admit evidence which was not tendered in the ct. below.—BANCO DE PORTUGAL *v.* WADDELL (1880), 5 App. Cas. 161 ; 49 L. J. Bcy. 33 ; 42 L. T. 698 ; 28 W. R. 477, H. L.

Annotation :—**Mentd.** *Re* Somes, *Ex p.* De Lemos (1896), 3 Mans. 131.

80. ——.] — Pltf. appealed to the House of Lords & applied for leave to adduce further evidence which was refused.—HATMAKER *v.* NATHAN (JOSEPH) & CO., LTD. (1919), 36 R. P. C. 231, H. L.

81. —— Evidence rejected below — Effect of rejection on decision considered.]—*Semble:* the Lords, although a ct. of appeal, may & do look at evidence which has been rejected below, to see whether if admitted, it ought to have made any difference in the decree, & that although they should be of opinion that it should have been received below, yet if they should at the same time be of opinion that if received it ought to have made no difference in the decree, they will not remit.—MACCABE *v.* HUSSEY (1831), 5 Bli. N. S. 715 ; 2 Dow. & Cl. 440 ; 6 E. R. 791, H. L.

Annotations :—**Refd.** Attwood *v.* Small (1840), 6 Cl. & Fin. 232 ; Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161.

82. —— —— Concealment from Appeal Committee.]—Where an order granting special leave to appeal had been made upon a petition which improperly concealed from their Lordships the ground upon which the appeal had been refused by the ct. below :—*Held:* a subsequent petition that further evidence be taken must be refused, as nothing will be done to assist an appeal so instituted.—BAUDAINS *v.* JERSEY BANKING CO. (LIQUIDATORS), *Ex p.* BAUDAINS (1888), 13 App. Cas. 832, P. C.

83. —— Only in special circumstances.] — (1) All objections to the form & competency of an appeal to this House, should be made before the appeal is set down for hearing, so that it may be referred to the Appeal Committee.

(2) Although the time for appealing from an interlocutory order in a cause has expired, still if the final decree is appealed from in time, the right to appeal from the order is saved.

(3) This House may, under circumstances, depart from the general rule, &, to satisfy its conscience, look into instruments that were not tendered to the judge who made the decree appealed against.—ATTWOOD *v.* SMALL (1838), 6 Cl. & Fin. 232 ; 7 E. R. 684, H. L. ; *on appeal from* S. C. *sub nom.* SMALL *v.* ATTWOOD (1834), 1 Y. & C. Ex. 37.

Annotations :—*As to* (2) **Refd.** Beavan *v.* Mornington (1860), 8 H. L. Cas. 525. *As to* (3) **Consd.** Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161. **Refd.** Archbold *v.* Charitable Bequests for Ireland Comrs. (1849), 2 H. L. Cas. 440. *Generally,* **Refd.** Nelthorpe *v.* Holgate (1844), 8 Jur. 551 ; Marshall *v.* Sladden (1849), 7 Hare, 428 ; Reynell *v.* Sprye, Sprye *v.* Reynell (1849), 8 Hare, 222 ; Cockell *v.* Taylor (1852), 15 Beav. 103 ; Jorden *v.* Money (1854), 5 H. L. Cas. 185 ; Smith *v.* Kay (1859), 7 H. L. Cas. 750 ; Venezuela Central Ry. *v.* Kisch (1867), L. R. 2 H. L. 99 ; Other *v.* Smurthwaite (1868), L. R. 5 Eq. 437 ; Shedden & Shedden *v.* A.-G. & Patrick (1869), 22 L. T. 631 ; Torrance *v.* Bolton (1872), 41 L. J. Ch. 643 ; Weise *v.* Wardle (1874), L. R. 19 Eq. 171 ; Panama *v.* South Pacific Telegraph Co. *v.* Indiarubber, Gutta Percha & Telegraph Works Co. (1875), 32 L. T. 238 ; Redgrave *v.* Hurd (1881), 20 Ch. D. 1 ; Roots *v.* Snelling (1883), 48 L. T. 216 ; Burstall *v.* Beyfus (1884), 26 Ch. D. 35. **Mentd.** Lovell *v.* Hicks (1836), 2 Y. & C. Ex. 46 ; Bacon *v.* Simpson (1837), 3 M. & W. 78 ; Brown *v.* Sawer (1841), 3 Beav. 598 ; Sneezum *v.* Marshall (1841), 7 M. & W. 417 ; Benson *v.* Heathorn (1842), 1 Y. & C. Ch. Cas. 326 ; Kirkman *v.* Andrews (1842), 4 Beav. 554 ; Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542 ; Holland *v.* Baker (1843), 3 Hare, 68 ; Bather *v.* Kearsley (1844), 13 L. J. Ch. 321 ; Humphries *v.* Horne (1844), 3 Hare, 276 ; Doyle *v.* Muntz (1846), 5 Hare, 509 ; Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903 ; Fishmonger's Co. *v.* Dimsdale (1852), 12 C. B. 557 ; Morrell *v.* Wootton (1852), 16 Beav. 197 ; A.-G. *v.* Chesterfield (1854), 18 Beav. 596 ; Ernest *v.* Croysdill (1860), 2 De G. F. & J. 175 ; Higgins *v.* Samels (1862), 2 John. & H. 460 ; Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485 ; Arkwright *v.* Newbold (1880), 28 W. R. 828.

84. —— —— Party adducing must give notice to other side.]—MORRISON SHIPPING CO., LTD. *v.* R., [1925] W. N. 6, H. L.

C. Raising New Points.

85. Not admitted.]—Upon an appeal from the Rolls, or to the House of Lords, no new matter to be insisted upon.—THOMPSON *v.* WALLER (1710), Prec. Ch. 295 ; 24 E. R. 140, L. C.

86. ——.]—The House will not permit parties, on appeal, to raise objections which they did not raise in the ct. below.—KAY *v.* MARSHALL (1841), 8 Cl. & Fin. 245 ; 2 Web. Pat. Cas. 79 ; West, 682 ; 5 Jur. 1028 ; 8 E. R. 96, H. L. ; *affg.* (1839), 1 Beav. 535.

Annotations :—**Mentd.** *Re* Kay's Patent (1839), 3 Moo. P. C. C. 24 ; Steiner *v.* Heald (1851), 20 L. J. Ex. 410 ; Bovill *v.* Crate (1867), Griffin's Patent Cases (1887), 46 ; Bovill *v.* Smith (1868), Griffin's Patent Cases (1887), 49 ; Edison & Swan Electric Light Co. *v.* Woodhouse & Rawson (1887), 3 T. L. R. 327 ; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 431 ; Jandus Arc Lamp & Electric Co. *v.* Arc Lamps (1905), 21 T. L. R. 308.

87. ——.]—A question not argued before the Ct. of Session will not be entertained by the House of Lords.—LIVINGSTONE *v.* RAWYARDS COAL CO. (1880), 5 App. Cas. 25 ; 42 L. T. 334 ; 44 J. P. 392 ; 28 W. R. 357, H. L.

Annotations :—**Mentd.** Tucker *v.* Linger (1882), 46 L. T. 198 ; Taylor *v.* Mostyn (1886), 33 Ch. D. 226 ; Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n. ; Dreyfus *v.* Peruvian Guano Co. (1889), 42 Ch. D. 66 ; Whitwham *v.* Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538 ; Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351 ; *Re* A. B. (No. 2), [1900] 2 Q. B. 429 ; *Re* Eden & James Joicey & N. E. Ry. (1906), 71 J. P. 91 ; Eden *v.* N. E. Ry., [1907] A. C. 400 ; James Joicey *v.* N. E. Ry., [1907] 1 K. B. 402.

88. —— Except in very exceptional circumstances.]—Observations on the practice of the House as to permitting parties to raise points of law not raised in the cts. below.

Decisions of this House have laid it down that in very exceptional cases . . . new matters may be considered by your lordships (LORD BIRKENHEAD, C.).

If the omission be a mere omission to state & argue a legal proposition which requires for its discussion no underlying hypothesis of facts other than those which have been admitted or proved in the cts. below, I should hold that your lordships should not turn a deaf ear to such argument even at the eleventh hour. But if the proposition is such that a variation in the admitted or proved facts, or any addition to them would affect the argument, then I think it is too late, & that your lordships should not allow the argument to be put forward (LORD DUNEDIN).—NORTH STAFFORDSHIRE RY. CO. *v.* EDGE, [1920] A. C. 254; 89 L. J. K. B. 78; 122 L. T. 385; 84 J. P. 33; 3 T. L. R. 115; 64 Sol. Jo. 146; 18 L. G. R. 19, H. L.

D. Non-Appearance or Death of Parties.

89. Appellant not appearing — Whether appeal dismissed with costs.]—If applt. does not appear to support his appeal, respt.'s counsel are not compellable to go on, but the appeal may be dismissed, & the House will afterwards exercise their discretion as to the costs.—GARDINER *v.* SIMMONS (1832), 6 Bli. N. S. 60; 1 Cl. & Fin. 35; 5 E. R. 521, H. L.

90. —— ——.]—Where no person appeared on the part of applt., when his appeal was called on, & the agent only of resp. appeared, alleging that he had retained counsel, & praying that the appeal be dismissed with costs, it was dismissed with costs.—MURPHY *v.* CONWAY (1842), 9 Cl. & Fin. 73; 8 E. R. 343, H. L.

—— ——.]—Where no applt. appears to support an appeal, the only order the House can make will be to dismiss the appeal for want of prosecution, with costs.—SCANLAN *v.* USHER (1842), 8 Cl. & Fin. 561; 8 E. R. 219, H. L.

92. —— —— **Competency of appeal requiring to be argued.**]—On the day appointed for hearing an appeal, when its competency also was first to be argued by one counsel at a side, pursuant to an order of the House, resp.'s counsel appeared at the bar, &, no counsel or agent appearing for applt., prayed that the appeal be dismissed. The House required him to open a *primâ facie* case against the appeal before they would dismiss it.—FRASER *v.* GORDON (1835), 3 Cl. & Fin. 718; 6 E. R. 1606, H. L.

93. —— —— **Appellant having received indulgence from House.**]—Where applt., after receiving indulgence from the House upon terms, fails to comply with the terms, or to appear on the day appointed for the hearing, his appeal will be dismissed with costs, upon motion, on behalf of resp., without requiring him to present a petition for the purpose.—MAHON *v.* IRWIN (1837), 4 Cl. & Fin. 559; 7 E. R. 213, H. L.

94. Respondent not appearing—Appeal dismissed without costs.]—Where resp. did not appear to support a judgment of the ct. below, this House reversed such judgment, but did not give applt. the costs of the appeal.—HAMILTON *v.* LITTLEJOHN (1836), 4 Cl. & Fin. 20; 7 E. R. 8, H. L.

95. Neither party appearing—Appeal dismissed for want of prosecution—No costs on either side.]—Where no party appears when an appeal is called on for hearing, it will be dismissed for want of prosecution, without costs on either side.—SHERBURNE *v.* MIDDLETON (1842), 9 Cl. & Fin. 72; 8 E. R. 343, H. L.; *previous proceedings, sub nom.* MIDDLETON *v.* SHERBURNE (1841), 4 Y. & C. Ex. 358.

Annotations:—**Mentd.** Lancashire *v.* Lancashire (1846), 9 Beav. 259; Boyse *v.* Rossborough (1857), 6 H. L. Cas. 2.

96. Death of appellant pending appeal—Representative allowed to be heard.]—Pending an appeal to the House of Lords by defts. in a suit, one of applts. died, & the House of Lords allowed the parties, who represented him, to be heard on the appeal.—THORPE *v.* MATTINGLEY (1842), 1 Ph. 200; 12 L. J. Ch. 95; 41 E. R. 608, L. C.; *subsequent proceedings* (1843), 1 Ph. 443, L. C.

E. Counsel.

97. Number of counsel heard—Two on each side.]—(1) It is an inflexible rule of the House to hear only two counsel for each party in any one case; & the House will not avoid the effect of this rule by permitting one senior & one junior counsel to be heard in the opening, & a third counsel to reply.

(2) The opinion purports to be unanimous, but the more important matter of the reasons urged to support it would not seem to be thus represented. . . . The opinions of the learned judges are resorted to by your lordships, not to decide the question before you, but to give you information, suggestions, & generally speaking assistance in forming your own. It therefore becomes necessary that their reasons should accompany those opinions & accordingly they are by the course of your lordships' proceedings & indeed by your orders, invariably required (LORD BROUGHAM).—R. *v.* MILLIS, R. *v.* CARROLL (1844), 10 Cl. & Fin. 534; 8 E. R. 844, H. L.

Annotations:—*As to* (2) **Refd.** O'Connell *v.* R. (1844), 11 Cl. & Fin. 155. *Generally*, **Refd.** A.-G. *v.* Windsor (Dean & Canons) (1860), 8 H. L. Cas. 369; Beamish *v.* Beamish (1861), 9 H. L. Cas. 274; Usher's Wiltshire Brewery *v.* Bruce, [1915] A. C. 433. **Mentd.** Catherwood *v.* Caslon (1844), 13 M. & W. 261; Catterall *v.* Sweetman (1845), 4 Notes of Cases, 222; R. *v.* Chadwick (1846), 11 J. P. 140; Catterall *v.* Catterall (1847), 1 Rob. Eccl. 580; R. *v.* Canterbury (Archbp.) (1848), 11 Q. B. 483; Maclean *v.* Cristall (1849), 7 Notes of Cases Supp. xvii.; R. *v.* Manwaring (1856), Dears. & B. 132; Hope *v.* Hope (1858), 1 Sw. & Tr. 94; Prince of Wales Assce. *v.* Harding (1858), E. B. & E. 183; Beachey *v.* Brown (1860), E. B. & E. 796; Bevan *v.* M'Mahon (1861), 30 L. J. P. M. & A. 61; Sichel *v.* Lambert (1864), 15 C. B. N. S. 781; R. *v.* Fanning (1866), 10 Cox, C. C. 411; Exeter (Bp.) *v.* Marshall (1868), L. R. 3 H. L. 17; Phillips *v.* Eyre (1870), L. R. 6 Q. B. 1; Thompson *v.* Ward, Ellis *v.* Burch (1871), 24 L. T. 679; R. *v.* Allen (1872), L. R. 1 C. C. R. 367; Anderson *v.* Morice (1876), 1 App. Cas. 713; Machonochie *v.* Penzance (1881), 6 App. Cas. 424; Culling *v.* Culling, [1896] P. 116; Moss *v.* Moss, [1897] P. 263; London Street Tram. Co. *v.* L. C. C., [1898] A. C. 375; *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481; R. *v.* Canterbury (Archbp.) (No. 1) (1901), 71 L. J. K. B. 894; Lightbody *v.* West (1902), 87 L. T. 138.

98. —— —— **Although order advancing — Appeal provided for one only.**]—DILLON *v.* PARKER, No. 52, *ante*.

99. —— —— **Respondents with different interests—Two for each respondent.**]—(1) A Ct. of Appeal will not entertain an appeal for costs alone.

(2) Where resps. have different defences, the House will hear two counsel for one on the whole case, & two for the other on the points wherein their defences differ.—HOME *v.* PRINGLE & HUNTER (1841), 8 Cl. & Fin. 264; 8 E. R. 103, H. L.

Annotations:—*Generally*, **Mentd.** Skeffington *v.* Budd (1842), 9 Cl. & Fin. 219; Toplis *v.* Hurrell (1854), 19 Beav. 423; Carruthers *v.* Carruthers, [1896] A. C. 659.

100. —— —— —— ——.]—Where there were two resps., having distinct interests, the House allowed two counsel to be heard for each.—SOUTH LEITH PAROCHIAL BOARD *v.* ALLAN & EDINBURGH PAROCHIAL BOARD (1852), 1 Macq. 93, H. L.

Sect. 2.—Appellate jurisdiction: Sub-sect. 7, E F. (a), (b) & (c); sub-sect. 8, A

101. Absence of counsel—Case adjourned—Party paying costs.]—STRICKLAND *v.* COKER (1680), 1 Moo. P. C. C. 133, n.; 12 E. R. 766, H. L.

Annotation:—**Mentd.** Harvey *v.* Ashley (1748), 3 Atk. 607.

102. —— —— ——.]—An appeal was called on in its regular course; applt.'s counsel were not present, but he appeared in person. The House would not dismiss the appeal, but allowed it to stand over & ordered applt. to pay the costs of the day.—GODSON *v.* HALL (1840), 7 Cl. & Fin. 549; 7 E. R. 1178, H. L.

103. —— —— ***Unless other counsel on same side.***]—This House will not postpone the hearing & decision of any appeal on account of the absence of counsel, but will call on the counsel on either side in attendance to proceed with the argument.—MELLISH *v.* RICHARDSON (1832), 1 Cl. & Fin. 224; 6 Bli. N. S. 80, n.; 6 E. R. 900, H. L.

Annotations:—**Mentd.** Exeter (Bp.) *v.* Gully (1830), 5 Man. & Ry. K. B. 499; Ferrier *v.* Howden (1834), 4 Cl. & Fin. 25; Scales *v.* Cheese (1844), 12 M. & W. 685; King *v.* Simmonds (1845), 14 L. J. Q. B. 248; Bowers *v.* Nixon (1848), 12 Q. B. 546; Newton *v.* Boodle (1848), 6 C. B. 529; Gregory *v.* Brunswick (1849), 2 H. L. Cas. 415; Marianski *v.* Cairns (1852), 19 L. T. O. S. 277; Alleyne *v.* R. (1855), 5 E. & B. 399; Gregory *v.* Cotterell (1855), 5 E. & B. 571; Webster *v.* Emery (1855), 10 Exch. 901; Wilkinson *v.* Sharland (1855), 3 C. L. R. 619; Mansell *v.* R. (1857), 8 E. & B. 54; *Ex p.* Fernandez (1861), 10 C. B. N. S. 3; Mersey Docks & Harbour Board *v.* Penhallow (1861), 7 H. & N. 341, n.; Irwin *v.* Grey (1865), 19 C. B. N. S. 584; Indermaur *v.* Dames (1867), 36 L. J. C. P. 181; Tetley *v.* Wanless (1867), L. R. 2 Exch. 275; Scott *v.* Bennett (1871), L. R. 5 H. L. 234; Bradlaugh *v.* Clarke (1883), 48 L. T. 681.

Lords' prior claim to attendance.]—*See* BARRISTERS, Vol. III., p. 350, No. 421.

104. Practice with regard to counsel's application for adjournment.]—APPLICATION TO POSTPONE A CASE (1920), 149 L. T. Jo. 317, H. L.

105. Hearing of counsel not in attendance for his turn.]—BOOTH *v.* BANK OF ENGLAND, No. 54, *ante*.

106. Private party presenting appeal—Attorney-General presenting cross appeal—Order of hearing.]—In a case where a private party had presented an appeal, & the A.-G., on behalf of the Crown, had presented a cross appeal against the same decree, the counsel for the private party were heard continuously on both appeal & cross appeal, & then the counsel for the Crown were heard on both, & the senior counsel for the private party was heard in a final reply; & this course was adopted, although the case was one in which, being a matter of revenue, the Crown was directly concerned.—DRAKE *v.* A.-G. (1843), 10 Cl. & Fin. 257; 8 E. R. 739, H. L.; *on appeal from* S. C. *sub nom.* PLATT

Annotations:—**Refd.** O'Connell *v.* R. (1844), 11 Cl. & Fin. 155. **Mentd.** Matson *v.* Swift (1845), 14 L. J. Ch. 354; Ewart *v.* Ewart (1853), 1 Eq. Rep. 536; *Re* Wallop's Trust (1864), 1 De G. J. & Sm. 656; *Re* Philbrick's Settlmt. (1865), 5 New Rep. 502; Perry *v.* R. (1868), L. R. 4 Exch. 27; *Re* Hoskin's Trusts (1877), 5 Ch. D. 229; *Re* Reynolds, Williams *v.* Mitchell (1891), 60 L. J. Ch. 807; *Re* Power, *Re* Stone, Acworth *v.* Stone, [1901] 2 Ch. 659; Stamp Duties Comr. *v.* Stephen, [1904] A. C. 137; *Re.* Orlebar, Wynter *v.* Orlebar, [1908] 1 Ch. 136; O'Grady *v.* Wilmot, [1916] 2 A. C. 231.

Right of audience before House of Lords.]—*See* BARRISTERS, Vol. III., p. 318, Nos. 38–45.

Signature of appeals by counsel.]—*See* BARRISTERS, Vol. III., p. 320, Nos. 73, 74; Standing Orders of the House of Lords (Judicial Proceedings), 1926, No. II.

F. Assistance of Judges of Supreme Court.

(a) In General.

107. Lords & judges in no doubt as to correctness of judgment below—After hearing appellant—Respondent not called.]—Although the judges attend to assist the Lords yet if after hearing the case made for pltf. in error, or for applt., no doubt is entertained by any of them that the judgment of the ct. below was right, their lordships will not hear deft. or resp.—R. *v.* JOHNSON (1839), 6 Cl. & Fin. 41; Macl. & Rob. 1; 7 E. R. 613, H. L.; *affg.* (1836), 5 Ad. & El. 488, Ex. Ch.

Annotations:—**Mentd.** Duckworth *v.* Harrison & [illegible] *v.* Narracott & Hesketh (1864), 3 Sw. & Tr. 408; Yco *v.* Tatem, The Orient (1871), L. R. 3 P. C. 696.

108. When want of unanimity between judges—Each should give reasons for opinion.]—R. *v.* MILLIS, R. *v.* CARROLL, No. 97, *ante*.

109. —— ——.]—EGERTON *v.* BROWNLOW (EARL), No. 115, *post*.

(b) When Resorted to.

110. For information & suggestions.]—R. *v.* MILLIS, R. *v.* CARROLL, No. 97, *ante*.

111. Causes of great public importance—Regardless of difficulty of questions—House not bound by opinions.]—We adopted that course [calling in the judges] without any regard to the supposed difficulty of the questions likely to be raised before us . . . because the cause was one of great public importance. . . . I agree, however, that we are not at all bound by the opinions thus given (LORD BROUGHAM).—O'CONNELL *v.* R. (1844), 11 Cl. & Fin. 155; 3 L. T. O. S. 429; 9 Jur. 25; 1 Cox, C. C. 413; 8 E. R. 1061, H. L.; *sub nom.* R. *v.* O'CONNELL, 5 State Tr. N. S. 1, H. L.

Annotations:—**Mentd.** King *v.* R. (1845), 9 Jur. 832; R. *v.* Gompertz (1846), 9 Q. B. 824; Campbell *v.* R. (1847), 11 Q. B. 814; *Re* Dunn (1847), 5 C. B. 215; A.-G. *v.* Warren (1848), 10 L. T. O. S. 445; Dunn *v.* R. (1848), 13 Jur. 233; Gregory *v.* R. (1848), 15 Q. B. 957; R. *v.* Duffy (1848), 4 Cox, C. C. 294; R. *v.* Mitchel (1848), 3 Cox, C. C. 1; Shea *v.* R., Dwyer *v.* R. (1848), 3 Cox, C. C. 141; Ryalls *v.* R. (1849), 11 Q. B. 795; Wright *v.* R. (1849), 14 Q. B. 148; Irvine (or Douglas) *v.* Kirkpatrick (1850), 17 L. T. O. S. 32; *Ex p.* Purdy (1850), 9 C. B. 201; Holloway *v.* R. (1851), 17 Q. B. 317; R. *v.* Rowlands, Peel, Green, Winters, Platt, Duffield, Woodnorth, & Gaunt (1851), 2 Den. 364; *Ex p.* Rose (1852), 18 Q. B. 751; Kendall *v.* Wilkinson (1855), 24 L. J. M. C. 89; R. *v.* Eagleton (1855), 24 L. J. M. C. 158; New River Co. *v.* Hertford Land Tax Comrs. (1857), 2 H. & N. 129; A.-G. *v.* Sillem (1864), 2 H. & C. 581; Latham *v.* R. (1864), 5 B. & S. 635; R. *v.* Heane (1864), 4 B. & S. 947; Burton *v.* Low (1867), 16 L. T. 385; Irwin *v.* Grey (1867), L. R. 2 H. L. 20; Mulcahy *v.* R. (1868), L. R. 3 H. L. 306; R. *v.* Murphy (1869), L. R. 2 P. C. 535; Anderson *v.* Morice (1876), 1 App. Cas. 713; Castro *v.* R. (1881), 6 App. Cas. 299; Mackonachie *v.* Penzance (1881), 6 App. Cas. 424; Combe *v.* De la Bere (1882), 22 Ch. D. 316; Enraght *v.* Penzance (1882), 7 App. Cas. 240; R. *v.* Bradlaugh (1883), 15 Cox, C. C. 217; R. *v.* Manning (1883), 12 Q. B. D. 241; Mogul S.S. Co. *v.* M'Gregor, Gow (1885), 15 Q. B. D. 476; R. *v.* Pierce (1887), 3 T. L. R. 586; R. *v.* Stephens (1888), T. L. R. 479; Mogul S.S. Co. *v.* M'Gregor, Gow (1889), 23 Q. B. D. 598; R. *v.* Plummer, [1902] 2 K. B. 339; Sykes *v.* Barraclough, [1904] 2 K. B. 675.

(c) What Questions May be Put.

112. Not question of construction of bill.]—The judges declined to answer a question proposed to them by the House of Lords, in terms which rendered it doubtful whether it did not extend to the construction of a bill before the House.—*Re* LONDON & WESTMINSTER BANK (1834), 1 Bing. N. C. 197; 2 Cl. & Fin. 191; 1 Scott, 4; 131 E. R. 1093, H. L.

113. ——.]—The judges cannot be required by the House of Lords to give their opinion upon a bill not yet passed into law, but they may be called on to assist the House by giving their opinions on abstract questions of existing law.—M'NAGHTEN'S CASE (1843), 10 Cl. & Fin. 200; 1 Car. & Kir. 130, n.; 8 E. R. 718; *sub nom.* R. *v.* MCNAUGHTON, 4 State Tr. N. S. 847; 1

Town. St. Tr. 314; *sub nom.* INSANE CRIMINALS, 8 Scott, N. R. 595, H. L.

Annotations :—**Consd.** Wensleydale Peerage Case (1856), 8 State Tr. N. S. 479. **Mentd.** R. *v.* Crouch (1844), 3 L. T. O. S. 186; R. *v.* Francis (1849), 14 J. P. 24; R. *v.* Haynes (1859), 1 F. & F. 666; R. *v.* Burton (1863), 3 F. & F. 772; Boughton *v.* Knight (1873), L. R. 3 P. & D. 64; R. *v.* Oxford (Bp.) (1879), 4 Q. B. D. 525; R. *v.* Davis (1881), 14 Cox, C. C. 563; R. *v.* Tolson (1889), 23 Q. B. D. 168; Yarrow *v.* Yarrow (1892), 8 T. L. R. 215; R. *v.* Kay (1904), 68 J. P. Jo. 376; R. *v.* Ireland (1910), 4 Cr. App. Rep. 74; R. *v.* Smith (1910), 26 T. L. R. 614; R. *v.* Marsland (1911), 7 Cr. App. Rep. 77; Felstead *v.* R., [1914] A. C. 534; Grime *v.* Fletcher (1915), 59 Sol. Jo. 233; R. *v.* Codere (1916), 12 Cr. App. Rep. 21; R. *v.* Jolly (1919), 83 J. P. 296; Public Prosecutions Director *v.* Beard, [1920] A. C. 479; R. *v.* Holt (1920), 15 Cr. App. Rep. 10; R. *v.* True (1922), 127 L. T. 561; R. *v.* Flavell (1926), 19 Cr. App. Rep. 141.

114. Preliminary point arising before appeal heard.]—DIMES *v.* GRAND JUNCTION CANAL (PROPRIETORS) (1852), 3 H. L. Cas. 759; 8 State Tr. N. S. 85; 19 L. T. O. S. 317; 17 Jur. 73; 10 E. R. 301, H. L.

Annotations :—**Refd.** Bright *v.* Hutton, Hutton *v.* Bright (1852), 3 H. L. Cas. 341; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1. **Mentd.** R. *v.* West Riding JJ. (1853), 17 J. P. 67; Bancks *v.* Ollerton (1854), 10 Exch. 168; Ranger *v.* G. W. Ry. (1854), 5 H. L. Cas. 72; R. *v.* Surrey JJ. (1855), 19 J. P. Jo. 755; *Ex p.* Hopkins (1857), 4 Jur. N. S. 529; R. *v.* Storks (1857), 5 W. R. 563; Ellis *v.* Hopper (1858), 3 H. & N. 766; Kemp *v.* Rose (1858), 1 Giff. 258; Lancaster & Carlisle Ry. *v.* Heaton (1858), 27 L. J. Q. B. 195; Williams *v.* G. W. Ry. (1858), 3 H. & N. 869; Parr *v.* Winteringham (1859), 5 Jur. N. S. 787; Wildes *v.* Russell (1866), L. R. 1 C. P. 722; R. *v.* M. S. & L. Ry. (1867), 36 L. J. Q. B. 171; Phillips *v.* Eyre (1870), L. R. 6 Q. B. 1; Todd *v.* Robinson (1884), 14 Q. B. D. 739; R. *v.* Farrant (1887), 20 Q. B. D. 58; Leeson *v.* General Council of Medical Education & Registration (1889), 43 Ch. D. 366; Lowther *v.* Cale. Ry., [1891] 3 Ch. 443; Allinson *v.* General Medical Council (1894), 42 W. R. 289; City of London Electric Lighting Co. *v.* London Corpn. (1901), 65 J. P. 563; R. *v.* Simpson, [1914] 1 K. B. 66; Transvaal Lands Co. *v.* New Belgium (Transvaal) Land & Development Co., [1914] 2 Ch. 488; Haynes *v.* Davis, [1915] 1 K. B. 332; Lapish *v.* Braithwaite, [1925] 1 K. B. 474.

115. Questions of law.] — The judges were summoned to answer questions of law: they differed in opinion on these questions. Most of the judges being on circuit, two of their number attended on a day fixed by the House for receiving the answers, & proposed to read answers which embodied their own opinions & those of their brethern. The House adjourned the matter till the majority of the judges should have returned from the circuit, so as to be able to attend in person, & individually express their reasons for their opinions. It was intimated that this permission to dispense with the attendance of any of the judges to whom questions had been put, & who differed in their answers, must not be drawn into a precedent.—EGERTON *v.* BROWNLOW (EARL) (1853), 4 H. L. Cas. 1; 8 State Tr. N. S. 193; 23 L. J. Ch. 348; 21 L. T. O. S. 306; 18 Jur. 71; 10 E. R. 359, H. L.

Annotations :—**Mentd.** Kerkin *v.* Kerkin (1854), 3 E. & B. 399; Bean *v.* Griffiths (1855), 1 Jur. N. S. 1045; Hilton *v.* Eckersley (1855), 6 E. & B. 47; Kiallmark *v.* Kiallmark (1856), 26 L. J. Ch. 1; Scott *v.* Avery (1656), 5 H. L. Cas. 811; H. *v.* W. (1857), 3 K. & J. 382; Clavering *v.* Ellison (1859), 7 H. L. Cas. 707; Shrewsbury *v.* Scott (1859), 6 C. B. N. S. 1; Wright *v.* Wilkin (1860), 2 B. & S. 232; Tatham *v.* Vernon (1861), 29 Beav. 604; Gosling *v.* Gosling (1863), 32 Beav. 58; Christie *v.* Gosling (1866), L. R. 1 H. L. 279; Elliott *v.* Richardson (1870), L. R. 5 C. P. 744; *Re* Harrison's Estate (1870), 5 Ch. App. 408; Sackville-West *v.* Holmesdale (1870), L. R. 4 H. L. 543; Thompson *v.* Fisher (1870), L. R. 10 Eq. 207; *Re* Exmouth, Exmouth *v.* Praed (1883), 23 Ch. D. 158; Davies *v.* Davies (1887), 36 Ch. D. 359; Lound *v.* Grimwade (1888), 39 Ch. D. 605; Windhill L. B. of Health *v.* Vint (1890), 45 Ch. D. 351; Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; Savill *v.* Langman (1898), 79 L. T. 44; *Re* Kelcey, Tyson *v.* Kelcey, [1899] 2 Ch. 530; Marlborough *v.* Marlborough (1900), 83 L. T. 578; Jeffreys *v.* Jeffreys (1901), 84 L. T. 417; *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198; Janson *v.* Driefontein Consolidated Mines, [1902] A. C. 484; *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470; Prince *v.* Haworth, [1905] 2 K. B. 768; Wilson *v.* Carnley, [1908] 1 K. B. 729; R. *v.* Local Government Board, *Ex p.* Arlidge, [1913] 1 K. B. 463; Continental Tyre & Rubber Co. (Great Britain) *v.* Daimler Co., Same *v.* Tilling, [1915] 1 K. B. 893; Montefiore *v.* Menday Motor Components Co., [1918] 2 K. B. 241; Rodriguez *v.* Speyer, [1919] A. C. 59; Kemp *v.* Glasgow Corpn., [1920] A. C. 836; *Re* Wallace, Champion *v.* Wallace, [1920] 2 Ch. 274.

116. ——.]—ALLEN *v.* FLOOD, [1898] A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 62 J. P. 595; 46 W. R. 258; 14 T. L. R. 125; 42 Sol. Jo. 149; *on appeal from* S. C. *sub nom.* FLOOD *v.* JACKSON, [1895] 2 Q. B. 21, C. A.

Annotations :—**Mentd.** Lyons *v.* Wilkins, [1896] 1 Ch. 811; Ajello *v.* Worsley, [1898] 1 Ch. 274; Huttley *v.* Simmons, [1898] 1 Q. B. 181; Taylor *v.* Cambridge Gazette Co. & Kilner (1898), 42 Sol. Jo. 832; Charnock *v.* Court (1899), 68 L. J. Ch. 550; Hubbuck *v.* Wilkinson, Heywood & Clark, [1899] 1 Q. B. 86; Lyons *v.* Wilkins, [1899] 1 Ch. 255; Boots *v.* Grundy (1900), 82 L. T. 769; Linaker *v.* Pilcher (1901), 70 L. J. K. B. 396; Quinn *v.* Leathem, [1901] A. C. 495; Read *v.* Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2 K. B. 732; Brigg *v.* Thornton (1903), 73 L. J. Ch. 301; Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Glamorgan Coal Co. *v.* South Wales Miners' Federation, [1903] 2 K. B. 545; South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239; Denaby & Cadeby Main Collieries *v.* Yorkshire Miners' Assocn., [1906] A. C. 384; Conway *v.* Wade (1908), 78 L. J. K. B. 14; National Phonograph Co. *v.* Edison-Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Wilford *v.* West Riding of Yorkshire County Council, [1908] 1 K. B. 685; Santen *v.* Busnach (1913), 29 T. L. R. 214; *Re* Ainsworth, Finch *v.* Smith, [1915] 2 Ch. 96; Stott *v.* Gamble, [1916] 2 K. B. 504; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Valentine *v.* Hyde, [1919] 2 Ch. 129; Davies *v.* Thomas, [1920] 2 Ch. 189; Hodges *v.* Webb, [1920] 2 Ch. 70; Wolstenholme *v.* Ariss, [1920] 2 Ch. 403; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40; White *v.* Riley, [1921] 1 Ch. 1; Sorrell *v.* Smith, [1925] A. C. 700.

117. —— Abstract law.]—M'NAGHTEN'S CASE, No. 113, *ante*.

-BRIGHT *v.* HUTTON, HUTTON *v.* BRIGHT, No. 9, *ante*.

119. —— ——.] — WENSLEYDALE PEERAGE (1856), 5 H. L. Cas. 958; 8 State Tr. N. S. 479; 10 E. R. 1181, H. L.

Annotations :—**Mentd.** *Re* Buckhurst Peerage (1876), 2 App. Cas. 1; A.-G. for the Dominion of Canada *v.* A.-G. for the Province of Ontario (1897), 67 L. J. P. C. 17; Rhondda's Claim, [1922] 2 A. C. 339.

120. Questions relating to privileges of Parliament.]—WENSLEYDALE PEERAGE (1856), 5 H. L. Cas. 958; 8 State Tr. N. S. 479; 10 E. R. 1181, H. L.

Annotations :—**Mentd.** *Re* Buckhurst Peerage (1876), 2 App. Cas. 1; A.-G. for the Dominion of Canada *v.* A.-G. for the Province of Ontario (1897), 67 L. J. P. C. 17; Rhondda's Claim, [1922] 2 A. C. 339.

SECT. 8.—PRACTICE WITH REGARD TO DECISIONS IN COURT BELOW.

A. In General.

121. Where decision clearly right — Though Lords' decision on different grounds—House will not remit.]—Where a decision is clearly right, the House of Lords will not remit, merely because the ground of decision below has been different from the ground of its own decision.—YOUNG & CO. *v.* LEVEN (1816), 4 Dow, 138; 3 E. R. 1116, H. L.

122. Decision not reversed — For inaccurate form of issue merely—Non-direction or misdirection not misleading jury.]—(1) Where the real justice of a case between the parties has been tried, the House of Lords will not upset the proceedings because the form of the issue is inaccurate.

(2) In the case of a non-direction & no misdirection, where the jury have not been misled, the House of Lords will not entertain an objection to the judge's charge.—MACFARLANE *v.* TAYLOR (1868), L. R. 1 Sc. & Div. 245; 18 L. T. 214, H. L.

Sect. 2.—*Appellate jurisdiction: Sub-sect.* 8, *A. & B.; sub-sects.* 9 *&* 10.]

123. —— When judges unanimous below—Unless decision on erroneous principles.]—In matters of practice where the judges of the ct. below have been unanimous, the House never varies their decision unless perfectly satisfied that it is founded on erroneous principles.—COWAN *v.* BUCCLEUCH (DUKE) (1876), 2 App. Cas. 344, H. L.

Annotation:—**Mentd.** Sadler *v.* G. W. Ry., [1896] A. C. 450.

124. Exercise of discretion by Court of Appeal—Confirming opinion of judge of first instance—Revision only in exceptional cases.]—It is only in exceptional cases that the House of Lords will entertain the revisal of a discretion exercised by the Ct. of Appeal confirming the opinion of the judge of first instance.—KENT COAL CONCESSIONS, LTD. *v.* DUGUID, [1910] A. C. 452; 79 L. J. K. B. 872; 103 L. T. 89; 26 T. L. R. 571 54 Sol. Jo. 634, H. L.

Annotation:—**Mentd.** British Assocn. of Glass Bottle Manufacturers *v.* Nettlefold, [1912] 1 K. B. 369.

125. Award for salvage services—Made by court of first instance & confirmed by Court of Appeal—Not reviewed in absence of special circumstances—Award larger than Lords would have been.]—In the absence of exceptional or extraordinary circumstances the House will not interfere with the amount of an award for salvage services made by the ct. of first instance & confirmed by the Ct. of Appeal, even though the award be larger than their lordships would have granted if the question had come before them for assessment in the first instance.—GLENGYLE, HER CARGO & FREIGHT (OWNERS) *v.* NEPTUNE SALVAGE CO., THE GLENGYLE, [1898] A. C. 519; 67 L. J. P. 87; 78 L. T. 801; 14 T. L. R. 522; 8 Asp. M. L. C. 436, H. L.

126. Assessment of damages—Not admitting of precise calculation—Not reviewed.] — Resps. obtained against applts. an interdict restraining the latter in the working of their mines. Errors were made by both parties in respect of their rights, & the interdict was too wide in its terms. Applts. sustained damage by reason of this access. The interdict was, in effect, recalled by the House, & applts. brought their action for damages, & substantial damages were awarded. In the House larger damages were awarded, on the ground that the interdict continued to be operative for a longer time than the Lord Ordinary held it to be operative:—*Held:* the House could not interfere with an award of damages which did not admit of precise calculation, but was based upon a series of conjectures, the House not being in a position to deal with the detailed evidence which had been considered in the cts. below.—CLIPPENS OIL CO., LTD. *v.* EDINBURGH & DISTRICT WATER TRUSTEES, [1907] A. C. 291; 76 L. J. P. C. 79, H. L.

127. Decision on question of fact.]—The question of custom is undoubtedly a question of fact, but none the less it is a question of fact which it is quite right & proper for this House to review if there be reason to think that the learned judge who tried the action either misapprehended the evidence that was given, or that he misunderstood or misconstrued the correspondence which forms part of that evidence. I desire to make that statement lest it be thought that the House in a case of this kind would be prepared to avoid the necessity of investigation by the simple assertion that the matter was one of fact which had been determined by the learned judge who heard the witnesses. Excepting in cases where the of fact by certain tribunals are made final by statute, there is no reason why questions of fact should not be reviewed by this House, just as questions of law are, subject to this, that where the question of fact depends upon determining as to which, between two groups of witnesses, are to be believed in their oral evidence, in the absence of special & unusual circumstances their lordships would greatly hesitate before they interfered with the finding of the learned judge who had the opportunity of seeing & hearing the witnesses by whom the evidence was given (LORD BUCKMASTER, C.).—STRATHLORNE S.S. CO. *v.* BAIRD & SONS, [1916] S. C. 134, H. L.

From Scottish courts.]—*See* Nos. 11–14, *ante.*

B. Concurrent Findings of Fact.

128. Whether House will review — Erroneous finding clearly shown.]—This House will not disturb a mere finding of fact in which both the cts. below have concurred, unless it can be clearly shown that the finding was erroneous.—P. CALAND & FREIGHT (OWNERS) *v.* GLAMORGAN S.S. CO., LTD., THE P. CALAND, [1893] A. C. 207; 62 L. J. P. 41; 68 L. T. 469; 9 T. L. R. 309; 7 Asp. M. L. C. 317; 1 R. 138, H. L.

Annotations:—**Apld.** McIntyre *v.* McGavin, [1893] A. C. 268. **Expld.** Montgomerie *v.* Wallace-Jones, [1904] A. C. 73. **Distd.** Hatfield (Owners) *v.* Glasgow (Owners), The Glasgow (1914), 84 L. J. P. 161. **Apld.** S.S. Mendip Range *v.* Radcliffe, [1921] 1 A. C. 556. **Foll'd.** Willmot *v.* Anglo-American Oil Co. (1923), 67 Sol. Jo. 678. **Refd.** Johnston *v.* O'Neill, [1911] A. C. 552; Cooper *v.* General Accident, Fire & Life Insce. (1923), 92 L. J. P. C. 168. **Mentd.** The Calyx (1910), 27 T. L. R. 166.

129. —— ——.]—There is nothing to show that the learned judges below have so distinctly erred as to justify your Lordships in saying that the concurrent finding of these two cts. ought not to stand (LORD HERSCHELL, C.).—MCINTYRE BROTHERS *v.* MCGAVIN, [1893] A. C. 268; 69 L. T. 389; 57 J. P. 548; 1 R. 246, H. L.

Annotation:—**Mentd.** Hulley *v.* Silversprings Bleaching & Dyeing Co., [1922] 2 Ch. 268.

130. —— ——.]—The House of Lords will refuse to disturb a mere finding of fact, in which the cts. below have concurred, unless it is clearly demonstrated that the finding was erroneous.—WILLMOT *v.* ANGLO-AMERICAN OIL CO. (1923), 67 Sol. Jo. 678, H. L.

131. —— No law or settled practice.]—There is no law or settled practice of this House to prevent it from differing even from two concurrent judgments of fact, & this House cannot decline the duty of formally expressing its own judgment.—MONTGOMERIE & CO., LTD. *v.* WALLACE-JAMES, [1904] A. C. 73; 73 L. J. P. C. 25; 90 L. T. 1, H. L.

Annotations:—**Consd.** Dominion Trust Co. *v.* New York Life Insce., [1919] A. C. 254; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. **Mentd.** Greville *v.* Parker, [1910] A. C. 335.

132. —— Additional evidence in Court of Appeal—Further evidence in House of Lords.]—Where there have been concurrent findings of fact in the cts. below the House of Lords will not, in ordinary cases, review those findings. But in a case in which additional evidence, which had not been before the ct. of first instance, & tended to show that the witnesses on both sides were mistaken as to a material fact, was admitted in the Ct. of Appeal, &, after the hearing in the Ct. of Appeal, the parties agreed that certain other evidence which had been before that Ct. was inaccurate in some particulars, the House of Lords allowed the whole case to be re-opened.—OLYMPIC (OWNERS) *v.* BLUNT, OLYMPIC (OWNERS) *v.* ADMIRALTY

COMRS., THE OLYMPIC, [1915] A. C. 385; 112 L. T. 49; 31 T. L. R. 54; 12 Asp. M. L. C. 580; *sub nom.* THE OLYMPIC & THE HAWKE, 84 L. J. P. 49, H. L.

Annotation:—**Mentd.** S.S. Orduna *v.* Shipping Controller, [1921] 1 A. C. 250.

133. —— Tolerably clear evidence that finding erroneous—Finding based on consideration of probability.]—The rule that concurrent findings should not be disturbed on appeal does not apply where on appeal there is tolerably clear evidence which satisfies the ct. that the findings are erroneous, & the principle is especially applicable to a case in which the conclusion sought to be set aside rests upon the consideration of probability.—HATFIELD (OWNERS) *v.* GLASGOW (OWNERS), THE GLASGOW (1914), 84 L. J. P. 161; 112 L. T. 703; 13 Asp. M. L. C. 33, H. L.

134. —— In absence of misdirection.]—Resps., who had chartered a vessel from applts., the owners, to carry a cargo of grain, obtained judgment against applts. for damages for refusing to permit the vessel to go to Amsterdam, the port nominated by resps. under the charter. Applts. appealed to the Ct. of Appeal, which reserved judgment. Before the Ct. of Appeal delivered judgment the Courts (Emergency Powers) Act, 1917, came into operation, but applts. did not bring the Act to the notice of the Ct. of Appeal & that Ct. dismissed the appeal. Sect. 3 of the Act provides that compliance with a direction given by a Govt. department in the national interest shall be a good defence to an action for non-fulfilment of a contract where the non-fulfilment is due to such compliance. On appeal to the House of Lords applts. applied to be allowed to raise a defence under the sect.:—*Held:* as applts. had not brought the Act to the attention of the Ct. of Appeal they ought not in the circumstances to be allowed to rely on the Act, & on the merits the appeal failed.—STRATH S.S. CO., LTD. *v.* HARDY (1919), 35 T. L. R. 336, H. L.

135. ——.]—In an action arising out of a collision between a merchant ship & one of His Majesty's cruisers, which was disabled & had exhibited the "not under command" signal, the owners of the merchant ship claimed damages against the officer in charge of the cruiser for negligent navigation.

ROCHE, J., & the Ct. of Appeal were of opinion on the evidence that the cruiser was out of command & that deft. was not guilty of negligence in the navigation of his ship in her disabled condition, but the Ct. of Appeal differed to some extent from ROCHE, J., on one subsidiary question of fact:—*Held:* there having been concurrent findings of fact substantially on the same grounds by the cts. below, their decisions ought not to be disturbed.—MENDIP RANGE STEAMSHIP *v.* RADCLIFFE, [1921] 1 A. C. 556; 90 L. J. P. 209; 124 L. T. 706; 37 T. L. R. 474; 15 Asp. M. L. C. 242, H. L.

SUB-SECT. 9.—DELIVERY OF OPINIONS—JUDGMENT.

136. Death of Lord of Appeal—After preparation but before delivery of judgment—Judgment read by other lord.]—GALLOWAY *v.* CRAIG (1861), 4 Macq. 267, H. L.

Annotation:—**Folld.** Lord Advocate *v.* Wemyss, [1900] A. C. 48.

137. —— —— ——.]—LORD ADVOCATE *v.* WEMYSS, [1900] A. C. 48, H. L.

Annotations:—**Mentd.** Parker *v.* Lord Advocate, [1904] A. C. 373, n.; Secretary of State for India *v.* Sri Rajah Chelikani Rama Rao (1916), 85 L. J. P. C. 222; The Fagernes, [1926] P. 185.

After hearing evidence but before preparing judgment—Appeal reargued by one counsel on each side.]—RUABON S.S. CO. *v.* LONDON ASSURANCE, [1900] A. C. 6; 69 L. J. Q. B. 86; 81 L. T. 585; 48 W. R. 225; 16 T. L. R. 90; 44 Sol. Jo. 116; 9 Asp. M. L. C. 2; 5 Com. Cas. 71, H. L.

Annotations:—**Mentd.** The Acanthus, [1902] P. 17; The Haversham Grange, [1905] P. 307; Pyman S.S. Co. *v.* Admiralty Comrs., [1918] 1 K. B. 480: Admiralty Comrs. *v.* S.S. Chekiang, [1926] A. C. 637.

139. Judgment of one lord not read by misadventure—Handed in & put on record.]—LLOYD *v.* POWELL DUFFRYN STEAM COAL CO., LTD., as reported in [1914] A. C. at p. 749, n., H. L.

Annotation:—**Mentd.** *Re* Wright, Hegan *v.* Bloor, [1920] 1 Ch. 108.

140. Whether lord hearing arguments must give decision.]—*Qu.*: whether there is any rule requiring a Member of the House, who has heard the arguments in a case, to take part in the decision.—DI SORA (DUCHESS) *v.* PHILLIPPS (1863), 10 H. L. Cas. 624; 2 New Rep. 553; 33 L. J. Ch. 129; 11 E. R. 1168, H. L.

Annotations:—**Mentd.** Stearine Kaarsen Fabrick Gonda Co. *v.* Heintzmann (1864), 17 C. B. N. S. 56; U.S.A. *v.* McRae (1867), 3 Ch. App. 79; Pickering *v.* Stephenson (1872), L. R. 14 Eq. 322; Copin *v.* Adamson, Copin *v.* Strachan (1874), 31 L. T. 242; Great Western (Forest of Dean) Collieries Co. *v.* Trafalgar Colliery Co. (1887), 3 T. L. R. 724; *Re* Harman, Lloyd *v.* Tardy, [1894] 3 Ch. 607; Russian Commercial & Industrial Bank *v.* Comptoir D'Escompte de Mulhouse, [1923] 2 K. B. 630.

141. Question put to House.]—In cases of appeal to the House of Lords there are always two motions before the House: one, that the judgment under appeal be reversed; the other, that the judgment under appeal be affirmed, & the appeal dismissed with costs. When the votes are equal upon the first motion, the motion is lost. The second motion is not put, as it is assumed that it would be lost also. The judgment appealed from is therefore affirmed, but no costs are given.—PRYCE *v.* MONMOUTHSHIRE CANAL & RAILWAY COS. (1879), 4 App. Cas. 197; 49 L. J. Q. B. 130; 40 L. T. 630; 43 J. P. 524, H. L.

Annotations:—**Mentd.** G. W. Ry. *v.* Ry. Comrs. (1881), 7 Q. B. D. 182; Tennant *v.* Swansea Harbour Trustees (1886), 3 T. L. R. 128; R. *v.* Ry. Comrs. & Distington Iron Co. (1889), 22 Q. B. D. 642; McDougall & Bonthron *v.* London & India Docks Co., Page & East *v.* London & India Docks Co., [1908] 2 K. B. 175.

142. ——.]—CARR *v.* RENDER (HENRY), LTD. (1883), 115 Lords Journals, 461, H. L.

143. Where voting equal—Judgment affirmed.] On appeal to this House the Lords were equally divided, & so the decision of the Appeal Ct. stood affirmed.—PRUDENTIAL ASSURANCE CO. *v.* EDMONDS (1877), 2 App. Cas. 487, H. L.

144. —— ——.]—PRYCE *v.* MONMOUTHSHIRE CANAL & RAILWAY COS., No. 141, *ante*.

145. —— ——.]—CARR *v.* RENDER (HENRY), LTD. (1883), 115 Lords Journals, 461, H. L.

146. —— ——.]—PAQUIN, LTD. *v.* BEAUCLERK, [1906] A. C. 148; 75 L. J. K. B. 395; 94 L. T. 350; 54 W. R. 521; 22 T. L. R. 395; 50 Sol. Jo. 358, H. L.

Annotations:—**Refd.** Skeate *v.* Slaters, [1914] 2 K. B. 429 **Mentd.** Cooke *v.* Wilson (1915), 85 L. J. K. B. 888; Lea Bridge District Gas Co. *v.* Malvern, [1917] 1 K. B. 803; Winterbotham, Gurney *v.* Sibthorp & Cox, [1918] 1 K. B. 625.

Authority of dicta.]—*See* JUDGMENTS, Vol XXX., p. 184, Nos. 518–522.

SUB-SECT. 10.—ENTRY OF JUDGMENT IN LOWER COURT.

147. Order of Court of Appeal reversed—Application to court of first instance to enter order

Sect. 2.—Appellate jurisdiction: Sub-sects. 10 & 11, A., B., C., D. & E.; sub-sect. 12, A.]

of Lords.]—An application to have an order of the House of Lords reversing a decision of the Ct. of Appeal made an order of the Ct. of Ch. should be made to the ct. of first instance where the decree appealed from was originally made.—BRITISH DYNAMITE CO. *v.* KREBS (1879), 11 Ch. D. 448; 48 L. J. Ch. 800; 40 L. T. 514; 27 W. R. 575.

148. —— Appeal from Divorce Court.]—On appeal to the House of Lords in a petition for nullity of marriage, the House reversed the decree of the Divorce Ct. by annulling the marriage, & remitted the case to that ct., but made no order as to costs. The Divorce Ct. ordered the judgment of the Lords to be entered on its records, but held that it had no power to order petitioner her costs incurred in the ct. below, as the House of Lords had exercised its discretion by making no order on the subject.—L. (FALSELY CALLED H.) *v.* H. (1866), L. R. 1 P. & D. 293; 36 L. J. P. & M. 76; 15 W. R. 319.

149. Appeal under Workmen's Compensation Act, 1906 (c. 58).]—HODGSON *v.* WEST STANLEY COLLIERY CO. (OWNERS) (1910), 3 B. W. C. C. 392, C. A.

SUB-SECT. 11.—COSTS.

A. In General.

150. Objection to competency of appeal not taken before appeal committee—Objection in its nature fatal—Appeal dismissed without costs.]—ROCHFORT *v.* BATTERSBY, No. 66, *ante*.

151. When given out of estate—Where matter might have required to be tried as question of fact—Not upon mere miscarriage in court below.]—(1) The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the ct. below, where the subject of litigation, though in the result decided by the ct., was one which might have required to be tried as a question of fact.

(2) The House strongly condemned the custom of each party printing an appendix to his case, & desired that, in future, a joint appendix might alone be printed.—PIERS *v.* PIERS (1849), 2 H. L. Cas. 331; 13 L. T. O. S. 41; 13 Jur. 569; 9 E. R. 1118, H. L.

Annotations:—Generally, **Mentd.** Sichel *v.* Lambert (1864), 15 C. B. N. S. 781; De Thoren *v.* A.-G. (1876), 1 App. Cas. 686; Collins *v.* Bishop (1878), 48 L. J. Ch. 31; Aronegary *v.* Sambonado (1881), 50 L. J. P. C. 28; Fox *v.* Bearblock (1881), 44 L. T. 508; Sastry Velaider Aronegary *v.* Sembecutty Vaigalie (1881), 6 App. Cas. 364; Lauderdale Peerage (1885), 10 App. Cas. 692; Andrewes *v.* Uthwatt (1886), 2 T. L. R. 895; *Re* Duvall, Duvall *v.* Craddock (1892), 36 Sol. Jo. 398; *Re* Shephard, George *v.* Thyer, [1904] 1 Ch. 456; Goldstone *v.* Goldstone (1922), 127 L. T. 32.

152. —— Plaintiff disclosing reasonable case—Important & debatable issue.]—It has long been a wholesome rule in litigation of this class [construction of settlements] that pltf. disclosing a reasonable case may invoke the assistance of the ct. without being personally involved in liability for damages if he fail. It has been thought reasonable in such cases that the cost of resolving a reasonable doubt should be borne by the estate. But it has been equally held that if pltf. being defeated in the ct. below, chooses to carry his quarrel further, & fails in the appellate ct., he must himself support the expenses of an adventure pronounced by the result to be rash. To this salutary rule one exception may, I think, be admitted. If the course of appeal in the appellate cts. discloses a difference of judicial opinion so clear & so persistent as to make it plain that there was in fact a legal issue to be debated both important & debatable, the indulgence may, in my opinion, be extended (LORD BIRKENHEAD, C.).—BOYCE *v.* WASBROUGH, [1922] 1 A. C. 425; 91 L. J. Ch. 369; 38 T. L. R. 483, H. L.

153. No set-off allowed.]—R. S. C., Ord. 65, r. 14, by which set-off for damages or costs is allowed, notwithstanding the solr.'s lien, in the particular cause in which the set-off is sought, does not apply to the House of Lords, & the Appeal Committee, after final judgment in the appeal, will not set off costs due by applt. in the House of Lords against costs due to applt. in the Ct. of Appeal.—RUSSELL *v.* RUSSELL, [1898] A. C. 307; 67 L. J. P. 69, H. L.

154. Where Crown a party—No costs for or against—Unless case governed by local statute—Or exceptional circumstances exist.]—The Judicial Committee will henceforth adhere to the practice of the House of Lords, under which the Crown neither pays nor receives costs, unless the case is governed by some local statute or there are exceptional circumstances to justify a departure from the ordinary rule.—JOHNSON *v.* R., [1904] A. C. 817; 73 L. J. P. C. 113; 91 L. T. 234; 53 W. R. 207; 20 T. L. R. 697, P. C.

Annotations:—**Apld.** Vaithinatha Pillai *v.* King-Emperor (1913), 29 T. L. R. 709; The Zamora, [1916] 2 A. C. 77. **Refd.** A.-G. *v.* Till (1909), 5 Tax Cas. 440; *Re* Carbonit Akt. & Schmidt (1924), 93 L. J. Ch. 309; *Re* Letters Patent No. 139207, *Re* Carbonit Akt., [1924] 2 Ch. 53.

155. —— 22 & 23 Vict. c. 21, s. 21.]—A.-G. *v.* TILL, [1910] A. C. 50; 79 L. J. K. B. 141; 101 L. T. 819; 54 Sol. Jo. 132; 5 Tax Cas. 440, H. L.

Annotation:—**Refd.** Edinburgh Life Assce. *v.* Lord Advocate, [1910] A. C. 143.

——.]—*See, generally,* CONSTITUTIONAL LAW, Vol. XI., pp. 530-535, Nos. 341-378.

B. Judgment Affirmed.

156. Costs follow affirmance.]—*Semble:* if two cts. have been of the same opinion on any point, & their judgments are appealed from & affirmed, the House of Lords will give costs on the affirmance.—DUVERGIER *v.* FELLOWES (1832), 1 Cl. & Fin. 39; 6 Bli. N. S. 87; 6 E. R. 831, H. L.

Annotations:—**Refd.** Solarte *v.* Palmer (1834), 2 Cl. & Fin. 93. **Mentd.** Blundell *v.* Winsor (1837), 8 Sim. 601; London Grand Junction Ry. *v.* Freeman (1841), 2 Man. & G. 606; Garrard *v.* Hardey (1843), 5 Man. & G. 471; Harrison *v.* Heathorn (1843), 6 Man. & G. 81; Sheppard *v.* Oxenford (1855), 1 K. & J. 491; *Re* Mexican & South American Co., *Re* Aston (1859), 27 Beav. 474.

157. ——.]—This House will, as a general rule, make the costs of an appeal follow the affirmance of the judgment of the ct. below.—STEWART *v.* MENZIES (1841), 8 Cl. & Fin. 309; 8 E. R. 121, H. L.

158. ——.]—BEGG *v.* BEGG (1890), 15 App. Cas. 170, H. L.

Interest on judgments.]—*See* JUDGMENTS, Vol. XXX., p. 179, Nos. 478-480.

C. Judgment Reversed.

159. Whether costs given to appellant.]—Where the judgment of the ct. below is reversed in this House, & the House pronounces the judgment which ought to have been pronounced in the ct. below, the effect of such judgment, is to give to applt. the costs of the suit in the ct. below,

b. *No costs from commencement of action—Jurisdiction of House to order.*]—ROBINSON *v.* NATIONAL BANK OF SCOTLAND, LTD., [1916] S. C. 46.—SCOT.

which he would have had there had the proper judgment been pronounced in the first instance in that ct.

You never give costs against a party coming to defend & sustain a decree in his favour; therefore applt. never gets his costs here; but in this case we are putting ourselves in the place of the ct. below & giving those costs which the party ought to have had there (LORD BROUGHAM).—MACKERSY *v.* RAMSAYS, BONARS & CO. (1843), 9 Cl. & Fin. 818; 8 E. R. 628, H. L.

Annotations:—**N.F.** West Ham Union Grdns. *v.* St. Matthew, Bethnal Green, [1896] A. C. 477. **Mentd.** Beatie *v.* Carmichael (1857), 29 L. T. O. S. 228; Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325; Meyerstein *v.* Eastern Agency Co. (1885), 1 T. L. R. 595.

160. ——.]—WEST HAM UNION GUARDIANS *v.* ST. MATTHEW, BETHNAL GREEN (CHURCHWARDENS, ETC.), [1894] A. C. 230, 242, n.; 63 L. J. M. C. 97; 70 L. T. 818; 58 J. P. 493; 42 W. R. 573; 10 T. L. R. 375; 6 R. 111, H. L.

Annotations:—**Mentd.** St. Olaves Union Grdns. *v.* Canterbury Union Grdns., [1897] 1 Q. B. 438; Fulham Parish *v.* Woolwich Union, [1907] A. C. 255; Hampstead Grdns. *v.* West Ham Union (1909), 73 J. P. 492; Braintree Union *v.* Rochford Union (1911), 81 L. J. K. B. 251; Paddington Union *v.* Westminster Union, [1915] 2 K. B. 644; Wycombe Grdns. *v.* Barton-upon-Irwell Grdns. (1926), 43 T. L. R. 89.

161. —— **Costs of immaterial inquiries made under reversed decree.**]—The House, in reversing a decree which directed immaterial inquiries, & ordering the bill to be dismissed, as at the hearing, with costs, will not give applt. relief from his costs of prosecuting the inquiries before he appealed.—SIREE *v.* KIRWAN (1843), 9 Cl. & Fin. 716; 8 E. R. 588, H. L.

162. Repayment of costs under reversed order.] An order, made on an application with reference to the taxation of costs, granted leave to appeal, & reserved the costs of the litigation for the Ct. of Appeal:—*Held:* the costs thus reserved ought to be dealt with in the same manner as the costs of the appeal, & the judgment of the Ct. of Appeal being reversed in this House, resp. was ordered to repay the costs which he had received under the order now reversed.—GARNETT *v.* BRADLEY (1878), 3 App. Cas. 944; 48 L. J. Q. B. 186; 39 L. T. 261; 43 J. P. 20; 26 W. R. 698, H. L.; *revsg.* (1877), 2 Ex. D. 349, C. A.

Annotations:—**Refd.** Bowey *v.* Bell, Brooks *v.* Israel, North *v.* Bilton, Siddons *v.* Lawrence (1878), 4 Q. B. D. 95; King *v.* Hawksworth (1879), 48 L. J. Q. B. 484; *Re* Knight's Will (1884), 26 Ch. D. 82; Rockett *v.* Clippingdale, [1891] 2 Q. B. 293; *Re* Fisher (1894), 63 L. J. Ch. 235; The Diagoman (1895), 11 T. L. R. 428; R. *v.* London JJ., [1895] 1 Q. B. 616. **Mentd.** Clarke *v.* Roche (1877), 36 L. T. 727; Monmouth Corpn. & Monmouth (Churchwardens & Overseers, etc.) (1878), 38 L. T. 612; *Ex p.* Mercers' Co. (1879), 10 Ch. D. 481; Barton *v.* Titmarsh (1880), 49 L. J. Q. B. 573; The Ganges (1880), 5 P. D. 247; Marsden *v.* L. & Y. Ry. (1880), 42 L. T. 630; Myers *v.* Defries (1880), 5 Ex. D. 180; Pellas *v.* Neptune Marine Insce. (1880), 28 W. R. 405; Tenant *v.* Ellis (1880), 6 Q. B. D. 46; *Re* Morris, *Ex p.* Streeter (1881), 19 Ch. D. 216; Turner *v.* Bridgett (1882), 51 L. J. Q. B. 377; Bradlaugh *v.* Clarke (1883), 8 App. Cas. 354; Hasker *v.* Wood (1885), 54 L. J. Q. B. 419; Parnell *v.* Mort, Liddell (1885), 33 W. R. 481; Snelling *v.* Pulling (1885), 52 L. T. 335; *Re* Mills' Estate, *Ex p.* Works & Public Buildings Comrs. (1886), 34 Ch. D. 24; Stokes *v.* Stokes (1887), 19 Q. B. D. 419; *Re* Williams, Jones *v.* Williams (1887), 36 Ch. D. 573; *Re* Jones (1889), 59 L. J. Ch. 157; Goldhill *v.* Clarke (1892), 68 L. T. 414; R. *v.* L. C. C. JJ., [1894] 1 Q. B. 435; Sion College *v.* London Corpn., [1900] 2 Q. B. 581; R. *v.* Speyer, [1916] 2 K. B. 858; Banbury *v.* Bank of Montreal, [1918] A. C. 626; Reid, Hewitt *v.* Joseph, [1918] A. C. 717.

Interest on judgments & orders.]—*See* JUDGMENTS, Vol. XXX., p. 180, Nos. 487, 488.

D. Judgment Varied.

163. Appellant pays costs—Decree varied in point of form.]—*Semble*, on an appeal for such a cause, the House might affirm the decree in all other respects, but vary it on the point of form, & make applt. pay the costs.—WATERS *v.* GROOM (1844), 11 Cl. & Fin. 684; 8 E. R. 1262, H. L.

164. —— **Decree varied on point not raised below or ground of appeal.**]—When a decree is varied by the House, only on a point which was not raised in the ct. below, nor made a ground of appeal, applt. must pay the costs of the appeal.—WALLACE *v.* PATTON (1846), 12 Cl. & Fin. 491; 8 E. R. 1501, H. L.

Annotation:—**Mentd.** Galbraith *v.* Cooper (1860), 8 H. L. Cas. 316.

Person Suing in forma pauperis.

See Standing Orders of the House of Lords (Judicial Proceedings), 1926, No. X.

165. Counsel's fees disallowed—Solicitor's costs limited to out of pocket & reasonable office expenses.]—On the taxation of a pauper applt.'s costs on a successful appeal in this House, the fees of this House & the fees of counsel are to be disallowed, & the solr. is to have his costs out of pocket with a reasonable allowance to cover office expenses, including clerks, etc.—JOHNSON *v.* LINDSAY & CO., [1892] A. C. 110.

Annotations:—**Consd.** *Re* Raphael, *Ex p.* Salomon, [1899] 1 Ch. 853. **Refd.** Richardson *v.* Richardson, [1895] P. 276; Landi *v.* Carl Rosa Opera Co., [1919] W. N. 273.

166. —— ——.]—The rule as to the taxation of the costs of a successful pauper applt. in the House of Lords, whereby the fees of counsel are disallowed & the solr.'s costs are limited to costs out of pocket, with a reasonable allowance for office expenses, applies to Scottish appeals.—M'ALINDEN *v.* NIMMO (J.) & CO., LTD., [1920] A. C. 39; 88 L. J. P. C. 131; 121 L. T. 585; 63 Sol. Jo. 722; 12 B. W. C. C. 293, H. L.

Annotation:—**Mentd.** Portland Colliery Co. *v.* Murray, Watson *v.* Quinn, Dixon *v.* Madden, [1923] A. C. 566.

167. —— —— **Litigant's ultimate liability not affected.**]—Where a solr. had been retained by, & acted for a successful pauper applt., since deceased, in the House of Lords, but in accordance with the practice in the House of Lords as laid down in *Johnson* v. *Lindsay & Co.*, No. 165, *ante*, resp. in the House of Lords was not liable for party & party costs:—*Held:* on an application by the solr. against the estate of his deceased client for taxation of the costs of the appeal to the House of Lords, the solr. was entitled to recover from the client's estate the ordinary costs which a solr. is entitled to charge, viz., costs to be taxed as between solr. & client.—*Re* RAPHAEL, *Ex p.* SALOMON, [1899] 1 Ch. 853; 68 L. J. Ch. 309; 80 L. T. 226; 47 W. R. 330; 43 Sol. Jo. 299; *revsd.* on other grounds, 68 L. J. Ch. 765, C. A.

See, also, Sect. 2, sub-sect. 3, *ante*.

SUB-SECT. 12.—JURISDICTION TO REVIEW OWN ORDER.

A. Alteration of Previous Order.

168. Lords may vary own order.]—RAVENSCROFT *v.* LANTHALL (1616), 1 Moo. P. C. C. 133, n.; 12 Lords Journals, 211; 12 E. R. 763, H. L.

169. ——.]—CHUTE *v.* DACRES (LADY) (1680), 1 Moo. P. C. C. 133, n.; 13 Lords Journals, 709; 12 E. R. 763, H. L.

170. ——.]—COKE *v.* COBB (1689), 1 Moo. P. C. C. 133, n.; 14 Lords Journals, 375; 12 E. R. 763, H. L.

-.]—ASHFIELD *v.* ASHFIELD (1689), 1 Moo. P. C. C. 133, n.; 14 Lords Journals, 395; 12 E. R. 763, H. L.

Sect. 2.—*Appellate jurisdiction: Sub-sect.* 12, *A. & B.; sub-sect.* 13. *Sect.* 3: *Sub-sects.* 1 & 2, *A. & B. Part III. Sect.* 1: *Sub-sect.* 1.]

172. ——.]—FOUNTAIN *v.* COKE (1690), 1 Moo. P. C. C. 133, n.; 14 Lords Journals, 473; 12 E. R. 763, H. L.

173. ——.]—BOVEY *v.* SMITH (1692), 1 Moo. P. C. C. 133, n.; 15 Lords Journals, 285; 12 E. R. 763, H. L.

174. ——.]—DAVY *v.* COURTNEY (1692), 1 Moo. P. C. C. 133, n.; 15 Lords Journals, 178; 12 E. R. 763, H. L.

175. ——.]—OUNDLE (INHABITANTS) *v.* BARTON (1692), 15 Lords Journals, 224, H. L.

Annotation:—**Consd.** Rajunder Narain Rae *v.* Bijai Govind Sing (1839), 2 Moo. Ind. App. 181.

176. ——.]—ASHETON *v.* ASHETON (1694), 1 Moo. P. C. C. 133, n.; 15 Lords Journals, 457; 12 E. R. 764, H. L.

177. ——.]—STEPHENS *v.* CASTLE (1695), 1 Moo. P. C. C. 133, n.; 15 Lords Journals, 625; 12 E. R. 763, H. L.

178. ——.]—LLOYD *v.* CAREW (1697), 1 Moo. P. C. C. 133, n.; 16 Lords Journals, 246; 1 Com. 20; 12 E. R. 763, H. L.

179. ——.]—WARNER *v.* JACKSON (1699), 1 Moo. P. C. C. 133, n.; 16 Lords Journals, 520; 12 E. R. 763, H. L.

180. ——.]—TILEY *v.* WHARTON (1701), 1 Moo. P. C. C. 133, n.; 16 Lords Journals, 731; 12 E. R. 763, H. L.

181. ——.]—FALKLAND (LADY) *v.* CHENEY (LORD) (1704), 1 Moo. P. C. C. 133, n.; 17 Lords Journals, 681; 5 Bro. Parl. Cas. 476; 12 E. R. 763, H. L.

182. ——.]—BUCK *v.* RAWLINSON (1704), 17 Lords Journals, 661; *sub nom.* BIRCH *v.* RAWLINSON, 1 Moo. P. C. C. 133, n.; 12 E. R. 763, H. L.

183. ——.]—CALTHROP *v.* MAY (1712), 19 Lords Journals, 435, H. L.

Annotation:—**Refd.** Rajunder Narain Rae *v.* Bijai Govind Sing (1839), 2 Moo. Ind. App. 181.

184. ——.]—MORGAN *v.* JONES (1785), 1 Moo. P. C. C. 133, n.; 37 Lords Journals, 344; 1 Bro. Parl. Cas. 32; 12 E. R. 763, H. L.

185. ——.]—KELLY *v.* WOODWARD (1805), 1 Moo. P. C. C. 133, n.; 45 Lords Journals, 200; 12 E. R. 764, H. L.

186. ——.]—HILL *v.* SPENCE (1808), 46 Lords Journals, 536, H. L.

Annotation:—**Refd.** Rajunder Narain Rae *v.* Bijai Govind Sing (1839), 2 Moo. Ind. App. 181.

187. ——.]—PAGE *v.* HAMILTON (1809), 47 Lords Journals, 322, H. L.

Annotation:—**Refd.** Rajunder Narain Rae *v.* Bijai Govind Sing (1839), 2 Moo. Ind. App. 181.

188. ——.]—SIBBALD *v.* HILL (1814), 1 Moo. P. C. C. 133, n.; 49 Lords Journals, 1106; 12 E. R. 764, H. L.

189. ——.]—ESSEX KER (LADY) *v.* WAUCHOPE (1819), 1 Moo. P. C. C. 133, n.; 52 Lords Journals, 335; 12 E. R. 764, H. L.

190. —— **Errors of subordinate kind.**]—Their lordships have carried their discretionary power of alteration no further than to rectify errors of a subordinate kind, &, in very particular circumstances, to indulge parties by keeping partial questions open, which the decree had concluded, without there having been any distinct intention of that kind on the part of the House (LORD BROUGHAM).—RAJUNDER NARAIN RAE *v.* BIJAI GOVIND SING (1836), 2 Moo. Ind. App. 181; 1 Moo. P. C. C. 117; 18 E. R. 269, P. C.

Annotations:—**Consd.** The Singapore, & The Hebe (1866), L. R. 1 P. C. 378. **Refd.** *Ex p.* Kisto Nauth Roy (1869), L. R. 2 P. C. 274; Venkata Narasimha Appa Row *v.* Court of Wards, Venkata Ramalakshmi Garu *v.* Gopala Appa Row, *Ex p.* Rajah Gopala Appa Row (1886), 11 App. Cas. 660. **Mentd.** Keerut Sing *v.* Koolahul Sing (1840), 2 Moo. Ind. App. 331.

B. Reversal of Previous Order.

191. Whether Lords will reverse own order.]—PETTIT *v.* HYDE (1667), 12 Lords Journals, 147; *sub nom.* PETET *v.* HYDE, 1 Moo. P. C. C. 133, n.; 12 E. R. 763, H. L.

192. ——.]—PITT *v.* PELHAM (1670), as reported in 12 Lords Journals, 392, 397; 1 Moo. P. C. C. 133, n.: 12 E. R. 763, H. L.

Annotations:—**Mentd.** Cook *v.* Fountain (1672), 3 Swan. 585; Roll *v.* Roll (1689), 2 Vern. 99; Bath & Mountague's Case (1693), 3 Cas. in Ch. 55; Clarke *v.* Smith (1698), 1 Lut. 793; Burgess *v.* Wheate (1759), 1 Eden, 177; Newton *v.* Bennet (1782), 1 Bro. C. C. 134; Marston *v.* Roe d. Fox (1838), 8 Ad. & El. 14.

193. ——.]—NEILDER *v.* KENDALL (1678), 13 Lords Journals, 234, n.: *sub nom.* HALLETT *v.* KENDALL, 1 Moo. P. C. C. 133, n.; 12 E. R. 763, H. L.

194. ——.]—The House of Lords will sometimes rehear its decree, where the object is to give effect to the decree, or to do something consistent with it, but never with a view of reversing it.—A.-G. *v.* WARD (1836), 1 My. & Cr. 449; Donnelly, 102; 6 L. J. Ch. 95; 40 E. R. 448, L. C.

Annotation:—**Refd.** Morgan *v.* Morgan (1851), 14 Beav. 72.

——.]—*See* JUDGMENTS, Vol. XXX., pp. 188–192, Nos. 563–599.

195. Judgment obtained by fraud—Procedure.]—To set aside a judgment had by fraud, the proper course, when such judgment has been confirmed by the House of Lords, is to apply to the House for direction. Hence it is wrong to ask the ct. below, upon proof of the fraud or collusion, to set aside a judgment confirmed by the House.—SHEDDEN *v.* PATRICK (1854), 1 Macq. 535; 23 L. T. O. S. 194, H. L.

Annotations:—**Refd.** R. *v.* Saddlers' Co. (1863), 10 H. L. Cas. 404. **Mentd.** *Re* Wright's Trust (1856), 2 K. & J. 595; Edwards *v.* Kilkenny & G. S. & W. Ry. (1857), 2 C. B. N. S. 397; *Re* Goodman's Trusts (1881), 17 Ch. D. 266; *Re* Grove, Vaucher *v.* Treasury Solicitor (1888), 40 Ch. D. 216.

SUB-SECT. 13.—HOW FAR PREVIOUS DECISIONS BINDING.

On House itself.]—*See* JUDGMENTS, Vol. XXX., pp. 188–190, Nos. 563–580.

On inferior courts.]—*See* JUDGMENTS, Vol. XXX., pp. 190–192, Nos. 581–599.

SECT. 3.—ORIGINAL JURISDICTION.

SUB-SECT. 1.—IN GENERAL.

Trial of a peer by his peers.]—*See* CRIMINAL LAW, Vol. XIV., pp. 125, 126, Nos. 956–985.

Jurisdiction in peerage claims.]—*See* PEERAGES & DIGNITIES.

Jurisdiction in claims of Scottish & Irish peers to vote at election of representative peers.]—*See* PEERAGES & DIGNITIES.

196. Original jurisdiction in civil case.]—SKINNER *v.* EAST INDIA CO. (1666), 6 State Tr. 709, H. L.

Annotations:—**Refd.** Mostyn *v.* Fabrigas (1774), 1 Cowp. 161; British South Africa Co. *v.* Companhia de Mocambique, [1893] A. C. 602.

SUB-SECT. 2.—IMPEACHMENT.

A. In General.

197. How proceedings instituted—By motion in Commons—Articles of impeachment sent to Lords.]—BLAIR'S CASE (1689), 12 State Tr. 1207, H. L.

198. —— —— Cannot be preferred originally in Lords.]—FOX'S (JUSTICE) CASE (1805), 45 Lords Journals, 181, 203, H. L.

199. Place of trial—House of Lords.]—MIDDLESEX (LORD TREASURER) CASE (1624), 2 State Tr. 1183, H. L.

200. Procedure at trial—Defendant not entitled to copies of indictment or depositions.]—MIDDLESEX (LORD TREASURER) CASE (1624), 2 State Tr. 1183, H. L.

201. —— ——.]—FITZHARRIS'S CASE (1681), 1 Vent. 354; 86 E. R. 228; *sub nom.* R. *v.* FITZHARRIS, 8 State Tr. 255.

Annotations:—**Mentd.** R. *v.* Layer (1722), 8 Mod. Rep. 82; Stockdale *v.* Hansard (1839), 9 Ad. & El. 1; Mansell *v.* R. (1857), Dears. & B. 375; Bradlaugh *v.* Gossett (1884), 50 L. T. 620.

202. —— Counsel allowed to defendant.]—MORDAUNT'S (LORD) CASE (1666), 6 State Tr. 785, H. L.

203. Right of defendant to bail by King's Bench—On prorogation or dissolution.]—A peer of the Realm committed by the House of Lords, on an impeachment carried up against him by the Commons, may, on the Session being prorogued, or the Parliament dissolved, be bailed by the Ct. of K. B., to appear at the Bar of the House of Lords on the first day of the ensuing Session, or meeting of Parliament.—R. *v.* DANBY (1683), 2 Show. 335; 89 E. R. 973; *sub nom.* DANBY'S (LORD) CASE, Skin. 56, 162; 11 State Tr. 600, H. L.

Annotations:—**Refd.** R. *v.* Paty (1704), 2 Ld. Raym. 1105; Anon. (1729), 1 Barn. K. B. 225.

204. Impeachment no bar to indictment for same crime.]—FITZHARRIS'S CASE (1681), 2 Show. 163; 89 E. R. 862; *sub nom.* R. *v.* FITZHARRIS, 8 State Tr. 326.

Annotations:—**Refd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1. **Mentd.** R. *v.* Layer (1722), 8 Mod. Rep. 82; Mansell *v.* R. (1857), Dears. & B. 375; Bradlaugh *v.* Gossett (1884), 50 L. T. 620.

205. Particular words supposed to be criminal—Need not be expressly specified in impeachment.]—R. *v.* SACHEVEREL (1710), 15 State Tr. 1, H. L.

Annotations:—**Refd.** R. *v.* Layer (1722), 8 Mod. Rep. 82; Cook *v.* Cox (1814), 3 M. & S. 110; R. *v.* Duffy (1849), 7 State Tr. N. S. 795; Bradlaugh *v.* R. (1878), 3 Q. B. 607.

206. Pardon under Great Seal cannot be pleaded—In answer to impeachment.]—The Act of Settlement, 1700 (c. 2), s. 3, which enacts that no pardon under the Great Seal shall be pleadable in bar to an impeachment by the Commons in Parliament, renders a pardon under the Great Seal wholly inoperative to prevent impeachment by the House of Commons, & so getting rid of the judgment of the House of Lords; for that purpose a subsequent pardon must be granted by the Crown.—R. *v.* BOYES (1861), 1 B. & S. 311; 30 L. J. Q. B. 301; 5 L. T. 147; 25 J. P. 789; 7 Jur. N. S. 1158; 9 W. R. 690; 9 Cox, C. C. 32; 121 E. R. 730.

Annotations:—**Refd.** *Re* Reynolds, *Ex p.* Reynolds (1882), 20 Ch. D. 294. **Mentd.** R. *v.* Hamilton, Kinglake & Lovibond (1870), 22 L. T. 316; Lamb *v.* Munster (1882), 10 Q. B. D. 110; *Re* Genese, *Ex p.* Gilbert (1886), 3 Morr. 223; Evans *v.* Evans & Blyth, [1904] P. 378; R. *v.* Christie, [1914] A. C. 545; R. *v.* Cohen (1914), 111 L. T. 77.

207. —— In subsequent application for habeas corpus.]—R. *v.* SALISBURY (EARL) (1690), 1 Show. 100; 89 E. R. 476; *sub nom.* SALISBURY'S (EARL) CASE, Carth. 131.

B. What Crimes Impeachable.

208. Bribery & corruption.]—BACON'S (LORD) CASE (1620), 2 State Tr. 1087.

209. Asserting right of Crown to raise money—Without authority of Parliament.]—MANWARING'S CASE (1628), 3 State Tr. 335.

210. Treason.]—NINE LORDS' CASE (1642), 4 State Tr. 175.

211. ——.]—DERWENTWATER'S (LORD) CASE (1716), 15 State Tr. 761.

Annotations:—**Mentd.** Jones *v.* Randall (1774), Lofft, 383; Egerton *v.* Brownlow (1853), 8 State Tr. N. S. 193.

212. Interfering with persons presenting petition to Parliament.]—GURNEY'S CASE (1642), 4 State Tr. 159.

213. Taking part in petitioning Parliament—Against act of both Houses.]—BENYON'S CASE (1642), 4 State Tr. 142.

Annotation:—**Mentd.** R. *v.* Knowles (1693), 12 Mod. Rep. 55.

214. Malicious prosecution.]—HERBERT'S CASE (1642), 4 State Tr. 119.

Part III.—The House of Commons.

SECT. 1.—MEMBERS.

SUB-SECT. 1.—IN GENERAL.

Number of members.]—*See* Redistribution of Seats Act, 1885 (c. 23); Representation of the People Act, 1918 (c. 64).

215. General duty of member—Representative—Not delegate.]—By our Constitution a representative is chosen by the vote of the majority, & however little the political views of the elected member coincide with those of the minority, they cannot complain. But that election is the election of a representative, &, whoever be chosen, there remains that he shall be a representative, & not one who has contractually fettered himself in discharge of the duty of representative which he has accepted as regards the public, & not only as regards his own supporters (FLETCHER-MOULTON, L.J.).

His [Member of Parliament's] primary duty is to his country, & he cannot bind himself at law by any promise in abnegation of such duty (FARWELL, L.J.).—OSBORNE *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS, [1909] 1 Ch. 163; 78 L. J. Ch. 204; 99 L. T. 945; 25 T. L. R. 107, C. A.; *on appeal, sub nom.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS *v.* OSBORNE, [1910] A. C. 87, H. L.

Annotations:—**Refd.** Gaskell *v.* Lancashire & Cheshire Miners' Federation (1912), 28 T. L. R. 518; Parr *v.* Lancashire & Cheshire Miners' Federation (1913), 108 L. T. 446; Kemp *v.* Glasgow Corpn., [1920] A. C. 836. **Mentd.** Russell *v.* Carpenters' & Joiners' Amalgamated Soc., [1910] 1 K. B. 506; Wilson *v.* Amalgamated Soc. of Engineers, [1911] 2 Ch. 324; Vacher *v.* London Soc. of Compositors, [1912] 3 K. B. 547; Kelly *v.* National Soc. of Operative Printers' Assistants (1915), 84 L. J. K. B. 2236; Carter *v.* United Soc. of Boilermakers (1916), 85 L. J. Ch. 289; Jenkin *v.* Pharmaceutical Soc. of Great Britain, [1921] 1 Ch. 392; *Re* Quinn & National Catholic Benefit & Thrift Soc.'s Arbitration, [1921] 2 Ch. 318.

216. Attendance at sitting—Not legally compellable.]—It is an error, I think, to suppose that there is now available any effective legal or parliamentary machinery to compel Members to attend the sitting of the House. . . . A Member may, no doubt, in justice to his constituents, be morally, though not legally, bound to attend the sitting of the House (LORD ATKINSON).—HOLLINSHEAD *v.* HAZLETON, [1916] 1 A. C. 428; 85 L. J.

Sect. 1.—*Members: Sub-sects.* 1 *&* 2, *A., B., C., D., E., F. & G.*]

P. C. 60; 114 L. T. 292; 32 T. L. R. 177; [1916] H. B. R. 85, H. L.

Annotation:—**Mentd.** Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173.

Election of member—Without consent—Duty to serve in Parliament.]—*See* ELECTIONS, Vol. XX., p. 116, No. 930.

——.]—*See* ELECTIONS, Vol. XX., pp. 7–119, 143–145, 149–181, Nos. 1–973, 1169–1195, 1261–1585.

217. Payment of member—By trade union.]—(1) It is not competent for a trade union to provide for the maintenance of Parliamentary representation by means of a compulsory levy on its members.

(2) He [Member of Parliament] is not entitled to bind himself to subordinate his opinions on public questions to others for wages or at the peril of pecuniary loss; & any contract entered into by him of this character will not be recognised by a ct. of law, either for its enforcement or in respect of its breach (LORD SHAW).—AMALGAMATED SOCIETY OF RAILWAY SERVANTS *v.* OSBORNE, [1910] A. C. 87; 79 L. J. Ch. 87; 101 L. T. 787; 26 T. L. R. 177; 54 Sol. Jo. 215, H. L.; *affg.* S. C. *sub nom.* OSBORNE *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS, [1909] 1 Ch. 163, C. A.

Annotations:—*As to* (1) **Refd.** Gaskell *v.* Lancashire & Cheshire Miners' Federation (1912), 28 T. L. R. 518; Parr *v.* Lancashire & Cheshire Miners' Federation (1913), 108 L. T. 446. *Generally*, **Refd.** Wilson *v.* Amalgamated Soc. of Engineers, [1911] 2 Ch. 324; Kemp *v.* Glasgow Corpn., [1920] A. C. 836. **Mentd.** Russell *v.* Carpenters' & Joiners' Amalgamated Soc., [1910] 1 K. B. 506; Vacher *v.* London Soc. of Compositors, [1912] 3 K. B. 547; Kelly *v.* National Soc. of Operative Printers' Assistants (1915), 84 L. J. K. B. 2236; Carter *v.* United Soc. of Boilermakers (1916), 85 L. J. Ch. 289; Jenkin *v.* Pharmaceutical Soc. of Great Britain, [1921] 1 Ch. 392; *Re* Quinn & National Catholic Benefit & Thrift Soc.'s Arbitration, [1921] 2 Ch. 318.

Appropriation of salary on bankruptcy.]—*See* BANKRUPTCY, Vol. V., p. 928, No. 7599.

Women qualified for membership.]—*See* Parliament (Qualification of Women) Act, 1918 (c. 47).

SUB-SECT. 2.—PERSONS DISQUALIFIED FOR MEMBERSHIP.

A. Aliens.

See ALIENS, Vol. II., p. 139, Nos. 137–140; & *generally*, British Nationality & Status of Aliens, Act, 1914 (c. 17).

B. Bankrupts.

See BANKRUPTCY, Vol. IV., p. 177, No. 1643; Vol. V., p. 1190, No. 9609.

C. Clergy.

English clergy & ministers of the Church of Scotland.]—*See* 41 Geo. 3, c. 63.

Welsh clergy.]—*See* 4 & 5 Geo. 5, c. 91, s. 2 (4).

Roman Catholic priests.]—*See* 10 Geo. 4, c. 7, s. 9.

D. Convicted Traitors or Felons.

See Forfeiture Act, 1870 (c. 23), s. 2.

E. Persons Guilty of Corrupt Practices at Elections.

See ELECTIONS, Vol. XX., pp. 143–145, Nos. 1169–1195.

F. Government Contractors.

See House of Commons (Disqualification) Acts, 1782 (c. 45), 1801, (c. 52), s. 4.

218. Contract must be executory—At time of election.]—To incapacitate a person from being elected as a Member of the House of Commons as executing, holding or enjoying a contract made for the public service within the meaning of House of Commons (Disqualification) Act, 1782 (c. 45), s. 1, such contract must, at the time of the election, be an executory one.

Where, therefore, under a contract for the supply of goods, the goods had been delivered to & accepted by the govt. before the election, & at the time of the election nothing remained to be done under the contract except for the govt. to pay the price which previously had become ascertained & was payable, the contractor was held not to be disqualified, inasmuch as, at the time of the election, the contract was executed, & was not within the statute.

House of Commons (Disqualification) Act, 1782 (c. 45), s. 1, applies only to cases where the person contracting with the govt. knew, or ought reasonably to have known, that he was so dealing with the govt.

Qu.: whether the Secretary of State for India is such an agent of the govt., that a contract with him in Council for the supply of goods for the Indian department is within the statute.—ROYSE *v.* BIRLEY (1869), L. R. 4 C. P. 296; *sub nom.* MANCHESTER ELECTION PETITION, ROYSE *v.* BIRLEY, 38 L. J. C. P. 203; 20 L. T. 786; 17 W. R. 827.

Annotations:—**Apld.** Tranton *v.* Astor (1917), 33 T. L. R. 383. **Refd.** *Re* Gloucester Municipal Petn., Ford *v.* Newth (1901), 84 L. T. 354; Cox *v.* Truscott (1905), 69 J. P. 174. **Mentd.** Kursell *v.* Timber Operators & Contractors (1926), 95 L. J. K. B. 569.

219. —— At time of sitting & voting.]—A simple order to insert a govt. advertisement in a particular issue of a newspaper is not a contract or agreement within the House of Commons (Disqualification) Act, 1782 (c. 45), & House of Commons (Disqualification) Act, 1801 (c. 52), & s. 2 of the former Act does not apply to contracts which have already been executed at the time of sitting & voting in the House.—TRANTON *v.* ASTOR (1917), 33 T. L. R. 383.

220. Contract assigned before election.] — *Re* DARTMOUTH BOROUGH ELECTION PETITION (1845), 1 Bar. & Arn. 455.

221. Contractor's knowledge of disability.]—ROYSE *v.* BIRLEY, No. 218, *ante*.

222. Contract with Secretary of State for India.]—ROYSE *v.* BIRLEY, No. 218, *ante*.

223. ——.]—A member of a firm holding a contract with the Secretary of State for India in Council is, under House of Commons (Disqualification) Acts, 1781 (c. 45) & 1801 (c. 106) disabled from sitting & voting in the House of Commons.—*Re* SAMUEL, [1913] A. C. 514; 82 L. J. P. C. 106; 108 L. T. 696; 29 T. L. R. 429 P. C.

Annotation:—**Refd.** Forbes *v.* Samuel, [1913] 3 K. B. 706.

224. —— Action for penalties.]—A member of the House of Commons was a partner in a firm which made a contract with the Secretary of State for India in Council for purchasing silver for the Indian currency:—*Held:* (1) he had thereby entered into a contract with a person or persons for or on account of the public service within House of Commons (Disqualification) Act, 1782

PART III. SECT. 1, SUB-SECT. 2.—D.

c. *Conviction essential—Mere indictment insufficient.*]—Where it was alleged that resp. to an election petition was disqualified as being under indictment for high treason & bound by recognisance to appear & take his

Held: resp. was duly elected. ROSS CASE (1853), 2 Pow. R. D. 188.—IR.

(c. 45), s. 1, & was therefore disabled for sitting & voting in the House of Commons.

Pltf., as a common informer, claimed penalties from deft. for having sat & voted in the House of Commons when incapacitated for so doing by reason of his interest in a govt. contract, contrary to the provisions of the House of Commons (Disqualification) Act, 1782 (c. 45). Two writs by other common informers against deft. for penalties for the same offence were issued prior to the writ in pltf.'s action :—*Held :* (2) it was not necessary for the maintenance of the action that pltf. should first have made oath under 21 Jac. 1, c. 4, that he believed in his conscience that the offence was committed by deft. within a year before action brought ; (3) the action failed inasmuch as it was barred not only by the fact of the prior issue of the other writs for penalties, but also by the fact that pltf. had proceeded under House of Commons (Disqualification) Act, 1782 (c. 45), instead of under the House of Commons (Disqualification) Act, 1801 (c. 52).—FORBES *v.* SAMUEL, [1913] 3 K. B. 706 ; 82 L. J. K. B. 1135 ; 109 L. T. 599 ; 29 T. L. R. 544.

Annotations :—As to (1) **Folld.** Bird *v.* Samuel (1914), 30 T. L. R. 323. **Refd.** Tranton *v.* Astor (1917), 33 T. L. R. 383. *As to* (2) **Folld.** Bird *v.* Samuel (1914), 30 T. L. R. 323. *As to* (3) **Refd.** Burnett *v.* Samuel (1913), 109 L. T. 630 ; Bird *v.* Samuel (1914), 30 T. L. R. 323. *Generally*, **Mentd.** Nichol *v.* Fearby, Nichol *v.* Robinson, [1923] 1 K. B. 480.

225. —— ——.]—Pltf. as a common informer brought an action for penalties under House of Commons (Disqualification) Act, 1782 (c. 45), which was applicable only to the Parliament of Great Britain. He alleged that deft. had sat & voted in the House of Commons when he was disqualified for so sitting & voting. Application having been made to amend by adding the right statute :—*Held :* pltf. having based his claim for penalties on the wrong statute the discretion of the court to amend ought not to be exercised in favour of a common informer suing for penalties.—BURNETT *v.* SAMUEL (1913), 109 L. T. 630 ; 29 T. L. R. 583.

226. —— ——.]—A Member of the House of Commons was partner in a firm which made a contract with the Secretary of State for India in Council for purchasing silver for the Indian currency. A common informer brought an action against the member for penalties, & alleged in the statement of claim that deft. was elected to Parliament on Jan. 10, 1910, & that he voted on various dates in 1912. In fact Parliament was dissolved on Jan. 10, 1910, & was again dissolved in Dec. 1910, & deft. was elected at a general election in Dec. 1910 :—*Held :* deft. had entered into a contract for or on account of the public service within House of Commons (Disqualification) Act, 1782 (c. 45), s. 1 ; pltf. was entitled to an amendment of the date alleged in the statement of claim as the date of deft.'s election, & therefore pltf. was entitled to recover the penalties sued for. —BIRD *v.* SAMUEL (1914), 30 T. L. R. 323.

Annotation :—**Folld.** Tranton *v.* Astor (1917), 33 T. L. R. 383.

227. Contract with regimental colonel—Furnishing regiment with army clothing.]—A clothier who contracts with the colonel of a regiment to furnish the regiment with army clothing, is not thereby incapacitated by House of Commons (Disqualification) Act, 1782 (c. 45), from being elected as a Member to serve in Parliament.—THOMPSON *v.* PEARCE (1819), 1 Brod. & Bing. 25 ; 3 Moore, C. P. 260 ; 129 E. R. 632.

Annotation :—**Refd.** Tranton *v.* Astor (1917), 33 T. L. R. 383.

228. Contract for carriage of mails.]—The lessee of a railway from the Public Works Loan Comrs. in Ireland [who had taken possession to enforce charges] is not disqualified from being elected a Member of Parliament as a contractor either by reason of his being such lessee or by reason of his conveying mails on his railway under a contract with the Postmaster-General.—*Re* CITY OF LONDONDERRY ELECTION PETITION (1860), Wolf. & B. 206.

229. Simple order for newspaper advertisement.]—TRANTON *v.* ASTOR, No. 219, *ante*.

Subscribers to war loan.]—*See* War Loan Act, 1915 (c. 55).

Purchasers of Treasury bills.]—*See* Finance Act, 1915 (c. 62), s. 26.

G. Holders of Office under the Crown.

See 6 Anne, c. 41, ss. 25, 26 ; House of Commons (Vacation of Seats) Act, 1864 (c. 34) ; Re-election of Ministers Acts, 1919 (c. 2), s. 1, 1926 (c. 19) ; Law of Property Act, 1924 (c. 5), Sched. II. (1).

230. Office created after 1705.]—*Re* NORTH BERWICK DISTRICT ELECTION PETITION (1775), 2 Doug. El. Cas. 423.

231. ——.]—The office of Secretary of the Order of St. Patrick is an office of profit under the Crown under 6 Anne, c. 7.—*Re* FROME BOROUGH ELECTION PETITION (1853), 2 Pow. R. & D. 58 ; 20 L. T. O. S. 295.

232. ——.]—J. held the rank of captain in the Royal Artillery, & brevet-major in the army. In 1856 he received a regimental order to report himself to his superior officer at Enfield. He was then employed for twelve months as assistant superintendent of a Royal small arms factory at Birmingham. He was transferred to Enfield, where he acted for twelve months in a similar capacity. He was lastly transferred to London, & assumed the command of a corps of armoury serjeants newly created. For these services he received pay in addition to his regimental pay. In 1859 he was elected Member for Harwich. & whilst still superintendent of the small arms factory in London, in command of the corps of armoury serjeants, he was re-elected :—*Held :* J. did not hold a new office or place of profit under the Crown within the disqualifying provisions of 6 Anne, c. 7.—*Re* HARWICH BOROUGH ELECTION PETITION (1866), 14 L. T. 380.

Judges.]—*See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 12 (2).

Judicial officers in Scotland.]—*See* Parliamentary Elections (Scotland) Act, 1733 (c. 16), s. 4.

County court judges.]—*See* County Courts Act, 1888 (c. 43), s. 8.

Chairman or deputy chairman of London Quarter Sessions.]—*See* Local Government Act, 1888 (c. 41), s. 42 (4).

Recorder—For borough in which office held.]—*See* Municipal Corporations Act, 1882 (c. 50), s. 163 (6).

Registrar & officers in bankruptcy.] — *See* Bankruptcy Act, 1883 (c. 52), s. 116.

Barrister appointed to try municipal election petition.]—*See* Municipal Corporations Act, 1882 (c. 50), s. 92.

Commissioners of metropolitan police.]—*See* Metropolitan Police Acts, 1829 (c. 44), s. 18 ; 1856 (c. 2), s. 9.

Corrupt practices commissioners.]—*See* Election Commissioners Act, 1852 (c. 57), . 1.

Sheriff & sheriff substitutes in Scotland.]—*See* Sheriff Courts (Scotland) Act, 1907 (c. 51), s. 21.

Commissioners & officers of excise.]—*See* Excise Management Act, 1827 (c. 53), s. 8.

Sect. 1.—*Members: Sub-sect.* 2, *G., H., J., K. & L. Sects.* 2, 3, 4, 5, 6 & 7. *Part IV. Sects.* 1, 2 3. *Part V. Sect.* 1: *Sub-sects.* 1 & 2. . 2: *Sub-sect.* 1.]

Permanent paid officers of county councils.]—Local Government Act, 1888 (c. 41), s. 83 (13).

Commissioners of Woods & Forests.]—*See* Crown Lands Act, 1851 (c. 42), s. 10.

Charity commissioners.]—*See* Charitable Trusts Act, 1853 (c. 137), s. 5.

See, also, House of Commons (Disqualification) Acts, 1742 (c. 22); 1801 (c. 52), s. 4; Civil List Audit Act, 1816 (c. 46), s. 8; Government of India Act, 1858 (c. 106), ss. 4, 12, 64; Exchequer & Audit Departments Act, 1866 (c. 39), s. 3; Air Force Act, 1917 (c. 51), s. 4; Ministry of Transport Act, 1919 (c. 50), s. 27.

H. Infants.

See 7 & 8 Will. 3, c. 25, s. 7, &, *generally*, INFANTS, Vol. XXVIII., pp. 131 *et seq.*

233. Election void.]—*Re* FLINTSHIRE ELECTION PETITION (1797), 1 Peck. 526.

Annotation:—**Refd.** Pritchard *v.* Bangor Corpn. (1888), 58 L. T. 502.

J. Lunatics.

See Lunacy (Vacating of Seats) Act, 1886 (c. 16), s. 2, &, *generally*, LUNATICS, Vol. XXXIII., pp. 125 *et seq.*

K. Peers.

234. Peer of Scotland's eldest son—Representation of Scottish county.]—The eldest son of a peer of Scotland is not eligible to represent a Scotch county in the Commons House of Parliament.—DAER (LORD) *v.* STEWART (1793), 8 Bro. Parl. Cas. 1; 3 E. R. 405, H. L.

L. Pensioners under the Crown.

See 6 Anne, c. 41, ss. 24, 28; Crown Pensioners Disqualification Act, 1715 (c. 56); Pensioners Civil Liabilities Relief Act, 1869 (c. 15), s. 1; Diplomatic Salaries Act, 1869 (c. 43), s. 17.

235. Pension during pleasure—Paid to member's wife.]—READING ELECTION CASE (1819), Corb. & D. 114.

SECT. 2.—**THE SPEAKER.**

Salary of Speaker.]—*See* House of Commons Officers Act, 1834 (c. 70), s. 1.

Position on dissolution of Parliament.]—*See* House of Commons Offices Act, 1846 (c. 77), s. 5.

Duties with regard to money & other bills.]—*See* Parliament Act, 1911 (c. 13).

SECT. 3.—**THE OFFICERS.**

Clerk & clerk's assistant.]—*See* House of Commons (Offices) Acts, 1812 (c. 11), s. 16; 1856 (c. 1), s. 1.

Serjeant-at-Arms—Appointment of attendants.]—*See* House of Commons (Offices) Act, 1812 (c. 11), s. 15.

236. "Teller."]—A Member of the House who acts as a teller on a division is not an "officer of the House."—CHUBB *v.* SALOMONS (1852), 3 Car. & Kir. 75.

SECT. 4.—

Admissibility as evide *See* EVIDENCE, Vol. XXII., p. 325, Nos.

SECT.

237. General rule.
145 E. R. 117.

238. ——.] — W[illegible]HARTON (L[illegible]ORD (1704), Colles, 270; 1

SECT. 5.—**PUBLIC**

239. Presentation by member sary to deal with the question of petitions to the House of Commons or to the King in person, because the former has to be presented by a Member & the latter by the Home Office (LORD ALVERSTONE, C.J.).—PANKHURST *v.* JARVIS (1909), 101 L. T. 946; 74 J. P. 64; 26 T. L. R. 118; 22 Cox, C. C. 228, D. C.

—**Refd.** Despard *v.* Wilcox (1910), 102 L. T. 103.

240. Member refusing to present—Petitioner's right of action.]—There is no right in a person desirous of petitioning the House of Commons to compel any particular Member of the House to present such petition, & no action will lie against any Member of the House for refusing to present such a petition.—CHAFFERS *v.* GOLDSMID, [1894] 1 Q. B. 186; 63 L. J. Q. B. 59; 70 L. T. 24; 58 J. P. 212; 42 W. R. 239; 10 T. L. R. 14; 38 Sol. Jo. 11; 10 R. 19, D. C.

Unlawful assembly of petitioners.]—*See* CRIMINAL LAW, Vol. XV., p. 710, No. 7679.

SECT. 7.—**COMMITTEES.**

Select committee—Power to administer oath.]—*See* Parliamentary Witnesses Oaths Act, 1871 (c. 83), s. 1.

Evidence before committee—Admissibility on criminal charge.]—*See* CRIMINAL LAW, Vol. XIV., p. 408, No. 4283.

Part IV.—Meeting, Prorogation and Dissolution.

SECT. 1.—THE OATH OF ALLEGIANCE.

See Parliamentary Oaths Act, 1866 (c. 19); Oaths Acts, 1888 (c. 46), ss. 1, 2, 5, 1909 (c. 39).

See CONSTITUTIONAL LAW, Vol. XI., pp. 498, 499, Nos. 19–21.

241. Failure to take oath—Recovery of penalty.]—The penalty of £500 " to be recovered by action in one of Her Majesty's Superior Cts. at Westminster " which is imposed by the Parliamentary Oaths Act, 1866 (c. 19), s. 5, upon any Member of the House of Commons voting as such in the House or sitting during any debate after the Speaker has been chosen without having made & subscribed the oath thereby appointed cannot be recovered in an action by a common informer & can be sued for only by the Crown.—BRADLAUGH *v.* CLARKE (1883), 8 App. Cas. 354; 52 L. J. Q. B. 505; 48 L. T. 681; 47 J. P. 405; 31 W. R. 677, H. L.; *revsg.* S. C. *sub nom.* CLARKE *v.* BRADLAUGH (1881), 7 Q. B. D. 38, C. A.; *subsequent proceedings sub nom.* A.-G. *v.* BRADLAUGH (1885), 14 Q. B. D. 667, C. A.

Annotations :—**Mentd.** Bradlaugh *v.* Gossett (1884), 12 Q. B. D. 271; Dixon *v.* Farrer (1886), 35 W. R. 95; Charrington Sells Dale *v.* Mid. Ry. (1901), 11 Ry. & Can. Tr. Cas. 222; Banbury *v.* Bank of Montreal, [1918] A. C. 626; Neville *v.* London Express Newspaper (1918), 88 L. J. K. B. 282.

242. —— —— Whether penal clauses repealed by Statute Law Revision Act, 1875 (c. 66).]—The penal clauses of the Parliamentary Oaths Act, 1866 (c. 19), are not repealed by above Act.—CLARKE *v.* BRADLAUGH (1881), 8 Q. B. D. 63; 51 L. J. Q. B. 1; 46 L. T. 49; 46 J. P. 278; 30 W. R. 53, C. A.

Annotation :—**Mentd.** Jenkins *v.* G. C. Ry., [1912] 1 K. B. 1.

SECT. 2.—PROROGATION.

See Prorogation Act, 1867 (c. 81).

243. Effect of prorogation—On arrest by order or warrant of Parliament.]—PRITCHARD'S CASE (1665), T. Raym. 120; 83 E. R. 64; *sub nom.* PRICHARD'S CASE, 1 Lev. 165; *sub nom.* LEE *v.* PRICHARD, 1 Sid. 245; *sub nom.* R. *v.* PRITCHARD, 1 Keb. 887.

Annotation :—**Refd.** Danby's Case (1681), Skin. 56.

244. —— On judicial acts of House of Lords.]—If the prorogation is a *supersedeas* you may take out execution without applying to the ct.; if it is not, we cannot grant the motion. What the Lords do in their judicial capacity, goes over from Session to Session, as matters below do from term to term (*per* CUR.).—WRIGHT *v.* GROVE (1723), Bunb. 131; 145 E. R. 621.

245. —— On committal by House of Lords—For contempt.]—PRITCHARD'S CASE (1665), T. Raym. 120; 83 E. R. 64; *sub nom.* PRICHARD'S CASE, 1 Lev. 165; *sub nom.* LEE *v.* PRICHARD, 1 Sid. 245; *sub nom.* R. *v.* PRITCHARD, 1 Keb. 887.

Annotation :—**Refd.** Danby's Case (1681), Skin. 56.

246. —— —— Right to discharge.]—PRITCHARD'S CASE (1665), T. Raym. 120; 83 E. R. 64; *sub nom.* PRICHARD'S CASE, 1 Lev. 165; *sub nom.* LEE *v.* PRICHARD, 1 Sid. 245: *sub nom.* R. *v.* PRITCHARD, 1 Keb. 887.

Annotation :—**Consd.** Danby's Case (1681), Skin. 56.

247. —— —— On impeachment by Commons.]—R. *v.* DANBY (EARL), No. 203, *ante.*

248. Judicial notice of prorogation.]—The ct. *ex officio* ought to take notice of the beginning & end of prorogations & Sessions of Parliament.—R. *v.* WILDE (1670), 1 Lev. 296; 2 Keb. 686; T. Raym 191; 83 E. R. 415.

Annotation :—**Refd.** Adcock *v.* Gill (1752), Say. 60.

SECT. 3.—DISSOLUTION.

See Parliament Act, 1911 (c. 13), s. 7.

Power to dissolve.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 514, No. 159.

249. Effect of dissolution—On committal by speaker.]—PROTECTOR *v.* STREETER (1654), Sty. 415; 82 E. R. 824.

Annotation :—**Refd.** R. *v.* Paty (1704), 2 Ld. Raym. 1105.

250. —— On committal by House of Lords.]—R. *v.* DANBY (EARL), No. 203, *ante.*

Part V.—The Legislative Work of Parliament.

SECT. 1.—PUBLIC BILLS.

SUB-SECT. 1.—BILLS PASSED BY COMMONS ONLY.

251. General rule.]—REGICIDES CASE (1660), 5 State Tr. 947, 1029.

Annotation :—**Mentd.** Crosthwaite *v.* Gardner (1852), 18 Q. B. 640.

See, now, Parliament Act, 1911 (c. 13).

SUB-SECT. 2.—THE ROYAL ASSENT.

252. Necessity for.]—REGICIDES CASE (1660), 5 State Tr. 947, 1029.

Annotation :—**Mentd.** Crosthwaite *v.* Gardner (1852), 18 Q. B. 640.

253. How given.]—HOWARD (QUEEN CATHERINE'S) CASE (1542), 1 State Tr. 445.

.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 514, No. 160.

SECT. 2.—PRIVATE BILLS.

SUB-SECT. 1.—PARLIAMENTARY AGENTS.

254. Liability for negligence—Non-compliance with standing orders—Failure due to misconstruction.]—A Parliamentary agent, entrusted with the passing of a local bill through Parliament, who puts a construction on an order of the House of Lords which is doubtful in its terms, such construction being different from that which is adopted by the standing orders committee & by the House, whereby it becomes necessary to abandon the bill, is not guilty of such gross negligence as to disentitle him to recover a remuneration for his labour in passing the bill through the House of Commons.—BULMER *v.* GILMAN (1842), 4 Man. & G. 108; 4 Scott, N. R. 781; 11 L. J. C. P. 174; 6 Jur. 761; 134 E. R. 45.

Annotation :—**Mentd.** Hunter *v.* Caldwell (1847), 11 Jur. 770.

Sect. 2.—Private bills: Sub-sects. 1, 2, 3 & 4, A.]

255. Necessary proceedings — Duty to notify promoter's solicitor.]—GALE *v.* KITE (1886), 3 T. L. R. 49.

Advertisement of application to Parliament—Promotion of company—Liability for expenses.]—*See* COMPANIES, Vol. X., p. 1173, No. 8326.

256. Recovery of fees — Agent subscriber to undertaking.]—Where the agent employed in endeavouring to carry through Parliament a bill for making a railway, sued the chairman of a committee of subscribers to the undertaking, for his work & labour, & expenses incurred as such agent, & it appeared that the agent himself was a subscriber to the undertaking:—*Held:* the action would not lie.—HOLMES *v.* HIGGINS (1822), 1 B. & C. 74; 2 Dow. & Ry. K. B. 196; 1 L. J. O. S. K. B. 47; 107 E. R. 28.

Annotations:—**Refd.** Lucas *v.* Beach (1840), 1 Man. & G. 417; Reynell *v.* Lewis, Wyld *v.* Hopkins (1846), 4 Ry. & Can. Cas. 351; Wilson *v.* Curzon (1847), 15 M. & W. 532; Smith *v.* Archibald (1849), 14 L. T. O. S. 174. **Mentd.** Wilson *v.* King (1834), 2 Cr. & M. 689; Chadwick *v.* Clarke (1845), 1 C. B. 700; Day *v.* Sharp (1846), 7 L. T. O. S. 62; Walstab *v.* Spottiswoode (1846), 10 Jur. 498; Boulter *v.* Peplow (1850), 9 C. B. 493.

—— **Proof in winding up of company.**]—*See* COMPANIES, Vol. X., pp. 1112, 1113, Nos. 7822, 7830.

257. —— By whom payable.] — (1) The Parliamentary agent, though nominated by the law clerk, has in the absence of any agreement a right to be paid his bill by the trustees directly, & not through the law clerk who nominated him.

(2) A claim by a Parliamentary agent to participate in the profits of a solr.'s bill was rejected as no such agreement was proved to have been made.—RIDGWAY *v.* LEES (1856), 25 L. J. Ch. 584.

258. —— Right to participate in solicitors costs.]—RIDGWAY *v.* LEES, No. 257, *ante*.

—— **Lien on books & papers.**]—*See* LIEN, Vol. XXXII., p. 251, No. 366.

——.]—*See* House of Commons Costs Taxation Act, 1847 (c. 69).

SUB-SECT. 2.—SOLICITORS.

See, generally, SOLICITORS.

259. Taxation of costs.] — No jurisdiction for taxing a solr.'s bill of costs for obtaining an Act of Parliament.

In the House of Lords great difficulty has frequently occurred from not knowing how directly to tax a solr.'s bill. Under the recognisance the effect has certainly been obtained; & the House has sometimes called in the assistance of a master, to determine what the amount ought to be; but that has been considered only as putting in force the recognisance; not as a taxation, independant of that, by virtue of any inherent authority, possessed by the House. It must be admitted, that there is a great difference between the costs of a solr., attending the House of Lords in a cause, & the costs of soliciting a bill; which any one may do. Is there any instance of the taxation of such a bill as this, where the party has done no business in any cause as solr.? At present I think I have no authority to order it; but I will look into the cases (LORD ELDON, C.).—*Ex p.* WHEELER (1814), 3 Ves. & B. 21; 35 E. R. 387, L. C.

260. —— Gross overcharges.] — House of Commons Costs Taxation Act, 1847 (c. 69), does not deprive this ct. of its jurisdiction to order taxation of a solr.'s bill of costs for Parliamentary business. To entitle a client to an order for taxation of his solr.'s bill of costs after the expiration of twelve months from its delivery, he must show either pressure, or gross overcharge amounting to what this ct. designates as fraud. But it is not necessary to show both.

Taxation of a solr.'s bill for Parliamentary business ordered, under Solicitors Act, 1843 (c. 73), s. 37, upon a petition presented more than twelve months from the delivery of the bill, on the ground of gross overcharges, amounting to what this ct. designates as fraud, coupled with misrepresentation by him in accounting for one of the items overcharged, notwithstanding the client knew of the circumstances, & had another legal adviser, within a month of the delivery of the bill, & might reasonably have availed himself of these circumstances to present his petition within the twelve months.—*Re* STROTHER (1857), 3 K. & J. 518; 26 L. J. Ch. 695; 30 L. T. O. S. 63; 3 Jur. N. S. 736; 5 W. R. 797; 69 E. R. 1214.

Annotation:—**Consd.** *Re* Baker, Lees, [1903] 1 K. B. 189.

261. —— Scale.] — The costs of & connected with the preparation & making of a provisional order under the Light Railways Act, 1896 (c. 48), are taxed on the Chancery, & not the Parliamentary scale.

Semble: the deposit of plans ought to be made by post, & the cost of personal service will not be allowed, except under special circumstances.—*Re* P. (A SOLICITOR) (1909), 53 Sol. Jo. 735, C. A.

262. Recovery of fees & expenses — Right to payment out of deposit or bond.]—A solr. was employed in the promotion of a railway & in obtaining the Act for its incorporation. He was then appointed solr. of the co., & was employed in obtaining two other Acts by which the scheme was amended & fresh powers granted. The undertaking proved abortive, & the railway was never constructed. A warrant of the Board of Trade was obtained under Railways Abandonment Act, 1869 (c. 114), for the abandonment of the railway, which contained the usual clause that the bond which had been given for the completion of the railway should be assets of the co.:—*Held:* the costs of the solr. incurred in getting up the co., &, after its incorporation, in obtaining the subsequent Acts, were costs incurred on account of the promotion of the co. within Railways Abandonment Act, 1869 (c. 114), s. 5, & ought not to be paid out of the bond.—*Re* BARRY RY. CO. (1876), 4 Ch. D. 315; 46 L. J. Ch. 206; 36 L. T. 125; 25 W. R. 201, C. A.

263. —— ——.] — Where the undertaking, authorised by Parliament, of a tramway or other co. has been abandoned, all the creditors of the co., including the solr. or Parliamentary agent, concerned in the promotion of the bill in Parliament, are, as between themselves & the depositors, entitled, under Parliamentary Deposits & Bonds Act, 1892 (c. 25), s. 1 (1), (2), to be paid out of the Parliamentary deposit in priority to the depositors. But, in a case in which the co. was a paper co., that is, a co. which never had any existence beyond statutory incorporation, & there was a contest between several claimants to the deposit, including the solr. & Parliamentary agent who had been instrumental in obtaining the passing of the co.'s Act:—*Held:* none of claimants were entitled to rank as creditors.—*Re* MANCHESTER, MIDDLETON & DISTRICT TRAMWAYS CO., [1893] 2 Ch. 638; 62 L. J. Ch. 752; 41 W. R. 631; 9 T. L. R. 343; 37 Sol. Jo. 356; 3 R. 533; *sub nom. Re* MANCHESTER, MIDDLETON & DISTRICT TRAMWAY CO., *Ex p.* BARNARD, *Ex p.* ASHBY, *Ex p.* HANLY, *Ex p.*

GLOBE INDUSTRIAL & GENERAL TRUST CORPN., LTD., 68 L. T. 820.

264. —— Solicitors employed by promoter of company—Liability of company—Implied promise to pay on taxation.]—A co. was being promoted for the building of a railway, & for the purchase, in connection therewith, of a certain canal. The promoters & a firm of solrs. came to an agreement, afterwards adopted by the co., by which the solrs. consented to give their services gratis "in the event of the application to Parliament failing, or the capital not being raised," but in the event of these two conditions being fulfilled, there were to be paid the customary professional charges for work done. An Act of Parliament was obtained incorporating the co., & providing for the transfer to it of the canal, & authorising the construction of the railway. The capital was not to exceed eight million pounds, & the co. was authorised to resolve that the canal undertaking & capital necessary for it should be a separate undertaking, with a separate capital. This course was adopted by the co., & the canal capital fixed at one & a quarter millions. This amount was raised, but the rest of the capital of the co. was not raised. In an action by the solrs. to recover the customary professional charges for work done by them:—*Held:* the raising of the canal capital was not a raising of "the capital," & the conditions of the contract made between the promoters & the solrs. not having been fulfilled, the solrs. were not entitled to succeed in the action.—NICHOLS *v.* NORTH METROPOLITAN RAILWAY & CANAL CO. (1894), 71 L. T. 836, C. A.; *affd.* (1896), 74 L. T. 744, H. L.

265. —— Solicitor employing Parliamentary agent — Solicitor's fees only recoverable.]—A solr., who employs a Parliamentary agent in passing a bill through Parliament but acts in some instances by himself & not through the agent, can only be allowed to charge for his services as a solr., & cannot claim fees as a Parliamentary agent, even in cases in which he may have acted without the aid of the Parliamentary agent.—*Re* WALTERS (1845), 9 Beav. 299; 1 New Pract. Cas. 288; 5 L. T. O. S. 342; 50 E. R. 359.

Annotation:—**Mentd.** *Re* Grant, Bulcraig, [1906] 1 Ch. 124.

266. —— Solicitor acting as Parliamentary agent—Agent's fees only recoverable.]—Where a bill of costs delivered by a Parliamentary agent, who is likewise a solr., relates exclusively to business done by him in the capacity of a Parliamentary agent, & not in that of a solr., the bill cannot be referred for taxation under Solicitors Act, 1843 (c. 73).—*Re* BAKER, LEES & CO., [1903] 1 K. B. 189; 72 L. J. K. B. 136; 87 L. T. 662; 51 W. R. 246; 19 T. L. R. 113; 47 Sol. Jo. 148, C. A.

.]—*See* COMPANIES, Vol. X., pp. 1111–1113, Nos. 7820, 7824, 7828, 7832, 7834.

267. Compliance with standing orders—Duty to ensure.]—It seems to be the business of the solr. for a private Act of Parliament, to take care that the standing orders of the House of Commons are complied with, even though they relate to maps, plans, etc.

It seems, that although the maps, etc., of an engineer may be incorrect, yet he is entitled to a remuneration for journeys made respecting them.—TAYLOR *v.* HIGGINS (1822), 1 L. J. O. S. K. B. 19.

. 3.—PLANS.

268. Deposit of plans.]—*Re* P. (A SOLICITOR), No. 261, *ante*.

269. Recovery of engineer's charges — Though plans incorrect.]—TAYLOR *v.* HIGGINS, No. 267, *ante*.

270. ——.]—Comrs. for supplying a town with water executed the works authorised by their Act, & supplied the district to which their powers extended. Eighteen years after they were incorporated complaints were made of the insufficiency of the supply, & their engineer reporting that any extension of the existing works would be insufficient, & recommending that a supply should be obtained from the S. Brook, a source to which the powers of their Act did not apply, & which would be sufficient for the supply, not only of the town, but also of several adjacent villages, it was resolved by a committee of management of the co. to apply to Parliament for powers to make works to render the S. Brook supply available, & they issued a prospectus for an additional capital of £90,000, & their views being approved & adopted at a special general meeting of the co., they employed their engineer to make plans pursuant to the standing orders of the House of Commons, which he accordingly did, & had them lithographed. The municipal corpn. of the town afterwards became the purchasers, under an Act of Parliament, of the works of the co., & liable to pay their debts:—*Held:* the engineer was entitled to recover against the corpn. his charges for preparing the Parliamentary plans.—BATEMAN *v.* ASHTON-UNDER-LYNE CORPN. (1858), 3 H. & N. 323; 27 L. J. Ex. 458; 31 L. T. O. S. 299; 22 J. P. 498; 6 W. R. 829; 157 E. R. 494.

Annotations:—**Mentd.** Maunsell *v.* Mid. G. W. Ry. (of Ireland) & G. N. & W. (of Ireland) Ry. (1863), 8 L. T. 347; Taylor *v.* Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356; Pickering *v.* Ilfracombe Ry. (1868), L. R. 3 C. P. 235; A.-G. *v.* G. E. Ry. (1879), 11 Ch. D. 449; Dartford Union Grdns. *v.* Trickett (1888), 59 L. T. 754.

Whether plans binding—Incorporated in Act.]—*See* RAILWAYS; TRAMWAYS & LIGHT RAILWAYS.

SUB-SECT. 4.—DEPOSIT OF MONEY.

A. Nature and Purpose.

See Parliamentary Deposits Acts, 1846 (c. 20), p. 1892 (c. 27), R. S. C., Ord. 50, r. 6.

271. Deposit of borrowed money—Contract for repayment.]—A bank agreed with the promoters of a railway bill to deposit the Exchequer bills required to be deposited in Chancery by the Standing Orders of the House of Commons & it was agreed that the projectors should withdraw the bill at the third reading, unless the deposit should then have been repaid to the bank:—*Held:* (1) there was nothing illegal or contrary to public policy in this arrangement; (2) a bill would lie to compel the persons in whose names the Exchequer bills were invested to restore them to the bank.—SCOTT *v.* OAKELEY (1864), 33 Beav. 501; 4 New Rep. 5; 33 L. J. Ch. 612; 10 L. T. 322; 28 J. P. 328; 10 Jur. N. S. 431; 12 W. R. 728; 55 E. R. 462; *affd.*, 4 New Rep. 258, L. JJ.

272. —— —— On rejection of bill.]—The committee of a projected railway co. agreed to subscribe for a certain number of shares, in order to comply with the Standing Orders of the House of Commons, stipulating, at the same time, that in the event of the project failing, they were to receive the amount so subscribed in full, without any deduction:—*Held:* such agreement was a fraud on the House of Commons, & therefore the stipulation for the repayment in full of the sum subscribed was void.—CLEMENTS *v.* BOWES (1853),

Sect. 2.—Private bills: Sub-sect. 4, A., B. & C.]

1 Drew. 684; 1 Eq. Rep. 553; 22 L. J. Ch. 1022; 21 L. T. O. S. 278; 1 W. R. 442; 61 E. R. 612.

Annotations:—**Mentd.** Stupart *v.* Arrowsmith (1856), 3 Sm. & G. 176; Williams *v.* Page (1858), 24 Beav. 654; Hallows *v.* Fernie (1868), 3 Ch. App. 467; Ward *v.* Sittingbourne & Sheerness Ry. (1874), 9 Ch. App. 490, n.

273. —— —— Before payment of creditors.]—The principle of demanding a deposit is that it should stand as a security for the claims of creditors in case the work was not proceeded with during the period allowed for the completion of the work. Those creditors are entitled to come upon the deposit, & the policy of the legislature is that some one outside the railway co. should provide the security for any claims which had been created. That being so, it is clearly *ultra vires* for a railway co. to make a promise to repay the deposit out of their assets before the question whether or not there are any creditors had been decided (CHANNELL, J.).—HOARE *v.* PLYMOUTH & NORTH DEVON DIRECT RY. CO. (1904), 21 T. L. R. 165.

274. —— —— Promotion of further bills before repayment.]—CUTBILL *v.* SHROPSHIRE RY. CO. (1891), 7 T. L. R. 381.

275. —— —— Extension of operations before repayment.]—BEECHAM *v.* LASTINGHAM & ROSEDALE LIGHT RY. CO., [1907] W. N. 101.

276. Deposit not company's general assets.]—A Parliamentary deposit forms no part of the assets of the co.—*Re* UXBRIDGE & RICKMANSWORTH RY. CO. (1890), 43 Ch. D. 536; 59 L. J. Ch. 409; 62 L. T. 347; 38 W. R. 644, C. A.

277. —— But for payment of creditors.]—The liquidator cannot be allowed out of the deposit any costs beyond those proceedings taken by him in reference to the application of the deposit.

When a tramway co., which has been authorised to construct tramways by a provisional order of the Board of Trade, made under Tramways Act, 1870 (c. 78) & afterwards confirmed by an Act of Parliament, has failed to construct the authorised tramways within the time limited for the purpose, & has been ordered to be wound up, the ct. has not, under Board of Trade Rules, 1886, r. 22, jurisdiction to order the liquidator's general costs of the liquidation to be paid out of the deposit made, in pursuance of Tramways Act, 1870 (c. 78), s. 12, prior to the issue of the provisional order.—*Re* COLCHESTER TRAMWAYS CO., [1893] 1 Ch. 309; 62 L. J. Ch. 243; 67 L. T. 846; 41 W. R. 169; 37 Sol. Jo. 80; 3 R. 168.

Annotations:—**Folld.** Turpin *v.* Somerton Tram. Co., [1900] W. N. 94. **Refd.** *Re* Manchester, Middleton & District Tram. Co., [1893] 2 Ch. 638.

278. —— ——.]—By an Act for a public undertaking it was provided that if within a certain time the undertaking should not be completed or half the capital paid up & expended on the work, the deposit made in pursuance of the Standing Orders of the House of Parliament should be forfeited to the Crown, or, in the discretion of the ct., if the co. was insolvent & had been ordered to be wound up, should wholly or in part be applied as assets of the co. for the benefit of the creditors. The co. was ordered to be wound up on the ground of inability to pay its debts:—*Held:* the deposit was to be resorted to so far only as was necessary for paying creditors, & no order could be made for applying any part of it as assets of the co. until it was ascertained in the winding-up that there were debts which could not be paid by means of calls on the shareholders.—*Re* BRADFORD TRAMWAYS CO. (1876), 4 Ch. D. 18; 46 L. J. Ch. 89; 35 L. T. 827; 25 W. R. 88, C. A.

Annotations:—**Apld.** Lowestoft, Yarmouth & Southwold Tram. Co. (1877), 6 Ch. D. 484; *Re* Birmingham & Lichfield Junction Ry. (1885), 28 Ch. D. 652. **Consd.** *Re* Uxbridge & Rickmansworth Ry., Way's Case (1890), 43 Ch. D. 536. **Distd.** *Ex p.* Bradford & District Tram. Co., [1893] 3 Ch. 463.

279. —— ——.]—A railway co. in 1873 obtained an Act of Parliament authorising them to construct a branch line, the Parliamentary deposit being paid by B. who was the principal proprietor in the co., & the Act containing the usual provisions for return of the deposit, if, as happened, the requirements of the Act were not complied with. In 1875 a receiver of the branch undertaking was appointed, & in 1876, an Act was obtained, extending the time for completion of the line to May, 1881. In 1880 an Act was obtained for the abandonment of the undertaking, providing that rights to compensation should not be affected thereby, & that subject to such rights, & the protection of the co.'s creditors, the ct. might order the deposit money to be repaid to the persons named in the Parliamentary warrant. There were no creditors' claims in respect of the branch undertaking, but the costs of the Act of 1876 & the abandonment Act were owing to B. who had paid them, & the general creditors of the co. had large claims. On the application of B. as representing the persons named in the warrant, for the payment to him of the deposit money:—*Held:* the deposit money had become part of the general assets of the co., & must be applied for the benefit of the general creditors.—*Re* MANCHESTER & MILFORD RY. CO. (1881), 45 L. T. 129.

280. —— ——.]—By a special Act of 1885 a tramway co. was authorised to construct a tramway & a deposit was ordered to be paid. The Parliamentary Deposits & Bonds Act, 1892 (c. 27), s. 1, provided that where in pursuance of any general or special Act of Parliament moneys had been deposited "to secure the completion by any co." of any undertaking authorised by Parliament, & the undertaking had "not been completed" within the time limited in that behalf, the deposit fund should be applied towards compensating landowners &, in the case of a tramway co., the road authorities, & subject thereto, if, among other things, a receiver had been appointed, or the undertaking had been abandoned, for the benefit of the creditors of the co. The special Act of 1885 contained a substantially similar provision as to the application of the deposit fund if the co. did not complete the tramway within the time limit. In 1904, when the tramway had not been completed & before the expiration of the period for completion, a receiver of the undertaking of the co. was appointed & the uncompleted tramway was acquired by the London County Council under the powers of a special Act:—*Held:* both under the special Act of 1885 & under the general Act the deposit was paid to secure the completion of the undertaking by the co. &, inasmuch as that event could never happen by reason of the transfer of the undertaking, the time had passed within which the co. could complete; & there had been an abandonment of the undertaking by the co.; consequently that the deposit moneys paid under the special Act of 1885 were applicable for the benefit of the creditors of the co. subject to the prior claims, if any, of the landowners & road authorities.—*Re* PECKHAM, DULWICH & CRYSTAL PALACE TRAMWAYS BILL, [1910] 2 Ch. 1; 79 L. J. Ch. 451; 102 L. T. 689; 74 J. P. 266; 54 Sol. Jo. 458; 8 L. G. R. 571, C. A.

B. Investment.

See Parliamentary Deposits Acts, 1846 (c. 20), 1892, c. 27 ; R. S. C., Ord. 55, r. 6.

281. Permissible investment—Exchequer Bills.]—Exchequer bills are govt. securities within 1 & 2 Vict. c. 117.—*Ex p.* SOUTH EASTERN RY. CO. (1845), 9 Jur. 650.

282. —— —— Or appointed stocks.]—Where, by the prayer of a petition, the required Parliamentary deposit of a railway co. is sought to be invested in Exchequer bills, the ct. will give the parties liberty to lay out the same in any of the Parliamentary stocks appointed by the Accountant General, or in Exchequer bills from time to time, as may be most convenient to the parties.—*Re* MANCHESTER, HUDDERSFIELD & GREAT GRIMSBY RY. CO. (1846), 4 Ry. & Can. Cas. 204.

283. —— Bank annuities.]—In 1 & 2 Vict. c. 117, the term government securities will include new £3 5*s.* per cent. bank annuities. The ct. will not allow a railway co. to retain any option after the order for investment as to the fund in which, or the time when, the moneys are to be invested.—*Ex p.* NEWPORT, ABERGAVENNY & HEREFORD RY. CO. (1847), 11 Jur. 160.

284. —— ——.]—A sum of money deposited in the Bank of England pursuant to 9 & 10 Vict. c. 20 is not cash under the control of the ct. within the meaning of the Order of Feb. 1, 1861, & can only be invested in consolidated or reduced bank annuities, or in govt. securities, as provided by 9 & 10 Vict. c. 20, s. 4.—*Ex p.* GREAT NORTHERN RY. CO. (1870), L. R. 9 Eq. 274.

Annotation :—**Refd.** *Re* Wilkinson's Estate (1870), L. R. 9 Eq. 343.

285. —— India stock.]—Although India stock is not one of the securities mentioned in the statute 9 & 10 Vict. c. 20, s. 4 ; or in Lands Clauses Consolidation Act, 1845 (c. 18), s. 70, the ct. will allow railway Parliamentary deposits to be invested in that stock.—*Re* SOUTHWOLD RAILWAY CO.'S BILL, *Ex p.* DEPOSITORS (1876), 1 Ch. D. 697 ; 45 L. J. Ch. 800 ; 24 W. R. 293 ; *sub nom.* RE SOUTHWOLD RAILWAY CO.'S BILL, *Ex p.* EASTON, 34 L. T. 56.

286. Investment by broker.]—On application for the interim investment of Parliamentary deposits paid into ct. under 9 & 10 Vict. c. 20, the ct. will permit the brokers of petitioners to be named in the order directing the investment if it appear that a saving of expense will thereby accrue to petitioners.—*Ex p.* WEST RIDING OF YORKSHIRE RY. CO. (1876), 34 L. T. 168.

287. ——.]—An application by the promoters of certain new railways, that the Parliamentary deposits might be invested by a private broker, who offered more advantageous terms than the Paymaster General's broker, was acceded to.—*Re* WEST RIDING & LANCASHIRE RAILWAYS UNDERTAKING (1876), 24 W. R. 357.

Annotation :—**N.F.** *Ex p.* Bolton Junction Ry. (1876), 24 W. R. 451.

288. ——.]—An application by the promoters of a new railway, that the Parliamentary deposit might be invested by a private broker, who offered more advantageous terms than the Paymaster General's broker, was refused.—*Re* BOLTON TRAMWAYS ACT (1876), 34 L. T. 230 ; *sub nom. Ex p.* BOLTON JUNCTION RY. CO., 24 W. R. 451.

C. Repayment.

See Parliamentary Deposits Act, 1846 (c. 20), s. 5 ; Parliamentary Deposits & Bonds Act, 1892 (c. 27) ; Standing Orders of the House of Lords (Private Business), 1911, No. 115 ; Standing Orders of the House of Commons (Private Business), 1911, No. 158a. R. S. C., Ord. 55, r. 6.

289. Application for—By petition.]—An application for payment out of ct. of money deposited under 9 & 10 Vict. c. 20, should be by petition.—*Re* ACTON & BRENTFORD RY. CO., *Re* LONDON, CHATHAM & DOVER RY. CO. (1884), 1 T. L. R. 180.

290. —— —— Petition bearing seal of company—Payment to company's solicitor.]—A petition for payment of the Parliamentary deposit to the solr. of a railway co., if sealed with the common seal is sufficient authority, & a power of attorney is unnecessary. But the ct. will not act upon any other documents not being part of the petition, although sealed with such common seal.—*Re* DARTMOUTH & TORBAY RY. CO. (1861), 9 W. R. 609.

291. —— In Long Vacation.]—An Act authorising the execution of part of the undertaking proposed by a railway bill, the rest being abandoned, provided for the return to the promoters of a part of the deposit. The Act passed so lately that no application could be made to the ct. before the Long Vacation :—*Held :* the obtaining payment of this sum out of ct. was vacation business.—*Re* WIGAN JUNCTION RAILWAYS ACT, 1875 (1875), 10 Ch. App. 541 ; 44 L. J. Ch. 774, L. C.

292. Jurisdiction of court to order—Order restrained by court.]—Where one of the judges of the Ct. of Ch. has made an order on petition for the payment out of ct. of moneys deposited by the committee of management of a railway co. under the standing orders of the House of Commons, one of the other judges of the ct. has jurisdiction, upon bill filed, to grant an injunction to restrain the committee from receiving the money.—CASTENDIECK *v.* DE BURGH (1846), 4 Ry. & Can. Cas. 386 ; 15 L. J. Ch. 425, L. C.

293. —— On withdrawal of bill—Certificate signed by Deputy Speaker.]—An order can be made for the return of a Parliamentary deposit on the withdrawal of a railway bill, under 9 & 10 Vict. c. 20, s. 5, upon production of a certificate signed by the Deputy Speaker of the House of Commons in the Speaker's absence.—*Ex p.* STOCKSBRIDGE RAILWAY BILL (1866), L. R. 2 Eq. 364 ; 12 Jur. N. S. 465 ; *sub nom. Re* STOCKBRIDGE RY. CO., 14 W. R. 826.

294. —— On partial withdrawal of bill—Repayment of part of deposit.]—When a deposit has been paid into ct. under the Standing Orders of Parliament in respect of several undertakings comprised in one bill, & the bill is subsequently withdrawn as to some only of the undertakings, the promoters cannot, upon certificate of such withdrawal, procure at once the payment out of ct. of so much of the deposit as is attributable to the abandoned undertakings.—*Re* ABERYSTWITH & WELCH COAST RAILWAYS (1861), 3 De G. F. & J. 201 ; 30 L. J. Ch. 674 ; 4 L. T. 537 ; 7 Jur. N. S. 564 ; 45 E. R. 855, L. JJ.

295. —— On passing of bill—Proof by Queen's Printer's copy of Act—In lieu of chairman's certificate.]—*Re* YARMOUTH & VENTNOR RY. CO., [1871] W. N. 236.

Annotation :—**Mentd.** A.-G. *v.* Bournemouth Corpn. (1902), 46 Sol. Jo. 586.

296. —— On stoppage of bill.]—The promoters of a railway co. paid their deposit into ct. under the Railways Construction Facilities Act, 1864 (c. 121), upon obtaining the usual certificate of the Board of Trade. The bill had passed through the House of Commons, & had passed the first reading in the House of Lords ; but no further progress could be made, in consequence of the rules of the House

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requiring certain stages to be passed at an earlier period of the session:—*Held:* although this case was omitted from the Railways Construction Facilities Act (c. 121), the ct. had power to make the order.—*Re* WIDNES RY. CO. (1872), L. R. 15 Eq. 108; 42 L. J. Ch. 352; 21 W. R. 241.

Annotation:—**Refd.** *Re* Popular Life Assce., [1909] 1 Ch. 80.

297. —— ——.]—*Re* CENTRAL LONDON RAILWAY BILL, [1901] W. N. 177.

298. —— **On termination of session.**] —A Railway Co. whose bill, at the close of a session of Parliament, was before a Committee of the House of Lords sought, by petition, to get the deposit, lodged by them in the Bank of England, previously to such session, paid out to one of the five directors in whose names the deposit had been made:—*Held:* this case came within the alternative contained in 1 & 2 Vict. c. 117, s. 4; & the order was made for payment to the five directors, it not appearing that the one director named in the prayer of the petition had been legally appointed to receive it.—*Re* LONDON & PORTSMOUTH DIRECT RY. CO., *Ex p.* WILKINSON (1845), 4 Ry. & Can. Cas. 78.

299. —— **At expiration of time for completion of works.**]—Under Parliamentary Deposits & Bonds Act, 1892 (c. 27), s. 1, the ct. has no jurisdiction to make an order for the repayment of a Parliamentary deposit until the time limited for the completion of the co.'s undertaking has expired, even though the co.'s compulsory powers for the purchase of land have expired, & they have raised no capital & have taken no steps to acquire land, & have passed a resolution to abandon the undertaking.—*Ex p.* CHAMBERS, [1893] 1 Ch. 47; 62 L. J. Ch. 78; 67 L. T. 647; 41 W. R. 170; 37 Sol. Jo. 47; 3 R. 118.

Annotations:—**Expld.** *Re* Peckham, Dulwich & Crystal Palace Tramways Bill, [1910] 2 Ch. 1. **Refd.** *Re* Hull, Barnsley & West Riding Junction Ry. Bill (1893), 37 Sol. Jo. 477.

300. —— **On abandonment of undertaking—Without special abandonment Act.**]—Where the usual deposit has been paid into ct. under 9 & 10 Vict. c. 20, in furtherance of a special Act subsequently passed authorising the construction of a railway, & the undertaking is afterwards abandoned, the deposit can be dealt with by the ct. under Parliamentary Deposits & Bonds Act, 1892 (c. 27), s. 1, without a special abandonment Act being obtained.—*Re* TORRINGTON & OKEHAMPTON RAILWAY BILL, [1907] 1 Ch. 186; 76 L. J. Ch. 175.

301. —— —— **Evidence of abandonment.**]—Promoters of a tramway applied for a return of the Parliamentary deposit on the ground that the undertaking had been abandoned, & the powers to make the tramway had determined:—*Held:* the proper evidence of the abandonment & cesser of the powers was a notice published in the London Gazette pursuant to Tramways Act, 1870 (c. 78), s. 18, & other evidence thereof could not be accepted.—*Re* DUDLEY & KINGSWINFORD TRAMWAYS CO. (1893), 63 L. J. Ch. 108; 69 L. T. 711; 42 W. R. 126; 8 R. 6.

Annotation:—**Overd.** A.-G *v.* Bournemouth Corpn., [1902] 2 Ch. 714.

302. —— —— ——.]—(1) In Tramways Act, 1870 (c. 78), s. 18, which provides that the powers of promoters under a provisional order shall cease "if within one year from the date of the order the works are not substantially commenced," the term "works" means physical works actually executed.

A corpn., who had obtained a provisional order for the construction of electric tramways, had done no work within the year on the tramway itself, but had purchased land for offices & a generating station, & had entered into binding contracts for the supply of electric cars & for the supply & installation of dynamos & electric machinery:—*Held:* the works had not been substantially commenced within Tramways Act, 1870 (c. 78), s. 18.

(2) Tramways Act, 1870 (c. 78), s. 18, also provides that "a notice, purporting to be published by the Board of Trade, in the *Gazette* to the effect . . . that the work has not been substantially commenced . . . shall be conclusive evidence for the purposes of this sect. of such . . . non-commencement":—*Held:* in the absence of such a notice, other evidence of the non-commencement of the works was not excluded.—A.-G. *v.* BOURNEMOUTH CORPN., [1902] 2 Ch. 714; 71 L. J. Ch. 730; 87 L. T. 252; 51 W. R. 129; 18 T. L. R. 744; 46 Sol. Jo. 648, C. A.

303. Certificate of chairman of House of Lords Committees—Proof of signature.]—Signature of chairman of Committees of House of Lords to a certificate under 9 & 10 Vict. c. 20, s. 5, must be proved.—*Re* PARLIAMENTARY DEPOSITS ACT, 1846 (1854), 2 W. R. 614.

D. To Whom paid.

304. Promoters.] — An injunction had been obtained, restraining the members of the managing committee of a railway co. from obtaining payment of the deposit out of ct. on account of alleged misconduct on the part of the committee. It afterwards appeared that the deposit had been paid out of a fund which was the joint property of that railway co., & of two others which had been amalgamated with it. The injunction was dissolved as to a part of the deposit, proportionate to that part of the fund which was the property of the other cos.—GOODMAN *v.* DE BEAUVOIR (1846), 4 Ry. & Can. Cas. 380; 10 Jur. 938.

305. ——.]—Under the usual provision, in an Act incorporating a railway co., that in the event of the undertaking being abortive the Parliamentary deposit shall either be forfeited to the Crown, or, in the discretion of the ct., be wholly or in part applied, as part of the assets of the co., for the benefit of the creditors thereof, the ct. will not apply the deposit for the benefit of all the creditors without distinction as to the nature & merit of their claims; & accordingly the promoters & the Parliamentary agents claiming in respect of costs incurred in obtaining the Act, or in relation to the promotion of the co., not being "meritorious creditors" will not be admitted to share in the distribution of the fund.—*Re* BIRMINGHAM & LICHFIELD JUNCTION RY. CO. (1885), 28 Ch. D. 652; 54 L. J. Ch. 580; 52 L. T. 729; 33 W. R. 517; 1 T. L. R. 241.

306. —— **Parliamentary agent & contractor.**]—Upon the construction of Abandonment of Railways Act, 1869 (c. 114), s. 5, claims in respect of expenses incurred by Parliamentary agents in getting the bill of a projected railway co. passed through Parliament, & for moneys advanced by the intending contractor for the same purpose, are debts which have been incurred on account of the promotion of the co.; & the ct., under the discretion given by Abandonment of Railways Act, 1869 (c. 114), s. 5, will not hold it reasonable, as between such creditors & the surety to the bond, that their debts should be paid out of the bond, which, by the warrant for the abandonment of the railway, has been directed to be applied as part of the assets of the co.—*Re* BRAMPTON & LONGTOWN RY. CO. (1870), L. R. 10 Eq. 613; 39

. J. Ch. 681 ; 23 L. T. 356 ; *sub nom. Re* BRAMPON & LONGTOWN RY. CO., *Ex p.* RICARDO, 18 V. R. 994.

nnotations :—**Apld.** *Re* Barry Ry. (1876), 4 Ch. D. 315. **Refd.** Kensington Station & North & South Junction Railway Act, 1859, Reed's Claim, Anton's Claim (1875), 32 L. T. 183.

307. —— Effect of regulations under Tramways Act, 1870 (c. 78).]—The intention of the Board of Trade regulations under above Act elative to the ultimate disposal of the deposit ıade by a tramway co. on obtaining a Provisional)rder authorising the construction of their tramvay, is (*a*) that the promoters of the co. are not, by ny subterfuge or device, to get back the deposit, ither directly or indirectly, if the tramway is not ompleted, (*b*) that, on an application under rule 2 or application of the deposit, the creditors only re to be considered, & not the shareholders, & c) that the only creditors to be considered are neritorious creditors, coming with a *bonâ fide* case. Otherwise the deposit will be forfeited to the Crown. —*Re* LOWESTOFT, YARMOUTH & SOUTHWOLD TRAMWAYS CO. (1877), 6 Ch. D. 484 ; 46 L. J. Ch. 393 ; 36 L. T. 578 ; 25 W. R. 525.

Innotations :—**Apld.** *Re* Birmingham & Litchfield Junction Ry. (1885), 28 Ch. D. 652. **Refd.** *Re* Uxbridge & Rickmansworth Ry., Way's Case (1890), 43 Ch. D. 536 ; *Re* Bradford & District Tram. Co., [1893] 3 Ch. 463 ; *Re* Colchester Tram. Co., [1893] 1 Ch. 309.

308. Creditors — Effect of Parliamentary Bonds & Deposits Act, 1892 (c. 27).]—(1) All distinction between meritorious & non-meritorious creditors as to the right, upon the abandonment of an undertaking, to share in the deposit made by the promoters in order to obtain from the Board of Trade the Provisional Order authorising the undertaking, has, since the passing of above Act ceased to exist.

(2) Persons who lent the money to the promoters of the undertaking to enable them to make the deposit, are "creditors" entitled, under above Act, sect. 1 (2), upon the abandonment of the undertaking, to share in the deposit fund *pari passu* with the other creditors of the company.

(3) The word "creditors" in above Act, sect. 1 (2), is not limited to creditors of the particular undertaking which has been abandoned, but includes the general creditors of the co.—*Ex p.* BRADFORD & DISTRICT TRAMWAYS CO., [1893] 3 Ch. 463 ; 37 Sol. Jo. 561 ; 3 R. 640 ; *sub nom. Re* PARLIAMENTARY DEPOSITS & BONDS ACT, 1892, *Ex p.* BRADFORD & DISTRICT TRAMS & TRAMWAYS ACT, 1870, 62 L. J. Ch. 668 ; 9 T. L. R. 502 ; *sub nom. Re* PARLIAMENTARY D— — — — BONDS ACT, 1892, *Ex p.* BRADFORD & DISTRICT TRAMWAYS EXTENSION ORDER, 1890, 69 L. T. 131.

Annotations :—*Generally,* **Refd.** Turpin *v.* Somerton Tram. Co., [1900] W. N. 94 ; *Re* Torrington & Okehampton Ry. Bill, [1907] 1 Ch. 186.

309. —— ——.]—*Re* HULL, BARNSLEY & WEST RIDING JUNCTION RAILWAY BILL (1893), 37 Sol. Jo. 477.

Refd. *Ex p.* Bradford & District Tram. Co., Ch. 463.

310. —— Liquidator of company.]—*Re* COLCHESTER TRAMWAYS CO., No. 277, *ante.*

311. —— ——.]—TURPIN *v.* SOMERTON TRAMWAY CO., [1900] W. N. 94.

312. —— Meritorious creditors—Effect of Regulations under Tramways Act, 1870 (c. 78).]—*Re* LOWESTOFT, YARMOUTH & SOUTHWOLD TRAMWAYS CO., No. 307, *ante.*

313. —— "Paper company."]—*Re* MANCHESTER, MIDDLETON & DISTRICT TRAMWAYS CO., No. 263, *ante.*

314. —— Priority over depositors.]—*Re* MANCHESTER, MIDDLETON & DISTRICT TRAMWAYS CO., No. 263, *ante.*

315. —— —— As to costs of inquiry.]—By a railway co.'s Act & the Act for its abandonment the Parliamentary deposit was directed to be applied in payment, first, of compensation to landowners, & secondly, of creditors, & subject thereto to be repaid to the depositors. The depositors took out a summons for distribution of the deposit, & an order was made directing inquiries whether there were any landowners or others entitled to compensation, & any debts which ought to be paid out of the deposit. These inquiries were conducted by the depositors, & resulted in a certificate that no one was entitled to compensation ; that the claim of one creditor must be disallowed ; but there were debts which ought to be paid out of the deposit exceeding its amount. On a summons taken out by the depositors :—*Held :* they could not be allowed the costs of the inquiries in priority to payment of creditors' debts.—*Re* LANCASHIRE, DERBYSHIRE & EAST COAST RAILWAY ACTS, 1891 TO 1896, *Re* LINCOLN & EAST COAST RAILWAY ACTS, 1897 to 1902, [1903] 2 Ch. 711 ; 72 L. J. Ch. 789 ; 52 W. R. 26 ; 48 Sol. Jo. 15.

316. Shareholders.]—*Re* LOWESTOFT, YARMOUTH & SOUTHWOLD TRAMWAYS CO., No. 307, *ante.*

317. Landowners — Compensation for abandonment of undertaking.]—Where the Act incorporating a railway co. contains a clause in the usual form that in case of the abandonment of the railway the Parliamentary deposit shall be applicable towards compensating any landowners whose property may have been interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, a landowner can, as a general rule, only claim compensation on account of acts done or omitted to be done by the co. under their statutory powers, & not on account of any collateral obligation entered into by the co. :—*Held :* (1) where a co. has entered into a collateral obligation of such a nature that the breach of the obligation is necessarily involved in the abandonment of the railway & undistinguishable from it, such as a covenant to build a station, the breach of such obligation may be taken into account in assessing the dimunution of value of the land ; (2) a covenant to put up fences on the land taken by the co. was not such an obligation as could form the subject of a claim for compensation out of the deposit.—*Re* RUTHIN & CERRIG-Y-DRUIDION RAILWAY ACT (1886), 32 Ch. D. 438 ; 56 L. J. Ch. 30 ; 55 L. T. 237 ; 2 T. L. R. 644 ; *sub nom. Re* RUTHIN, ETC. RY. CO., *Ex p.* HUGHES' TRUSTEES, 34 W. R. 581, C. A.

Annotations :—*As to* (1) **Consd.** *Re* Southport & Lytham Tramroad Act, 1900, *Ex p.* Hesketh, [1911] 1 Ch. 120. *As to* (2) **Apld.** *Re* Southport & Lytham Tramroad Act, 1900, *Ex p.* Hesketh, [1911] 1 Ch. 120 ; *Re* West Yorkshire Tramways Act, 1906, [1913] 1 Ch. 170.

318. —— ——.]—Applt. tramroad co., in contemplation of an application to Parliament for an Act to extend their tramroads, entered into an agreement with resp. whereby they agreed (*inter alia*) that they would use their best endeavours to obtain power to construct, & in the event of their obtaining such power would construct, & afterwards maintain, a solid embankment on a part of certain marsh land of resp. for the purpose of carrying one of their tramroads, such embankment to be formed so as to be sufficient to prevent resp.'s marsh land being inundated by certain tidal

310 i. *Creditors—Liquidator of company.*]—*Re* ENNIS & WEST CLARE RY. CO. (1885), 15 L. R. Ir. 180.—IR.

310 ii. —— ——.]—*Re* ENNISKILLEN & BUNDORAN RY. CO. (1890), 25 L. R. Ir. 472.—IR.

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waters. An Act was accordingly obtained which authorised the making of (*inter alia*) such tramroad with all necessary embankments. The Act contained the usual provision with regard to the money deposited in respect of the application to Parliament—namely, that, if the co. should make default in opening the tramroads, then the deposit fund should be applied towards compensating any landowners or other persons whose property should have been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the tramroads or any part thereof. Resp. conveyed to the co. the right to construct & maintain the embankment on his land, & the co. covenanted to construct, execute, & perform the works, matters, & things specified in the agreement. The co. subsequently obtained an Abandonment Act, & the proposed embankment was never made:—*Held:* inasmuch as the breach of the covenant to make the embankment was not the necessary result of the abandonment of the tramroads, resp. was not entitled to claim against the deposit fund in respect of the diminution in the value of his land caused by the non-construction of the embankment.—*Re* SOUTHPORT & LYTHAM TRAMROAD ACT, 1900, *Ex p.* HESKETH, [1911] 1 Ch. 120; 80 L. J. Ch. 137; 104 L. T. 154, C. A.

Annotation:—**Refd.** *Re* West Yorkshire Tramways Act, 1906, [1913] 1 Ch. 170.

319. —— ——.]—By a tramway Act, the co. were authorised to carry out certain works, amongst others being the widening of a certain street, which involved the acquisition of a portion of appct.'s property. Appct. sold this portion of his property to the co. The tramway not having been constructed & the undertaking being abandoned, the widening was not carried out & appct. was deprived of any frontage. Appct. thereupon claimed as a landowner who had suffered loss & damage by the abandonment of the undertaking, to be entitled to compensation out of the Parliamentary Deposit:—*Held:* by the Act, the tramway co. were bound to effect the widening in question, unless the district council entered into an agreement in writing relieving them from this obligation, as no such agreement had been entered into the obligation had become absolute & therefore appct. was a person whose property had been interfered with, or otherwise rendered less valuable by the abandonment of the undertaking & consequently he was entitled to compensation.—*Re* WEST YORKSHIRE TRAMWAYS ACT, 1906, [1913] 1 Ch. 170; 82 L. J. Ch. 98; 108 L. T. 18; 29 T. L. R. 115; 57 Sol. Jo. 111; 11 L. G. R. 78; 76 J. P. Jo. 616, C. A.

320. Parliamentary agent—Where sum paid to depositor as indorcement.]—*Re* COVENTRY & NUNEATON TRAMWAYS CO. (1888), 4 T. L. R. 458.

321. Nominees of directors.]—Five of the directors of a projected railway co., by petition, prayed the payment out of ct. of a large sum, standing in their names in the Bank of England, which had been paid in by them in compliance with the standing orders, to two bankers & two gentleman, not petitioners. The order was made according to the prayer.—*Ex p.* BOSTON & SHEFFIELD RY. CO. (1846), 4 Ry. & Can. Cas. 230.

SUB-SECT. 5.—RESTRAINT OF APPLICATIONS TO PARLIAMENT.

See INJUNCTION, Vol. XXVIII., pp. 486–488, Nos. 911–920.

SUB-SECT. 6.—OPPOSITION TO BILLS.

322. Who may oppose — Parties interested in property affected.]—A ct. of equity has jurisdiction, if a proper case connected with private property or interest be made, to restrain a party by injunction from petitioning against a bill in Parliament. The Stockton Railway co. being leased to the Clarence co., entered into an agreement for the sale of their railway to the Leeds co., & it was a term of the agreement, that the purchase should be completed three weeks after an Act had passed for permitting the Leeds to amalgamate with the Clarence Railway co. It did not appear that any definite agreement was concluded between the Clarence & the Leeds co., but it was understood that a bill should be presented by the Clarence co. for the amalgamation of the two cos. The bill was presented & passed the Commons without opposition, but in the Lords the Leeds co. presented a petition against the bill. The Stockton co., fearing that if this Act did not pass they would lose the benefit of their contract, filed a bill against the two other cos., praying an injunction to restrain the Leeds co. from opposing the bill in Parliament, & also specific performance of the agreement:—*Held:* the Stockton co. had not made out such a case as to induce a ct. of equity to exercise its jurisdiction by injunction.

A party who comes to oppose a railway bill in Parliament does so solely in respect of his private interest, not as representing any interest of the public, or for the purpose of communicating any information to Parliament. He is not even allowed to be heard as a petitioner against the bill, unless he has a *locus standi* in respect of some property or interest liable to be affected by it if it should pass into a law. This ct., therefore, if it sees a proper case connected with private property or interest, has just the same jurisdiction to restrain a party from petitioning against a bill in Parliament as if he were bringing an action at law, or asserting any other right connected with the enjoyment of the property or interest which he claims. . . . In order to found an equity upon these circumstances [pltfs.] must prove that the Clarence Railway co. are entitled to have that Act passed; for, if they are not, it follows that those against whom it is to be passed in Parliament, have a right to resist it. . . . The Clarence co. are not so entitled, for the evidence shows, that the Act was to be only consequential upon the agreement, when its terms should be definitely concluded; & that no such agreement has yet been concluded. . . . If there were no concluded contract, but only an intended contract, there could be no violation of duty in resisting the bill, which was only to give effect to such intended contract. On the contrary, the attempt to pass the bill under such circumstances, for any collateral purpose, would be a violation of duty on the part of the Clarence Railway co., & would justify the Leeds co. in opposing it. In that case, therefore, the injunction would operate, not to prevent, but to facilitate a violation of equity & duty (LORD COTTENHAM, C.).—STOCKTON & HARTLEPOOL RY. CO. *v.* LEEDS & THIRSK & CLARENCE RY. CO. (1848), 2 Ph. 666; 5 Ry. & Can. Cas. 691; 12 L. T. O. S. 305; 12 Jur. 735; 41 E. R. 1101, L. C.

Annotation:—**Consd.** Lancaster & Carlisle Ry. *v.* N. W. Ry. 1856), 2 K. & J. 293.

323. —— ——.]—A petition against the making of a railroad through the parish of B. was signed by persons who appeared to be merely inhabitants of the parish, but not possessed of property within it:—*Held:* upon the true construction of Standing Order 128, those only

the inhabitants whose land was taken under powers of the railroad could be heard against bill.—LONDON & SOUTH WESTERN RY. CO., EW LINES IN SURREY, BILL, KINGSTON (IN-ABITANTS) PETITION (1865), 12 L. T. 86.

324. —— ——.]—(1) The owners & occupiers wharves or quays on the banks of a river etitioned to be heard against an intended railway. hey alleged that the railroad, which proposed to oss the river by a bridge or viaduct, would bstruct the navigation & hinder vessels from ischarging their cargoes at the wharves & quays: -*Held:* petitioners were entitled to be heard gainst the railway.

(2) A petition was also presented against the ame railway by the owner of house property ommanding an extensive view, which, as it was lleged, would be marred by the new works. etitioner also alleged that his yacht would be revented from navigating the river above the ridge, & that he & his tenants were supplied ith goods by vessels passing up the stream, which, the navigation were interrupted as proposed, hey would be unable to do:—*Held:* petitioner as not entitled to be heard against the bill.—AREHAM & NETLEY RY. CO., MILWARD'S & UMPHREYS' PETITION (1865), 12 L. T. 88.

325. —— ——.]—In a petition against a roposed line of railway the petitioners were escribed as the promoters of a bill now pending n your honourable House." It appeared that heir bill, for non-compliance with the Standing Orders, had been referred to the Select Committee n Standing Orders. That committee had not hen the petition was presented, pronounced their pinion as to whether or not the parties should be ermitted to proceed with their bill:—*Held:* etitioners had no *locus standi*.—GREAT WESTERN & SURREY DOCKS JUNCTION RAILWAY BILL ETITION (1865), 12 L. T. 87.

326. Restraint of opposition—By injunction.]—TOCKTON & HARTLEPOOL RY. CO. *v.* LEEDS & HIRSK & CLARENCE RY. CO., No. 322, *ante*.

327. —— ——.]—Applications to Parliament n public & on private grounds distinguished—he latter may, in a proper case, be restrained; he former cannot, in any case, be restrained by njunction.

Defts., a railway co., agreed with pltfs., also railway co., not to apply to Parliament to make ny line, or branch line, connecting defts.' with ltfs.' railway, except a certain main line & ranches & certain deviations, for which applica-ion had been made to Parliament by defts., &, n consideration of the premises, pltfs., who had reviously opposed, agreed to support defts.' pplication, &, if required, to petition Parliament n its favour. Pltfs. performed their part of the greement, & defts. obtained their Act. The ct. efused to restrain defts. from applying to Parlia-nent for power to make a further deviation, on he ground that the bill, if passed, would be passed n public grounds, which this ct. could not try, & with full knowledge of the agreement; while, f rejected, the inconvenience of opposing the bill would be compensated in damages for a breach of he agreement, assuming that agreement to be egal.—LANCASTER & CARLISLE RY. CO. *v.* NORTH WESTERN RY. CO. (1856), 2 K. & J. 293; 25 L. J. Ch. 223; 4 W. R. 220; 69 E. R. 792.

Annotations:—**Consd.** Steele *v.* North Metropolitan Ry. (1867), 2 Ch. App. 237; *Re* London, Chatham, & Dover Railway Arrangement Act, *Ex p.* Hartridge & Allender (1869), 5 Ch. App. 671. **Refd.** Hare *v.* L. & N. W. Ry. (1861), 30 L. J. Ch. 817.

See, also, INJUNCTION, Vol. XXVIII., pp. 486–488, Nos. 911–920.

328. Vexatious opposition—Costs—Actual petitioner only liable.]—A bill, promoted by pltf., being before a Parliamentary Committee, a petition was presented against it in the name & under the seal of a co. of which defts. were directors. The Committee reported that the promoter had been vexatiously subjected to expense on the promotion of the Bill by the opposition of defts., petitioners against the Bill, & that the promoter was entitled to recover a portion of his costs from defts. The bill of costs was accordingly taxed & a certificate obtained under 28 & 29 Vict. c. 27, & pltf. commenced an action & signed judgment for the certified amount. On an application to set aside the judgment & for leave to defend:—*Held:* defts. not being the actual petitioners, the order on them to pay costs was made without jurisdiction, & could not be enforced.—MALLET *v.* HANLEY (1887), 18 Q. B. D. 787; 56 L. J. Q. B. 384; 57 L. T. 913; 35 W. R. 601; 3 T. L. R. 497, C. A.

Contract for withdrawal of opposition.]—*See* CONTRACT, Vol. XII., pp. 251, 252, Nos. 2057–2066.

SUB-SECT. 7.—COMMITTEES.

329. Practice of committees — Insertion of special clause in railway bill.]—The practice sanctioned by committees of both Houses of Parliament, viz., not to insist on the insertion of special clauses in railway bills at the instance of persons alleging grounds for their introduction, if agreements between the promoters & the persons asking for the special clauses are entered into, whereby the promoters engage that the co., when incorporated, shall give to those who are asking for special enactments the same benefit as if there were clauses in the bill to the effect asked for, seems illegal.—CALEDONIAN & DUMBARTONSHIRE JUNCTION RY. CO. *v.* HELENSBURGH MAGISTRATES (1856), 2 Macq. 391; 27 L. T. O. S. 241; 2 Jur. N. S. 695; 4 W. R. 671, H. L.

Annotations:—**Refd.** Leominster Canal Navigation Co. *v.* Shrewsbury & Hertford Ry. (1857), 3 K. & J. 654; Bedford & Cambridge Ry. *v.* Stanley (1862), 32 L. J. Ch. 60. **Mentd.** Shrewsbury & Birmingham Ry. *v.* N. W. Ry. (1857), 6 H. L. Cas. 113; Shrewsbury *v.* North Staffordshire Ry. (1865), L. R. 1 Eq. 593; Mann *v.* Edinburgh Northern Tram. Co., [1893] A. C. 69.

SUB-SECT. 8.—REJECTION OF BILLS.

330. Grounds for rejection—What grounds presumed.]—A bill introduced into either House of Parliament & rejected, will be presumed to have been rejected on its merits, unless the contrary appear.

By 19 & 20 Vict. c. 120, s. 21, no application to this ct. is to be granted where a similar application has been rejected by Parliament.

Where, therefore, a petitioner under this Act had several times applied to Parliament for similar powers of leasing certain settled property as were asked for by the present petition, & such applications were rejected:—*Held:* ct. had no power to grant such an application.—*Re* WILSON'S ESTATE BILL & SETTLED ESTATES ACT (1859), 1 L. T. 25; 24 J. P. 84.

SUB-SECT. 9.—TAXATION OF COSTS.

See, generally, House of Commons Costs Taxation Act, 1847 (c. 69); House of Lords Costs Taxation Act, 1849 (c. 78); Parliamentary Costs Act, 1865 (c. 27).

Sect. 2.—Private bills : Sub-sects. 9 & 10.]

331. Time for application for taxation.]—(1) The application to be made to the taxing officer of the House under 28 & 29 Vict. c. 27, s. 3, must be made within six months after the report of the committee, & not until one month after the delivery of the bill of costs.

(2) The provisions of 28 & 29 Vict. c. 27, s. 5, that the validity of the taxing officer's certificate shall not be called in question in any ct., only applies to cases where the certificate has been given in conformity with the provisions of 28 & 29 Vict. c. 27.—WILLIAMS *v.* SWANSEA CANAL NAVIGATION CO. (1868), L. R. 3 Exch. 158 ; 37 L. J. Ex. 107 ; *sub nom.* WILLIAMS *v.* NEATH & BRECON RY. CO. & SWANSEA CANAL NAVIGATION CO. OF PROPRIETORS, 18 L. T. 368 ; 16 W. R. 794.

332. Validity of taxing officer's certificate.]—WILLIAMS *v.* SWANSEA CANAL NAVIGATION CO., No. 331, *ante*.

333. —— Chancery jurisdiction.]—(1) 28 & 29 Vict. c. 27, s. 5, provides that the validity of such a certificate of costs as that prescribed by 28 & 29 Vict. c. 27, "shall not be called in question in any ct." (2) Where a certificate of costs had been obtained from the taxing officer, certifying that two promoters of a private bill were the parties liable to pay a sum of costs, & the taxation of such costs had been made in the absence of, & without notice having been given to, one of such promoters ; the certificate being regular in point of form, & consequently not assailable at common law :—*Held :* the Ct. of Ch., in exercise of its jurisdiction to set aside judgments obtained by fraud, had, notwithstanding 28 & 29 Vict. c. 27, jurisdiction to restrain an action commenced upon such certificate against the promoter, who had no notice, & the other promoter was not a necessary party to the suit.—SWANSEA CANAL PROPRIETORS *v.* GREAT WESTERN RY. CO. (1868), L. R. 5 Eq. 444 ; 37 L. J. Ch. 238 ; 18 L. T. 78 ; 16 W. R. 1034.

Annotation :—Generally, **Refd.** Mallet *v.* Hanly (1886), 18 Q. B. D. 303.

334. —— Absence of jurisdiction.]—MALLET *v.* HANLEY, No. 328, *ante*.

SUB-SECT. 10.—DIVORCE BILLS.

See, generally, HUSBAND & WIFE, Vol. XXVII., pp. 262 *et seq.*

335. Effect of Matrimonial Causes Act, 1857 (c. 85)—On legislative power of Parliament.]—SANDWITH *v.* SANDWITH (1859), cited in 1 Sw. & Tr. at p. 470 ; 29 L. J. P. M. & A. at p. 174 ; 5 Jur. N. S. at p. 715 ; 7 W. R. at p. 727 ; 164 E. R. 818, H. L.

*:—***Refd.** Ratcliff *v.* Ratcliff (1859), 1 Sw. & Tr. 467.

336. Petition by wife.]—WESTROPP'S DIVORCE BILL (1886), 11 App. Cas. 294 ; 2 T. L. R. 628, H. L.

*Annotation :—***Folld.** Gifford's Divorce Bill (1886), 12 App. Cas. 361.

337. Petition by husband—Allowance for wife's defence.]—CAMPBELL'S CASE (1858), cited in 1 Sw. & Tr. at p. 221 ; 28 L. J. P. M. & A. 11 ; 6 W. R. 867 ; 164 E. R. 701, H. L.

*Annotation :—***Apld.** Weber *v.* Weber & Pyne (1858), 1 Sw. & Tr. 219.

338. —— ——.]—(1) Where on a bill for a divorce it appeared that resp.'s address was concealed, & the House ordered substituted service, service was ordered to be made on the resp.'s solr., on resp.'s parent, & also on the person with whom resp. appeared to be residing.

(2) Where upon a bill for divorce by the husband it appears that the wife has no means to defend herself, the House will order the husband to pay her a small sum in order that she may make her defence.

(3) Where, on a bill of divorce by the husband on the ground of the wife's adultery the adultery was proved, but it appeared that the husband had not fulfilled his duty by providing a home for the wife when she was separated from him by order of his medical attendant, the House in passing the bill directed that a clause should be added making provision for the wife.—A.'s DIVORCE BILL (1887), 12 App. Cas. 364, H. L.

339. —— ——.]—WEBER *v.* WEBER & PYNE (1858), 1 Sw. & Tr. 219 ; 28 L. J. P. & M. 11 ; 31 L. T. O. S. 302 ; 6 W. R. 867 ; 164 E. R. 701.

*Annotation :—***Refd.** Powell *v.* Powell (1874), L. R. 3 P. & D. 186.

340. —— Clause providing for wife's maintenance.]—A.'s DIVORCE BILL, No. 338, *ante*.

341. Service of bill—Evidence of personal service dispensed with—Respondent outside jurisdiction—Petitioner in poor circumstances.]—Resp. in a divorce bill being out of the jurisdiction & petitioner in poor circumstances, the House dispensed with the attendance at the bar of a witness to prove personal service of the bill & the several orders of the House on resp. ; & ordered that an affidavit proving such personal service, & sworn under 18 & 19 Vict. c. 42, before the British minister or consul at the place where resp. resided, should be deemed sufficient proof of such service.—JOYNT'S DIVORCE BILL (1888), 13 App. Cas. 741, H. L.

342. —— Respondent's whereabouts unknown.]—In proceedings upon a divorce bill application was made in May, 1886, to dispense with personal service on resp. on the ground that his address was unknown to petitioner, that a solr. who had previously acted for resp. had admitted that he knew of his address but had refused to divulge it & that resp. had been last heard of in Feb. 1886, being then at Montreal, in Canada :—*Held :* the application was premature, & must be refused.—GIFFORD'S DIVORCE BILL (1886), 12 App. Cas. 361, H. L.

343. —— Substituted service—Service on respondent's father.]—CASHEL DIVORCE BILL (1866), 98 Lords Journals, 49, H. L.

*Annotations :—***Distd.** Gifford's Divorce Bill (1886), 12 App. Cas. 361. **Mentd.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374.

344. —— —— Service on respondent's solicitor.]—A.'s DIVORCE BILL, No. 338, *ante*.

345. —— —— Service on respondent's parents.]—*Re* FLEMING'S DIVORCE BILL, [1893] W. N. 93, H. L.

346. —— ——.]—*Re* HURLY'S DIVORCE BILL, [1908] W. N. 41, H. L.

347. Delay in petitioning—Absence of respondent—Illness of petitioner.]—A husband, immediately after his wife's elopement, brought an action & obtained a verdict for damages against the adulterer, & also proceeded against the wife in the Ecclesiastical Ct., & obtained a divorce there, but did not for five years from the elopement apply for a divorce in Parliament :—*Held :* delay was sufficiently accounted for by the absence of the wife in America, & by the inability of the

332 i. *Validity of taxing officer's certificate.*]—NEWRY & ARMAGH RY. *v.* ULSTER RY. (1869), I. R. 4 C. L. 62.—IR.

husband, in consequence of his affliction, to attend to any business.—*Re* HEAVISIDE'S DIVORCE BILL (1845), 12 Cl. & Fin. 333; 8 E. R. 1435, H. L.

348. —— Petitioner's want of means.]—The production of the record of a judgment at law, for criminal conversation, was also dispensed with in this case, where, during a voluntary separation of petitioner & his wife, she committed adultery, of which he was not informed until after the death of the adulterer:—*Held:* a lapse of nine years from the admitted discovery, & of nineteen years from the fact, of the wife's adultery, was not a bar to petitioner's right to a divorce *a vinculo*, he having shown that he was not able, for want of funds, to apply to Parliament sooner.—*Re* LARDNER'S DIVORCE (1839), 6 Cl. & Fin. 569; 7 E. R. 812, H. L.

Annotation:—**Refd.** Bell *v.* Bell & Anglesea (1859), 8 W. R. 178.

349. —— —— Leave to proceed in formâ pauperis.]—Petitioner, a motor mechanic, residing at Claresford, Ireland, obtained a decree a *mensa et thoro* in the Irish Cts. in 1910 dissolving his marriage with his wife. He alleged that owing to want of means he had been unable to present a bill for divorce until recently, & he asked on the second reading of the bill for leave to prosecute *in formâ pauperis:—Held:* (1) want of means was a reasonable ground for the delay in presenting the bill; (2) leave should be granted to prosecute *in formâ pauperis.—Re* WHITE'S DIVORCE BILL (1920), 64 Sol. Jo. 461, H. L.

350. Petitioner's attendance at bar of House—Dispensed with—On reasonable grounds.]—The husband's attendance at the bar on the second reading of his bill for a divorce, in compliance with Standing Order No. 142, may be dispensed with, on petition of his attorney showing reasonable grounds for his non-attendance.—*Re* SHULDAM'S DIVORCE BILL (1845), 12 Cl. & Fin. 363; 8 E. R. 1448, H. L.

351. —— —— On grounds of ill-health.]—(1) The enforcement of the Standing Order of the House, requiring petitioner in a divorce bill to present himself for examination at the bar, may be dispensed with on account of the state of his health.

(2) The acceptance, by petitioner in a divorce bill, of an offer of a certain sum upon a writ of inquiry to assess the damages, after judgment by default, in an action of *crim. con.* against the wife's paramour:—*Held:* under the circumstances, not to be a bar to the bill.—*Re* HENEAGE'S DIVORCE BILL (1848), 1 H. L. Cas. 496; 9 E. R. 852, H. L.

352. Allegations of petitioner proved—Second reading allowed.]—Where a decree a *mensa et thora* has been obtained by the husband in the Irish cts., but owing to the co-resp. cited not being within the jurisdiction, no action at law could be brought against him:—*Held:* the facts alleged by petitioner being strictly proved, the House could order a bill to dissolve the marriage of petitioner with his wife to be read a second time.—TORRENS' DIVORCE BILL (1909), 53 Sol. Jo. 396, H. L.

353. Bastardising clause in bill—Deletion.]—A paragraph in a divorce bill contained allegations tending to bastardise a child to which the wife had given birth during the marriage. There was access at the natural period of the conception of the child:—*Held:* such paragraph was inadmissible, & must be struck out of the bill.—HEWAT'S DIVORCE BILL (1887), 12 App. Cas. 312, H. L.

354. Irish divorce bill—Evidence of adultery.]—In suing out a divorce bill, the Standing Order No. 141, requiring petitioner to produce a record of a judgment in an action for criminal conversation against the adulterer, will be dispensed with, where it is shown that such action was impracticable.—*Re* COODE'S DIVORCE (1839), 6 Cl. & Fin. 567; 7 E. R. 812, H. L.

355. —— ——.]—*Re* LARDNER'S DIVORCE, No. 348, *ante*.

356. —— ——.]—(1) It is not necessary for the first reading of an Irish divorce bill that a definitive sentence of divorce *a mensa et thora* should have been pronounced in the Irish cts.

(2) Where in the proceedings upon an Irish divorce bill it appears that no action for criminal conversation has been brought against a co-resp. who was not domiciled & could not be served in Ireland, the House of Lords may allow the bill for divorce to be received.—SINCLAIR'S DIVORCE BILL, [1897] A. C. 469, H. L.

357. —— —— Sufficiency of.]—The same evidence which since Matrimonial Causes Act, 1857 (c. 85), enables the Divorce ct. to pronounce a decree for dissolution of marriage will be considered by the House of Lords sufficient ground for passing a divorce bill relating to Ireland, where Matrimonial Causes Act, 1857 (c. 85), does not apply.—WESTROPP'S DIVORCE BILL (1886), 11 App. Cas. 294; 2 T. L. R. 628, H. L.

Annotation:—**Foll.** Gifford's Divorce Bill (1886), 12 App. Cas. 361.

358. —— Evidence taken on commission—Where accepted by Irish courts.]—Evidence taken in India on commission, & received & acted on by the Q. B. Div. of the High Ct. of Justice in Ireland, admitted to be used on the second reading of an Irish divorce bill.—JONES' DIVORCE BILL, [1899] A. C. 348, H. L.

359. —— Custody of children.]—In an Irish divorce bill, although no separate action has been instituted in Ireland to obtain the custody of infant children after a decree for separation *a mensa et thora* has been pronounced, the House of Lords will sanction a clause giving the custody of the children to the innocent party.—HART'S DIVORCE BILL, [1898] A. C. 305, H. L.

360. —— ——.]—The House of Lords will approve of a clause in a divorce bill giving the custody of the children of the marriage to the innocent party, but will refuse to order that a provision shall be inserted in the clause giving the guilty party access to the children. Any such provision must be left for arrangement between the parties.—KILLERY'S DIVORCE BILL, [1907] A. C. 306, H. L.

361. —— Settlement of crim. con. action—Whether bar to bill.]—*Re* HENEAGE'S DIVORCE BILL, No. 351, *ante*.

362. —— Second reading—Copy of Irish judgment.]—On the hearing of a petition that a bill of divorce may be read a second time & sent to Committee, a certified copy of any judgment affecting the matter given in the Irish cts. must be supplied by the registrar of such ct. for evidence before the House.—GALWEY'S DIVORCE BILL (1907), 51 Sol. Jo. 306, H. L.

Part VI.—Financial Work of Parliament.

363. Nature of funds voted for public service—Not trust funds in hands of Secretaries of State—Jurisdiction of Chancery Division.]—The funds voted by Parliament for the public service are not trust funds in the hands of the Secretaries of State who receive them from the Treasury; & the Ct. of Ch. has no jurisdiction to take any account of the application of such funds.—GRENVILLE-MURRAY *v.* CLARENDON (EARL) (1869), L. R. 9 Eq. 11; 39 L. J. Ch. 221; 21 L. T. 448; 18 W. R. 124.

Annotation:—**Mentd.** Hayman *v.* Rugby School (1874), L. R 18 Eq. 28.

Effect of resolution of Committee of Ways & Means—Levying income tax.]—*See* INCOME TAX, Vol. XXVIII., p. 97, No. 578.

Rights of executive to levy taxation before passing of Act.]—*See* INCOME TAX, Vol. XXVIII., pp. 96, 97, Nos. 577, 578.

Part VII.—Privileges of Parliament.

SECT. 1.—IN GENERAL.

364. Origin of privilege—Lex et consuetudo parliamenti.]—(1) This Ct. [of Common Pleas] cannot know the nature & power of the proceedings of the House of Commons; it is founded on a different law, the *lex et consuetudo parliamenti*, is known to Parliament-men only (GOULD, J.).

(2) A Member of the House of Commons committed for breach of privilege cannot be discharged on a *habeas corpus* during the session.—BRASS CROSBY'S CASE (1771), 3 Wils. 188; 2 Wm. Bl. 754; 19 State Tr. 1137; 95 E. R. 1005.

Annotations:—*As to* (1) **Consd.** Gosset *v.* Howard (1847), 10 Q. B. 411. **Refd.** Wensleydale Peerage Case (1856), 8 State Tr. N. S. 479. *As to* (2) **Apld.** R. *v.* Flower (1799), 8 Term Rep. 314. **Consd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1. **Apld.** Middlesex Sheriff's Case (1840), 11 Ad. & El. 273. *Generally*, **Refd.** Burdett *v.* Abbot (1812), 4 Taunt. 401.

365. —— ——.]—*Semble:* the House of Commons possess this power [power of arrest] only by virtue of ancient usage & prescription; the *lex et consuetudo parliamenti*.—KIELLEY *v.* CARSON (1842), 4 Moo. P. C. C. 63; 4 State Tr. N. S. 669; 7 Jur. 137; 13 E. R. 225, P. C.

Annotations:—**Consd.** Fenton *v.* Hampton (1858), 11 Moo. P. C. C. 347. **Refd.** *Ex p.* Brown (1864), 5 B. & S. 280; Dill *v.* Murphy (1864), 1 Moo. P. C. C. N. S. 487; Doyle *v.* Falconer (1866), L. R. 1 P. C. 328; A.-G. of New South Wales *v.* Macpherson (1870), L. R. 3 P. C. 268; Phillips *v.* Eyre (1870), L. R. 6 Q. B. 1; Barton *v.* Taylor (1886), 11 App. Cas. 197.

366. —— ——.]—The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the *lex et consuetudo parliamenti*, which is a law peculiar to & inherent in the two Houses of Parliament of the United Kingdom (*per* CUR.).—DOYLE *v.* FALCONER (1866), L. R. 1 P. C. 328; 4 Moo. P. C. C. N. S. 203; 36 L. J. P. C. 33; 15 W. R. 366; 16 E. R. 293, P. C.

Annotations:—**Refd.** A.-G. of New South Wales *v.* Macpherson (1870), L. R. 3 P. C. 268; Barton *v.* Taylor (1886), 11 App. Cas. 197; Fielding *v.* Thomas, [1896] A. C. 600.

367. —— **In House of Lords.**]—The House of Lords, when sitting legislatively, has that power [the power to commit for contempt] by prescription; when the Lords are sitting as a judicial body they have it in their own right (BLACKBURN, J.).—*Ex p.* BROWN (1864), 5 B. & S. 280; 10 L. T. 458; 122 E. R. 835; *sub nom. Re* BROWN, 4 New Rep. 163; 33 L. J. Q. B. 193; 28 J. P. 566; 10 Jur. N. S. 945; 12 W. R. 821.

Annotation:—**Mentd.** R. *v.* Secretary of State for Affairs, *Ex p.* O'Brien, [1923] 2 K. B. 361.

368. Jurisdiction unless specially exempted.]—Action of trespass against the Serjeant-at-Arms attending the House of Commons for arresting & imprisoning pltf. Deft. pleaded the Speaker's warrant, which after reciting that the House of Commons had that day ordered that pltf. should be sent for in the custody of the Serjeant-at-Arms, required & authorised him to take into custody the body of pltf.:—*Held:* (1) The House of Commons, as grand inquest of the nation, had a right to institute inquiries & to order the attendance of witnesses; (2) in case of disobedience to such order, or to an order to attend & answer a charge of contempt or breach of privilege, the House might order the offending parties to be brought to the bar of the House in custody, & was the sole judge when such power should be exercised; (3) the House of Commons being part of the High Ct. of Parliament, its process must be construed by the rule applicable to all the Superior Cts., that nothing shall be intended to be out of their jurisdiction unless the same shall specially appear; (4) the Speaker's warrant, though defective according to the rule applicable to Inferior Cts., was sufficient, & justified the alleged trespasses.—HOWARD *v.* GOSSET, GOSSET *v.* HOWARD (1847), 6 State Tr. N. S. 319; 10 Q. B. 411; 16 L. J. Q. B. 345; 10 L. T. O. S. 51; 11 J. P. 457; 11 Jur. 750; 116 E. R. 158, Ex. Ch.

Annotations:—*As to* (3) **Refd.** Wickens *v.* Goatly (1851), 11 C. B. 666. *As to* (4) **Consd.** Fenton *v.* Hampton (1858), 11 Moo. P. C. C. 347; Bradlaugh *v.* Erskine (1883), 47 L. T. 618. **Refd.** Crawford's Case (1849), 13 Q. B. 613; *Ex p.* Fernandez (1861), 10 C. B. N. S. 3; Dale's Case, Enraght's Case (1881), 6 Q. B. D. 376. *Generally*, **Mentd.** Ryalls *v.* R. (1849), 11 Q. B. 795; Wagner *v.* Imbrie (1851), 20 L. J. Ex. 416.

369. Parliament alone judge when privilege to be exercised.]—HOWARD *v.* GOSSET, GOSSET *v.* HOWARD, No. 368, *ante*.

370. Proof of privilege — Judicial notice.]—DELL *v.* MURPHY (1864), as cited in 24 L. T. at p. 318, P. C.

Annotations:—**Consd.** Victoria Legislative Assembly *v.* Glass (1871), L. R. 3 P. C. 560. **Refd.** Doyle *v.* Falconer (1866), L. R. 1 P. C. 328.

—— ——.]—*See, also*, EVIDENCE, Vol. XXII., p. 146, Nos. 1229, 1230.

371. Whether necessary to plead privilege.]—(1) Privilege of Parliament allowed without pleading it.

(2) A Member of Parliament may be discharged without pleading the privilege.—HOLLIDAY *v.* PITT (1734), Fortes. Rep. 342; 92 E. R. 882; *sub nom.* HOLIDAY *v.* PIT, Lee *temp.* Hard. 28, 37;

2 Stra. 985; *sub nom.* PITT'S CASE, Fortes. Rep. 159; 7 Mod. Rep. 225; Ridg. *temp.* H. 91; 2 Com. 444.

Annotations:—*As to* (1) **Refd.** Crosby's Case (1771), 3 Wils. 188. *As to* (2) **Refd.** Chester *v.* Upsdale (1750), 1 Wils. 278; Bartlett *v.* Hebbes (1794), 5 Term Rep. 686; Webb *v.* Taylor (1843), 8 Jur. 39. *Generally*, **Refd.** Luntley *v.* Battine (1818), 2 B. & Ald. 234. **Mentd.** Strong *v.* Dickenson (1836), 1 M. & W. 488; Magnay *v.* Burt (1843), 1 L. T. O. S. 206.

SECT. 2.—BY WHOM ASCERTAINED.

372. Whether courts have jurisdiction.]—THORPE'S CASE (1454), 1 Hatsell's Precedents, 28.

Annotations:—**Consd.** Stockdale *v.* Hansard (1840), 3 State Tr. N. S. 723. **Refd.** Burdett *v.* Abbott (1811), 14 East, 1; Wensleydale Peerage Case (1856), 8 State Tr. N. S. 479.

-.]—The House of Lords & House of Commons can alone determine & decide upon their own privileges, orders, & customs.—PARLIAMENT CASE (1609), 13 Co. Rep. 63; 77 E. R. 1473.

374. ——.]—BINION *v.* EVELING (1662), cited in 2 Salk. 512; cited in Carth. 137; 91 E. R. 436.

Annotations:—**Refd.** R. *v.* Knollys (1693), 2 Salk. 509; R. *v.* Paty (1704), 2 Ld. Raym. 1105; Fenton *v.* Hampton (1858), 11 Moo. P. C. C. 347. **Mentd.** Hall *v.* Wyborn (1689), 1 Show. 98.

375. ——.]—SOMERSET (DUCHESS) *v.* MANCHESTER (EARL) (1663), 4 Prynne's Register of Parliamentary Writs, 1214.

Annotation:—**Refd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1.

376. ——.]—To them [Parliament] it belongs to determine the fundamental rights of their House, & of the constituent parts of it, the members (POWYS, J.).—ASHBY *v.* WHITE (1703), 2 Ld. Raym. 938; Holt, K. B. 524; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 92 E. R. 126; *revsd.* (1704), 1 Bro. Parl. Cas. 62, H. L.

Annotations:—**Consd.** R. *v.* Paty (1704), 2 Ld. Raym. 1105; Myddleton *v.* Wynn (1746), Willes, 597; Milward *v.* Serjeant (1786), 14 East, 60, n. **N.F.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1. **Refd.** Selwyn *v.* Honeywood (1744), 9 Mod. Rep. 419; R. *v.* Midhurst Borough (1750), 1 Wils. 283; Drewe *v.* Coulton (1789), 1 East, 563, n.; Burdett *v.* Abbot (1811), 14 East, 1; Cullen *v.* Morris (1819), 2 Stark. 577; Pryce *v.* Belcher (1847), 4 C. B. 866; *Ex p.* Mawby (1854), 18 Jur. 906; Chamberlain *v.* West End of London & Crystal Palace Ry. (1862), 2 B. & S. 617; Bradlaugh *v.* Erskine (1883), 47 L. T. 618; Chaffers *v.* Goldsmid, [1894] 1 Q. B. 186. **Mentd.** R. *v.* Loggen et Froome (1718), 1 Stra. 73; Chapman *v.* Pickersgill (1762), 2 Wils. 145; R. *v.* Pasmore (1789), 3 Term Rep. 199; Schinotti *v.* Bumsted (1796), 6 Term Rep. 646; Harman *v.* Tappenden (1801), 1 East, 555; Tewkesbury Corpn. *v.* Diston (1805), 6 East, 438; Williams *v.* Mostyn (1838), 4 M. & W. 145; Ferguson *v.* Kinnoull (1842), 9 Cl. & Fin. 251; Hampden *v.* Macmullen (1843), 3 Notes of Cases Supp. 1; Harnett *v.* Maitland (1847), 16 M. & W. 257; R. *v.* James (1850), 3 Car. & Kir. 167; Embrey *v.* Owen (1851), 6 Exch. 353; King *v.* Rochdale Canal Co. (1851), 14 Q. B. 136; Crouch *v.* L. & N. W. Ry. (1854), 14 C. B. 255; Nicklin *v.* Williams (1854), 10 Exch. 259; Tozer *v.* Child (1857), 7 E. & B. 377; Fotherby *v.* Met. Ry. (1866), L. R. 2 C. P. 188; Smith *v.* Thackerah (1866), L. R. 1 C. P. 564; Basébé *v.* Matthews (1867), L. R. 2 C. P. 684; Morgan *v.* Met. Ry. (1868), 37 L. J. C. P. 265; Metropolitan Board of Works *v.* M'Carthy (1874), L. R. 7 H. L. 243; Wood *v.* Woad (1874), L. R. 9 Exch. 190; Humphrey *v.* Cousins (1877), 46 L. J. Q. B. 438; Bowen *v.* Hall (1881), 6 Q. B. D. 333; Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1; Ratcliffe *v.* Evans, [1892] 2 Q. B. 524; Allen *v.* Flood, [1898] A. C. 1; Clarke *v.* London General Omnibus Co., [1906] 2 K. B. 648; I. R. Comrs. *v.* Joicey (No. 1), [1913] 1 K. B. 445; Hammerton *v.* Dysart, [1916] 1 A. C. 57; Neville *v.* London Express Newspaper, [1919] A. C. 368; Weld-Blundell *v.* Stephens, [1920] A. C. 956; Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616; Manton *v.* Brocklebank, [1923] 2 K. B. 212; Everett *v.* Ryder (1926), 135 L. T. 302.

377. ——.]—The ct. had jurisdiction to inquire, for the purposes of the action, into the existence & extent of the privilege or power alleged in the plea; in such inquiry the resolution & declaration of the House of Commons did not conclude the ct.—STOCKDALE *v.* HANSARD (1839), 9 Ad. & El. 1; 3 State Tr. N. S. 723, 849; 2 Per. & Dav. 1; 8 L. J. Q. B. 294; 3 Jur. 905; 112 E. R. 1112.

Annotations:—**Consd.** Gosset *v.* Howard (1847), 10 Q. B. 411; Wason *v.* Walter (1868), L. R. 4 Q. B. 73; Bradlaugh *v.* Erskine (1883), 47 L. T. 618; Bradlaugh *v.* Gossett (1884), 12 Q. B. D. 271. **Refd.** R. *v.* Gossett (1840), 3 Per. & Dav. 349; Fenton *v.* Hampton (1858), 11 Moo. P. C. C. 347; A.-G. of New South Wales *v.* Macpherson (1870), L. R. 3 P. C. 268; Henwood *v.* Harrison (1872), L. R. 7 C. P. 606. **Mentd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534; Feather *v.* R. (1865), 6 B. & S. 257; Mangena *v.* Lloyd (1908), 98 L. T. 640.

378. ——.]—WENSLEYDALE PEERAGE (1856), 5 H. L. Cas. 958; 8 State Tr. N. S. 479, 635; 10 E. R. 1181, H. L.

Annotations:—**Mentd.** *Re* Buckhurst Peerage (1876), 2 App. Cas. 1; A.-G. for Dominion of Canada *v.* A.-G. for Province of Ontario (1897), 67 L. J. P. C. 17; Rhondda's Claim, [1922] 2 A. C. 339.

379. ——.]—WASON *v.* WALTER, No. 401, *post*.

SECT. 3.—WHO MAY CLAIM PRIVILEGE.

380. Candidate at election.]—CITY OF LONDON CASE (1804), 2 Peck. 268.

381. Person elected while in custody.]—FITZHERBERT'S CASE (1592), Moore, K. B. 340; 72 E. R. 616.

382. —— **Entitled to discharge.**]—An unprivileged person in custody in execution, elected a Member of Parliament, is entitled to his discharge on motion; &, therefore, bail may have an *exoneretur* entered on the bail piece, if the privileged person be elected between perfecting bail & final judgment; & this was allowed, although a *cognovit* had been given with the express consent of the bail; & pltf., had he not taken the *cognovit*, might have compelled a render before deft. acquired privilege. — PHILLIPS *v.* WELLESLEY (1830), 1 Dowl. 9; 9 L. J. O. S. K. B. 6.

383. Unsworn member.]—EUROPEAN & AMERICAN FINANCE CORPN., LTD. *v.* M.P., No. 416, *post*.

384. Alleged Scottish peer.] — Deft. having voted at the election of Scottish peers:—*Held:* as a Scottish peer, entitled to be discharged from arrest, although his vote had been protested against, his claim to the title disputed, & never recognised by the House of Lords or at Court. —DIGBY *v.* STIRLING (LORD) (1831), 8 Bing. 55; 1 Dowl. 248; 2 State Tr. N. S. App. 1014; 1 Moo. & S. 116; 131 E. R. 321; *subsequent proceedings, sub nom.* DIGBY *v.* ALEXANDER (1832), 9 Bing. 412.

Annotation:—**Refd.** Smart *v.* Johnstone (1837), Murp. & H. 351.

385. Servant of peer — Gamekeeper.] — *Qu.:* whether a gamekeeper to a peer be privileged from arrests?—CHESTER *v.* UPSDALE (1750), 1 Wils. 278; 95 E. R. 617.

SECT. 4.—DURATION OF PRIVILEGE.

386. During session.]—A Member of the House of Commons is privileged from arrests during the session of Parliament, but after such session may be taken again.—SKEWYS *v.* CHAMOND (1544), 1 Dyer, 59 b; 73 E. R. 131; *sub nom.* TREWYNNARD'S CASE, Hatsell's Cases of Privilege of Parliament, 59.

Annotations:—**Consd.** Cassidy *v.* Steuart (1841), 2 Man. & G. 437. **Refd.** Benyon *v.* Evelyn (1664), O. Bridg. 324; Brass Crosby's Case (1771), 3 Wils. 188; Burdett *v.* Abbot (1811), 14 East, 1; Stockdale *v.* Hansard (1839), 9 Ad. & El. 1. **Mentd.** Rutland's Case (1606), 6 Co. Rep. 52 b; Marshalsea Case (1613), 10 Co. Rep. 68 b; Gwinne *v.* Poole (1692), 2 Lut. App. 1560; R. *v.* Knowles (1693), 12 Mod. Rep. 55.

Sect. 4.—*Duration of privilege.* *Sect.* 5: *Sub-sects.* 1, *A.*]

387. —— & forty days before & after.]—BUTCHER *v.* STEUART (1843), 11 M. & W. 857; 1 Dow. & L. 308; 12 L. J. Ex. 391; 1 L. T. O. S. 386; 7 Jur. 774; 152 E. R. 1052.

Annotations:—**Mentd.** Tanner *v.* Moore (1846), 9 Q. B. 1; Goldshede *v.* Swan (1847), 1 Exch. 154; Steele *v.* Hoe (1849), 14 Q. B. 431; Bainbridge *v.* Wade (1850), 16 Q. B. 89; Colbourn *v.* Dawson (1851), 10 C. B. 765; Broom *v.* Batchelor (1856), 1 H. & N. 255; Reader *v.* Kingham (1862), 13 C. B. N. S. 344.

388. —— ——.]—A Member of the House of Commons is privileged from arrest under a *ca. sa.* for forty days before & forty days after each meeting of Parliament, & the privilege is equally applicable to the meeting of a new Parliament after a dissolution, as to the meeting of a Parliament after a prorogation.—GOUDY *v.* DUNCOMBE (1847), 1 Exch. 430; 5 Dow. & L. 209; 17 L. J. Ex. 76; 10 L. T. O. S. 187; 11 J. P. Jo. 857; *sub nom.* GOWDEY *v.* DUNCOMBE, 2 New Pract. Cas. 458.

Annotation:—**Extd.** *Re* Anglo-French Co-op. Soc. (1880), 14 Ch. D. 533.

389. —— ——.] — *Re* ANGLO-FRENCH CO-OPERATIVE SOCIETY, No. 394, *post.*

390. Reasonable time before & after Parliament.]—MARTIN'S CASE (1586), D'Ewes Journals of Parliaments, 414; Bac. Abr., 7th ed. 549.

Annotation:—**Consd.** Goudy *v.* Duncombe (1847), 1 Exch. 430.

391. ——.]—Privilege from arrest continues to those who have been Members of the House of Commons, for a reasonable time after a dissolution of Parliament.—BARNARD *v.* MORDAUNT (1754), 1 Keny. 125; 96 E. R. 939.

392. Twenty days before & after Parliament.]—ATHOL (EARL) *v.* DERBY (EARL) (1672), 2 Lev. 72; 1 Cas. in Ch. 220; 83 E. R. 455.

Annotations:—**Consd.** Goudy *v.* Duncombe (1847), 1 Exch. 430. **Mentd.** Wharam *v.* Broughton (1748), 1 Ves. Sen. 180.

393. Rule applies to dissolution as well as prorogation.]—GOUDY *v.* DUNCOMBE, No. 388, *ante.*

394. ——.]—On a motion for attachment of a Member of the Parliament which was dissolved on Mar. 24, for contempt in not obeying an order of the ct. to pay certain moneys, etc., to the liquidator of the co.:—*Held:* the rule laid down in *Goudy* v. *Duncombe*, No. 388, *ante*, that a Member of Parliament was entitled to privilege from arrest for forty days both after & before the meeting of Parliament & whether after a prorogation or a dissolution applies to a person who was a Member of the old but is not a Member of the new Parliament.—*Re* ANGLO-FRENCH CO-OPERATIVE SOCIETY (1880), 14 Ch. D. 533; 49 L. J. Ch. 388; 28 W. R. 580.

Annotation:—**Consd.** *Re* Armstrong, *Ex p.* Lindsay, [1892] 1 Q. B. 327.

See, also, Sect. 5, sub-sect. 3, C., *post.*

SECT. 5.—PRIVILEGES COMMON TO BOTH HOUSES.

SUB-SECT. 1.—ACTS DONE IN PARLIAMENT.

395. Exclusive jurisdiction—Of House of Lords.]—R. *v.* KNOWLES (OR KNOLLYS) (*alias* BANBURY (EARL)) (1693), 12 State Tr. 1167; 1 Ld. Raym. 10; Comb. 273; 12 Mod. Rep. 55; 2 Salk. 509; 3 Salk. 242; Skin. 517; 91 E. R. 904; *sub nom.* BANBURY'S (LORD) CASE, Carth. 297, H. L.

Annotations:—**Consd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1; Wensleydale Peerage Case (1856), 8 State Tr. N. S. 479. **Reld.** R. *v.* Paty (1704), 2 Ld. Raym. 1105; Burdett *v.* Abbot (1811), 14 East, 1; Bradlaugh Gossett (1884), 50 L. T. 620. **Mentd.** Prideaux *v.* Morrice (1702), 7 Mod. Rep. 13; Ferrer's Case (1760), 2 Eden, 373; Digby *v.* Alexander (1832), 8 Bing. 416; Fenton *v.* Hampton (1858), 11 Moo. P. C. C. 347; *Re* Rivett-Carnac's Will (1885), 30 Ch. D. 136; Cowley *v.* Cowley, [1900] P. 305.

396. —— Of House of Commons.] — (1) The House of Commons is not subject to the control of her Majesty's Cts. in its administration of that part of the statute law which has relation to its internal procedure only. What is said or done within its walls cannot be inquired into in a ct. of law.

(2) A resolution of the House of Commons cannot change the law of the land. But a ct. of law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself something which by the general law of the land he had a right to do, *viz.*, take the oath prescribed by the Parliamentary Oaths Act, 1866 (c. 19).

(3) An action will not lie against the Serjeant-at-Arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House directing him to do so; nor will the ct. grant an injunction to restrain that officer from using necessary force to carry out the order of the House.

Pltf., having been returned as member for the borough of N., required the Speaker of the House of Commons to call him to the table for the purpose of taking the oath required by Parliamentary Oaths Act, 1866 (c. 19). In consequence of something which had transpired on a former occasion the Speaker declined to do so; & the House, upon motion, resolved "that the Serjeant-at-Arms do exclude Mr. B., pltf., from the House until he shall engage not further to disturb the proceedings of the House." In an action against the Serjeant-at-Arms praying for an injunction to restrain him from carrying out this resolution:—*Held:* this being a matter relating to the internal management of the procedure of the House of Commons, the Ct. of Q. B. had no power to interfere.—BRADLAUGH *v.* GOSSETT (1884), 12 Q. B. D. 271; 53 L. J. Q. B. 209; 50 L. T. 620; 32 W. R. 552.

397. Courts have no jurisdiction.] — R. *v.* ELLIOT, ETC. (1668), 3 State Tr. 293; Cro. Car. 605; 79 E. R. 1121, H. L.

Annotations:—**Consd.** Barnardiston *v.* Soam (1674), 3 Keb. 428, 442; R. *v.* Paty (1704), 2 Ld. Raym. 1105. **Apld.** Bradlaugh *v.* Gossett (1884), 12 Q. B. D. 271. **Reld.** Burdett *v.* Abbot (1811), 14 East, 1.

398. ——.]—BARNARDISTON *v.* SOAME (1676), as reported in 6 State Tr. 1063; *sub nom.* SOAMES *v.* BARNARDISTON, 1 Freem. K. B. 430; 89 E. R. 321, Ex. Ch.; *affd.* (1689), 6 State Tr. 1117, H. L.

Annotations:—**Apld.** Kendall *v.* John (1708), Fortes. Rep. 104. **Consd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1; **Reld.** Onslowe's Case (1681), 2 Vent. 37; Prideaux *v.* Morice (1700), 1 Lut. 82; Ashby *v.* White (1703), 2 Ld. Raym. 938; Myddelton *v.* Wynn (1746), Willes, 597; Bradlaugh *v.* Gossett (1884), 50 L. T. 620. **Mentd.** Ford *v.* Tilly (1706), 2 Salk. 653; Musgrave *v.* Nevinson (1724), 2 Ld. Raym. 1358; Everett *v.* Griffiths, [1920] 3 K. B. 163.

399. —— Act authorised by resolution.]—To a claim for damages for an assault committed on pltf. a Member of Parliament, whilst attempting to enter the House of Commons for the purpose of taking his seat, deft. pleaded in justification thereof that the House had previously resolved & ordered that deft., one of its officers, should "remove pltf. from the House until he should engage not further to disturb the proceedings of the House" & that, acting in pursuance of such order, deft. resisted & removed pltf.:—*Held:* the plea was good.—

BRADLAUGH *v.* ERSKINE (1883), 47 L. T. 618; 31 W. R. 365.
Annotation :—**Consd.** Bradlaugh *v.* Gossett (1884), 50 L. T. 620.

400. —— ——.]—BRADLAUGH *v.* GOSSETT, No. 396, *ante*.

401. Limitation of doctrine.]—From the doctrines involved in this defence, namely, that the House of Commons could by their order authorise the violation of private rights, & by declaring the power thus exercised to be matter of privilege, preclude a ct. of law from inquiring into the existence of the privilege, doctrines which would have placed the rights & liberties of the subject at the mercy of a single branch of the Legislature, LORD DENMAN & his colleagues, in a series of masterly judgments which will secure to the judges who pronounced them, admiration & reverence so long as the law of England & a regard for the rights & liberties of the subject shall endure, vindicated at once the majesty of the law & the rights which it is the purpose of the law to uphold. To the decision of this ct. in that memorable case we give our unhesitating & unqualified adhesion. But the decision in that case has no application to the present. The position, that an order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a ct. of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House or protected by the assertion of its privilege, but is, independently of such order or assertion of privilege, in itself privileged & lawful (COCKBURN, C.J.).—WASON *v.* WALTER (1868), L. R. 4 Q. B. 73; 8 B. & S. 671; 38 L. J. Q. B. 34; 19 L. T. 409; 33 J. P. 149; 17 W. R. 169.
Annotations :—**Mentd.** Henwood *v.* Harrison (1872), L. R. 7 C. P. 606; Davis *v.* Duncan (1874), L. R. 9 C. P. 396; Milissich *v.* Lloyds (1877), 46 L. J. Q. B. 404; Purcell *v.* Sowler (1877), 2 C. P. D. 215; Usill *v.* Hales, Usill *v.* Brearley, Usill *v.* Clarke (1878), 3 C. P. D. 319; Macdougall *v.* Knight (1886), 17 Q. B. D. 636; Hennessy *v.* Wright (1888), 4 T. L. R. 548; Allbutt *v.* General Council of Medical Education & Registration (1889), 23 Q. B. D. 400; McQuire *v.* Western Morning News Co., [1903] 2 K. B. 100; Hunt *v.* Star Newspaper Co., [1908] 2 K. B. 309.

SUB-SECT. 2.—FREEDOM FROM ARREST.

A. In General.

See, now, Standing Orders of House of Lords (Public Business), 1902, No. 79.

402. Treason, felony or breach of peace.]—PRIVILEGE OF PARLIAMENT CASE, SHIRLEY *v.* FAGG (1675), 6 State Tr. 1121.
Annotation :—**Refd.** Stockdale *v.* Hansard (1839), 2 Per. & Dav. 1.

403. ——.]—R. *v.* DEVONSHIRE (EARL) (1687), Comb. 49; 11 State Tr. 1354; 90 E. R. 336.
Annotations :—**Refd.** Wilkes *v.* R. (1768), Wilm. 322. **Mentd.** R. *v.* Gibson (1800), 8 East, 107; R. *v.* Taylor (1824), 3 B. & C. 502.

404. Charge of seditious libel.] — SEVEN BISHOPS' CASE (1688), 3 Mod. Rep. 212; 12 State Tr. 183; 87 E. R. 136.
Annotations :—**Consd.** R. *v.* Wilkes (1763), 2 Wils. 151. **Mentd.** Entick *v.* Carrington (1765), 2 Wils. 275; R. *v.* Shipley (1784), 4 Doug. K. B. 73; R. *v.* Johnson (1805), 7 East, 65; Butt *v.* Conant (1820), 1 Brod. & Bing. 548; R. *v.* Burdett (1820), 4 B. & Ald. 95; Doe d. Mudd *v.* Suckermore (1837), 5 Ad. & El. 703; R. *v.* Castro, Skipworth's Case (1873), L. R. 9 Q. B. 219.

405. ——.]—R. *v.* WILKES (1763), 2 Wils. 151; 19 State Tr. 982; 95 E. R. 737; *subsequent proceedings* (1770), 4 Burr. 2577, H. L.
Annotations :—**Refd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1. **Mentd.** Entick *v.* Carrington (1765), 2 Wils. 275; R. *v.* Platt (1777), 1 Leach, 157; R. *v.* Despard (1798), 7 Term Rep. 736; Crowley's Case (1818), 2 Swan. 1; Butt *v.* Conant (1820), 1 Brod. & Bing. 548; Haylock *v.* Sparke (1853), 1 E. & B. 471.

Criminal matters, generally.]—*See* CRIMINAL LAW, Vol. XIV., p. 172, No. 1500.

406. Contempt against King & government.]—R. *v.* STROUD (1629), 3 State Tr. 235.

Contempt of court.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 80, Nos. 977–981.

407. Attachment—Jurisdiction of criminal character—Debtors Act, 1869 (c. 62), s. 4 (3).]—A receiver & manager who has been ordered to bring money into ct. & has failed to do so, is a person in a fiduciary capacity within above subsect., & is liable to attachment, although at the time of the motion for attachment he may have been discharged from his office of receiver & manager.

The jurisdiction to attach for nonpayment by a person in a fiduciary capacity is of a criminal character, & a Member of Parliament will therefore not be exempt from arrest on the ground of Parliamentary privilege.—*Re* GENT, GENT-DAVIS *v.* HARRIS (1888), 40 Ch. D. 190; 58 L. J. Ch. 162; 60 L. T. 355; 37 W. R. 151; 5 T. L. R. 89.
Annotations :—**Mentd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784.

408. Recognisances to keep the peace.]—PLEDALL'S CASE (1556), 4 Prynne's Register of Parliamentary Writs, 1213; cited in 14 East, at p. 47; 104 E. R. 519.
Annotation :—**Refd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1.

409. ——.] — *Qu. :* privilege of Parliament does not protect a man where security of the peace is desired.—R. *v.* CULPEPER (1696), 12 Mod. Rep. 108; Holt, K. B. 293; Skin. 673; 88 E. R. 1198.
Annotation :—**Consd.** R. *v.* Wilkes (1763), 19 State Tr. 982.

410. ——.] — *Ex p.* GIFFORD (LORD) (1845), 9 J. P. Jo. 101.

411. Civil process.]—HYDE'S CASE (1474), Hatsell's Cases of Privilege of Parliament, 44.
Annotation :—**Refd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1.

412. ——.]—FERRER'S CASE (1543), O. Bridg. App. 625; 124 E. R. 782.
Annotations :—**Consd.** Benyon *v.* Evelyn (1664), O. Bridg. 324; Stockdale *v.* Hansard (1839), 9 Ad. & El. 1. **Refd.** Burdett *v.* Abbot (1811), 14 East, 1.

413. ——.] — The ct. will not grant an attachment against a peer for not paying a sum of money awarded, though deft. consent on condition that the attachment shall lie in the office for a certain time.—WALKER *v.* GROSVENOR (EARL) (1797), 7 Term Rep. 171; 101 E. R. 915.
Annotations :—**Refd.** Wellesley *v.* Beaufort, Long Wellesley's Case (1831), 2 Russ. & M. 639; Carron Iron Co. *v.* Maclaren (1855), 5 H. L. Cas. 416.

414. ——.]—The ct. will not grant an attachment against a Member of Parliament for nonpayment of money according to an award.—CATMUR *v.* KNATCHBULL (1797), 7 Term Rep. 448; 101 E. R. 1069.
Annotations :—**Consd.** Wellesley *v.* Beaufort, Long Wellesley's Case (1831), 2 Russ. & M. 639. **Refd.** Carron Iron Co. *v.* Maclaren (1855), 5 H. L. Cas. 416; Seldon *v.* Wilde, [1911] 1 K. B. 701.

415. ——.]—Pltf. who has obtained judgment against a Member of the House of Commons cannot afterwards proceed to outlawry. The issue of a *ca. sa.*, though it is not intended to execute it, is unlawful.

A capias ad satisfaciendum will only lie in those cases where a *capias ad respondendum* will lie. A

Sect. 5.—*Privileges common to both Houses: sect.* 2, *A., B. & C.; sub-sect.* 3, *A.*]

capias or *exigent* will not lie against a Lord of Parliament. If it is unlawful to issue such a writ, can it make any difference what is the intent of the party issuing it? I am clearly of opinion that it cannot, because the ct. must look to what was lawful or unlawful at the time of the issuing of the writ (TINDAL, C.J.).

Members of Parliament of both Houses are exempt from arrest of their persons. They are now liable to be sued, but cannot be arrested (BOSANQUET, J.).

A writ ordering a Member to be arrested is irregular. Peers have a privilege of peerage distinct from a privilege of Parliament, because peeresses in their own right have this privilege. By the privilege of Parliament generally Members of Parliament are privileged from arrest; a writ, therefore, directing the sheriff to seize their persons, is a writ ordering an illegal act (MAULE, J.).—CASSIDY *v.* STEUART (1841), 2 Man. & G. 437; 9 Dowl. 366; Drinkwater, 64; 2 Scott, N. R. 432; 10 L. J. C. P. 57; 5 Jur. 25; 133 E. R. 817.

Annotations:—**Consd.** Snape *v.* Waldegrave (1842), 12 L. J. Q. B. 99; Hay *v.* Charleville (1844), 13 L. J. Q. B. 201. **Followed.** European & American Finance Corpn. *v.* M.P. (1865), 13 L. T. 447. **Refd.** Taylor *v.* Stuart de Rothesay (1842), 4 Man. & G. 388; *Re* Newcastle, *Ex p.* Morris (1869), 5 Ch. App. 172. **Mentd.** Butcher *v.* Steuart (1843), 11 M. & W. 857.

416. Judgment debtor summons.] —A judgment debtor summons will not lie against a Member of Parliament, & the privilege of Parliament is not affected by the circumstance that the member has not been sworn in.—EUROPEAN & AMERICAN FINANCE CORPN., LTD. *v.* M.P. (1865), 13 L. T. 447; 14 W. R. 135.

417. ——.]—Where persons having as a class, certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them, & other persons having the same privileges are afterwards as a class subjected to the same liabilities, but nothing is said of their privileges, these privileges still continue to exist. Privilege of Parliament exists at common law, & is not taken away by implication because a statute makes persons enjoying it subject to the law of bkpcy., & does not specially reserve the privilege. Before 24 & 25 Vict. c. 134, traders having privilege of Parliament were rendered liable to the bkpt. laws, but the privilege of freedom from personal arrest was expressly reserved to them. By 24 & 25 Vict. c. 134, s. 69, all debtors, nontraders as well as traders, were made liable to the bkpt. laws. Nothing was said in 24 & 25 Vict. c. 134, to reserve to debtors, who had privilege of Parliament, their freedom from personal arrest:—*Held:* the statute included all debtors whatever, but such debtors as were entitled to privilege of Parliament still continued to enjoy its protection.—NEWCASTLE (DUKE) *v.* MORRIS (1870), L. R. 4 H. L. 661; 40 L. J. Bcy. 4; 23 L. T. 569; 35 J. P. 548; 19 W. R. 26, H. L.

418. Remedy revived—On expiry of privilege.] Where a party arrested under a *ca. sa.* is discharged on the ground of privilege, the writ is not executed, & he may be retaken under it when his privilege expires. Where a party, against whom there are several writs of *ca. sa.* in the sheriff's office, is taken under one of them in execution of a judgment not duly revived by *sci. fa.*, the arrest, though illegal, is not illegal from any wrongful act on the part of the sheriff, & therefore enures as a good arrest under all the other writs.—REYNOLDS *v.* NEWTON (1841), 1 Gal. & Dav. 153.

B. Application of Privilege to Civil Proceedings.

419. Civil remedy not barred.]—(1) It is lawful to sue out an original against a member of the House of Commons, although Parliament is sitting.

(2) Where, upon an action at common law, a question concerning the privilege of Parliament arises, nothing has been more frequent than for the judges of the common law to deliver their opinions concerning it (BRIDGMAN, C.J.).—BENYON *v.* EVELYN (1664), O. Bridg. 324; 124 E. R. 614.

Annotation:—**Refd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1.

420. ——.] —Peers may be sued in B. R. by original bill.—GOSLING *v.* WEYMOUTH (LORD) (1778), 2 Cowp. 844; 98 E. R. 1393.

Annotation:—**Followed.** Londsdale *v.* Littledale (1793), 2 Anst. 356.

421. ——.]—A peer may be sued in the Ct. of K. B. by bill, as having privilege of Parliament. The authority of that Ct. to hold plea, by bill in any cases, cannot be questioned in the Ex. Ch.

The case of *Gosling* v. *Weymouth* (*Lord*), No. 420, *ante*, is a decision directly in point & as the judgment there given by the Ct. of K. B. was acquiesced in, it becomes an authority in all cts. It is there decided, that, by the practice of the Ct. of K. B. a peer, before the statute of King William, might & still may, be sued by bill. Were it a question concerning the privilege of the peerage from arrests we should hesitate before admitting that privilege to be infringed by any single decision or by the practice of any Court; but here the privilege is not attacked; it is a mere question of practice as to the manner of suing, & seems to be at rest by the decision of Lord Weymouth's case. If it can at this day be questioned whether the Ct. of K. B. have authority to hold pleas by bill in the case of a peer, that question affecting the jurisdiction of the ct. could not be inquired into before us, as that is an exception to our authority in the original institution of this ct. (EYRE, C.J.).—LONSDALE (EARL) *v.* LITTLEDALE (1793), 2 Anst. 356; 2 Hy. Bl. 267; 145 E. R. 901; *affd.*, 5 Bro. Parl. Cas. 519, H. L.

Annotations:—**Mentd.** Bush *v.* Steinman (1799), 1 Bos. & P. 404; Bristow *v.* Waddington (1806), 2 Bos. & P. N. R. 355; Laugher *v.* Pointer (1826), 5 B. & C. 547; Chalmers *v.* Payne (1835), 2 Cr. M. & R. 156; Hilton *v.* Granville (1844), 13 L. J. Q. B. 193; Humphries *v.* Brogden (1850), 12 Q. B. 739; Rowbotham *v.* Wilson (1857), 27 L. J. Q. B. 61; Dalton *v.* Angus (1881), 6 App. Cas. 740; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217.

422. —— **Protection only for person.**]—HODGES *v.* MOOR (1626), Noy, 83; Benl. 184; Lat. 48; Poph. 164; 74 E. R. 1050.

Annotation:—**Refd.** R. *v.* Paty (1704), 2 Ld. Raym. 1105.

423. —— ——.]—Upon process by original writ against a Member of Parliament, the summons omitted to describe him as having privilege of Parliament, & the notice at the foot stated, that in default of his appearance on the return day of the writ, pltfs. would cause an appearance to be entered for him:—*Held:* the summons was sufficient.—EVERETT *v.* WHARTON (1816), 5 M. & S. 321; 105 E. R. 1069.

424. —— ——.] —A deft. who is an attorney, & a Member of Parliament, may be sued as an attorney without noticing his Parliamentary privilege, except by forbearing to issue process against his person.—GRAY *v.* WILKES (1827), 5 L. J. O. S. K. B. 291.

425. —— ——.]—CASSIDY *v.* STEUART, No. 415, *ante*.

426. —— **Injunction may issue — Not attachment.**]—ANON. (1572), Dal. 83; 123 E. R. 293.

427. —— —— ——.]—ANON. (1667), 3 Rep. Ch. 21; 21 E. R. 716.

428. ——— ——— ———.] — OTTOWAY'S CASE (1667), Freem. Ch. 126 ; 22 E. R. 1103.

429. Execution—Sequestration proper remedy.] —CRAWLEY *v.* CLARKE (1791), 3 Bro. C. C. 373 ; 29 E. R. 591, L. C.

——— ———.]—*See* EXECUTION, Vol. XXI., pp. 594, 596, 597, Nos. 1759, 1795–1800.

C. Proof of Privilege.

430. Delivery to Serjeant-at-Arms upon show of mace.]—FERRER'S CASE (1543), O. Bridg., App. 625 ; 124 E. R. 782.

Annotations :—**Consd.** Benyon *v.* Evelyn (1664), O'Bridg. 324. **Refd.** Burdett *v.* Abbot (1811), 14 East, 1 ; Stockdale *v.* Hansard (1839), 9 Ad. & El. 1.

431. By special supersedeas.] — HODGES *v.* MOOR (1626), Noy, 83 ; Benl. 184 ; Lat. 48 ; Poph. 164 ; 74 E. R. 1050.

Annotation :—**Refd.** R. *v.* Paty (1704), 2 Ld. Raym. 1105.

432. Writ of privilege not essential.]—HOLLIDAY *v.* PITT, No. 371, *ante*.

433. By return of writ.]—Member of Parliament having been held to special bail, moved to be discharged on a common appearance. The ct. takes no evidence of his being a Member but the return of the writ.—FENWICK *v.* FENWICK (1771), 2 Wm. Bl. 788 ; 96 E. R. 463.

SUB-SECT. 3.—COMMITTAL FOR CONTEMPT.

A. In General.

434. Power to commit.]—WENTWORTH'S CASE (1575), D'Ewes Journals of Parliaments, 241.

Annotation :—**Refd.** Burdett *v.* Abbot (1811), 14 East, 1.

435. ——.] — HALL'S CASE (1580), D'Ewes Journals of Parliaments, 291 ; Hatsell's Cases of Privilege of Parliament, 93.

Annotation :—**Refd.** Burdett *v.* Abbot (1811), 14 East, 1.

436. ——.] — To an action of trespass against the Speaker of the House of Commons for forcibly, & with the assistance of armed soldiers, breaking into the messuage of pltf., the outer door being shut & fastened, & arresting him there, & taking him to the Tower of London, & imprisoning there, it is a legal justification to plead that a Parliament was held which was sitting during the period of the trespasses complained of : that pltf. was a Member of the House of Commons, & that the House having resolved, " that a certain letter, etc., in Cobbett's *Weekly Register*, was a libellous & scandalous paper, reflecting on the just rights & privileges of the House, & that pltf., who had admitted that the said letter, etc., was printed by his authority had been thereby guilty of a breach of the privileges of that House " ; & having ordered that, for his said offence, he should be committed to the Tower, & that the Speaker should issue his warrant accordingly ; deft. as Speaker, in execution of the said order, issued his warrant to the Serjeant at Arms, to whom the execution of such warrant belonged, to arrest pltf., & to commit him to the custody of the Lieutenant of the Tower ; & issued another warrant to the Lieutenant of the Tower to receive & detain pltf. in custody during the pleasure of the House ; by virtue of which first warrant the Serjeant at Arms went to the messuage of pltf., where he then was, to execute it ; & because the outer door was fastened, & he could not enter, after audible notification of his purpose & demand made of admission, he, by the assistance of the said soldiers, broke & entered pltf.'s messuage, & arrested & conveyed him to the Tower, where he was received & detained in custody under the other warrant by the Lieutenant of the Tower.

It is clear in law that the House of Commons has the power of committing for contempt, & that this was a commitment for contempt.—BURDETT *v.* ABBOT, BURDETT *v.* COLMAN (1817), 5 Dow, 165 ; 3 E. R. 1289 ; *affg.* (1812), 4 Taunt. 401, Ex. Ch. ; (1811), 14 East, 163.

Annotations :—**Apld.** Beaumont *v.* Barrett (1836), 1 Moo. P. C. C. 59. **Folld.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1. **Apld.** Middlesex Sheriffs' Case (1840), 11 Ad. & El. 273 ; R. *v.* Evans & Wheelton (1840), 8 Dowl. 451. **Consd.** R. *v.* Gossett (1840), 3 Per. & Dav. 349. **Distd.** Kielley *v.* Carson (1841–2), 4 Moo. P. C. C. 63. **Apld.** Dill *v.* Murphy (1864), 1 Moo. P. C. C. N. S. 487 ; Harvey *v.* Harvey (1884), 26 Ch. D. 644 ; Fielding *v.* Thomas, [1896] A. C. 600. **Refd.** R. *v.* Hobhouse (1820), 2 Chit. 207 ; *Re* Long Wellesley (1831), 2 State Tr. N. S. 911 ; Howard *v.* Gosset (1845), 10 Q. B. 359 ; *Re* Martin, *Ex p.* Van Sandau (1845), 4 L. T. O. S. 369 ; Fenton *v.* Hampton (1858), 11 Moo. P. C. C. 347 ; *Ex p.* Fernandez (1861), 10 C. B. N. S. 3 ; A.-G. of New South Wales *v.* Macpherson (1870), L. R. 3 P. C. 268 ; Bradlaugh *v.* Erskine (1883), 47 L. T. 618 ; Bradlaugh *v.* Gossett (1884), 12 Q. B. D. 271 ; Barton *v.* Taylor (1886), 2 T. L. R. 382. **Mentd.** Launock *v.* Brown (1819), 2 B. & Ald. 592 ; Redford *v.* Birley (1822), 3 Stark. 76 ; Pearson *v.* M'Gowran (1825), 5 Dow. & Ry. K. B. 616 ; Perkins's Case (1826), 1 Lew. C. C. 99 ; Bedreechund *v.* Elphinstone (1831), 2 State Tr. N. S. 379 ; A.-G. *v.* Kenifeck (1837), 2 M. & W. 715 ; R. *v.* Lovett (1839), 9 C. & P. 462 ; *Re* Clarke (1842), 2 Q. B. 619 ; Crucknell *v.* Trueman (1842), 9 M. & W. 684 ; Roberts *v.* Taylor (1844), 7 Man. & G. 659 ; Hall *v.* Story (1846), 16 M. & W. 63 ; Reynolds *v.* Reynolds (1847), 9 L. T. O. S. 513 ; Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90 ; R. *v.* Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507 ; R. *v.* Duffy (1849), 7 State Tr. N. S. 795 ; Doe d. Bennett *v.* Hale (1850), 15 Q. B. 171 ; Turner *v.* Barnes (1860), 2 F. & F. 256 ; R. *v.* Meany (1867), 15 W. R. 1082 ; Cherry *v.* Thompson (1872), 41 L. J. Q. B. 243 ; R. *v.* Cooper (1875), 45 L. J. M. C. 15 ; R. *v.* Rogers (1877), 3 Q. B. D. 28 ; R. *v.* Carden (1879), 5 Q. B. D. 1 ; Bree *v.* Marescaux (1881), 7 Q. B. D. 434 ; R. *v.* Holmes (1883), 12 Q. B. D. 23 ; Tozier *v.* Hawkins (1885), 15 Q. B. D. 650 ; Broad *v.* Perkins (1888), 4 T. L. R. 545 ; R. *v.* Ellis, [1899] 1 Q. B. 230 ; R. *v.* De Marny, [1907] 1 K. B. 388 ; Heddon *v.* Evans (1919), 35 T. L. R. 642 ; Pitchers *v.* Surrey County Council, [1923] 2 K. B. 57.

437. ———.] — BEAUMONT *v.* BARRETT (1836), 1 Moo. P. C. C. 59 ; 3 State Tr. N. S. App. 1283 ; 12 E. R. 734.

Annotations :—**Consd.** Kielley *v.* Carson (1842), 4 Moo. P. C. C. 63. **Apld.** Fenton *v.* Hampton (1858), 11 Moo. P. C. C. 347. **Consd.** Doyle *v.* Falconer (1866), L. R. 1 P. C. 328. **Refd.** Dill *v.* Murphy (1864), 1 Moo. P. C. C. N. S. 487 ; Phillips *v.* Eyre (1870), L. R. 6 Q. B. 1 ; Barton *v.* Taylor (1886), 2 T. L. R. 382.

438. ———.]—(1) A warrant of commitment by an order of the House of Commons for contempt of the House need not specify the grounds of the order.

(2) Whatever jurisdiction a ct. of law may have when the grounds are specified in the warrant, it has no jurisdiction to inquire into their existence or sufficiency when they are not specified, & in such case the return of the warrant is conclusive.

(3) On such a commitment under the Speaker's warrant, stating the adjudication of contempt generally, without setting the particular facts out of which the contempt arose, the ct. of Q. B. on *habeas corpus* cannot discharge prisoner.—MIDDLESEX SHERIFF'S CASE (1840), 11 Ad. & El. 273 ; 3 State Tr. N. S. 1239 ; 113 E. R. 419 ; *sub nom.* R. *v.* EVANS, 8 Dowl. 451 ; 9 L. J. Q. B. 82 ; *sub nom.* STOCKDALE *v.* HANSARD, 4 Jur. 70 ; *sub nom.* R. *v.* GOSSET, 3 Per. & Dav. 349.

Annotations :—*As to* (3) **Refd.** Levy *v.* Moylan (1850), 10 C. B. 189 ; *Re* Fernandes (1861), 6 H. & N. 717. *Generally*, **Refd.** Howard *v.* Gosset (1845), 10 Q. B. 359 ; Dimmé's Case (1850), 14 Q. B. 554 ; *Re* Swan *v.* Dakins, *Ex p.* Dakins (1855), 16 C. B. 77 ; Dill *v.* Murphy (1864), 1 Moo. P. C. C. N. S. 487 ; Fielding *v.* Thomas, [1896] A. C. 600.

439. Contents of warrant—Whether particulars of offence necessary.]—MIDDLESEX SHERIFF'S CASE, No. 438, *ante*.

440. ——— **Effect of statement of particulars—Whether ground of jurisdiction.**] — MIDDLESEX SHERIFF'S CASE, No. 438, *ante*.

441. Commitment under warrant of chairman of select committee.]—The proceedings of a select

Sect. 5.—*Privileges common to both Houses: Sub-sect.* 3, *A., B. & C.; sub-sects.* 4 & 5. *Sects.* 6 & 7. *Part VIII.*]

committee of the House of Commons under 11 & 12 Vict. c. 98, are entitled to the respect accorded those of the House itself, & of all Superior Cts. of Justice; where, therefore, the chairman of such a body has power by 11 & 12 Vict. c. 98, s. 83, to commit witnesses & others to custody in certain events, it is not necessary that the warrant should specify the particular misconduct of which the party committed has been guilty; but it is sufficient if it states that he has been "guilty of prevarication & misbehaviour before the committee."—LINES *v.* RUSSELL (LORD) (1852), 19 L. T. O. S. 364; 16 J. P. 491, N. P.

442. Enforcement of warrant — Trespass by officers.]—Officers of the House of Commons, who have a warrant of the Speaker to take a person therein named, although they may have a right to enter his house, having been peaceably admitted, & to search the house, they have no right, in case they do not find him, to remain there to await his return; & if they stay several hours in the house for that purpose, they are trespassers *ab initio*.—HOWARD *v.* GOSSETT (1842), Car. & M. 380; 4 State Tr. N. S. 839, N. P.; *subsequent proceedings* (1845), 10 Q. B. 359.

B. Jurisdiction of Court to Discharge.

443. No jurisdiction during session—Warrant giving no particulars of offence.]—The Ct. of K. B. will not, during the continuance of the session, bail a peer, or other person, committed by the House of Lords "for a high contempt against the House," although the warrant do not express the nature of the contempt, nor the place where it was committed, nor the time when it was committed, nor whether it was on a conviction or accusation only; for this power of commitment is out of the privileges of the House, & therefore the ct. hath no jurisdiction; but a person committed for a contempt by the order of either House of Parliament may be discharged by the Ct. of K. B. after a dissolution or prorogation of the Parliament, whether he were committed during the session or afterwards; for all orders of Parliament are determined by a dissolution or prorogation.—SHAFTSBURY'S (EARL) CASE (1677), 1 Mod. Rep. 144; Freem. K. B. 453; 3 Keb. 792; 6 State Tr. 1270; 86 E. R. 792.

Annotations:—**Apld.** R. *v.* Paty (1705), 2 Ld. Raym. 1105. **Consd.** Burdett *v.* Abbot (1811), 14 East, 1. **Apld.** R. *v.* Hobhouse (1820), 2 Chit. 207. **Consd.** Wellesley *v.* Beaufort, Long Wellesley's Case (1831), 2 Russ. & M. 639; Stockdale *v.* Hansard (1839), 9 Ad. & El. 1. **Reld.** Dorchester's Case (1677), 2 Mod. Rep. 215; Murray's Case (1751), 1 Wils. 299; Brass Crosby's Case (1771), 2 Wm. Bl. 754; Middlesex Sheriff's Case (1840), 11 Ad. & Bl. 273; Gosset *v.* Howard (1847), 10 Q. B. 411; Bradlaugh *v.* Erskine (1883), 47 L. T. 618; Bradlaugh *v.* Gossett (1884), 12 Q. B. D. 271. **Mentd.** Poole Town *v.* —— (1729), 1 Barn. K. B. 283; R. *v.* Ellames (1734), Lee *temp.* Hard. 42.

444. Writ of habeas corpus not available.]—PAULHILL *v.* POWELL (1701), 12 Mod. Rep. 606; 88 E. R. 1551.

445. ——.]—On commitments by the House of Commons for privilege, no ct. can deliver on a *habeas corpus*.—R. *v.* PATY (1705), 2 Salk. 503; 2 Ld. Raym. 1105; Holt, K. B. 526; 91 E. R. 431.

Annotations:—**Folld.** Brass Crosby's Case (1771), 2 Wm. Bl. 754; R. *v.* Hobhouse (1820), 2 Chit. 207. **Consd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1; Bradlaugh *v.* Erskine (1883), 47 L. T. 618. **Reld.** Burdett *v.* Abbot (1811), 14 East, 1; Middlesex Sheriff's Case (1840), 11 Ad. & El. 273; Gosset *v.* Howard (1847), 10 Q. B. 411. **Mentd.** *Re* Oxford University (1841), 1 Q. B. 952; Eastern Archipelago Co. *v.* R. (1852), 2 E. & B. 856; R. *v.* [illegible] (1855), 24 L. J. Q. B. 246.

446. ——.]—One committed for a contempt of the House of Commons cannot be bailed by the K. B.—MURRAY'S CASE (1751), 1 Wils. 299; 95 E. R. 629.

Annotations:—**Folld.** Brass Crosby's Case (1771), 2 Wm. Bl. 754. **Reld.** Burdett *v.* Abbott (1811), 14 East, 1; Stockdale *v.* Hansard (1839), 2 Per. & Dav. 1; Middlesex Sheriff's Case (1840), 11 Ad. & El. 273.

447. —— **During session.**]—BRASS CROSBY'S CASE, No. 364, *ante*.

448. ——.]—The House of Lords having voted deft. guilty of a breach of privilege in publishing a libel upon a member of their House, & having sentenced him to pay a fine of £100, & to be imprisoned six months & until such fine was paid, which commitment was returned into this ct. upon a *habeas corpus* sued out by deft. the ct. refused to discharge him out of custody.—R. *v.* FLOWER (1799), 8 Term Rep. 314; 101 E. R. 1408.

Annotations:—**Reld.** Hobhouse's Case (1820), 3 B. & Ald. 420; Stockdale *v.* Hansard (1839), 2 Ad. & El. 1. **Mentd.** *Re* Fernandes (1861), 6 H. & N. 717.

449. ——.]—The House of Commons having voted deft. guilty of a breach of their privileges, for publishing a libel upon the House, & having ordered him to be committed to Newgate during their pleasure, & the Speaker's warrant being returned into this ct. upon a *habeas corpus* sued out by deft., the ct. refused to discharge him out of custody.—R. *v.* HOBHOUSE (1820), 2 Chit. 207; *sub nom.* HOBHOUSE'S CASE, 3 B. & Ald. 420; 1 State Tr. N. S. App. 1346; 106 E. R. 716.

Annotations:—**Reld.** Middlesex Sheriff's Case (1840), 11 Ad. & El. 273; Gosset *v.* Howard (1847), 10 Q. B. 411; Bradlaugh *v.* Erskine (1883), 31 W. R. 365. **Mentd.** *Ex p.* Beeching (1825), 6 Dow. & Ry. K. B. 209; *Ex p.* Aston (1844), 8 J. P. 663; Carus Wilson's Case (1845), 7 Q. B. 984; Cobbett *v.* Slowman (1850), 4 Exch. 747; Cobbett *v.* Truro (1853), 20 L. T. O. S. 258; Secretary of State for Home Affairs *v.* O'Brien, [1923] A. C. 603.

450. ——.]—MIDDLESEX SHERIFF'S CASE, No. 438, *ante*.

.]—*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 248–275.

C. Duration of Committal.

451. Termination—By dissolution.]—PROTECTOR *v.* STREETER (1654), Sty. 415; 82 E. R. 824.

Annotation:—**Reld.** R. *v.* Paty (1704), 2 Ld. Raym. 1105.

452. —— **By prorogation.**]—R. *v.* PRITCHARD (1665), 1 Keb. 887; 83 E. R. 1301; *sub nom.* PRICHARD'S CASE, 1 Lev. 165; *sub nom.* PRITCHARD'S CASE, T. Raym. 120.

Annotation:—**Apld.** Danby's Case (1681), Skin. 56.

SUB-SECT. 4.—PARLIAMENTARY PAPERS AND SPEECHES.

See LIBEL & SLANDER, Vol. XXXII., pp. 109, 110, 140, 141, Nos. 1414–1425, 1719–1722.

SUB-SECT. 5.—ATTENDANCE OF WITNESSES.

453. Nature of privilege.]—HOWARD *v.* GOSSET, GOSSET *v.* HOWARD, No. 368, *ante*.

SECT. 6.—**PRIVILEGES OF HOUSE OF LORDS.**

Privileges of peerage.]—*See* PEERAGES & DIGNITIES.

Trial by peers.]—*See* Part II., Sect. 3, *ante*.

Jurisdiction of House of Lords—Guardian of its own privileges.]—*See* Sect. 5, sub-sect. 1.

454. —— —— **Committal for conspiracy to slander the House.**]—To sell protections in the

name of a peer is a contempt of privilege. The House of Peers may commit for conspiring to charge a person with slander of the House.—CARTER'S CASE (1725), 8 Mod. Rep. 340; 88 E. R. 244.

455. Breach of privilege by commons.]—NEILE (BP. OF LINCOLN) CASE (1614), 2 State Tr. 865.

456. ——.]—FLOYDE'S CASE (1621), 2 State Tr. 1153.

Annotation:—**Reld.** Stockdale *v.* Hansard (1839), 2 Per. & Dav. 1.

In legal proceedings—Giving evidence—Whether oath must be taken.]—*See* EVIDENCE, Vol. XXII., p. 451, No. 4717.

457. —— When distringas issued.]—Where a peer deft. has left the kingdom, the ct. will, on affidavit of that fact, & of ineffectual attempts to find him, grant a *distringas* to compel an appearance under 2 & 3 Will. 4, c. 39, s. 3.—DAVIS *v.* LICHFIELD (EARL) (1841), 1 Dowl. N. S. 363; 11 L. J. Ex. 260; 6 Jur. 19.

Annotation:—**Follid.** Snape *v.* Waldegrave (1842), 12 L. J. Q. B. 99.

458. —— ——.]—The ct. will not grant a writ of *distringas* to proceed to outlawry against a peer of Parliament, but will grant such a writ to compel an appearance.—SNAPE *v.* WALDEGRAVE (EARL) (1842), 12 L. J. Q. B. 99; 6 Jur. 972.

Annotation:—**Distd.** Hay *v.* Charleville (1844), 13 L. J. Q. B.

459. —— Sealing of significavit.]—WESTMEATH *v.* WESTMEATH (1829), 2 Hag. Ecc. 653; 162 E. R. 987.

460. Do not extend to steward of peer.]—An attorney, although steward to a peer, has no privilege of Parliament.—WICKHAM *v.* HOBART (1736), Lee *temp.* Hard. 348; 2 Stra. 1065; 95 E. R. 225.

SECT. 7.—**PRIVILEGES OF HOUSE OF COMMONS.**

461. Unauthorised election.]—*Re* BLECHINGLEY BOROUGH ELECTION PETITION (1623), Glanv. El. Cas. 29.

462. Appeal to House of Lords—Where Member a party.]—PRIVILEGE OF PARLIAMENT CASE, SHIRLEY *v.* FAGG (1675), 6 State Tr. 1121.

Annotation:—**Consd.** Stockdale *v.* Hansard (1839), 2 Per. & Dav. 1.

463. Sermon vilifying the Commons.]—THOMPSON'S CASE (1680), 8 State Tr. 1.

Annotation:—**Reld.** *Re* Martin, *Ex p.* Turner (1844), 2 L. T. O. S. 375.

464. Judges giving judgment contrary to order of House.]—PEMBERTON'S CASE (1689), 10 Commons Journals 213, 227.

Annotation:—**Consd.** R. *v.* Evans & Wheelton (1840), 8 Dowl. 451.

465. Intimidation of voters.]—BLYTH'S CASE (1705), 2 Doug. El. Cas. 177.

466. Trespass upon property of Member.]—GRIFFIN'S (ADMIRAL) FISHERY CASE (1759), 28 Commons Journals 545.

Annotation:—**Reld.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1.

Part VIII.—Colonial Legislatures.

See cases *infra*.

PART VIII.

Distribution of powers, *see* DEPENDENCIES, Vol. XVII., pp. 427 *et seq.*

d. *Members — Disqualifications — Government contractors.*] — MILES *v.* (1883), 8 App. Cas. 120, P. C.—**AUS.**

e. —— —— ——.]—HACKETT *v.* PERRY, APPEAL IN PRINCE COUNTY, PRINCE EDWARD ISLAND ELECTION CASE (1887), 14 S. C. R. 265.—**CAN.**

f. —— —— ——.]—MCEACHERN *v.* HUGHES (1909), 7 E. L. R. 227.—**CAN.**

g. —— —— ——.]—Resp. absolutely controlled an incorporated co. by which a newspaper was published & job printing done in the constituency. He owned all the shares except a few held by persons to qualify them as directors. The co. printed proclamations, ballot-papers, etc., for the returning officer for the constituency, & he paid the co. for the work done out of moneys received for the purpose from the Provincial Government:—*Held:* resp. was not, by reason of this transaction, brought within the Act respecting the Legislative Assembly, 1914, s. 11, so as to be ineligible for membership in the Assembly.—*Re* GRENVILLE PROVINCIAL ELECTION, PAYNE *v.* FERGUSON (1920), 48 O. L. R. 289; 56 D. L. R. 122.—**CAN.**

h. —— —— *Holding office under the Crown.*]—Deft., while a Member of Parliament, was appointed to the office of Postmaster-General, & again re-elected for the same constituency. On July 29 he resigned that office, & within a month was appointed President of the Council, which office he resigned on the same day, & on the next day was re-appointed to his old office of Postmaster-General:—*Held:* this was authorised by 20 Vict. c. 22.—McDONELL *v.* SMITH (1859), 17 U. C. R. 310.—**CAN.**

k. —— —— ——.]—*Held:* the employment by the Dominion Government of a member of the British Columbia Legislative Assembly, a barrister, as counsel upon an arbitration involving thirty five days' attendance in Victoria, Toronto & Ottawa, though he refused to receive counsel fees therefor, disqualified the member under Stat. B. C. 1875, s. 1.—BARNARD *v.* WALKEM (1880), 1 B. C. R. pt. 1, 120.—**CAN.**

-.]—Defts., after their election, were appointed as non-official members of the Board of Revenue, to which a stipend attached. In an action for penalties under 25 Vict. c. 9:—*Held:* the appointments were in violation of 25 Vict. c. 9, were offices of emolument, & applied as well after as before the election.—GREENE *v.* BOWRING, PINSENT *v.* AYRE (1874), 6 Nfld. L. R. 6.—**NFLD.**

Absence.]—Where a statute provided that "if any legislative councillor shall for two successive sessions fail to give his attendance, without permission, his seat shall thereby become vacant"; & a councillor absented himself during the whole of three sessions, having previously obtained permission for a year, which period of time in the event covered the whole of the first & part of the second session:—*Held:* his seat was vacated. The permission did not cover two successive sessions.—A.-G. OF QUEENSLAND *v.* GIBBON (1887), 12 App. Cas. 442, P. C.—**AUS.**

n. —— *Proof of membership.*]—*Held:* papers produced by petitioner, purporting to be indentures of election, were not sufficient evidence of his being such Member of Parliament, so as to entitle him to the benefit of the writ.—*Ex p.* BEDARD (1810), S. R. C. 1.—**CAN.**

o. —— *Payment.*]—According to the true construction of Parliamentary Representatives Allowance Act, 53 Vict., No. 12, s. 2, an annual grant to "every member of the Legislative Assembly now serving or hereafter to serve therein," applies to every successive Legislative Assembly of the Colony, & is not limited to the particular Assembly existing at the date of the Act.—A.-G. FOR NEW SOUTH WALES *v.* RENNIE, [1896] A. C. 376, P. C.—**AUS.**

p. —— ——.]—A *mandamus* was refused to justices of a district in quarter sessions, to order parliamentary wages to be paid to the representative of a town, under 43 Geo. 3, c. 9.—R. *v.* NIAGARA JJ. (1826), Tay. 394.—**CAN.**

q. —— *Suspension—Duration.*]—Resp. having entered the Chamber of the New South Wales Assembly, of which he was a member, within a week after it had passed a resolution that he be "suspended from the service of the House," he was removed therefrom & prevented from re-entering it:—*Held:* the resolution must not be construed as operating beyond the sitting during which the resolution was passed.—BARTON *v.* TAYLOR (1886), 11 App. Cas. 197, P. C.—**AUS.**

r. —— *Resignation.*]—32 Vict. c. 4 (O.), ss. 10, 12, provide that a member may resign (*a*) by giving notice in his place of his intention; (2) by delivering to the Speaker a declaration of such intention, either during a session or in the interval between two sessions; or (*c*) by delivering it to any two members, in case there is no Speaker,

Part VIII.—Colonial Legislatures.]

& the resignation is made in the interval between two sessions:—*Held:* to mean only an interval between two sessions of the same assembly, & not to apply to the interval between the last general election & the election of a Speaker.—*Re* ELECTION FOR WEST DURHAM (Prov.), (1871), 31 U. C. R. 404.—**CAN.**

t. —— *Actions against*.]—A member of House of Assembly must be sued by bill & summons.—RENNIE *v.* RANKIN (1850), 1 All. 620.—**CAN.**

a. —— *Exempt from giving evidence during session.*]—The engagements of a witness, who was a senator of the Dominion & a member of the executive council, at his duties at Ottawa, where the Senate was in session, was deemed sufficient excuse for not procuring his attendance, & good ground for putting off the hearing.—REES *v.* A.-G. (1869), 2 Ch. Ch. 386.—**CAN.**

b. *Speaker—Powers—Preservation of order.*]—The Legislative Assembly of N.S.W. having only protective & self-defensive powers, & no punitive powers, the Speaker has no authority to cause a member who has been disorderly in the Chamber, & has left it in a disorderly manner, to be arrested outside the Chamber & brought back into it.—WILLIS *v.* PERRY (1912), 13 C. L. R. 592.—**AUS.**

c. —— —— ——.]—The power of the Speaker & officers of the House to preserve order may be exercised during the intervals of adjournment between sessions as well as when the House is sitting.—PAYSON *v.* HUBERT (1904), 24 C. L. T. 168; 34 S. C. R. 400.—**CAN.**

Pleading.]—Where an action of trespass has been brought against the Speaker of the House of Assembly for an arrest & imprisonment made under his warrant, if he claims exemption from personal liability in consequence of having acted under the order of the House, when the House had no authority to make the order, he should specially traverse with an *absque hoc*. If he justify generally, that question does not arise.—HILL *v.* WELDON (1845), 3 Kerr, 1.—**CAN.**

e. *Committees—Attendance of witnesses.*] — The Colonial Legislature cannot compel attendance of witnesses before a committee of the Legislative Assembly.—*Re* KELLY, *Ex p.* THE SHERIFF (1860), 2 Legge, 1275.—**AUS.**

f. —— *Chairman—Preservation of order.*]—The Speaker or Chairman of Committees of the Legislative Assembly has power, without a resolution of the House, to eject from the Chamber a member guilty of disorderly conduct & wilful interruption & obstruction of the business of Parliament.—TOOHEY *v.* MELVILLE (1892), 13 N. S. W. L. R. (L.) 132; 8 N. S. W. W. N. 125.—**AUS.**

g. —— *Liability for expenses of witnesses.*]—*Semble:* a returning officer, whose conduct has been impeached, is not entitled to his expenses as a witness before a committee of the House of Commons, although he was summoned to attend by the Speaker's warrant in the same manner as other witnesses.—BLACKLOCK *v.* MCMARTIN (1826), Tay. 320.—**CAN.**

h. —— *Services rendered—Liability of Crown.*]—The Crown is not liable upon a claim for the services rendered by any one to a committee of the House of Commons at the instance of such committee.—KIMMITT *v.* R. (1896), 5 Exch. C. R. 130.—**CAN.**

k. *Parliamentary documents—Liability for printing.*]—Members of a parliamentary committee are liable jointly but not severally, to a printer for work ordered by them.—PAPINEAU *v.* LOVELL (1870), 14 L. C. J. 238.—**CAN.**

l. —— ——.]—TAYLOR *v.* CAMPBELL (1873), 33 U. C. R. 264.—**CAN.**

m. —— ——.]—When a tender for parliamentary printing had been accepted by both Houses of Parliament, & a contract executed between the suppliants & the clerk of the joint committee of both Houses on printing:—*Held:* such a contract could not be enforced against the Crown.—R. *v.* MACLEAN (1882), 8 S. C. R. 210.—**CAN.**

n. —— *Whether admissible in evidence.*] — Certain alleged copies of journals of Parliament were tendered in evidence. It was not proved that originals of which the copies tendered were said to be copies ever existed nor was it shown that the copies tendered were copies of any original. They were, however, shown to have come from the parliamentary library at Ottawa, & most of them purported to have been printed by the Queen's printer:—*Held:* in the absence of a statute making them admissible, they could not be received.—LANGTRY *v.* DUMOULIN (1884), 7 O. R. 499.—**CAN.**

o. *Privileges—Extent.*]—The Colonial Legislature, in exercise of this power, enacted that the privileges, etc., of the Council & Assembly, should be those held, etc., by the British Commons House of Parliament at the date of 18 & 19 Vict. c. 55:—*Held:* this enactment properly defined these privileges, etc., & sufficiently exercised the power delegated to the Colonial Legislature.—DILL *v.* MURPHY (1864), 3 New Rep. 444, P. C.—**AUS.**

p. —— ——.]—The Legislative Assembly does not possess the privilege to authorise by resolutions imposing customs duties, the officers of customs to collect such duties until the end of the session of Parliament in which such resolutions have been passed.—STEVENSON *v.* R. (1865), 2 W. W. & A'B. 143.—**AUS.**

q. —— ——.]—The powers incident to or inherent in a Colonial Legislative Assembly are such as are necessary to the existence of such a body & the proper exercise of the functions which it is intended to execute, & do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly.—BARTON *v.* TAYLOR (1886), 11 App. Cas. 197, P. C.—**AUS.**

r. —— ——.] — The Legislative Assembly does not enjoy all the privileges which the House of Commons enjoys by virtue of ancient usages & prescription but only those privileges which are necessary to the existence of such a body as the Legislative Assembly.—NORTON *v.* CRICK (1894), 15 N. S. W. L. R. (L.) 172; 10 N. S. W. W. N. 197.—**AUS.**

-.]—Colonial Assemblies are not vested with all the rights & powers of the House of Parliament, but such only as are essential to the discharge of their legislative functions.—HILL *v.* WELDON (1845), 3 Kerr, 1.—**CAN.**

bb. —— ——.]—The *lex et consuetudo parliamenti*, itself part of the law of England, has no application to Colonial Legislature.—LE MESSURIER *v.* CARTER & EVANS (1870), 5 Nfld. L. R. 300.—**NFLD.**

in Parliament—Courts have no jurisdiction.]—As the Legislative Assembly has power under its Standing Orders pursuant to Constitution Act, 1867, s. 8, to regulate its internal procedure relating to orderly conduct, the Supreme Ct. has no jurisdiction to take cognisance of the mode in which a resolution for the suspension of a member was passed.—BROWN *v.* COWLEY (1895), 6 Q. L. J. 234.—**AUS.**

dd. —— —— ——.]—A Standing Order of the Legislative Assembly of New South Wales made under the power given to it by Constitution Act No. 32 of 1902, s. 15, & approved by the Governor, empowered the House to suspend from the service of the House a member charged with an offence until a verdict given or further order:—*Held:* that the Standing Order, being to regulate the orderly conduct of the Assembly, was within the terms of the power conferred. The House was sole judge as to the occasion requiring it; & a ct. of law could not question its validity so long as it related to orderly conduct.—HARNETT *v.* CRICK, [1908] A. C. 470, P. C.—**AUS.**

ee. —— —— ——.]—The House of Assembly passed a resolution adjudging pltf. guilty of a contempt of the House committed in the face of the House, & ordering his committal to the common gaol for the space of forty-eight hours:—*Held:* if, in the proceedings against pltf., the members of the House of Assembly were sitting as a ct. of record, trying a matter within the jurisdiction of the ct., the members could not be sued for their proceedings in such judicial capacity.—THOMAS *v.* HALIBURTON (1893), 26 N. S. R. 55.—**CAN.**

ff. —— —— ——.]—In an action for assault & imprisonment against members of the Assembly, who had voted for pltf.'s imprisonment:—*Held:* the sects. of the local Revised Statutes, series 5, c. 3, which create the jurisdiction of the House & indemnify its members against legal proceedings in respect to their votes therein, are a complete answer to an attempt to enforce civil liability for acts done & words spoken in the House.—FIELDING *v.* THOMAS, [1896] A. C. 600.—**CAN.**

gg. —— *Freedom from arrest—Extent of privilege.*]—A member of the provincial Parliament is privileged from arrest for forty days after the prorogation or dissolution of Parliament, & for the same period before the next appointed meeting.—WADSWORTH *v.* BOULTON, 2 C. L. Ch. 76.—**CAN.**

hh. —— —— ——.]—Petitioner having been arrested under a writ of *capias* prayed to have the writ quashed & to be liberated from such arrest on the ground of privilege as a member of the Legislative Assembly of Canada:—*Held:* such privilege did not attach to members of the Canadian Legislature in virtue of any law or usage or by reason of any analogy between it & the Parliament of Great Britain, but it attached solely on the ground of necessity, within which the case of the prisoner did not fall, the assembly having been prorogued some time previously, & the petitioner not being then engaged in any parliamentary duty or service.—CUVILLIER *v.* MUNRO (1848), 4 L. C. R. 146.—**CAN.**

kk. —— —— ——.]—R. *v.* GAMBLE (1852), 9 U. C. R. 546.—**CAN.**

ll. —— —— ——.]—The privilege of members of the House of Assembly from arrest during the session is for forty days, before & after the prorogation or dissolution.—RENNIE *v.* RANKIN (1850), 1 All. 620.—**CAN.**

mm. —— —— ——.]—A member of the House of Assembly of Newfoundland has the same privilege from arrest during the sitting of the Legislature for forty days before & after the meeting thereof as a member of the House of Commons in England.—MORIARTY *v.* KAVANAGH (1861), 4 Nfld. L. R. 591.—**NFLD.**

nn. —— —— *Contempt of court.*]—An order to commit to close custody for not attending to be examined pursuant to a judge's order is a commitment for contempt, not a commitment in execution. A Member of Parliament is therefore not privileged from arrest under such order.—HENDERSON *v.* DICKSON (1860), 19 U. C. R. 592.—**CAN.**

n. —— —— ——.]—COX *v.* PRIOR (1899), 18 P. R. 492.—**CAN.**

o. —— —— *Application to civil proceedings.*]—A Member of Parliament is not privileged from arrest under a writ of *ca. sa.*, even though Parliament be sitting at the time of his arrest.—NORTON *v.* CRICK (1894), 15 N. S. W. L. R. (L.) 172; 10 N. S. W. W. N. 197.—**AUS.**

p. —— *Committal for contempt.*]—The Legislative Council & Legislative Assembly of Victoria have all the privileges, immunities & powers which were legally held enjoyed & exercised by the Commons House of Parliament at the time of the passing of the Constitution Act; & publication outside the Parliament House of a newspaper article adjudged by the Assembly to be a libel on the Assembly, on a select committee thereof & on a member of each in his capacity of such member is a contempt for which the Assembly has authority to commit.—*Re* DILL (1862), 1 W. & W. 171.—**AUS.**

q. —— ——.]—*Held:* the Speaker of the Colonial Assembly has power to issue his warrant to arrest for contempt of the Legislature.—DILL *v.* MURPHY (1864), 10 L. T. 170, P. C.—**AUS.**

a [illegible] *corpus* on behalf of deft., the return set out a warrant issued by applt., as Speaker of the Legislative Assembly of Victoria, stating that resp. had been guilty of a contempt & breach of privilege of the assembly, & directing the Serjeant-at-Arms to take him into custody:—*Held:* the warrant was a sufficient answer to the writ; the full power & privilege of deciding what is contempt & of committing for that contempt having been conferred on the Legislative Assembly.—VICTORIA LEGISLATIVE ASSEMBLY (SPEAKER) *v.* GLASS (1871), 24 L. T. 317, P. C.—**AUS.**

t. —— ——.]—A warrant under the hand & seal of the Speaker of the Nova Scotia House of Assembly, reciting that T. was by resolution of the House adjudged guilty of a contempt thereof, committed in the face of the House, & was adjudged to be committed to gaol, commanded the Serjeant-at-Arms to convey T. to gaol & the gaoler to receive him:—*Held:* the commitment was not under the Act; the House can only proceed for contempt in the way pointed out by the Act & not by a general warrant.—*Re* THOMAS, 21 C. L. T. 503.—**CAN.**

-.]—The House of Assembly has the power of imprisoning persons guilty of contempt in answering or refusing to answer questions before a select committee.—MCNAB *v.* BIDWELL (1830), Dra. 144.—**CAN.**

b. —— ——.]—Where a party having privilege had been in contempt for non-compliance with an order of the ct., & the order *nisi* for a sequestration had been duly served; but between that & the application for the writ to issue, the party had ceased to be a member, the ct. refused the writ, & directed the party moving to commence proceedings for the contempt *de novo.*—MEYERS *v.* HARRISON (1853), 4 Gr. 148.—**CAN.**

c. —— ——.]—*Held:* the Legislative Assembly of the Province of Nova Scotia has, in the absence of express grant, no power to remove one of its members for contempt, unless he is actually obstructing the business of the House.—LANDERS *v.* WOODWORTH (1878), 2 R. & C. 84; 2 S. C. R. 158.—**CAN.**

d. —— ——.]—The jurisdiction given to the Legislature by R. S. O. 1877, c. 12, to punish as for a contempt, does not oust the jurisdiction of the cts. where the offence is of a criminal character, but the same act may be in one aspect a contempt of the Legislature & in another aspect a misdemeanour.—R. *v.* BUNTING (1884), 7 O. R. 524.—**CAN.**

e. —— ——.]—The Nova Scotia House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members is a breach of privilege & contempt, & to punish that breach by imprisonment.—FIELDING *v.* THOMAS, [1896] A. C. 600; 5 Cart. 398.—**CAN.**

f. —— ——.]—The House of Assembly of the Island of Newfoundland does not possess, as a legal incident, the power of arrest, with a view of adjudication on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions & duties as a local legislature.—KIELLEY *v.* CARSON, KENT (1843), 2 Nfld. L. R. App. X.—**NFLD.**

g. —— —— *Jurisdiction of court to discharge.*]—*Re* GLASS (1869), 6 W. W. & A'B. 45.—**AUS.**

h. —— —— ——.]—Petitioner was committed to gaol by the House of Assembly, on the warrant of the Speaker of the House, for the space of ten days for breach of the privileges of the House in that as deputy returning officer he had been guilty of gross fraud concerning the election books:—*Held:* the cts. could not inquire into such commitment, nor discharge nor bail a person so committed, yet if the commitment did not profess to be for contempt, but was evidently arbitrary, the ct. would not only be competent but bound to discharge the prisoner.—*Ex p.* LAVOIE (1855), 5 L. C. R. 99.—**CAN.**

k. —— —— *Duration.*]—A prisoner committed to the common gaol by Parliament during pleasure is entitled to his discharge as soon as Parliament is prorogued, & such discharge may be obtained by *habeas corpus.*—*Ex p.* MONK, 2 R. de L. 1817.—**CAN.**

l. —— —— ——.]—The House of Assembly has power to imprison or otherwise punish for disobedience of its orders during the session.—THOMAS *v.* HALIBURTON (1893), 26 N. S. R. 55.—**CAN.**

—— ——.]—*See, also,* DEPENDENCIES, Vol. XVII., pp. 425–427, Nos. 70–88.

m. —— *Breach of—Amounting to crime—Jurisdiction of House excluded.*]—*Held:* the presentation of a petition by pltf. reflecting on members of the House was a violation of law, for which he was liable to punishment under the provisions of R. S. c. 3, & a provincial legislature cannot adjudicate upon a crime indictable at common law merely because the offence touches its privileges.—THOMAS *v.* HALIBURTON (1893), 26 N. S. R. 55.—**CAN.**

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See PARLIAMENT.

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See ELECTIONS.

PAROCHIAL CHAPEL.

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PAROCHIAL CHARITIES.

See CHARITIES; SMALL HOLDINGS AND SMALL DWELLINGS.

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See CONTRACT; CUSTOM AND USAGES; DEEDS AND OTHER INSTRUMENTS; EVIDENCE; GUARANTEE AND INDEMNITY; AND TITLES *passim*.

PARSONS AND PARSONAGES.

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PART PERFORMANCE.

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PARTICULAR ESTATE.

See REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

PARTICULARS.

See COUNTY COURTS; INTERPLEADER; PLEADING; PRACTICE AND PROCEDURE; SET-OFF AND COUNTERCLAIM.

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PART I.

a. *Who may obtain partition—Sub-lessor.*]—The existence of a sub-lease does not prevent the sub-lessors from obtaining a decree for partition.—ROBINSON *v.* ROBINSON (1902), 2 S. R. N. S. W. (Eq.) 197.—**AUS.**

b. —— *Dowress.*]—A dowress is not entitled to demand, although she is compelled to suffer, partition.—RODY *v.* RODY, 1 C. L. T. 546.—**CAN.**

c. —— ——.]—A person entitled only to dower, unassigned, out of land, is entitled to apply for partition.—DEVEREUX *v.* KEARNS (1886), 11 P. R. 452.—**CAN.**

d. —— ——.]—Although some expressions in Partition Act, R. S. O., 1877, authorise a person entitled to dower not assigned to apply for partition or sale of the lands in which she is interested, yet the ct. may, in its discretion, refuse the application & leave the dowress to proceed under Dower Procedure Act, R. S. O., 1877, or otherwise, to have her dower assigned.—FRAM *v.* FRAM (1887), 12 P. R. 185.—**CAN.**

e. —— ——.]—MORRISON *v.* MORRISON (1917), 39 O. L. R. 163; 34 D. L. R. 677.—**CAN.**

f. —— *Necessity for possession.*]—

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LECAIN *v.* HOSTERMAN (1871), 8 N. S. R. 413.—**CAN.**

g. —— ——.]—MURCAR *v.* BOLTON (1884), 5 O. R. 164.—**CAN.**

h. —— ——.]—Persons in whom the shares of coparceners had vested, granted a lease for lives renewable for ever. Their interest vested in petitioner & resp. subject to the lease. Petitioner filed his petition for a partition:—*Held:* such a suit was not sustainable.—CANTWELL *v.* HASSARD (1858), 7 I. Ch. R. 370; 10 Ir. Jur. 377.—**IR.**

k. —— *Trustee for sale.*]—Pltf. in this case being a trustee for sale was held not to be in a position to ask for partition.—KEEFER *v.* MCKAY (1881), 29 Gr. 162.—**CAN.**

l. —— *Mortgagee.*]—*Qu.:* whether applt. in this case, whose only interest was that of mtgee. of the interest of one S., the owner of an undivided one-sixth interest in the lands, had any *locus standi* to bring a suit for partition or to appeal without his co-pltf.—LAPLANTE *v.* SCAMEN (1883), 8 A. R. 557.—**CAN.**

m. —— ——.]—A mtgee., whose title has not been perfected by foreclosure or otherwise, is not entitled to an order for partition or sale upon summary application.—MULLIGAN *v.* HENDERSHOTT (1896), 17 P. R. 227.—**CAN.**

n. —— *Life tenant.*]—A sole tenant for life of an estate has no *locus standi* under Partition Act, R. S. O., 1887, to apply for sale of the estate.—FISKEN *v.* IFE (1897), 28 O. R. 595.—**CAN.**

o. —— ——.]—Joint owners for life of a farm under a will that does not expressly or impliedly prohibit partition are entitled to have the farm divided between them for the period of their life interest.—PARKIN *v.* PARKIN (1869), Buch. 136.—**S. AF.**

p. —— *Plaintiff in possession of both moieties for different estates.*]—RIDDLER *v.* DEW (1901), 19 N. Z. L. R. 708.—**N.Z.**

q. —— *Parties in possession of defined portions.*]—Where it appeared that pltf. & deft., the joint owners of certain land in undivided shares, had each occupied for many years certain defined portions of the land, & thereafter pltf. claimed a partition on the basis of such occupation:—*Held:* as the evidence was conclusive that the parties had agreed to divide the property in the proportions claimed by pltf., he was entitled to succeed in the action, although the grant of the land had been issued to the parties jointly in undivided shares.—ROOS *v.* SIEBERHAGEN, [1912] App. D. 50.—**S. AF.**

r. ——.]—The common law writ of partition extends to joint tenants & tenants in common.—DOANE *v.* MCKENNY (1854), James, 328.—**CAN.**

t. ——.]—HARMONY PULP CO *v.* DELONG (1913), 13 E. L. R. 99; 12 D. L. R. 409.—**CAN.**

u. ——.]—Where a suit for partition was dismissed for default & a fresh suit was instituted:—*Held:* the right to enforce partition is a legal incident of a joint tenancy, & as long as such tenancy subsists so long may any of the joint tenants apply to the ct. for partition of the joint property.—BISHESHAR DAS *v.* RAM PRASAD (1906), I. L. R. 28 All. 627.—**IND.**

a. *What property may be partitioned —Estate subject to mortgage.*]—Although partition may be directed of an estate subject to a mtge. thereon, still, if one of several co-tenants creates an incumbrance on his undivided share & institutes proceedings to obtain a partition of the estate, the party holding the incumbrance must be brought before the ct.—MCDOUGALL *v.* MCDOUGALL (1868), 14 Gr. 267.—**CAN.**

.]—WOOD *v.* HURL (1880), 28 Gr. 146.—**CAN.**

c. —— *Right of squatter.*]—The right which a squatter acquires by being in possession of lands of the Crown is not such an interest therein as this ct. will order a partition of amongst [illegible] MARTIN (1873), 20 Gr. 613.—**CAN.**

d. —— *Land subject to right of way.*]—PUGH *v.* PETERS (1876), 11 N. S. R. (2 R. & C.) 139.—**CAN.**

e. —— *Partition amounting to waste.*]—Where a house was held by two tenants in common, under a lease for the unexpired residue of a term of years, subject to a rent & covenants, a bill for partition by one of the tenants was dismissed, as the landlord might restrain the parties from executing it by any act amounting to waste, & the ct. could not protect one of the tenants from a breach of covenant, which might be committed by the other.—NORTH *v.* GUINAN (1829), Beat. 342.—**IR.**

f. —— *Right of turbary.*]—HARGROVE *v.* CONGLETON (1861), 12 I. C. L. R. 368.—**IR.**

aa. —— *Mineral rights.*]—BADENHORST *v.* MARKS, [1911] T. P. D. 144.—**S. AF.**

bb. ——.]—Where in a suit for partition, possession was sought of a definite share of a property consisting of a number of houses: — *Held:* the principle in such cases is that, if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made; but where partition cannot be made without destroying the intrinsic value of the property, then a money compensation should be given.—ASHANULLAH *v.* KALI KINKUR KUR (1884), I. L. R. 10 Calc. 675.—**IND.**

cc. *Partition suit — Who must be joined—Lessee.*]—To a bill for partition a lessee for years may be a necessary party.—FITZPATRICK *v.* WILSON (1866), 12 Gr. 440.—**CAN.**

dd. —— —— ——.]—The tenant in common leased his undivided share, subject to partition being made. The lessee was made a party to a bill for a partition:—*Held:* he was not entitled to his costs as against his lessor.—HERBERT *v.* EYRE (1838), 2 Jo. Ex. Ir. 803.—**IR.**

ee. —— —— *All parties interested.*]—Where in a bill for partition it was stated that certain infants residing with or near their father, out of the jurisdiction of the ct., not parties, were interested in the lands sought to be partitioned, their father being a party deft., a demurrer for want of parties was allowed.—TRYON *v.* PEER (1867), 13 Gr. 311.—**CAN.**

ff. —— —— ——.]—MCEACHREN *v.* COX (1910), 8 E. L. R. 590.—**CAN.**

gg. —— —— ——.]—It is a general rule that all persons interested ought to be made parties to a partition suit.—CHUDASAMA SURSANJI *v.* PARTAPSANG KHENGARJI (1904), I. L. R. 28 Bom. 209.—**IND.**

hh. —— —— *Infants.*]—BROWN *v.* BROWN (1882), 9 P. R. 245.—**CAN.**

kk. —— —— *Dowress.*]—In a suit by coparceners for the partition of land & an assignment of the dower of the widow of their ancestor, she should be made a party.—WOOD *v.* AKERLY (1885), N. B. Dig. 656.—**CAN.**

ll. —— —— *Wife of tenant in common.*]—The wife of a tenant in common in land sought to be sold in a partition suit should be a party to the suit.—HANNAGHAN *v.* HANNAGHAN (1896), 1 N. B. Eq. Rep. 302.—**CAN.**

mm. —— *Jurisdiction of court.*]—Where a testator directed in his will that after the death of A. his land should be divided between his children, by his exors.:—*Held:* in the absence of any refusal of the exors. to make the partition after the death of A., the ct. could not direct a partition under 2 Will. 4, c. 35.—CRONK *v.* CRONK (1841), O. S. 332.—**CAN.**

.]—The ct. could not under 2 Will. 4, c. 35, where all the parties interested in the partition consent to its being made.—*Re* EASTWOOD (1844), 1 U. C. R. 3.—**CAN.**

oo. —— ——.]—*Re* USHER (1845), 1 U. C. R. 527.—**CAN.**

pp. —— ——.]—The ct. will not decree the partition of lands, the title to which is vested in the Crown; neither will it decree the sale of such lands at the instance of the representatives of a deceased locatee.—ABELL *v.* WEIR (1877), 24 Gr. 464.—**CAN.**

qq. —— ——.]—*Re* SIMPSON'S ESTATE (1878), 12 N. S. R. (3 R. & C.) 357.—**CAN.**

rr. —— ——.]—A bill for partition may be maintained in equity, notwithstanding that the parties proceeded against deny the title, & the title is purely legal.—DURANT *v.* HUESTIS & TUPLIN (1912), 10 E. L. R. 423; 1 D. L. R. 786.—**CAN.**

tt. —— ——.]—A partition will be decreed in equity only where pltf. would be entitled to a partition at law.—O'HARA *v.* STRANGE (1847), 11 I. Eq. R. 262.—**IR.**

aaa. —— ——.]—A co-proprietor is entitled to claim partition of the land held in common, but where the partition would be impracticable or inequitable, the ct. can award all the land to one co-proprietor upon condition that he pays a reasonable compensation to his co-proprietor.—DICKSON *v.* STAGG (1884), 3 S. C. 115.—**S. AF.**

bbb. —— —— *To order sale.*]—*Held:* a trust to divide equally did not oust the operation of Partition Act, but a majority of the beneficiaries could insist upon a sale unless good cause were shown to the contrary.—OATLEY *v.* OATLEY (1898), 19 N. S. W. Eq. 122, 129; 15 N. S. W. W. N. 72.—**AUS.**

ccc. —— —— .]—Where beneficiaries are entitled to a partition of a settled estate the ct. will generally sanction a sale of the settled estate under Conveyancing & Law of Property Act, on the application of a majority of the beneficiaries, as they would *primâ facie* be entitled to a sale in lieu of a partition under Partition Act.—*Re* RYAN'S SETTLED ESTATES (1899), 20 N. S. W. L. R. (Eq.) 135; 16 N. S. W. W. N. 70.—**AUS.**

ddd. —— —— ——.]—O'LONE *v.* O'LONE (1851), 2 Gr. 642.—**CAN.**

eee. —— —— ——.]—*Re* DENNIE (1853), 10 U. C. R. 104.—**CAN.**

fff. —— —— ——.]—A tenant for life is entitled to a partition, & where there is a right to a partition there may be a right to a sale as the ct. may determine.—LALOR *v.* LALOR (1883), 9 P. R. 455.—**CAN.**

ggg. —— —— .]—Where, on the hearing of a cause for partition, it was shown that the estate could not be divided without prejudice, the ct., without waiting for any return to that effect, ordered a sale.—BENNETT *v.* BENNETT (1860), 8 Gr. 446.—**CAN.**

hhh. —— —— .]—[illegible] *v.* POST (1865), 24 U. C. R. 311.—**CAN.**

kkk. —— —— ——.]—STEVEN *v.* HUNTER (1868), 14 Gr. 541.—**CAN.**

lll. —— —— ——.]—The ct. may order a sale in the first instance, if it see fit.—*Re* FOSTER, 1 Ch. Ch. 103.—**CAN.**

mmm. —— —— ——.]—BLASDELL *v.* BALDWIN (1878), 3 A. R. 6.—**CAN.**

nnn. —— —— ——.]—ONTARIO POWER CO. *v.* WHATTLER (1904), 24

C. L. T. 128; 7 O. L. R. 198 O. W. R. 340.—**CAN.**

.]—Upon the application of pltfs., the owners of undivided interests or shares in three mining claims, deft. holding the remaining shares, which were much less in amount, an order was made under English Partition Act, 1868, for a sale of the claims under the direction of the ct., an equitable partition being in the circumstances impossible.—BARNES *v.* BROGGLIO (Y. T.) (1911), 17 W. L. R. 294.—**CAN.**

c. —— —— ——.]—GILBERT *v.* GILBERT (1913), 13 E. L. R. 415; 14 D. L. R. 889; 42 N. B. R. 288.—**CAN.**

d. —— —— ——.]—Where deft. to a suit for partition by metes & bounds has definitely undertaken, according to Partition Act, 1893, s. 4, to purchase the share of pltf. in the property sought to be partitioned, he cannot be permitted to resile from his undertaking, & the ct. is bound to direct a sale.—ILIAS AHMAD *v.* BULAQI CHAND (1917), I. L. R. 39 All. 672.—**IND.**

is "good reason to the contrary" against a sale instead of partition, under Partition Act, 1868, s. 4, that owing to agrarian agitation the value of the land is depreciated, & that consequently the interest on the purchase money of the lands proposed to be sold would be but fifty per cent. of the amount of the rents payable thereout, to the alleged injury of the parties showing cause.—*Re* WHITWELL'S ESTATE (1887), 19 L. R. Ir. 45.—**IR.**

dissent of one of six joint owners, though an important matter for consideration, is not, *per se*, "good reason" against a sale instead of a partition, within Partition Act, 1868, s. 4, &, in the absence of "good reason to the contrary," the sect. is mandatory to the ct.—*Re* LANGDALE'S ESTATE (1871), 5 I. R. Eq. 572.—**IR.**

an suit by an owner of an undivided share in a holding held for a statutory term, brought against the owner of the other shares, seeking for a sale in lieu of partition, the ct. has jurisdiction to order such sale, notwithstanding the landlord has not given his consent to a partition.—PRENDERGAST *v.* MONGAN, [1913] 1 I. R. 321.—**IR.**

order for sale in lieu of partition was made in the event of its being certified that more than a moiety of the persons interested desired a sale.—GINGLES *v.* MAGILL, [1926] N. 234.—**IR.**

were tenants in common with defts. in a certain parcel of land brought a suit for the partition of the land. They sought to have an immediate & unconditional sale of it; but defts. desired to have the sale postponed, asserting the time to be a period of comparatively low prices, & that in any case there should be a reserve price put on the property when offered for sale. It was shown that pltfs. & defts. were disputing about the management, & that tenants' leases of the property were shortly falling in & required arrangement:—*Held*: the proper order in the suit was to direct an immediate sale of the land by the ct.—WACHSMANN *v.* BURROWES (1912), 31 N. Z. L. R. 833.—**N.Z.**

l. —— —— *Effect of existence of trust for sale.*]—*Re* DENNIS, DOWNEY *v.* DENNIS (1887), 14 O. R. 267.—**CAN.**

m. —— —— *To find as to title.*] HUESTIS *v.* DURANT (1908), 5 E. L. R. 483.—**CAN.**

n. —— —— *To make vesting order.*] —ST. LEGER *v.* FERGUSON (1860), 10 I. Ch. R. 488.—**IR.**

o. —— *Sale of part of property—Vesting order as to remainder.*]—ARNOLD *v.* HURD, 1 Ch. Ch. 252.—**CAN.**

p. —— *Necessity for opposing party.*] —A petition for a partition under 2 Will. 4, c. 35, must have been verified by affidavit, & there must be an opposing party, although the suit was an amicable one.—*Ex p.* ROBINSON (1839), 3 Ont. Dig. 5126.—**CAN.**

q. —— *Service of notice.*]—A writ of partition could not be ordered, under 2 Will. 4, c. 35, without forty clear days' notice before the term.—*Re* LONEY (1853), 10 U. C. R. 305.—**CAN.**

r. —— *Relief against unauthorised consent to mode of partition.*]—ROLFE COOTE (1865), 1 Ch. Ch. 308.—**CAN.**

t. —— *Appeal.*]—An appeal will lie under Partition Act, 32 Vict. c. 33 (O), from the judgment of a county ct. judge on a special case stated.—*Re* SHAVER & HART (1871), 31 U. C. R. 603.—**CAN.**

aa. —— *Reference to barrister—To take account of rents & profits.*]—FRASER *v.* DEWITT (1878), 1 P. & B. 738.—**CAN.**

Service of bill—Substituted service.]—In a partition suit an order allowing substitutional service of the bill on the official guardian of an infant deft., resident without the jurisdiction of the ct., was granted on the ground that the share of the infant in the lands in question amounted to only $40, & substitutional service would be inexpensive.—WEATHERHEAD *v.* WEATHERHEAD (1881), 9 P. R. 96.—**CAN.**

cc. —— *Advertisement for creditors.*] —The fact that an intestate, whose estate is being partitioned, has been dead for forty-five years, does not warrant the master in dispensing with the usual advertisement for creditors.—BIGGAR *v.* BIGGAR (1881), 8 P. R. 488.—**CAN.**

.]—Masters should not, without any specific or sufficient reasons, dispense with inquiries & advertisements for creditors holding specific or general liens upon the whole or any undivided share of the estate, down to the time of sale.—ROBSON *v.* ROBSON (1884), 10 P. R. 324.—**CAN.**

ee. —— *Powers of master.*]—In the course of a reference to make a partition of lands, a master appointed two skilled persons to examine the property & prepare a scheme of partition, & on their evidence he adopted the scheme prepared:—*Held*: the course adopted by the master was a reasonable one.—MCKAY *v.* KEEFER (1887), 12 P. R. 256.—**CAN.**

ff. —— *Protection of third parties.*]—Where one of two or more tenants in common has conveyed by metes & bounds a portion of the land held in common & improvements have been made by the grantee upon the portion of land so conveyed, the ct., in decreeing partition at the instance of other tenants, will protect the interests of the grantee, by setting apart the land conveyed as to the share of the grantor, if such setting apart can be made without detriment to the interests of the other tenants in common.—MCNEIL *v.* MCDOUGALL (1896), 28 N. S. R. 296.—**CAN.**

gg. —— *Report—Whether confirmation required.*]—The report in a partition suit by bill under C. S. U. C. c. 86, does not require to be specially confirmed by the ct.—DUNN *v.* DOWLING, 1 Ch. Ch. 365.—**CAN.**

hh. —— *Service of order for partition.*]—*Re* HYNES, HODGINS *v.* ANDREWS (1900), 20 C. L. T. 390; 19 P. R. 217.—**CAN.**

kk. —— ——.]—*Re* HYNES, HODGINS *v.* ANDREWS (1900), 19 P. R. 217. **CAN.**

ll. —— *Report of commissioners—Review.*]—The report of partition commissioners, in general, should be sustained, unless some positive rule of law has been violated or their estimate has been shown to be erroneous, by clear, strong, & indubitable evidence.—ARCHIBALD *v.* HANDLEY (1904), 40 N. S. R. 427.—**CAN.**

mm. —— *Claim of absolute right to part of lands.*]—Action for partition or sale of certain lands held by parties as tenants in common. Deft. admitted this, but claimed to own one lot absolutely. Judgment given under Manitoba rule 615 for partition or sale of all except said one lot.—KELLY *v.* KELLY (1911), 9 W. L. R. 509.—**CAN.**

nn. —— *Form of bill.*]—A bill in equity for partition is an analogy to the proceedings at law, & should be so framed that there shall be a party substantially interested, pltf. & deft.—LOWE *v.* FRANKS (1828), 1 Mol. 137.—**IR.**

oo. —— *Appointment of receiver.*]—On a bill for a partition by one tenant in common against another, a receiver will not be granted, if a case of exclusion is not shown.—SPRATT *v.* AHERNE (1834), 1 Jo. Ex. Ir. 50.—**IR.**

pp. —— *Reference to arbitrator.*]—PORTER *v.* PORTER (1921), 55 I. L. T. 206.—**IR.**

qq. —— *Right to reimbursement for expenditure—Improvements.*]—The rule that one of several tenants in common of real estate is entitled, when the property is sold, to receive out of the purchase-money the increased price obtained in consequence of permanent improvements effected by himself applies in suits for administration as well as suits for partition.—BOULTER *v.* BOULTER (1898), 19 N. S. W. L. R. (Eq.) 135; 15 N. S. W. W. N. 61.—**AUS.**

rr. —— —— ——.]—The equitable right of a tenant in common of real estate, who has made permanent improvements upon it while in sole occupation, to be compensated for his expenditure to the extent to which the value of the land has been increased thereby, is one which attaches to the land & passes with it to a purchaser, but is enforceable only as a defensive equity, in the event of a partition.—BRICKWOOD *v.* YOUNG & MINISTER FOR PUBLIC WORKS OF NEW SOUTH WALES (1905), 2 C. L. R. 387; 4 S. R. N. S. W. 743; 21 N. S. W. W. N. 257.—**AUS.**

tt. —— —— ——.]—FOSTER *v.* EMERSON (1854), 5 Gr. 135.—**CAN.**

-.]—BIEHN *v.* BIEHN (1871), 18 Gr. 497.—**CAN.**

-.]—One of several tenants in common or joint tenants, making improvements on the joint estate, is not entitled to be paid therefor; unless, on the other hand, he consents to be charged with occupation rent.—RICE *v.* GEORGE (1873), 20 Gr. 221.—**CAN.**

ccc. —— —— ——.]—The right of a tenant in common, in an action for partition of the property, to be paid for improvements executed by him thereon, is restricted to such as are made by him after his tenancy in common has commenced in fact.—LASBY *v.* CREWSON (1891), 21 O. R. 255.—**CAN.**

v. RODGER (1895), 27 O. R. 320.—**CAN.**

eee. —— —— ——.]—A tenant in common who holds possession of, manages, & receives the rent of, the common property, which is subject to an incumbrance, is entitled when called on for an account by his cotenant, to be allowed for advances properly & reasonably made by him, for repairs & improvements, & for principal & interest on the incumbrance, with interest from the time the advances are made.—*Re* CURRY, CURRY *v.* CURRY (1898), 25 A. R. 267.—**CAN.**

fff. —— —— ——.]—NEWALL *v.*

Part I.—Statutory Provisions.]

JOHNSTON (1903), 23 N. Z. L. R. 406.—**N.Z.**

obligation of co-owners to account to each other are the same in equity as at law & are the same in a partition suit as in other proceedings, save only that in a partition suit if an occupying owner claims an allowance for his expenditure he can obtain it only if he consents to be charged with an occupation rent.—MCCORMICK *v.* MCCORMICK, [1921] N. Z. L. R. 384.—**N.Z.**

h. ——— ———.]—MASTRON *v.* COTTON, [1926] 1 D. L. R. 767; 58 O. L. R. 251.—**CAN.**

k. ——— *Costs—Whether party & party or solicitor & client.*]—The costs decreed in partition suits are, as in other suits, party & party costs, & where any of the parties are not *sui juris*, costs as between solr. & client are not decreed even by consent.—HARKNESS *v.* CONMAY (1866), 12 Gr. 449.—**CAN.**

·.]—In a suit for partition, the decree omitted a direction to tax the costs as between solr. & client, or to apportion them amongst the several parties. On a motion for an order directing the master to do so upon the taxation, the order to apportion the costs was made. The order for taxation as between solr. & client was refused as being a variation of the decree.—BERNARD *v.* JARVIS, 1 Ch. Ch. 24.—**CAN.**

m. ——— ——— *Borne ratably by joint owners.*]—In suits between joint owners for partition or sale, the costs are to be borne by the parties in proportion to their respective interests in the property, except that in the case of partition the ct., if it see fit, may give no costs to either party up to the hearing.—CARTWRIGHT *v.* DIEHL (1867), 13 Gr. 360.—**CAN.**

n. ——— ——— ———.]—In partition suits in future, all parties are to abide their own costs, until the issuing of the commission; but the costs of issuing & executing same, & of the final hearing & decree, are to be borne by the parties in proportion to their respective interests.—M'BRIDE *v.* MALCOMSON (1840), 2 Dr. & Wal. 700.—**IR.**

o. ——— ——— ———.]—THOMPSON *v.* RICHARDSON (1872), 6 I. R. Eq. 596.—**IR.**

p. ——— ——— *Unnecessary suit.*]—CARROLL *v.* CARROLL (1876), 23 Gr. 438.—**CAN.**

q. ——— ——— *Application to vary order.*]—CLARK *v.* CLARK (1879), 8 P. R. 156.—**CAN.**

r. ——— ——— *Commission in lieu of costs.*]—In partition & administration suits, the commission in lieu of costs should be divided into equal fractional parts, & the parts allotted to the solrs. in proportion to the amount of work done by & the responsibility imposed upon them.—DODGE *v.* CLAPP (1880), 8 P. R. 388.—**CAN.**

t. ——— ——— ———.]—The sum allotted to the guardian of infants for commission in partition suits should not be measured only by the work done in the master's office.—CAMERON *v.* LEROUX (1882), 9 P. R. 304.—**CAN.**

a. ——— ——— ———.]—HENDRICKS *v.* HENDRICKS (1889), 13 P. R. 79.—**CAN.**

Refusal to partition amicably.]—Where a co-tenant refused to partition amicably a piece of land, & proceeded to strip it of its timber, the costs of a partition suit were ordered to be paid by him, & made a charge upon his share of the proceeds of the sale.—CASSIDY *v.* CASSIDY (1892), N. B. Dig. 314.—**CAN.**

c. ——— ——— *Unnecessary party.*]—Where, in a partition suit, one of defts. did not appear at the hearing, & his answer was unsupported by evidence, & was assumed by the ct. to be unnecessary, he was held not entitled to any costs.—SHIELDS *v.* QUIGLEY (1895), 1 N. B. Eq. Rep. 154.—**CAN.**

d. ——— ——— *Special costs in relation to one share—Borne by that share.*]—*Re* MAHONY'S ESTATE, [1909] 1 I. R. 132.

e. ——— ———.]—*Re* MCMILLAN, PATTERSON *v.* MCMILLAN (1881), 8 P. R. 546.—**CAN.**

·.]—Pltfs. had succeeded in respect of the title made under the judgment in partition, & not for the estate of the grantor in the memorial; & the effect of that judgment seemed not to have been pressed in the ct. below, & was not urged before this ct. until the second argument. Under the circumstances the appeal was dismissed without costs.—VAN VELSOR *v.* HUGHSON (1882), 9 A. R. 390.—**CAN.**

aa. ——— ———.]—FRY & MOORE *v.* SPEARE (1915), 9 O. W. N. 196; 34 O. L. R. 632.—**CAN.**

bb. *Summary proceedings.*]—Partition Act, 1869, only applies to cases in which some common title in the petitioner & resps. to the land in question is admitted. Where it appeared, from the statements in the petition, that two of several resps. claimed to be entitled absolutely to part of the lands sought to be partitioned, & that petitioners contested such claim:—*Held:* the proper mode of proceedings as against these resps. was by bill in the ordinary way.—BENNETTO *v.* BENNETTO (1874), 6 P. R. 145.—**CAN.**

cc. ———.]—A notice of motion for partition having been served, pltf. moved for an injunction restraining deft. from collecting rents, & for a receiver. It appeared that the deft. was a stranger, whose right to be in possession was denied:—*Held:* no relief could be had against him without bill filed.—YOUNG *v.* WRIGHT (1879), 8 P. R. 198.—**CAN.**

dd. ———.]—Under G. O. 640, where special circumstances are shown on an application for partition or sale of lands, a reference to a master other than the master in the county town of the county where the lands are situate, will be directed.—*Re* ARNOTT, CHATTERTON *v.* CHATTERTON (1879), 8 P. R. 39.—**CAN.**

ee. ———.]—The jurisdiction created by G. O. 640 is intended to be exercised in simple cases only where there is no dispute. Where questions are raised of title, or the like, a bill must be filed.—MACDONELL *v.* MCGILLIS (1880), 8 P. R. 339.—**CAN.**

ff. ———.]—A summary application for partition or sale of land by pltf. as one of several heirs was dismissed with costs where pltf. before making it knew that a deft. was in possession claiming title to the exclusion of the pltf. & his co-heirs.—HOPKINS *v.* HOPKINS (1881), 9 P. R. 71.—**CAN.**

gg. ———.]—GRANT *v.* GRANT (1882), P. R. 211.—**CAN.**

hh. ———.]—Where a motion is made under rule 956 for a summary order for partition or sale of lands, & it appears on the motion that such order should not be made until after a question of title has been determined, & then only in the event of the determination being against the title set up in opposition to the motion, the practice which should now be adopted is to adjourn the further hearing of the motion, with liberty to appt. to bring an action to try the question of title.—SMITH *v.* SMITH (1901), 21 C. L. T. 238; 1 O. L. R. 404.—**CAN.**

kk. ———.]—Where, on summary application for partition or sale of lands, it was alleged by deft. & *primâ facie* evidence given that he had acquired, as to part of the land, title by possession, & as to the residue, had only an easement or right of way over it, & no title to the land itself:—*Held:* there being no common title, no interest in common, an order for partition or sale should not be made.—STROUD *v.* SUN OIL CO. (1904), 24 C. L. T. 298; 7 O. L. R. 704; 8 O. L. R. 748; 3 O. W. R. 806; 4 O. W. R. 212.—**CAN.**

ll. *Effect of partition.*]—A sale of real estate belonging to an infant under the decree of the ct. rightfully made in a partition suit operates as a conversion of the property into personalty for all purposes, notwithstanding the statutory trust for reconversion. The order for sale operates as a disentailing deed where the property or portion of it is settled in tail.—CHARLTON *v.* MURRAY (1909), 10 S. R. N. S. W. 49; 27 N. S. W. W. N. 1.—**AUS.**

mm. ——.]—A., B., & C. owned lands as tenants in common; A. being under age, her father made a partition with B. & C. in 1810; in 1814 A. married, still being under age, & her husband occupied the share allotted to her until his death in 1842, & six years after she objected to the partition, demanded possession of B., & brought ejectment:—*Held:* the partition having been fair, she was bound by it, unless she objected within a reasonable time after her coverture ceased.—DOE d. ESTABROOKS *v.* HARRIS (1850), 2 All. 42.—**CAN.**

nn. ———.]—PARK *v.* PARK (1865), 24 U. C. R. 459.—**CAN.**

oo. ———.]—When lands are sold for the purpose of effecting a partition, the share of an infant retains its character of realty.—THOMPSON *v.* MCCAFFREY (1874), 6 P. R. 193.—**CAN.**

pp. ———.]—AYLWARD *v.* AYLWARD (1881), 14 N. S. R. (2 R. & G.) 243; 1 C. L. T. 706.—**CAN.**

qq. ———.]—Where a mtgee. comes in under a decree for partition or sale, & proves his claim & consents to a sale, he is not entitled to six months' interest, or six months' notice.—*Re* HOUSTON, HOUSTON *v.* HOUSTON (1882), 2 O. R. 84.—**CAN.**

·When proceedings for a partition in a county ct. have been terminated by an order confirming such partition, & nothing remains to be done by way of enforcing the judgment, such judgment cannot afterwards be impeached on the ground of fraud or deception on the ct. otherwise than in resisting an action in which it is relied on, or by bringing an action for the express purpose of setting it aside.—JENKING *v.* JENKING (1884), 11 A. R. 92.—**CAN.**

tt. ———.]—HEWARD *v.* O'DONOHOE (1891), 19 S. C. R. 341.—**CAN.**

aaa. ———.]—HOFER *v.* WALDNER, [1921] 1 W. W. R. 177.—**CAN.**

bbb. ———.]—The allotment of land to one person by partition extinguishes another's right altogether; his subsequent possession is either that of a trespasser or a tenant-at-will; his dispossession is not illegal, & he has no right of suit for recovery of possession.—MUSST NOWAB BEGUM *v.* RUSTUM KHAN (1867), 2 Agra, 149.—**IND.**

ccc. ———.]—A decree for partition is not like a decree for money or the delivery of specific property which is only in favour of the pltf. in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, & such a decree, when properly drawn up, is in favour of each shareholder or set of shareholders having a distinct share.—SHEIKH KHOORSHED HOSSEIN *v.* NUBBEE FATIMA (1878), I. L. R. 3 Calc. 551; 2 C. L. R. 187.—**IND.**

ddd. ———.]—A decree for partition does not operate as a severance so long as it remains under appeal.—SHAKARAM MAHADEV DANGE *v.* HARI KRISHNA DANGE (1881), I. L. R. 6 Bom. 113.—**IND.**

eee. ———.]—To effect a partition the property, if susceptible of division,

Part II.—Transitional Provisions.

See Law of Property Act, 1925 (c. 20), Sched. I., Part IV.

1. Representation of beneficiary.]—Trustees for sale under a will of an undivided share sufficiently represent that share, apart from the persons beneficially interested therein, for the purposes of the partition clauses.—DARLINGTON *v.* DARLINGTON (1926), 70 Sol. Jo. 778.

Part III.—Partition by Agreement.

SECT. 1.—MODES OF EFFECTING PARTITION.

2. General method—By conveyance.]—ANON. (1742), 3 Swan. 139, n.; 36 E. R. 807, L. C.

3. Cross-surrenders of copyhold.]—Two tenants in common of a copyhold estate in tail agree upon a partition, each surrenders the part allotted to the other:—*Held:* the entail was barred only as to a moiety.—OAKLEY *v.* SMITH (1759), Amb. 368; 27 E. R. 245; *sub nom.* OAKELEY *v.* SMITH, 1 Eden, 261.

4. Enjoyment of lands for alternate period of time—No severance as to estate.]—A partition for one parcener to have the land from Easter till Lammas, & the other from Lammas till Easter, binds as to the possession & taking of the profits, but is no severance as to the estate.—CORBET'S CASE, CORBET *v.* CORBET (1600), 1 Co. Rep. 83 b; 2 And. 134; Moore, K. B. 601; 76 E. R. 178.

Annotations:—**Reid.** Mildmay's Case (1606), 6 Co. Rep. 40 a. **Mentd.** Butler *v.* Baker (1591), 3 Co. Rep. 25 a; Chomley *v.* Humble (1593), Cro. Eliz. 379; Foy *v.* Hynde (1624), Cro. Jac. 697; Portington's Case (1631), 10 Co. Rep. 35 a; Baker *v.* Willis (1637), Cro. Car. 476; Manby *v.* Scott (1662), O. Bridg. 229; Payne *v.* Barker (1662), O. Bridg. 19; Williams *v.* Fry (1672), 3 Keb. 19. Dighton *v.* Greenvil (1690), 2 Vent. 321; R. *v.* Kemp (1693), 4 Mod. Rep. 275; Luddington *v.* Kime (1696), 1 Ld. Raym. 203; Goodright d. Fowler *v.* Forrester (1807), 8 East, 552; Holmes *v.* Godson (1856), 8 De G. M. & G. 152; Astley *v.* Essex (1874), 30 L. T. 485; *Re* Dick, Cloncurry *v.* Fenton, [1926] Ch. 992.

By arbitration.]—*See* ARBITRATION, Vol. II., p. 490, No. 1321.

5. Allotment of share — Right to particular part of lands.]—The assignee of an undivided share of certain premises, part of a larger estate, held by the assignor in common, has no title as against the other tenants in common to require that, on partition, the particular premises which he has purchased, or any part of them, shall be allotted to him.—COOPER *v.* FISHER (1841), 10 L. J. Ch. 221.

—— **By seniority.**]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 374, Nos. 1945–1947.

—— **By alternate terms.**]—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 374, 375, Nos. 1951–1953.

—— **By casting lots.**]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 375, No. 1957.

Whether deed necessary.]—*See* Sect. 4, sub-sect. 2, *post.*

SECT. 2.—WHAT PROPERTY MAY BE PARTITIONED.

6. Advowson.] — If co-parceners assign their parts of an advowson severally, the grantees shall present by turns.—HARRIS & HAIES *v.* NICHOLS (1583), Cro. Eliz. 19; 78 E. R. 285.

Annotations:—**Apld.** Buller *v.* Exeter (Bp.) (1749), 1 Ves. Sen. 340. **Reid.** Doe d. Winter, etc. *v.* Perratt (1826), 5 B. & C. 48.

7. ——.]—SALISBURY (BP.) *v.* PHILLIPS (1699), Carth. 505; Holt, K. B. 52; 1 Salk. 43; 1 Ld. Raym. 535; 90 E. R. 889; *sub nom.* PHILIPS *v.* SALISBURY (BP.), 12 Mod. Rep. 321.

Annotations:—**Consd.** Johnstone *v.* Baber (1856), 22 Beav. 562. **Reid.** Grocers' Co. *v.* Canterbury (Archbp.) (1771), 2 Wm. Bl. 770; Edwards *v.* Exeter (Bp.) (1839), 7 Scott, 652.

8. ——.]—The ct. can make a partition of an advowson.

A. seised of an advowson, of which his son W. must be transformed into estates in severalty & one of such estates assigned to each of the former occupants for his sole use & as his sole property.—JOGENDRA NATH RAI *v.* BALADEO DAS (1907), I. L. R. 35 Calc. 961; 12 C. W. N. 127.—**IND.**

n. ——.]—Difference between partition at law & in equity. The former operates by the judgment of a ct. of law, conclusive on the parties; the latter proceeds on conveyances to be executed between the parties, & cannot be effectual, if the parties be incompetent to execute.—WHALEY *v.* DAWSON (1805), 2 Sch. & Lef. 367.—**IR.**

o. ——.]—A partition order made by the Native Land Ct. is conclusive in the Supreme Ct. & Ct. of Appeal that the persons named in it are entitled to the lands comprised in it for the estates & interests therein mentioned, notwithstanding that it is shown to have been issued by the Native Land Court upon a mistake of law.—IHAKA TE ROU *v.* LOVE (1891), 10 N. Z. L. R. 529.—**N.Z.**

p. *Bars to petition—Term outstanding.*]—The fact that there is an outstanding term in lands to portions of which infants are entitled, is no defence to a bill of partition, altho ugh it may influence the ct. in deciding between a sale or partition of the estate.—FITZPATRICK *v.* WILSON (1866), 12 Gr. 440.—**CAN.**

q. —— *Title outstanding in third party.*]—ANGUS *v.* HEINZE (1909), 14 B. C. R. 157; 9 W. L. R. 488; *affd.* 42 S. C. R. 416.—**CAN.**

r. —— *Reference to arbitration.*]—A suit in equity cannot be sustained after an agreement to refer to arbn., naming the arbitrators, & containing a covenant not to sue, & power to examine witnesses, & to make the submission a rule of ct., while the arbitration might be proceeded with.—DIMSDALE *v.* ROBERTSON (1844), 7 I. Eq. R. 536; 2 Jo. & Lat. 58.—**IR.**

t. *Relief for unequal partition.*]—An unequal partition obtained in a county ct. against a minor & *feme covert* through the contrivance of the co-tenant, the gross laches of the guardian *ad litem*, & the misapprehension of the referee, as to the extent of his duty & power, was held not binding. The minor, on coming of age, filed a bill for a new partition, & a decree was made accordingly.—MERRITT *v.* SHAW (1868), 15 Gr. 321.—**CAN.**

a. *Partition decree—Whether evidence of title.*]—A decree of partition is evidence in an action of ejectment to show that the land in dispute, formerly part of an undivided estate, had been assigned as the separate property of pltf.—DOE *v.* ESTEY (1857), 3 All. 489.—**CAN.**

b. *Partition proceedings pending—Joint tenant restrained from waste.*]—Although the general principle is, that one joint tenant will not be restrained from committing waste at the instance of his co-tenant, the rule is different where a bill has been already filed for a partition of the estate.—LASSERT *v.* SALYERDS (1870), 17 Gr. 109.—**CAN.**

c. —— *Sale of standing grass.*]—During the pendency of a partition suit the ct. will not, in opposition to the tenant in possession, order the sale of standing grass & payment of the proceeds into ct., unless it is necessary in the interest of the co-tenants.—SMITH *v.* SMITH (1896), 1 N. B. Eq. Rep. 320.—**CAN.**

d. —— *Possession protected.*]—Pending a partition suit, the ct. will not interfere with the possession, nor allow it to be interfered with by the parties, until the partition shall have been completed.—HUGHES *v.* D'ARCY (1873), 8 I. R. Eq. 71.—**IR.**

Sect. 2.—*What property may be partitioned.* *Sect.* 3: *Sub-sects.* 1 & 2, *A.* & *B.*]

was incumbent, devised it to trustees to sell on his son's death & divide the produce between his own nine children:—*Held:* (1) the ct. had authority to make a partition of an advowson, & would follow, by analogy, the rule as to coparceners, & give the right of presentation to the members by seniority.—JOHNSTONE *v.* BABER (1856), 22 Beav. 562; 52 E. R. 1225; *on appeal*, 6 De G. M. & G. 439, L. C. & L. J.

———.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 383, Nos. 2065–2067.

Copyholds.]—*See* COPYHOLDS, Vol. XIII., pp. 68, 69, Nos. 858–861.

9. Estate for years.] — ANON. (1556), Benl. 30; 73 E. R. 952.

10. ———.]—BARING *v.* NASH, No. 27, *post.*

Expectancies.]—*See* FAMILY ARRANGEMENTS, Vol. XXIV., pp. 947, 948, Nos. 19–24.

Franchise.]—*See* COPYHOLDS, Vol. XIII., p. 21, No. 129.

11. Freehold interest — During existence of leasehold interest over share.]—PYNE *v.* MATTHEW (1669), 3 Rep. Ch. 29; 21 E. R. 719

12. House.]—BENSON'S CASE (undated), cited 8 Ves. at p. 144.

13. ———.]—A commission for partition of a house decreed.—TURNER *v.* MORGAN (1803), 8 Ves. 143; 32 E. R. 307, L. C.

Annotations:—**Refd.** Baring *v.* Nash (1813), 1 Ves. & B. 551; Manners *v.* Charlesworth (1833), Coop. *temp.* Brough. 52; Lister *v.* Lister (1839), 3 Y. & C. Ex. 540; Leake *v.* Cordeaux (1856), 4 W. R. 806; Ames *v.* Comyns (1867), 17 L. T. 163; Pemberton *v.* Barnes (1871), 40 L. J. Ch. 675; Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508; Hill *v.* Hickin, [1897] 2 Ch. 579.

14. Incorporeal hereditaments—Share in New River Company.]—R. was tenant in common with his brother C., under their father's will, of an interest in the New River co. The dividends were paid separately to R. & C., & they were regarded by the co. as being each the owner of an undivided share in the interest. No formal partition of the property, however, was at any time effected, & in an agreement between R. & C. relating to the partition of other property of which they were tenants in common it was recited that they had agreed not to partition the interest in the New River co., but to retain it for the present in their joint ownership. R. afterwards died, having devised to C. all his share & interest of & in all the real estate derived under the will of his father, which he held as tenant in common with C., & which should not, at the date of R.'s death, have been partitioned. At the date of R.'s death there was other real estate of which R. & C. were tenants in common under their father's will, & which had not in any way been partitioned. On a summons taken out for the determination of the question whether R.'s share in the interest in the New River co. passed to C. under the above devise or not:—*Held:* (1) in view of the separate receipt of dividends by R. & C., there had ceased to be unity of possession in the interest, it had been fully partitioned & R. & C. had ceased to be tenants in common of it, & it therefore did not pass by the devise; (2) the recital in the agreement for the partition of the other property was not admissible as evidence of testator's intention.—*Re* TRIMMER, CRUNDWELL *v.* TRIMMER (1904), 91 L. T. 26; 48 Sol. Jo. 492.

15. Jus individuum.]—Where two persons are joint owners of a lake, with a common right of sailing, fishing, floating timber, etc., such right is not indivisible; but either may, without the consent of the other, alien the whole or any portion of his right, even where it is merely appurtenant to the land.

But if the effect of such alienation was to deprive the co-owner of the full enjoyment of his moiety, such co-owner could maintain an action for the regulation of his enjoyment, as he could if there had been no alienation.

He contends that the ownership of a lake is what is called a *jus individuum*—incapable of division; & that where there are two joint proprietors of such a right one of them cannot, without the consent of the other, introduce a third. That that is the state of the law in reference to some property there is no doubt. You cannot in the case of a peerage, for instance, split that so as to make two peerages—you cannot grant part of a peerage (LORD CRANWORTH, C.).—MENZIES *v.* MACDONALD (1856), 2 Macq. 463; 2 Jur. N. S. 575; 4 W. R. 625, H. L.

Annotation:—**Refl.** Mackenzie *v.* Bankes (1878), 3 App Cas. 1324.

16. Land subject to overriding trust.]—Under a will two persons were equally entitled to real property for life with remainder to their children & issue, who were not yet ascertained. The trustees of the will had, during the lives of the tenants for life, powers of working a quarry on the estate, & making roads over the property for the purpose, & were directed to work the quarry & divide the profits among the persons entitled:—*Held:* while the overriding power & trust existed, the ct. had no jurisdiction to make a decree for partition or sale under Partition Acts.—TAYLOR *v.* GRANGE (1880), 15 Ch. D. 165; 49 L. J. Ch. 794; 43 L. T. 233, C. A.

Annotations:—**Consd.** Dodd *v.* Cattell, [1914] 2 Ch. 1. **Mentd.** Waite *v.* Bingley (1882), 30 W. R. 698.

17. ———.]—Where land is subject to an overriding term limited upon trusts for management which require the possession of the entirety to remain in the trustees, there is no right to a partition during the continuance of those trusts.

Testator by his will settled real estate upon certain trusts under which, in the events which had happened, pltf. was entitled, subject to a term of a thousand years, to the entire estate in fee simple, subject, however, as to one moiety thereof to have her estate divested by the attaining of a vested interest therein by other persons. The term was limited to trustees upon certain trusts for management & application of the rents under which, in the events which had happened, one moiety of the rents thereof was payable to pltf. together with a part of the other moiety. In an action by pltf. for partition of the estate:—*Held:* pltf. was not entitled to a partition on the grounds (*a*) there was not joint tenancy or tenancy in common; (*b*) the trusts for management required that the entirety of the property should remain in the trustees.—DODD *v.* CATTELL, [1914] 2 Ch. 1; 83 L. J. Ch. 721.

Manors.]—*See* COPYHOLDS, Vol. XIII., p. 18, Nos. 101–104.

18. Peerage.] — MENZIES *v.* MACDONALD, No. 15, *ante.*

19. Profits à prendre.] — MENZIES *v.* MACDONALD, No. 15, *ante.*

20. Rentcharge.] — A devise may be of part of a rent to be equally divided between three; & debt lies by each devisee for his share of the rent.

It was agreed by three justices that the action well lay; & therefore judgment was entered for pltf.—ARDS *v.* WATKINS (1598), Cro. Eliz. 637; 78 E. R. 877.

Annotations:—**Folld.** Rivis *v.* Watson (1839), 5 M. & W. 255. **Mentd.** Goodwin *v.* Parker (1670), Freem. K. B. 1; Williams *v.* Hayward (1859), 1 E. & E. 1040.

21. ——.]—Rentcharge dividable by fine or devise.—COLBORNE *v.* WRIGHT (1678), 2 Lev. 239 ; 83 E. R. 537 ; *sub nom.* COLEBURNE *v.* WIGHT, T. Jo. 119.

Annotation :—**Folld.** Rivis *v.* Watson (1839), 5 M. & W. 255.

22. ——.]—A rentcharge may be divided by will, or by deed operating under Statute of Uses, 1535 (c. 11), so as to make the tenant liable, without attornment, to several distresses by the devisees or *cestuis que use*. *Semble :* since 4 Ann. c. 16, s. 9, a rentcharge may be so divided by a conveyance of any kind.—RIVIS *v.* WATSON (1839), 5 M. & W. 255 ; 9 L. J. Ex. 67 ; 151 E. R. 109.

Annotations :—**Distd.** Owens *v.* Wynne (1855), 4 E. & B. 579. **Apld.** White *v.* Greenish (1861), 11 C. B. N. S. 209. **Mentd.** West *v.* Robson (1857), K. & G. 141; Johnson *v.* Barnes (1872), L. R. 7 C. P. 592.

23. Tithes.]—Demurrer to bill for partition of tithes overruled.—BAXTER *v.* KNOLLYS (1750), 1 Ves. Sen. 494 ; 27 E. R. 1163.

SECT. 3.—PARTIES.

SUB-SECT. 1.—NECESSARY PARTIES.

24. All parties required to make good conveyance.]—ANON. (1742), 3 Swan. 139, n. ; 36 E. R. 807, L. C.

25. Mortgagee of entirety.] — A mtgee. [of entirety] is not a necessary party to a suit for partition because he is entitled to the whole.—SWAN *v.* SWAN (1820), 8 Price, 516 ; 146 E. R. 1281.

Annotations :—**Apld.** Sinclair *v.* James, [1894] 3 Ch. 554. **Reid.** Watson *v.* Gass (1881), 45 L. T. 582 ; Hill *v.* Hickin, [1897] 2 Ch. 579. **Mentd.** *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552.

26. ——.] — An action for partition was brought by the owner of the equity of redemption of an undivided share of land subject to mtges. affecting the whole, pltf.'s mtgee. & the overriding mtgees. being made parties. The action was dismissed against the several mtgees. as showing no reasonable cause of action against them.—SINCLAIR *v.* JAMES, [1894] 3 Ch. 554 ; 63 L. J. Ch. 873 ; 71 L. T. 483 ; 38 Sol. Jo. 717 ; 8 R. 637.

27. Reversioner.]—Bill for partition by lessee for years. Demurrer, for cause, that the bill stated deft.'s estate not with sufficient certainty, viz. that he " is seized in fee, or otherwise well entitled to," & *ore tenus*, that the reversioner was not a party overruled.—BARING *v.* NASH (1813), 1 Ves. & B. 551 ; 35 E. R. 214.

Annotations :—**Apld.** Heaton *v.* Dearden (1852), 16 Beav 147. **Reid.** Giffard *v.* Williams (1869), L. R. 8 Eq. 494 ; Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508.

SUB-SECT. 2.—COMPETENT PARTIES.

A. In General.

28. Owner in fee as to one moiety—Tenant for moiety as to other.]—HICKS *v.* WITCHELL (1686), 2 Lut. 1015 ; 125 E. R. 565.

29. Life estate determinable on marriage.]—A party having a life estate determinable on his marriage, in one fifth of an estate, is entitled to a decree for partition.—HOBSON *v.* SHERWOOD (1841), 4 Beav. 184 ; 49 E. R. 309.

30. Reversioner.] — A tenant in common in reversion cannot maintain a suit for partition.—EVANS *v.* BAGSHAW (1870), 5 Ch. App. 340 ; 39 L. J. Ch. 145 ; 18 W. R. 657, L. C. & L. J.

Annotation :—**Reid.** Waite *v.* Bingley (1882), 30 W. R. 698.

31. Executor.]—(1) An exor. of testator who dies seized as tenant in common of an undivided share in real estate has power to concur with the co-owners of the other undivided shares therein in a deed of partition of the real estate, the exercise of such a power being a proper & reasonable step towards the beneficial realisation of the assets of his testator.

(2) A purchaser of the land taken in severalty by any one of the parties to such a deed of partition acquires a good title to the land purchased by him in the absence of notice of any impropriety in the transaction on the part of the executor.—*Re* KEMNAL & STILL'S CONTRACT, [1923] 1 Ch. 293 ; 92 L. J. Ch. 298 ; 129 L. T. 12 ; 39 T. L. R. 285 ; 67 Sol. Jo. 364, C. A. ; *revsg.* S. C. *sub nom.* *Re* KENNAL & STILL'S CONTRACTS (1922), 67 Sol. Jo. 124.

Annotation :—*Generally*, **Mentd.** Wise *v.* Whitburn, [1924] 1 Ch. 460.

B. Donees of Powers.

See, now, Law of Property Act, 1925 (c. 20), ss. 23–33, 34–38, 155–160.

32. Whether partition authorised by power—Power of sale.]—Power of sale not well executed by a partition.—M'QUEEN *v.* FARQUHAR (1805), 11 Ves. 467 ; 32 E. R. 1168, L. C.

Annotations :—**Consd.** A.-G. *v.* Hamilton (1816), 1 Madd. 214. **Apld.** Brassey *v.* Chalmers (1852), 16 Beav. 223. **Consd.** Bradshaw *v.* Fane (1856), 25 L. J. Ch. 413 ; *Re* Frith & Osborne (1876) 3 Ch. D. 618. **Reid.** Doe d. Knight *v.* Spencer (1848), 2 Exch. 752 **Mentd.** Wright *v.* Wakeford (1811), 17 Ves. 454 ; Moodie *v.* Reid (1816), 1 Madd. 516 ; Hougham *v.* Sandys (1827), 2 Sim. 95 ; Hall *v.* Montague (1830), 8 L. J. O. S. Ch. 167 ; Allen *v.* Bradshaw (1835), 1 Curt. 110 ; Green *v.* Pulsford (1839), 2 Beav. 70 ; Campbell *v.* Home (1842), 1 Y. & C. Ch. Cas. 664 ; Burdett *v.* Spilsbury (1843), 10 Cl. & Fin. 340 ; Butcher *v.* Jackson, Jackson *v.* Butcher (1845), 14 Sim. 444 ; Warren *v.* Postlethwaite (1845), 2 Coll. 108 ; Vincent *v.* Sodor & Man (Bp.) (1849), 8 C. B. 905 ; Domville *v.* Lamb (1853), 1 W. R. 246 ; Baker *v.* Bradley (1855), 2 Jur. N. S. 98 ; Wellesley *v.* Mornington (1855), 2 K. & J. 143 ; Cockcroft *v.* Sutcliffe (1856), 25 L. J. Ch. 313 ; Warde *v.* Dixon (1858), 28 L. J. Ch. 315 ; *Re* Rickett's Trust (1860), 2 L. T. 320 ; *Re* Huish's Charity (1870), L. R. 10 Eq. 5 ; Henty *v.* Wrey (1882), 21 Ch. D. 332 ; Ross *v.* Tyser Line, The Celtic King (1894), 10 T. L. R. 222 ; Cloutte *v.* Storey, [1911] 1 Ch. 18.

33. —— ——.] — A power to trustees " to sell & dispose of " testator's real estate & to give receipts, does not authorise a partition.—BRASSEY *v.* CHALMERS (1852), 16 Beav. 223 ; 51 E. R. 763 ; *on appeal* (1853), 4 De G. M. & G. 528, L. JJ.

Annotations :—**Reid.** Bradshaw *v.* Fane (1856), 3 Drew. 534 ; *Re* Frith & Osborne (1876), 3 Ch. D. 618.

34. —— **Power of sale or exchange.**]—Partition of an estate in common a good execution of a power to sell or exchange.—ABEL *v.* HEATHCOTE (1793), 2 Ves. 98 ; 4 Bro. C. C. 278 ; 30 E. R. 542, L. C.

Annotations :—**Expld.** M'Queen *v.* Farquhar (1805), 11 Ves. 467. **Distd.** A.-G. *v.* Hamilton (1816), 1 Madd. 214. **N.F.** Brassey *v.* Chalmers (1852), 16 Beav. 223. **Apld.** *Re* Frith & Osborne (1876), 3 Ch. D. 618. **Reid.** Doe d. Knight *v.* Spencer, Doe d. Knight *v.* Sansum (1848), 2 Exch. 752 ; Bradshaw *v.* Fane (1856), 3 Drew. 534.

35. —— **Power of sale & exchange.**] — A power to sell & exchange merely does not so clearly authorise a partition that the ct. will force on a purchaser a title taken under it.—BRADSHAW *v.* FANE (1856), 3 Drew. 534 ; 25 L. J. Ch. 413 ; 27 L. T. O. S. 25 ; 2 Jur. N. S. 247 ; 4 W. R. 422 ; 61 E. R. 1006.

Annotation :—**Expld.** *Re* Frith & Osborne (1876), 3 Ch. D. 618.

36. —— ——.] — A power of exchange of lands is properly executed by a partition. Accordingly, where an undivided moiety of lands was

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PART III. SECT. 3, SUB-SECT. 2.—B.

35 i. *Whether partition authorised by power—Power of sale & exchange.*]—The usual power of sale & exchange will authorise trustees to concur in a partition between any number of tenants in common.—*Re* THOMPSON'S TRUSTS, PERPETUAL TRUSTEE CO., LTD. *v.* THOMPSON (1908), 9 S. R. N. S. W. 38 ; 25 N. S. W. W. N. 198.—**AUS.**

Sect. 3.—*Parties: Sub-sect.* 2, *B., C. & D. Sect.* 4: *Sub-sects.* 1 & 2. *Sects.* 5, 6 & 7.]

vested in A., B., & C., as trustees of a settlement which expressly authorised a partition, & the other moiety was vested in D., E., & F., as trustees of a settlement, with power to sell, dispose of, convey, & assign the said hereditaments for such a price in money, or for such an equivalent or recompense in lands & hereditaments as to the trustees should seem reasonable, & for that purpose to revoke the old uses & to limit other uses & trusts, & a partition deed, purporting to be in exercise of the said powers, was executed by the trustees of the two moieties:—*Held:* the partition was properly effected by D., E., & F., under their power.—*Re* FRITH & OSBORNE (1876), 3 Ch. D. 618; 45 L. J. Ch. 780; 35 L. T. 146; *sub nom. Re* FRITH'S CONTRACT, FRITH *v.* OSBORNE, 24 W. R. 1061.

Annotation:—**Refd.** *Re* Kennal & Still's Contract, [1923] 1 Ch. 293.

37. —— Power of exchange.] — *Semble:* a power to exchange does not warrant a partition.—A.-G. *v.* HAMILTON (1816), 1 Madd. 214; 56 E. R. 80.

Annotations:—**Refd.** Brassey *v.* Chalmers (1852), 16 Beav. 223; Bradshaw *v.* Fane (1856), 3 Drew. 534; *Re* Frith & Osborne (1876), 3 Ch. D. 618.

38. —— —— Settlement of the moiety.] — Two tenants in common may exchange with each other their respective moieties of different parts of the land held in common; & where the moiety of an estate is settled to uses, with a power of exchange in the trustees, such a power may be well executed by dividing the land into two portions to be held in severalty, one to the uses of the settlement, the other by the party entitled to the other moiety.—DOE d. KNIGHT *v.* SPENCER, DOE d. KNIGHT *v.* SANSUM (1848), 2 Exch. 752; 154 E. R. 693.

Annotations:—**Consd.** Bradshaw *v.* Fane (1856), 25 L. J. Ch. 413; *Re* Frith & Osborne (1876), 3 Ch. D. 618.

See, generally, POWERS; SETTLEMENTS; TRUSTS & TRUSTEES.

Under Settled Land Acts.]—*See* SETTLEMENTS.

C. Infants.

See, now, Law of Property Act, 1925 (c. 20), ss. 1 (6), 19, 28 (4), 209 (2), Sched. I., Pt. III.; Settled Land Act, 1925 (c. 18), s. 26, Sched. II. (3).

D. Married Women.

Married woman tenant for life.] — *See, now*, Settled Land Act, 1925 (c. 18), s. 25.

SECT. 4.—THE PARTITION DEED.

SUB-SECT. 1.—IN GENERAL.

39. Right to deed—From other co-owner.]—On a partition between A., B., & C., A. refused to execute a conveyance to B., unless both B. & C. executed a conveyance to him:—*Held:* he was only entitled to require a conveyance from B. to himself, as the condition of his executing a conveyance to B.—ORGER *v.* SPARKE (1860), 9 W. 180.

40. Reservation—Power of mining.]—A. & B. being seised of M. & T. farms, & the mines & minerals under the same, by deed of partition, conveyed the same to S. to hold the same, as to M. farm, to the only use of A. & his heirs & assigns for ever, & as to T. farm to the only use & behoof of B. his heirs & assigns for ever. The deed recited the agreement of partition, & that by the said agreement all coals, cannel, etc., & all mines to be found within the said premises, should be taken by & between them under such payments, restraints, & liberties as in the said deed were after mentioned; & then conveyed to S. & his heirs the manors, lands, & hereditaments comprising M. & T. farms, & all the estate, right, title, interest, use, trust, possession, property, etc., of them A. & B. in, to, or out of the said hereditaments & premises, to hold to S., his heirs & assigns for ever, upon the trusts therein mentioned. The deed then provided that all ore, coal, mines, etc., & the rents & profits of such mines & minerals to be gotten within the said premises, shall be had, received, & taken, & the costs of getting & carrying away the same, & all trespass & damages done on the lands thereby, shall be paid by A. & B. equally, in such manner, as if the lands wherein the same shall be found had not been divided, allotted, or conveyed, but still remained in common between them; provided that he in whose lands such minerals may be found may get & dispose thereof in such manner as he shall think fit, paying to the other one half of the profits thereof, after deducting such costs & payments as aforesaid:—*Held:* by the above deed a complete partition was effected of the lands, surface, subsoil, mines, & minerals, & the proviso was only for the purpose of working the mines at the joint expense & for common profit, without prejudice to the separate ownership.—BATEMAN *v.* WILLIAMSON (1854), 23 L. T. O. S. 296; *affd. sub nom.* WILLIAMSON *v.* BATEMAN, 3 W. R. 110, Ex. Ch.

—— ——.]—*See* MINES, Vol. XXXIV., pp. 638, 707, Nos. 356—362, 944.

41. Custody of deed.]—ELTON *v.* ELTON (No. 1), No. 79, *post.*

42. Compensation for error.] — DACRE *v.* GORGES, No. 75, *post.*

——.]—*See, generally*, SALE OF LAND.

Rectification of deed.]—*See* Sect. 9, *post.*

43. Stamping of deed.] — Debt on bond. Plea: that it was given to secure the payment of £660 & interest agreed, after the passing of Stamp Act, 1815 (c. 184), to be paid for equality of partition of certain lands in which pltf. & deft. were interested; & that on the principal deed, by which pltf. conveyed to deft. her interest in the estate taken in severalty by deft., no mention was made of this sum:—*Held:* though the deed ought to have been stamped with an *ad valorem* stamp as an exchange, the improper stamping of the conveyance was no bar to an action on the bond given to secure the price.—HENNIKER *v.* HENNIKER (1852), 1 E. & B. 54; 22 L. J. Q. B. 94; 20 L. T. O. S. 125; 17 Jur. 436; 118 E. R. 357.

Annotation:—**Refd.** Christie *v.* I. R. C. (1866), 36 L. J. Ex. 11.

·.]—*See, generally*, REVENUE.

PART III. SECT. 4, SUB-SECT. 1.

40 i. *Reservation—Power of mining.*]—PRINCE OF WALES' COAL CO. *v.* OSMAN (1882), 22 N. B. R. 115.—**CAN.**

42 i. *Compensation for error.*]—STINSON *v.* MOORE (1863), 10 Gr. 94.—**CAN.**

e. *Construction of deed.*]—GREEN *v.* WARD (1899), 29 S. C. R. 572.—**CAN.**

f. —— *Land subject to mortgage.*]—DEW *v.* RIDDLER (1900), 19 N. Z. L. R. 281.—**N.Z.**

g. *Agreement for partition—Whether within Statute of Frauds.*]—An agreement for partition is within sect. 4 of above Act.—LOCKE *v.* KAHUTIA (1887), 5 N. Z. L. R. C. A. 214.—**N.Z.**

SUB-SECT. 2.—NECESSITY FOR DEED.

See Law of Property Act, 1925 (c. 20), s. 52.

k. Deed unexecuted—Attornment.]—A. & B., tenants in common, having agreed to divide their property, & that Blackacre should belong to A.; the occupier of Blackacre, who, after this agreement, had paid his whole rent to A., cannot, in an ejectment brought against him by A., object that the partition deed between A. & B. is not executed.—DOE d. PRICHITT *v.* MITCHELL (1819), 1 Brod. & Bing. 11; 129 E. R. 627; *sub nom.* DOE. d. PITCHER *v.* MITCHELL, 3 Moore, C. P. 229.

45. Parol partition—Binding on issue in tail.]—Partition between tenants in tail though only by parol shall bind the issue.—BURTON *v.* JEUX (undated), cited in 2 Vern. at p. 232; 23 E. R. 750.

Annotation:—**Refd.** Thomas *v.* Gyles (1691), 2 Vern. 232.

46. ——— ———.]—ROSE *v.* ROSE (undated), cited in 2 Vern. at p. 232; 23 E. R. 750.

Annotation:—**Refd.** Thomas *v.* Gyles (1691), 2 Vern. 232.

47. ——— **Title by lapse of time.**]—A partition by parol & separate possession cannot be questioned after being acted on for more than twenty years.—PAINE *v.* RYDER (1857), 24 Beav. 151; 53 E. R. 314.

48. ——— ———.]—*Re* TRIMMER, CRUNDWELL *v.* TRIMMER, No. 14, *ante*.

Specific performance of parol agreement.]—*See* Sect. 8, *post*.

Award of arbitrator.]—*See* ARBITRATION, Vol. II., p. 487, No. 1291.

SECT. 5.—**GRANTS FOR EQUALITY OF PARTITION.**

49. Validity — Rentcharge.] — ANON. (1580), Godb. 2; 78 E. R. 2.

50. ——— **Parol agreement of long standing.**]—(1) A parol agreement for an equality of partition of a long standing, by persons who had a right to contract, & accordingly put in execution, will be established by this ct.

(2) If a joint tenant, upon equality of partition, thinks proper to accept of a contingent uncertain advantage, where one moiety of the land is of superior value to the other, it will not vacate the agreement.—IRELAND *v.* RITTLE (1739), 1 Atk. 541; 26 E. R. 340, L. C.

51. ——— **Contingent uncertain advantage.**]—IRELAND *v.* RITTLE, No. 50, *ante*.

52. Incidents—Rentcharge—Partition of estate in tail—Whether charge descends in tail.]——— *v.* J. (1487), Y. B. 2 Hen. 7, fo. 4, pl. 17; Plowd. Quæries 50; 75 E. R. 928.

53. ——— ——— **Creation without deed.**] — A rent may be created & granted without deed in the case of a partition.—*Re* STODDARD (1622), Toth. 31; Duke, 81; 21 E. R. 114.

Annotation:—**Mentd.** Jenner *v.* Harper (1714), 1 P. Wms. 247.

54. ——— ——— **Descent to heir.**]—Bond given by one parcener to pay to the other parcener, his exors. or administrators, an annual sum during the life of J. for owelty of partition, shall go to the exor., & not to the heir.—HULBERT *v.* HART (1682), 1 Vern. 133; 23 E. R. 367.

55. ——— **Covenant of indemnity against actions—Runs with land.**]—COPARCENER'S CASE (1368), cited in Y. B. 42 Edw. 3, fo. 3, pl. 14; 2 Co. Litt. 384 b.

Annotations:—**Refd.** Forster *v.* Elvet Colliery Co., Quin *v.* The Same, Seed *v.* The Same, Morgan *v.* The Same, [1908] 1 K. B. 629. **Mentd.** Spencer's Case (1583), 5 Co. Rep. 17 b.

56. ——— **Bond to secure annuity—Descends to executor & not to heir.**]—HULBERT *v.* HART, No. 54, *ante*.

57. Agreement to give sum of money for possession—Whether stamp necessary.]—One tenant in common of a reversion agreed with another, who was possessed of a term in the whole of the land, to give him £100 on a certain day, when a partition or sale, of the common estate was to be effected, as a compensation for quitting possession; & the other agreed to give up possession on a day subsequent to that fixed for the payment of the £100:—*Held:* though the agreement was produced in evidence after the time fixed for giving up possession, it did not require to be stamped as a surrender.—WEDDALL *v.* CAPES (1836), 1 M. & W. 50; 1 Gale, 432; Tyr & Gr. 430; 5 L. J. Ex. 111; 150 E. R. 341.

Annotation:—**Mentd.** Doe d. Murrell *v.* Milward (1838), 3 M. & W. 328.

SECT. 6.—**ADJUSTMENT OF EXPENDITURE AND CHARGES.**

58. Liability to maintain sea wall—Covenant running with land.]—A deed of partition was executed in 1794, of land protected from the sea by a wall which skirted the land of one of the part owners. The deed contained a covenant that the expenses of maintaining the sea walls should be borne by the parties to the deed, their heirs, exors. & administrators, in proportion to their acreage. Part of the land was liable to scots for the repair of other sea walls, & had been purchased by the present owners under conditions which precluded them from inquiring into the deed of 1794:—*Held:* they were, from the position of their land, put on inquiry as to their liability to repair all sea walls which protected it, & were liable to contribute to the expenses of repairing the wall. *Semble:* such a covenant runs with the land.—MORLAND *v.* COOK (1868), L. R. 6 Eq. 252; 37 L. J. Ch. 825; 18 L. T. 496; 16 W. R. 777.

Annotations:—**Distd.** Allen *v.* Seckham (1879), 11 Ch. D. 790. **Expld.** Austerberry *v.* Oldham Corpn. (1885), 29 Ch. D. 750. **Refd.** Haywood *v.* Brunswick Permanent Benefit Bldg. Soc. (1881), 8 Q. B. D. 403. **Mentd.** Hudson *v.* Tabor (1876), 45 L. J. Q. B. 190.

SECT. 7.—**ENFORCEMENT OF PARTITION.**

59. Specific performance of agreement for partition.] — Devise to trustees, in trust to sell, & purchase other estates, to be settled. Those entitled under the limitations directed of the estates to be purchased have equitable interests co-extensive until a sale. Therefore a specific performance was decreed of an agreement for partition against an objection to a title under

PART III. SECT. 4, SUB-SECT. 2.

h. *Parol partition—Binding on successors in title.*]—A. & B., tenants in common of a lot of land, divided it without a deed of partition, & afterwards occupied their separate portion according to that division. J. came into possession after the division under A. of his part:—*Held:* he had a right to avail himself of the partition & of A.'s occupation.—JONES *v.* MORGAN (1882), 22 N. B. R. 338.—**CAN.**

PART III. SECT. 7.

59 i. *Specific performance of agreement for partition.*]—The provision in Conveyancing Ordinance, 1842, s. 6, that "no partition, exchange, lease, etc., of any land shall be valid unless the same shall be made by deed," does not render an agreement, whether verbal or by writing other than a deed, for partition, etc., invalid, or operate as a bar to a suit for specific perform-

Sect. 7.—*Enforcement of partition.* *Sects.* 8, 9, 10 & 11. *Part IV.*]

a fine by a person, who would have been tenant in tail of the estates to be purchased, the effect being an election to keep the estate; binding the trustees; though it may be questionable whether they could take upon themselves to convey in fee to a person, entitled to an estate tail only.—PEARSON *v.* LANE (1809), 17 Ves. 101; 34 E. R. 39.

Annotations:—**Mentd.** Farmer *v.* Bradford (1827), 3 Russ. 354; Clifford *v.* Clifford (1852), 9 Hare, 675.

60. ——.]—A. & B., having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised land, & divided them accordingly, A., the elder brother, taking somewhat the larger share, a doubt being then entertained whether their father had a right to devise the lands. A. was, in fact, at the time of this agreement, tenant in tail under the limitations of a surrender made by his grandfather; & after A.'s death without issue, B., having discovered his own title as tenant in tail, repudiated the agreement, & brought an action of ejectment to recover the whole estate.

On a bill filed by the devisee of A., the ct., upon the principle on which it supports family arrangements, decreed B. to do all necessary acts to bar the entail, & vest the parts of the lands, allotted under the agreement to A., upon the trusts of A.'s will.—NEALE *v.* NEALE (1837), 1 Keen, 672; 48 E. R. 466.

61. ——.]—The ct. might enforce the specific performance of an agreement between joint tenants of a copyhold estate to divide the land & hold the respective parts in severalty, & decree the parties to make mutual surrenders for that purpose; although, before 4 & 5 Will. 4, c. 35, the ct. had not jurisdiction in a mere suit for partition, to decree the partition of copyholds.—BOLTON *v.* WARD (1845), 4 Hare, 530; 14 L. J. Ch. 361; 5 L. T. O. S. 284; 9 Jur. 591; 67 E. R. 758.

62. By lessee from one co-owner.]—One of two tenants in common of an estate agreed to grant a lease of the mines under it:—*Held:* the lessee was entitled to a decree for specific performance & for a partition of the estate.—HEATON *v.* DEARDEN (1852), 16 Beav. 147; 51 E. R. 733.

63. Mortgagor of one share—Against mortgagee.]—Where one tenant in common has mortgaged his interest in the property to another tenant in common, the mtgor. cannot enforce a partition or sale of the property against the will of the mtgee., except on the terms of paying off the mtge., & this rule is unaffected by Conveyancing & Law of Property Act, 1881 (c. 41), s. 25 (2).—GIBBS *v.* HAYDON (1882), 47 L. T. 184; 30 W. R. 726.

Annotation:—**Apld.** Sinclair *v.* James, [1894] 3 Ch. 554.

SECT. 8.—EFFECT OF PARTITION.

64. Effect on descent.]—THETFORD *v.* THETFORD (1589), Sav. 109; 1 And. 220; 123 E. R. 1040; *sub nom.* THETFORD & THETFORD'S CASE, 1 Leon. 204.

Annotations:—**Reld.** Butler *v.* Baker (1591), 3 Co. Rep. 25 a; Delacherois *v.* Delacherois (1864), 11 H. L. Cas. 62. **Mentd.** Hudson *v.* Jones (1706), 1 Salk. 90.

65. ——.]—The son of one of two coparceners made partition by deeds of lease & release with the alienee of the other coparcener:—*Held:* the son of the coparcener who made the partition had the same estate in the land as before, & took nothing as purchaser; & therefore the descent *ex parte maternâ* was not broken.—DOE d. CROSTHWAITE *v.* DIXON (1836), 5 Ad. & El. 834; 2 Har. & W. 364; 1 Nev. & P. K. B. 255; 6 L. J. K. B. 61; 111 E. R. 1382.

66. As barring entail.]—OAKLEY *v.* SMITH, No. 3, *ante.*

67. ——.]—In ejectment, the lessor of pltf. was heir in tail of one of three coparceners, all of whom had been married. The other two had suffered recoveries of their shares; & in 1759 the three husbands entered into an agreement for a partition of the lands in question, as well as of other lands, some leasehold & some freehold, providing for a deed of partition to be afterwards executed; there was no proof that such deed ever had been executed; but the lands were held from that time to the commencement of the action in accordance with that agreement. The coparcener, under whom the lessor of pltf. claimed, died in 1818; & the action was commenced in 1832, before the passing of Real Property Limitation Act, 1832 (c. 27):—*Held:* there was no ground for presuming a fine or recovery, which would be necessary to bar the entail; the agreement for partition not contemplating any such proceeding, but provding only for the execution of a deed of partition.—DOE d. MILLETT *v.* MILLETT (1848), 11 Q. B. 1036; 17 L. J. Q. B. 202; 11 L. T. O. S. 175; 12 Jur. 649; 116 E. R. 760.

Annotation:—**Mentd.** A.-G. *v.* Horner (No. 2), [1913] 2 Ch. 140.

68. Effect on charges—Rentcharge.]—ANON. (1572), Moore, K. B. 95; 72 E. R. 464.

69. —— Annuity.]—POOLE *v.* POOLE, [1885] W. N. 15.

Partition of leasehold interest—Liability for rent.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 401, No. 5469.

As conversion—Parties sui juris.]—*See* EQUITY, Vol. XX., pp. 361, 362, 401, Nos. 995, 997, 998, 1002, 1395.

—— **Married women.**]—*See* EQUITY, Vol. XX., pp. 362, 364, 395, Nos. 1001, 1012, 1013, 1334–1336.

Infants.]—*See* EQUITY, Vol. XX., pp. 364, 396, Nos. 1015–1019, 1348.

—— **Lunatics.**]—*See* EQUITY, Vol. XX., p. 364, No. 1014; LUNATICS, Vol. XXXII., pp. 215, 217, Nos. 1228, 1254.

SECT. 9.—RELIEF FOR UNEQUAL PARTITION.

70. Available in equity.]—NORSE *v.* LUDLOW (1590), Toth. 155; 21 E. R. 153.

71. ——.]—LONG *v.* MILLER (1594), Toth. 155; 21 E. R. 153.

72. —— Small defect not material—Apart from fraud.]—The ct. will not suppress or vary the certificate of comrs. of partition, by reason of alleged irregularity in the allotments, except on the ground of fraud, or of negligence amounting to fraud.—LISTER *v.* LISTER (1839), 3 Y. & C. Ex. 540; 160 E. R. 816.

ance.—PERCY *v.* MCKAY, 2 J. R. N. S. 9.—**N.Z.**

59 ii. ——.]—An agreement of partition between two joint owners of land cannot be enforced without the consent of all other persons beneficially interested, unless they are in some way bound by the agreement.—PROUDFOOT *v.* TURNBULL (1882), 1 N. Z. L. R. C. A. 247.—**N.Z.**

PART III. SECT. 9.

70 i. *Available in equity.*]—MONRO *v.* TORONTO RY. CO. (1904), 9 O. L. R. 299.—**CAN.**

73. —— ——.] — On a bill for a partition, when there is a small failure in proof of title, or when the shares of the parties are alone doubtful, the ct. will grant an inquiry: but where there is a material omission in the proof of pltf.'s title, the bill will be dismissed with costs.—JOPE *v.* MORSHEAD (1843), 6 Beav. 213; 12 L. J. Ch. 190; 49 E. R. 807.

Annotations:—**Distd.** Bolton *v.* Ward (1845), 4 Hare, 530. **Mentd.** Davies *v.* Davies (1850), 3 De G. & Sm. 698.

74. —— ——.]—A partition will not be set aside on light grounds, or for light matters, or for mere inequality of value of the allotments if, in making it, the comrs. have honestly exercised their own judgment.—PEERS *v.* NEEDHAM (1854), 19 Beav. 316; 52 E. R. 371; *sub nom.* PEARSE *v.* NEEDHAM, 2 W. R. 514.

75. Reformation of deed — Mistake.] — Surveyors appointed to make a partition between tenants in common, having, by mistake, allotted to one of them a piece of land which belonged to him exclusively; & several of the allotments having been sold before the mistake was discovered, the ct. decreed a pecuniary compensation to be made to him.—DACRE *v.* GORGES (1825), 2 Sim. & St. 454; 4 L. J. O. S. Ch. 50; 57 E. R. 420.

76. ——.]—After a partition under a decree, the ct. cannot give a party any right as to the property, which the certificate of the comrs. & the deeds of partition do not give him: nor will it interfere to reform the deeds, in order to give a party the more convenient & complete use or enjoyment of his portion of the premises.—BURLEY *v.* MOORE (1827), 5 L. J. O. S. Ch. 120.

SECT. 10.—**BARS TO PARTITION.**

77. Agreement to deal with the land—Inconsistent with partition.]—A. being entitled to an undivided moiety of a piece of ground, agreed with B. that in case either of them should at any time purchase the other moiety, the whole should be divided in a particular manner between them; the moiety was sold to a third party, whereupon A. & B. further agreed that neither of them would purchase that moiety until they had agreed upon a sum to be given for it, subject to the stipulations & conditions of the former agreement. A. afterwards refused to agree upon the price to be given, & B. having purchased the moiety of the property, A. refused to carry the agreement into effect:—*Held:* (1) A. was not justified in refusing to fix a price; & (2) a suit having been instituted against him by B. for a partition of the property, A. had abandoned the contract, & could not set it up as a bar to the partition.—MORRIS *v.* TIMMINS (1838), 1 Beav. 411; 48 E. R. 999.

78. —— ——.]—Four persons purchased some land, & agreed that it should be laid out in streets, & sold in lots, according to a specified plan. All the parties died; & there being no equitable ground for putting an end to the agreement:—*Held:* the representatives of one of the parties could not maintain a suit for a partition against the representatives of the others.

Consistently with the agreement . . . there cannot be a partition. It is evident that, according to that agreement, the parties thereto & those claiming under them, were to hold the land remaining unsold together, for the purpose of selling the same in lots for building, according to a certain plan. The bill does not allege any equitable ground for putting an end to the agreement, but claims partition as a right (LORD LANGDALE, M.R.).—PECK *v.* CARDWELL (1839), 2 Beav. 137; 48 E. R. 1131.

Annotation:—**Mentd.** Dale *v.* Hamilton (1846), 5. Hare, 369.

Lapse of time.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 464, No. 1303.

Award of compensation authority under Licensing Acts.]—*See* INTOXICATING LIQUORS, Vol. XXX., p. 57, No. 433.

SECT. 11.—**COSTS.**

79. According to value of shares.]—(1) Where the parties are equally interested, the practice is to give the custody of the deeds to pltf., but where they are not, then they are usually given to the person having the greatest interest.

(2) Subsequent costs, in a partition suit, ordered to be borne by the parties according to the value of their respective shares.—ELTON *v.* ELTON (No. 1) (1860), 27 Beav. 632; 54 E. R. 251; *sub nom.* ELTON *v.* ELTON, BAILY *v.* ELTON, 6 Jur. N. S. 136.

80. Death of co-owner.]—A. & B. being entitled to fourteen freehold houses as tenants in common in undivided moieties, entered into an agreement for partition, by which A. was to take & hold in severalty seven of the houses, & B. the other seven. Both died before a deed of partition was executed. A., who was the survivor, specifically devised the seven houses agreed to be held in severalty by him, but allowed the legal estate in one moiety of the other seven houses to devolve on his heir-at-law:—*Held:* the costs of carrying the agreement for partition into effect, including the costs incurred in getting in the outstanding legal estate, must be borne by the devisees of A., & not by his personal estate.—*Re* TANN, TANN *v.* TANN, GRAVATT *v.* TANN (1) (1869), L. R. 7 Eq. 434; 38 L. J. Ch. 459.

Part IV.—Inclosure Awards.

81. Award made without jurisdiction not conclusive.]—Pltfs. brought an action for the recovery of certain land as representatives of a person to whom the land had been allotted in severalty by an award of partition made under Inclosure Acts in 1880. Defts. were in possession of the land, & at the date of the award had acquired a good title thereto under Stat. Limitations, having been in undisturbed possession since 1851. The partition was not made under any inclosure scheme. None of the parties to the partition proceedings had any interest whatever in the land, & it was by mere mistake included in the schedule to their application & dealt with in the award:—*Held:* the effect of Inclosure Act, 1845 (c. 118), s. 105, was not to make the award conclusive as to the title of the allottee, & the award, not having been made on the application of persons interested in the land within Inclosure Act, 1848 (c. 99), s. 13, had been made without jurisdiction, & defts. were therefore entitled to judgment.—JACOMB *v.* TURNER, [1892] 1 Q. B. 47; 8 T. L. R. 21.

Annotations:—**Refd.** Blackett *v.* Ridout, [1915] 2 K. B. 415; Collis *v.* Amphlett, [1918] 1 Ch. 232.

PARTNERSHIP.

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Part I.—Partnership Generally.

SECT. 1.—IN GENERAL.

See, generally, Partnership Act, 1890 (c. 39).

1. Effect of Partnership Act, 1890 (c. 39)—Merely declaratory.]—BRITISH HOMES ASSURANCE CORPN., LTD. *v.* PATERSON, No. 486, *post*.

SECT. 2.—DEFINITION, NATURE AND CHARACTERISTICS.

Statutory definition.] — *See* Partnership Act, 1890 (c. 39), s. 1.

2. Essentials of partnership—Mutual participation in profit & loss.]—Pltf. agreed with deft.

PART I. SECT. 1.

a. *Necessity to comply with statutory rules.*]—MOORE *v.* DEAL (B. C.), [1917] 2 W. W. R. 955.—**CAN.**

b. *Manx law—Whether different from English law.*]—There is no difference between the Manx law & the law of England in respect to the principles applicable to the law of partnership.—LABOUCHERE *v.* TUPPER (1857), 11 Moo. P. C. C. 198; 14 E. R. 670.—**I. of M.**

PART I. SECT. 2.

2 i. *Essentials of partnership—Mutual participation in profit & loss.*]—A partnership *inter se* can only exist where there is an express agreement between the parties to divide both profits & losses in certain proportions between them, or where such agreement to divide losses may be implied from the fact of a joint ownership of the capital & stock in trade.—WALLER'S TRUSTEES *v.* BROOM (1825), 1 Nfld. L. R. 438.—**NFLD.**

2 ii. —— ——.]—The essentials of

to convey by horse & cart the mail between N. & B. at £9 a mile *per annum*, & to pay his proportion of the expense of the cart, etc.; money received for the carriage of parcels to be divided between the parties, & the damage occasioned by loss of parcels, etc., to be borne in equal portions: —*Held:* this agreement constituted a partnership & not a mere measure of wages, & consequently pltf. could not sue deft. for the £9 per mile.

I have always understood the definition of partnership to be a mutual participation in profit & loss (TINDAL, C.J.).

No action will lie for one of the parties unless there has been a balance struck (PARK, J.).—GREEN *v.* BEESLEY (1835), 2 Bing. N. C. 108; 1 Hodg. 199; 2 Scott, 164; 4 L. J. C. P. 299; 132 E. R. 43.

3. —— ——.]—Where there is also evidence that deft. has acted with relation to the proposed scheme, it is a question for the jury, whether, by his consent & acts, he has authorised the solr., or secretary, or any member of the committee, to pledge his credit for the necessary & ordinary expenses to be incurred in forming such a co.; & if so, whether the work was done, & the credit given, on the faith of his being liable. Such an intended assocn. does not constitute a partnership, inasmuch as it constitutes no agreement to share in profit or loss.—REYNELL *v.* LEWIS, WYLD *v.* HOPKINS (1846), 15 M. & W. 517; 4 Ry. & Can. Cas. 351; 16 L. J. Ex. 25; 8 L. T. O. S. 167; 10 J. P. 775; 10 Jur. 1097; 153 E. R. 954; *subsequent proceedings* (1848), 10 L. T. O. S. 424.

Annotations:—**Refd.** Lewis *v.* Armstrong (1846), 8 L. T. O. S. 257; Symmonds *v.* Muntz (1846), 8 L. T. O. S. 237; Waddy *v.* Dillon (1846), 8 L. T. O. S. 218; Bailey *v.* Stevenson (1847), 8 L. T. O. S. 368; Barker *v.* Stead (1847), 11 Jur. 90; Frost *v.* Stanley (1847), 8 L. T. O. S. 451; Nevins *v.* Henderson (1848), 12 J. P. Jo. 802; Bailey *v.* Macaulay (1849), 13 Q. B. 815; *Re* Direct Exeter, Plymouth, & Devonport Ry., *Ex p.* Roberts (1850), 2 H. & Tw. 391; *Re* Falmouth, Helston & Penzance Ry., *Ex p.* Clarke (1850), 20 L. J. Ch. 14; Norris *v.* Cottle (1850), 2 H. L. Cas. 647; *Ex p.* Besley (1851), 3 Mac. & G. 287; *Re* Direct Exeter, Plymouth, & Devonport Ry., Tanner's Case (1852), 5 De G. & Sm. 182. **Mentd.** Banks *v.* Goode (1846), 7 L. T. O. S. 286; Mitchell *v.* Moore (1847), 8 L. T. O. S. 385; Parratt *v.* Blunt & Cornfoot (1847), 9 L. T. O. S. 103; Wallington *v.* Lambert (1847), 9 L. T. O. S. 171; Williams *v.* Pigott (1848), 2 Exch. 201; Rennie & Remington *v.* Wynn (1849), 19 L. J. Ex. 2; Collingwood *v.* Berkeley (1863), 15 C. B. N. S. 145; Maddick *v.* Marshall (1864), 12 W. R. 687; Burbidge *v.* Morris (1865), 13 W. R. 921; Nichol *v.* Fearby, Nichol *v.* Robinson, [1923] 1 K. B. 480.

4. —— ——.]—MOLLWO, MARCH & CO. *v.* COURT OF WARDS, No. 25, *post.*

—— —— **Sharing profit & loss as consideration affecting partnership generally.**]—*See* Part II., Sect. 5, *post.*

5. —— **Contribution of capital, labour or skill —Sleeping partner.**]—(1) Partnership Act, 1865 (c. 86), s. 1, does not apply to any contract unless the advance of money under it would, independently of that Act, have created the relation of debtor & creditor as distinguished from the relation of partners.

(2) In the absence of something in the contract to show a contrary intention, the right to share profits, as profits, constitutes according to English law, a partnership.

(3) Then whether or not the assocn. requires that one or more of the partners shall contribute labour or skill, or what they shall contribute, is a question which may be considered as subsidiary; but I take it that the ordinary meaning of the word "partnership" is that, no doubt as a rule, each partner does contribute something, either in the shape of property or skill. But it is not a universal rule. . . . You can have, undoubtedly, according to English law, a dormant partner who puts nothing in, neither capital, nor skill, nor anything else. In fact, those who are familiar with partnerships know it is by no means uncommon to give a share to the widow or relative of some former partner who contributes nothing at all, neither name, nor skill, nor anything else. Therefore it is not quite accurate that they must contribute labour, skill, or money, or some or all of them (JESSEL, M.R.).—POOLEY *v.* DRIVER (1876), 5 Ch. D. 458; 46 L. J. Ch. 466; 36 L. T. 79; 25 W. R. 162.

Annotations:—*As to* (1) **Consd.** *Re* Megevand, *Ex p.* Delhasse (1878), 7 Ch. D. 511. **Apld.** White *v.* Churchyard (1887), 3 T. L. R. 428. *As to* (2) **Consd.** *Re* Howard, *Ex p.* Tennant (1877), 6 Ch. D. 303; Frowde *v.* Williams (1886), 56 L. J. Q. B. 62. **Refd.** Meyer *v.* Schacher (1878), 38 L. T. 97; Walker *v.* Hirsch (1884), 27 Ch. D. 460; Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238; *Re* Young, *Ex p.* Jones, [1896] 2 Q. B. 484; *Re* Fort, *Ex p.* Schofield, [1897] 2 Q. B. 495. *As to* (3) **Consd.** Frowde *v.* Williams (1886), 56 L. J. Q. B. 62. **Refd.** Hollom *v.* Whichelow (1895), 64 L. J. Q. B. 170. *Generally*, **Refd.** Adam *v.* Newbigging (1888), 13 App. Cas. 308; *Re* Beard, *Ex p.* Trustee, [1915] H. B. R. 191. **Mentd.** Steel *v.* Lester (1877), 3 C. P. D. 121; Norfolk *v.* Arbuthnot (1880), 6 Q. B. D. 279; Rye *v.* Purcell, [1926] 1 K. B. 446.

6. —— **Agreement to carry on business.**]—MOLLWO, MARCH & CO. *v.* COURT OF WARDS, No. 25, *post.*

—.]—*See, now,* Partnership Act, 1890 (c. 39), s. 45.

7. Partnership distinguished from company.]—The difference between a partnership & a joint stock co. is, that a shareholder cannot dissolve the partnership by retiring, whereas a partner can; & therefore, a decree specifically to perform a contract against a shareholder at the suit of the co. would not be nugatory.—NEW BRUNSWICK, ETC. CO. *v.* MUGGERIDGE (1859), 4 Drew. 686; 7 W. R. 369; 62 E. R. 263.

Annotations:—**Consd.** Oriental Inland Steam Co. *v.* Briggs (1861), 2 John. & H. 625. **Mentd.** Byrne *v.* Millom & Askam Hæmatite Iron Co. (1901), 46 Sol. Jo. 85.

8. ——.]—The difference between an "ordinary partnership" & a co. or association is, that an ordinary partnership is a partnership composed of definite individuals, bound together by contract between themselves to continue for some joint object, either during pleasure or during a limited time, the partnership being essentially composed of the persons originally entering into the contract: whereas "co." & "association" are synonymous terms, & respectively mean an arrangement by which parties intend to have a partnership which would be constantly changing, a succession of partnerships; a partnership to-day consisting of certain members, & a partnership to-morrow consisting of some of those members only & some others who have come in—formed always with the intention that, so far as the contracting parties can by agreement form it, the new partnership shall take upon itself the assets of the old partnership.—SMITH *v.* ANDERSON (1880), 15 Ch. D. 247; 50 L. J. Ch. 39; 43 L. T. 329; 29 W. R. 21, C. A.

Annotations:—**Mentd.** Wigfield *v.* Potter (1881), 45 L. T. 612; *Re* Padstow Total Loss & Collision Assce. Assocn. (1882), 20 Ch. D. 137; Crowther *v.* Thorley (1884), 50 L. T. 43; *Re* Siddall (1885), 29 Ch. D. 1; *Re* Faure Electric Accumulator Co. (1888), 40 Ch. D. 141; *Re*

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partnership are that each of the partners brings something into the partnership, that the business be carried on for their joint benefit, with the object of making a profit & for a legitimate purpose.—JOUBERT *v.* TARRY & CO., [1915] T. P. D. 277.—**S. AF.**

7 i. *Partnership distinguished from company.*]—SCHAEFER *v.* SCHRIEBER (1899), 25 V. L. R. 254.—**AUS.**

c. *Whether single individual.*]—A partnership must not be looked upon as a single individual, liable as such, but as composed of partners each of

Sect. 2.—Definition, nature and characteristics.]

Governments Stock Investment Co., [1891] 1 Ch. 649; *Re* Jones, Clegg *v.* Ellison, [1898] 2 Ch. 83; *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817; Kirkwood *v.* Gadd, [1910] A. C. 422; Kensington & Knightsbridge Electric Lighting Co. *v.* Notting Hill Electric Lighting Co. (1918), 82 J. P. 197; I. R. Comrs. *v.* Cornish Mutual Assce. (1924), 94 L. J. K. B. 237; South Behar Ry. *v.* I. R. Comrs., [1925] A. C. 476; *Re* Debtor (No. 3, of 1926) (1926), 135 L. T. 689.

9. ——.]—There is no real analogy between an ordinary partnership & a co. incorporated under Joint Stock Companies Acts (LORD FITZGERALD).—BIRCH *v.* CROPPER, *Re* BRIDGEWATER NAVIGATION CO., LTD. (1889), 14 App. Cas. 525; 59 L. J. Ch. 122; 61 L. T. 621; 38 W. R. 401; 5 T. L. R. 722; 1 Meg. 372, H. L.

Annotations:—**Mentd.** *Re* Weymouth & Channel Islands Steam Packet Co., [1891] 1 Ch. 66; *Re* Wakefield Rolling Stock Co. (1892), 36 Sol. Jo. 524; *Re* Sheppard's Corn Malting Co., *Ex p.* Lowenfeld (1893), 70 L. T. 3; *Re* New Transvaal Co., [1896] 2 Ch. 750; Andrews *v.* Gas Meter Co., [1897] 1 Ch. 361; Welton *v.* Saffery, [1897] A. C. 299; *Re* Anglo-Continental Corpn. of Western Australia, [1898] 1 Ch. 327; *Re* Driffield Gas Light Co., [1898] 1 Ch. 451; *Re* Mutoscope & Biograph Syndicate, [1899] 1 Ch. 896; *Re* Printers & Transferrers Soc., Challinor *v.* Maskery (1899), 68 L. J. Ch. 537; *Re* Welsh Whisky Distillery Co. (1900), 16 T. L. R. 246; *Re* Odessa Waterworks Co., [1901] 2 Ch. 190, n.; *Re* Welsbach Incandescent Gas Light Co., [1904] 1 Ch. 87; *Re* Espuela Land & Cattle Co., [1909] 2 Ch. 187; *Re* Spanish Prospecting Co., [1911] 1 Ch. 92; Will *v.* United Lankat Plantations Co., [1912] 2 Ch. 571; *Re* Fraser & Chalmers, [1919] 2 Ch. 114; I. R. Comrs. *v.* Burrell, [1924] 2 K. B. 52.

10. Relations between partners — Debtor & creditor.]—A. being indebted in his individual capacity to a house in trade, of which he himself was a partner, in a sum of money, the amount of which could not be exactly ascertained, covenanted to pay the firm all his then debts, & such other debts as should subsequently accrue. A. died without having satisfied the original debt, & having contracted further debts subsequent to the execution of the deed:—*Held:* his exors., two of whom were partners in the house of trade, could not plead either of these debts by way of retainer, or as an outstanding specialty debt.—DE TASTET *v.* SHAW (1818), 1 B. & Ald. 664; 106 E. R. 244.

Annotations:—**Consd.** *Re* Morris's Estate, Morris *v.* Morris (1874), 10 Ch. App. 68. **Refd.** Ellis *v.* Kerr, [1910] 1 Ch. 529.

11. —— ——.]—The advances made by one partner to the partnership, & those received by another from it, until the concern has been wound up, only constitute items in the account between the partners, & cannot be treated as debts, & the ct., therefore, will not, upon an interlocutory application, order the amount of such advances to be paid in & secured, pending a suit for taking the partnership accounts.—RICHARDSON *v.* BANK OF ENGLAND (1838), 4 My. & Cr. 165; 8 L. J. Ch. 1; 2 Jur. 911; 41 E. R. 65, L. C.

Annotations:—**Refd.** London Syndicate *v.* Lord (1878), 8 Ch. D. 84; Rodriguez *v.* Speyer, [1919] A. C. 59. **Mentd.** Knight *v.* Haythorne (1840), 4 Jur. 360.

12. —— **Trustees.**]—One partner receiving assets of the partnership on account of himself & his co-partners, is not liable to imprisonment under Debtors Act, 1869 (c. 62), s. 4 (3), as a person acting in a fiduciary capacity.—PIDDOCKE *v.* BURT, [1894] 1 Ch. 343; 63 L. J. Ch. 246; 70 L. T. 553; 42 W. R. 248; 38 Sol. Jo. 141; 8 R. 104.

Annotations:—**Consd.** Gordon *v.* Holland, Holland *v.* Gordon (1913), 82 L. J. P. C. 81. **Refd.** Rodriguez *v.* Speyer, [1919] A. C. 59.

13. —— **Master & servant—Partner working for wages.**]—A member of a partnership formed for the purpose of working a mine, by arrangement with his co-partners, worked in the mine as a working foreman, & received weekly wages out of the profits of the business. While working in the mine he met with an accident which caused his death, & his widow thereupon claimed compensation under Workmen's Compensation Act, 1897 (c. 37), from the surviving partners:—*Held:* the case contemplated by Workmen's Compensation Act, 1897 (c. 37), was that of a workman employed by some other person or persons; the deceased having been himself one of the partners in the firm for which he was working, he could not be said to have been employed by them; & therefore, the case was not within the Act, & appct. was not entitled to compensation.—ELLIS *v.* JOSEPH ELLIS & CO., [1905] 1 K. B. 324; 74 L. J. K. B. 229; 92 L. T. 718; 53 W. R. 311; 21 T. L. R. 182, C. A.

Annotation:—**Consd.** Whelan *v.* Great Northern Steam Fishing Co. (1909), 100 L. T. 913.

14. Assignment for benefit of creditors — Debtor carrying on business—Whether partner with trustees or creditor.]—A., a horse dealer & jobber, by a deed of trust, assigned all his stock-in-trade, etc., to certain trustees for the benefit of his creditors, until all his then debts should be paid off, to hold on certain trusts (*inter alia*) that, so long as A. should observe the orders of the trustees, he was to be allowed to carry on & conduct the business, subject to their orders, but that they should have the power to determine his possession on his failing to observe their orders; that all moneys received in the business were to be paid to the account of the trustees, & all moneys paid by their cheques; & that A. was to receive a certain weekly salary. The creditors also advanced a large sum of money to carry on the business. The business was carried on by A. for some time, his name being over the door at the place of business, & he had dealings with various persons as if he carried on the business on his own account; but on his neglecting to observe the orders of the trustees, they determined his right to carry on the business, & he admitted in writing, that they had a right to & did assume the possession of the stock-in-trade, etc. The trustees thereupon gave notice to the parties who had some of the horses, part of the stock-in-trade, that they belonged to them. Two days after this notice A. committed an act of bkpcy. On an interpleader issue, to try whose horses these were:—*Held:* the deed did not create a partnership between A. & the trustees; the trustees, by allowing A. to carry on the business in his own name, were not estopped from denying that the horses were A.'s.—PRICE *v.* GROOM (1848), 2 Exch. 542; 17 L. J. Ex. 346; 154 E. R. 606.

Annotation:—**Refd.** *Re* Whiteley, *Ex p.* Smith (1892), 67 L. T. 69.

——.]—By an agreement in writing, W., a trader, who was insolvent, assigned all his machinery, stock, & book debts to B., his largest creditor; B. agreed to carry on the business as before in W.'s name, to engage W. as manager at a weekly salary, to discharge the existing & future trade liabilities of W., & to find funds for carrying on the business; all profits made were to be placed to the credit of W., & as

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whom is liable.—HUFFMAN *v.* Ross (1925), 57 O. L. R. 329.—**CAN.**

d. *Personal relationship.*]—A partnership firm is not a person, but is merely a collective name of the individuals who are members of the partnership & as such cannot be a partner in another firm.—SEODOYAL KHEMKA, ETC. *v.* JOHARMULL MANMULL (1923), I. L. R. 50 Calc. 549.—**IND.**

•. ——.]—Partnership is a personal relationship.—*Re* WILTSHIRE & SCOTT, *Ex p.* SCOTT (1904), 24 N. Z. L. R. 354.

soon as the losses were made up B. was to resell the business to W. without any further responsibility on the part of B., or any consideration on the part of W. B. having become bkpt., & W. having become bkpt., a question arose as to the ownership of the business:—*Held:* under the agreement, B. & W. took a joint interest in the business.—*Re* WHITELEY, *Ex p.* SMITH & Co. (1892), 67 L. T. 69, C. A.

Trustees to wind up business.]—A deed of assignment for the benefit of creditors was made by E. which contained, amongst others, a clause empowering the trustee "to employ the said E. or any other person, in winding up the affairs of him the said E. & in collecting & getting in his estate & effects, & in carrying on his trade," etc., which was that of a publican. In an interpleader issue between the trustee & a creditor, who, having obtained a judgment, had taken the property in execution:—*Held:* the above clause did not create a partnership of the creditors, for the purpose of carrying on the trade of E. but amounted simply to a power to the trustee to wind up the affairs of the execution debtor, & therefore the deed was valid against the execution creditor.—JANES *v.* WHITBREAD (1851), 11 C. B. 406; 20 L. J. C. P. 217; 17 L. T. O. S. 155; 15 Jur. 612; 138 E. R. 530.

Annotations:—**Apld.** Coates *v.* Williams (1852), 7 Exch. 205. **Consd.** Cox *v.* Hickman (1860), 8 H. L. Cas. 268. **Refd.** Mason *v.* Briton Medical & General Life Assocn. (1888), 4 T. L. R. 755. **Mentd.** Hidson *v.* Barclay (1864), 3 H. & C. 361.

17. —— —— —— ——.]—A deed of assignment in the usual form to trustees, for the benefit of the creditors, which empowers the trustees to employ the debtor or other person in winding up his affairs & in collecting & getting in his estate, & in carrying on his trade, if thought expedient, is a valid deed, & does not constitute a partnership between the creditors.—COATES *v.* WILLIAMS (1852), 7 Exch. 205; 21 L. J. Ex. 116; 155 E. R. 918.

Annotations:—**Refd.** *Re* Stanton Iron Co. (1855), 21 Beav. 164; Hickman *v.* Cox (1857), 3 C. B. N. S. 523.

18. Firm—Corporation.]—A firm of S. & Co. consisted of three partners, F., R., & N., & carried on business in London. Another firm of N. & Co. consisted of five partners, F., R., N., H., & M., & carried on business in India. In Sept. 1872, N & co. applied by letter to a bank for a credit, agreeing to deliver to the bank as security "the personal obligation of this firm & individual partners, & a guarantee by S. & co." The bank granted the credit, & under it N. & co. received large advances. In Feb. 1874, a letter was addressed to the bank, signed by S. & co. & also by F., R., & N., saying, "We hereby guarantee you payment of all sums which are or may at any time become due to you by N. & co. under the credit applied for in Sept., 1872, & granted by you." This letter & the signature of S. & co. to it were written by F., & he had negotiated the original transaction with the bank. S. & co. filed a liquidation petition, & N. & co. stopped payment, a large sum being due to the bank under the credit:—*Held:* the letter of Feb. 1874, pledged to the bank the joint liability of the firm of S. & co., & also the separate liability of each of the three partners who signed it, & the bank were entitled to prove against the separate estate of F. for the amount due to them by N. & co. under the credit.

It is not the name of a corpn., it is simply the name of a firm of three persons who are carrying on business together at a particular place (COTTON, L.J.).—*Re* SMITH, FLEMING & Co., *Ex p.* HARDING (1879), 12 Ch. D. 557; 48 L. J. Bcy. 115; 41 L. T. 517; 28 W. R. 158, C. A.

19. —— **Legal "persona."**]—We have not yet introduced into our law the notion that a firm is a *persona* (JAMES, L.J.).—*Re* SAWERS, *Ex p.* BLAIN (1879), 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334, C. A.

Annotations:—**Mentd.** *Re* Pearson, *Ex p.* Pearson, [1892] 2 Q. B. 263; *Re* Clark, *Ex p.* Beyer, Peacock, [1896] 2 Q. B. 476; *Re* Clark, *Ex p.* Clark (1897), 77 L. T. 417; *Re* A. B., [1900] 1 Q. B. 541; Cooke *v.* Vogeler Co., [1901] A. C. 102; Dulaney *v.* Merry, [1901] 1 K. B. 536; Whitney *v.* I. R. Comrs., [1926] A. C. 37.

20. —— ——.]—When the trustee in bkpcy. of partners disclaims a lease of premises used by the partners for partnership purposes but which was granted to the partners as joint tenants, they entering into a joint & several covenant to pay the rent, Bkpcy. Act, 1869 (c. 71), s. 23, gives the lessor a right to prove against the separate estate of each partner for the injury caused to him by the disclaimer. *Qu.:* whether a right is given to prove also against the joint estate of the partners.

There is no such thing as a "firm" known to the law (JAMES, L.J.).—*Re* SHAND, *Ex p.* CORBETT (1880), 14 Ch. D. 122; 49 L. J. Bcy. 74; 42 L. T. 164; 28 W. R. 569, C. A.

21. —— ——.]—In English law a firm as such has no existence; partners carry on business both as principals & as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under R. S. C., Ord. 48A, it may be used for the sake of suing & being sued (FARWELL, L.J.).—SADLER *v.* WHITEMAN, [1910] 1 K. B. 868; 79 L. J. K. B. 786; 102 L. T. 472, C. A.; *on appeal, sub nom.* WHITEMAN *v.* SADLER, [1910] A. C. 514, H. L.

Annotations:—**Apld.** *Re* Vagliano Anthracite Collieries (1910), 79 L. J. Ch. 769; R. *v.* Holden, [1912] 1 K. B. 483. **Mentd.** Blaiberg *v.* Calvert (1910), 26 T. L. R. 328; *Re* Bagley, [1911] 1 K. B. 317; *Re* Campbell, *Ex p.* Seal, [1911] 2 K. B. 992; *Re* Robinson, Clarkson *v.* Robinson, [1911] 1 Ch. 230; Whiteman *v.* Public Prosecutions Director, [1911] 1 K. B. 824; Blair *v.* Holcombe, (1912), 28 T. L. R. 198; *Re* Blair Open Hearth Furnace Co., [1914] 1 Ch. 390; Cornelius *v.* Phillips, [1918] A. C. 199; Jubilee Cotton Mills (Official Receiver & Liquidator) *v.* Lewis, [1924] A. C. 958

22. —— ——.]—A co. is not bound to enter the name of a partnership firm on the register of members.

Appcts. are not a person—neither a natural person nor a legal entity at all (JOYCE, J.).—*Re* VAGLIANO ANTHRACITE COLLIERIES, LTD. (1910), 79 L. J. Ch. 769; 103 L. T. 211; 54 Sol. Jo. 720.

23. —— ——.]—Prisoner was in partnership with F. under the style or firm of H. & F. With intent to defraud & without lawful authority or excuse he accepted a bill of exchange in the manner following: "payable at the L. & W. Bank, Ltd., London, H. & F.":—*Held:* having accepted the bill in the name of his partner, he was properly convicted under Forgery Act, 1861 (c. 98), of having accepted it in the name of another person within the meaning thereof.—R. *v.* HOLDEN, [1912] 1 K. B. 483; 81 L. J. K. B. 327; 106 L. T. 305; 76 J. P. 143; 28 T. L. R. 173; 56 Sol. Jo. 188; 22 Cox, C. C. 727; 7 Cr. App. Rep. 93, C. C. A.

Annotation:—**Mentd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356.

24. Whether executors partners.]—Exors. carried on their testator's business under the powers of his will in the same firm name in which he had carried it on. Subsequently a receiving order was made against them in the firm name on a bkpcy. petition by a creditor who had recovered judgment against them in the K. B. Div. in the

Sect. 2.—*Definition, nature and characteristics. Part II. Sects.* 1, 2 *&* 3: *Sub-sects.* 1 *&* 2.]

firm name on two dishonoured bills of exchange accepted in the firm name:—*Held:* the exors. were not liable to be adjudicated bkpt. as partners.—*Re* FISHER & SONS, [1912] 2 K. B. 491; 81 L. J. K. B. 1246; 106 L. T. 814; 56 Sol. Jo. 553; 19 Mans. 332.

Charitable & other associations — Whether amounting to partnership.]—*See* Part VIII., *post.*

Part II.—Tests of Partnership.

SECT. 1.—IN GENERAL.

25. Whole circumstances to be considered.]—Agreement in writing entered into between W. & co., British merchants, carrying on business at Calcutta with a Hindoo Rajah, by which, in consideration of moneys already advanced, & which might be thereafter advanced by the Rajah to them, they agreed to carry on the business subject to the control of the Rajah in several particulars, stipulating that the Rajah should receive a commission of 20 per cent. on all profits made by the firm until the whole amount of the debt due to him should be paid off with 12 per cent. interest upon all cash advances which had been or might be thereafter made by him to the firm. Further advances having been made by the Rajah to the firm, W. & co. executed to him a mtge. of certain tea plantations, to secure the then amount of his advances, & the Rajah by a deed released his right to commission & interest under the original agreement between them. No proceeds of the business were ever received by the Rajah, & though he was credited in the books of the firm with a considerable sum, that sum was never received by him, & was afterwards written back in the books of the firm. The Rajah did not interfere or exercise any such control in the business as to make him an ostensible partner in the firm:—*Held:* (1) having regard to the restrictions & modifications made of late in the rule of law formerly prevailing, participation in the net proceeds of a business made the participant liable as a partner to third parties; & looking at the whole scope of the agreement, the primary object was to give security to the Rajah as a creditor of the firm of W. & co., & the participation given him in the net profits of the business was not sufficient to establish a partnership between W. & co. & the Rajah as regarded third parties.

(2) Although a right to participate in the profits of a trade is a strong test of partnership, & there may be cases where, from such perception alone, it may as a presumption—not of law, but of fact—be enforced, yet whether that relation does or does not exist must depend on the real intention & contract of the parties.

Where a man holds himself out as a partner or allows others to do it . . . he is then properly estopped from denying the character he has assumed & upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel (SIR MONTAGUE SMITH).—MOLLWO, MARCH & CO. *v.* COURT OF WARDS (1872), L. R. 4 P. C. 419; 9 Moo. P. C. C. N. S. 214; 17 E. R. 495, P. C.

Annotations:—*As to* (1) **Consd.** Pooley *v.* Driver (1876), 5 Ch. D. 458. **Refd.** Frowde *v.* Williams (1886), 56 L. J. Q. B. 62. *As to* (2) **Consd.** Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238. **Refd.** Ross *v.* Parkyns (1875), L. R. 20 Eq. 331; Pooley *v.* Driver (1876), 5 Ch. D. 458; *Re* Howard, *Ex p.* Tennant (1877), 6 Ch. D. 308; Davis *v.* Davis, [1894] 1 Ch. 393; King *v.* Whichelow (1895), 64 L. J. Q. B. 801. *Generally*, **Refd.** *Re* Megevand, *Ex p.* Delhasse (1878), 38 L. T. 106; Adam *v.* Newbigging (1888), 13 App. Cas. 308. **Mentd.** Adams *v.* N. B. Ry. (1873), 29 L. T. 367; Gosling *v.* Gaskell, [1897] A. C. 575.

26. ——.]—ROSS *v.* PARKYNS, No. 121, *post.*

27. ——.]—*Re* MEGEVAND, *Ex p.* DELHASSE, No. 150, *post.*

28. ——.]—WALKER *v.* HIRSCH, No. 80, *post.*

29. ——.]—BADELEY *v.* CONSOLIDATED BANK, No. 98, *post.*

30. ——.]—DAVIS *v.* DAVIS, No. 50, *post.*

31. ——.]—KING & CO. *v.* WHICHELOW, No. 102, *post.*

32. ——.]—In order to determine whether there is or is not a partnership between the whole of the agreement between them must be looked at in order to see what is the intention of the parties, together with the surrounding circumstances at the time when the agreement was entered into. Subsequent conduct can only be looked at in order to show that the agreement has been varied or a new agreement made.—*Re* BEARD & CO., *Ex p.* THE TRUSTEE, [1915] H. B. R. 191, C. A.

——.]—*See, also*, No. 5, *ante.*

33. Subsequent conduct of parties.]—*Re* BEARD & CO., *Ex p.* THE TRUSTEE, No. 32, *ante.*

34. Intention of parties.]—WALKER *v.* HIRSCH, No. 80, *post.*

SECT. 2.—WHETHER TRADE CARRIED ON FOR BENEFIT OF ALLEGED PARTNERS.

35. True test of partnership.]—COX *v.* HICKMAN, No. 91, *post.*

PART II. SECT. 1.

25 i. *Whole circumstances to be considered.*]—MONTEFIORE *v.* SMITH (1876), 14 N. S. W. S. C. R. (L.) 245.—**AUS.**

25 ii. ——.]—BALLANS *v.* KLEINIG, [1925] S. A. S. R. 227.—**AUS.**

25 iii. ——.]—SCULTHOPE *v.* BATES (1849), 5 U. C. R. 318.—**CAN.**

25 iv. ——.]—MAIR *v.* BACON (1855), 5 Gr. 338.—**CAN.**

25 v. ——.]—DARLING *v.* MCLELLAND (1876), 11 N. S. R. (2 R. & C.) 164.—**CAN.**

25 vi. ——.]—CAMPBELL *v.* CAMPBELL (1909), 14 B. C. R. 354.—**CAN.**

25 vii. ——.]—ALDRIDGE *v.* PATERSON (1914), 33 N. Z. L. R. 997.—**N.Z.**

25 viii. ——]—In order to determine whether there is or is not a partnership between persons the whole agreement between the persons, & the surrounding circumstances as disclosed in the agreement at the time it was entered into, must be considered.—MCKENZIE *v.* MCKENZIE, [1921] N. Z. L. R. 319.—**N.Z.**

25 ix. ——.]—In the absence of a written contract the question of partnership must be decided by the intention of the parties as ascertained from their conduct.—TYSON *v.* RODGER & NICOL (1907), 10 H. C. 139.—**S. AF.**

25 x. ——.]—Whether the relation between several parties is that of partnership depends upon the intention of the parties to be discovered from the circumstances. Participation in the profits is one of the circumstances, but is in itself not decisive.—GRANGER & CO.'S ESTATE *v.* ANGLO-AFRICAN TRADING CO., LTD., [1912] S. R. 13.—**S. AF.**

PART II. SECT. 2.

35 i. *True test of partnership.*]—A partnership exists between persons carrying on a farming business in common with a view to profit.—WITT *v.* STOCKS, [1917] 1 W. W. R. 1451; 11 Alta. L. R. 154.—**CAN.**

35 ii. ——.]—AITCHISON *v.* AITCHISON (1877), 4 R (Ct. of Sess.) 899.—**SCOT.**

36. ——.]—*Re* ENGLISH & IRISH CHURCH & UNIVERSITY ASSURANCE SOCIETY (No. 2), No. 92, *post*.

37. ——.]—KILSHAW *v.* JUKES, No. 93, *post*.

38. ——.]—BULLEN *v.* SHARP, No. 94, *post*.

39. ——.]—HOLLOM *v.* WHICHELOW, No. 140, *post*.

SECT. 3.—CO-OWNERSHIP OF PROPERTY.

SUB-SECT. 1.—IN GENERAL.

See Partnership Act, 1890 (c. 39), s. 1 (1).

40. Whether partnership constituted — Joint owners of race horse.]—A. & B. being joint owners of a race horse, it was agreed between them that A. should keep & train & have the general management of the horse, conveying him to & entering him for the different races; that 35*s*. per week should be allowed for his keep; & that the expenses of keep, etc., should be borne jointly by A. & B., & the horse's winnings be equally divided between them. A. having paid all the expenses of the keep & management of the horse, & there being no winnings to divide:—*Held:* even assuming that this agreement constituted a partnership between A. & B., which the ct. thought it did not, A. was entitled to recover from B. a moiety of the disbursements made by him on account of the horse, as being in the nature of an advance of capital for B.—FRENCH *v.* STYRING (1857), 2 C. B. N. S. 357; 26 L. J. C. P. 181; 29 L. T. O. S. 127; 21 J. P. 743; 3 Jur. N. S. 670; 5 W. R. 561; 140 E. R. 455.

—— **Land speculations with solicitor—Method of book-keeping.**]—H., who was a solr., had for many years previously to his death been engaged in various land speculations jointly with C. The speculations consisted in the buying & selling of plots of land, the laying out of the land for building purposes, & the advancing of money to builders. The lands were generally bought in consideration of chief rents, & then sold to builders at increased chief rents, which were retained by H. & C. The conveyances of the lands bought were taken either to H. & C. jointly or to C. alone. A banking account was kept in the names of H. & C., & statements of account were made out every half-year, but there were no partnership articles between H. & C. Upon the death of H., there being an intestacy as to certain lands & chief rents which had been acquired by him in the course of his joint speculations with C., the question arose as to whether H.'s share of the property went to his heir-at-law or to his next of kin, as being partnership property & subject to conversion:—*Held:* the proper inference to be drawn from the evidence & statements of account was, that the relation which had existed between H. & C. was that of partners, & they were not co-owners of real estate but the property in question constituted partnership assets.—*Re* HULTON, HULTON *v.* LISTER (1890), 62 L. T. 200; *sub nom. Re* LISTER, HULTON *v.* LISTER, 6 T. L. R. 160, C. A.

Annotation:—**Refd.** Davis *v.* Davis, [1894] 1 Ch. 393.

42. —— Consent to acts of co-owners as condition precedent to liability—Master & owner of vessel.]—Pltfs. chartered a barge, the *Myrtle*, for the carriage of a cargo of cement, which was lost through the sinking of the barge consequent upon her unseaworthiness. The barge was being worked on the system of "thirds," under which the master, C., took two-thirds of the gross freights, paying thereout the mate, crew, cost of provisions, & the expenses of the voyage, & handing over one-third of the gross freights, less harbour & towage dues & brokerage, to deft. the owner, who provided the barge & paid for her upkeep. Neither the charterparty nor the bill of lading contained any reference to the owner. C., described only as "of the good ship the *Myrtle*," signed the charterparty, but not as "master" or "for the owner," & in the bill of lading, which he signed as "E. C.," he was referred to as "the master of the said ship."

In an action by pltfs. against deft. to recover the amount of the lost cargo, deft. denied liability on the ground that the contract was with the master, & that there was nothing to show that he was agent of, or servant for, an undisclosed principal.

It appeared from the evidence that C. usually arranged the chartering; that he was appointed by the deft. to work & sail the ship; & that he was not dismissable during the continuance of the voyage except for grave misconduct.

Co-owners are not partners. There must be . . . an assent by the several owners in order to make them liable for the acts of a man who may be apparently the managing owner or otherwise working the vessel (KENNEDY, L.J.).—ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LTD. *v.* ASHTON, [1915] 2 K. B. 1; 84 L. J. K. B. 519; 112 L. T. 486; 13 Asp. M. L. C. 40; 20 Com. Cas. 165, C. A.

SUB-SECT. 2.—CO-OWNERSHIP OF LAND.

See Partnership Act, 1890 (c. 39), s. 2 (2).

43. Whether partnership constituted — Land employed for purposes of business—Partnership in the property employed.]—The Lord Chancellor upon appeal affirmed the decree upon the points decided at the Rolls; & held further, that the case was not within the Stat. Frauds: the question being, whether a partnership subsisted in the trade of a colliery; a quesion of fact to be tried by evidence, as upon an issue; the interest in the lease passing, as an incident to the trade, by operation of law; & the evidence from books

PART II. SECT. 3, SUB-SECT. 1.

1. *Whether partnership constituted—Joint manufacture of timber.*]—Where persons jointly manufacture timber, which is to be divided between them, they are not partners, but tenants in common, & each has a right to dispose only of his own share.—WIGGINS *v.* WHITE (1836), Ber. 97.—**CAN.**

g. —— *Part owners of ship.*]—Part owners of a ship are tenants in common of the ship, & partners in the earnings only.—BAKER *v.* CASEY (1872), 19 Gr. 537.—**CAN.**

h. —— ——.]—Where the co-owners of a boat employ it to earn freight, they become partners in respect of such earnings.—VANAMATI SATTIRAJU *v.* BOLLUPRAGADA PALLAIN-RAJU (1918), I. L. R. 41 Mad. 939.—**IND.**

k. —— ——.]—DAVIE *v.* BUCHANAN (1880), 8 R. (Ct. of Sess.) 319; 18 Sc. L. R. 217.—**SCOT.**

l. —— *Cattle bought under agreement—Homestead worked jointly.*]—FURLONG *v.* THOMAS (N. W. T.) (1905), 2 W. L. R. 188.—**CAN.**

m. —— *Joint owners of store.*]—SEDORE *v.* COLEMAN (Man.) (1911), 17 W. L. R. 643.—**CAN.**

n. —— *Term "partnership" used.*]—The relationship between pltfs. & deft. with respect to the ownership of a hotel held to be that of co-owners & not a partnership, although they had used the term "partnership" in connection therewith.—SPROULE *v.* MCCONNELL, [1925] 1 D. L. R. 982; [1925] 1 W. W. R. 609; 19 Sask. L. R. 319.—**CAN.**

PART II. SECT. 3, SUB-SECT. 2.

43 i. *Whether partnership constituted—Land employed for purposes of business—Partnership in the property employed.*] — Co-owners of land who merely share the expense of management & divide the income arising from the land in specified shares are not

Sect. 3.—*Co-ownership of property: Sub-sect.* 2.]

& letters was admitted; & an issue refused.—FORSTER *v.* HALE (1800), 5 Ves. 308; 31 E. R. 603, L. C.

Annotations:—**Consd.** Dale *v.* Hamilton (1846), 5 Harc, 369. **Apld.** *Re* De Nicols, De Nicols *v.* Curlier, [1900] 2 Ch. 410. **Refd.** Gray *v.* Smith (1889), 43 Ch. D. 208; Isaacs *v.* Evans (1899), 16 T. L. R. 113. **Mentd.** Smith *v.* Matthews (1861), 3 De G. F. & J. 139; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196.

44. —— —— ——.]—In 1843 pltf. & A. entered into a parol contract to become jointly concerned in a speculation for buying, improving, & selling land at B.; A. to find the necessary capital, & pltf., a land agent, to select, purchase, lay out, & resell the same, without charge; the advances made by A., with interest thereon, to be the first charge upon the proceeds of the resale, & the surplus profits to go, two thirds to A. & one third to pltf. Land was selected & purchased by pltf. accordingly, & A. afterwards made over a moiety of his interest in the speculation to C. The purchase-money was provided by A. & C., & the conveyance taken in their joint names. On pltf. repeatedly pressing, by letters to A., for some written acknowledgment of his interest, A. handed over to him a copy of an agreement, dated Oct. 27, 1843, & made between A. & C., to the effect that A. & C. were interested in two thirds of the surplus profits, & that the remaining one third was to be reserved for pltf.; but that pltf. should have no power to determine when any resale should take place. In 1844 A. died, having devised the property by his will. To a bill by pltf. against C. & the devisees of A. for an account, a sale of the land, & application of the proceeds, according to the agreement, all defts. insisted by answer on Stat. Frauds, C. admitting that, previously to his joining in the speculation, A. had informed him that pltf. was to have one third of the surplus profits:—*Held:* (1) this was a partnership; &, the fact of the partnership being established by general evidence, the land would be dealt with in equity as the stock of the partnership, & the statute was no bar to pltf.'s claim; (2) the memorandum of Oct. 1843, coupled with the previous assertions in writing of pltf.'s right, which was never denied by A., was a sufficient manifestation in writing, within the statute, of the pre-existing interest of pltf. in the lands.—DALE *v.* HAMILTON (1847), 2 Ph. 266; 16 L. J. Ch. 397; 9 L. T. O. S. 309; 11 Jur. 574; 41 E. R. 945, L. C.

Annotations:—*As to* (1) **Refd.** Kay *v.* Johnston (1856), 21 Beav. 536; Gray *v.* Smith (1889), 43 Ch. D. 208. *As to* (2) **Apld.** Canning *v.* Catling (1864), 4 New Rep. 259. **Refd.** *Re* De Nicols, De Nicols *v.* Curlier, [1900] 2 Ch. 410. *Generally*, **Mentd.** Lincoln *v.* Wright (1859), 4 De G. & J. 16; Smith *v.* Matthews (1861), 3 De G. F. & J. 139; Maddison *v.* Alderson (1883), 8 App. Cas. 467; McManus *v.* Cooke (1887), 35 Ch. D. 681; Rawlinson *v.* Ames, [1925] 1 Ch. 96.

45. —— —— ——.] — A partnership, no doubt, may exist in land, as in the case of *Dale* v. *Hamilton*, No. 44, *ante*, but a partnership means this: that the joint property shall be employed for some purposes which shall produce a return in the shape of profits, or so as to add to its value; but nothing of that sort took place here. It was, in fact, nothing more than a joint occupation, under a joint ownership of the property, &, in that point of view, the source from which any money laid out by either party was obtained is immaterial, & does not give the person from whom the money is derived any lien (ROMILLY, M.R.).—KAY *v.* JOHNSTON (1856), 21 Beav. 536; 52 E. R. 967.

Annotations:—**Refd.** *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552; *Re* Jones, Farrington *v.* Forrester (1893), 62 L. J. Ch. 996.

46. —— —— ——.]—(1) A., in June, 1869, borrowed £250 from B., &, at the time, signed a paper in the following words: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music Hall & Tavern, to be drawn up under Partnership Act, 1865 (c. 86), called an 'Act to amend the Law of Partnership'":—*Held:* this paper, which contained no provision as to the date or duration of the partnership, constituted a partnership at will; & it was not put an end to by a letter, dated in Aug. 1872, in which A. promised to repay B. on Sept. 1, 1872, the principal sum together with interest thereon, treating it only as a loan, such as should, as on a calculation of one-eighth of the profits, be found to be due to B. on that day.

(2) This letter was followed by a tender, which was not accepted. On a bill filed by B. for specific performance of the agreement to execute a partnership deed for one-eighth share of the profits, A. put in an answer in which he denied that there had been a partnership at all, but submitted that if any partnership had ever existed it was only a partnership at will, of one-eighth share of the profits, payment of which he offered to make, & he submitted that this partnership had been determined by the letter of Aug. 1872:—*Held:* it had not been determined by that letter, but the answer had the effect of putting an end to it; & accounts must be directed to be taken as up to the day of filing the answer, & these accounts must include the principal, the eighth share of the profits, & also the eighth share of the assets up to that day.

(3) A co-partnership in profits is a co-partnership in the assets by which the profits are made.

(4) In order to bring a case within Partnership Act, 1865 (c. 86), there must be a contract in writing, & the document must show on the face of it that the transaction is one of loan, & parol testimony to vary it is inadmissible.

(5) In a case like the present the Ct. of Ch. has power, in its discretion, to grant either a sale of the undertaking as a going concern, or a proposal for a purchase, by the holder of the seven-eighth share, of the one-eighth share mentioned in the agreement. The House, under the circumstance here, adopted the latter course.—SYERS *v.* SYERS (1876), 1 App. Cas. 174; 35 L. T. 101; 24 W. R. 970, H. L.

Annotations:—*Generally*, **Refd.** *Re* Megevand, *Ex p.* Delhasso (1878), 26 W. R. 338; Speyer *v.* Rodriquez (1917), 87 L. J. K. B. 171; Stevenson *v.* Akt. für Cartonnagen-Industrie (1918), 87 L. J. K. B. 416.

47. —— —— ——.] — An agreement in reference to a building speculation upon the S. estate, bought with the money of A., provided that B., in consideration of his services to enable A. to realise the estate, should be paid one half of the profits after A. had made certain payments; that B. should bring in a third of certain fees which he might receive from builders, & bear one half of any losses, & generally it was agreed that he should receive & bear one half of the profits & losses upon the whole transaction; but the agreement was not in any way to be construed

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partners; but if they use the land for the carrying on of a business they are partners as regards the business.—JAENICKE *v.* SCHULTZ, [1924] 4 D. L. R. 488; [1924] 3 W. W. R. 325; 19 Sask. L. R. 7.—**CAN.**

43 ii. —— —— ——.]—*Re* CHRISTIE, CHRISTIE *v.* CHRISTIE, [1917] 1 I. R. 17.—**IR.**

into a partnership between the parties, & should wholly & solely relate to the S. estate. B.'s services were to be the consideration for the agreement, & he was not to charge for his time & trouble, but only actual disbursements made by him for the benefit of the estate & for realising it for A. & B.'s mutual benefit:—*Held:* the agreement constituted a partnership between the parties, & a dissolution was declared.—MOORE *v.* DAVIS (1879), 11 Ch. D. 261; 27 W. R. 335.

Annotations:—**Refd.** Kelly *v.* Scotto (1880), 49 L. J. Ch. 383; Morden Rigg & Eskrigge *v.* Monks (1923), 8 Tax Cas. 450.

48. —— —— ——.]—Three brothers, tenants in common of a farm & lands in Wales, carried on a farming business together. One brother died, having devised his one third share to a nephew, & he & the two surviving brothers, B. & W., continued to carry on the farming business. The nephew sold his one third share of the farm & lands to his uncles B. & W., the conveyance being to them as joint tenants, & they continued to carry on the farming business. B. died, having given all his property to his wife. The farm & lands were subsequently sold. W. claimed, as surviving joint tenant, the proceeds of sale, representing the one third share purchased from the nephew:—*Held:* the one third share became involved in partnership dealings, & must be regarded as partnership property & W. was entitled to only moiety of the proceeds of sale.—DAVIES *v.* GAMES (1879), 12 Ch. D 813; 28 W. R. 16.

Annotation:—**Consd.** Davis *v.* Davis, [1894] 1 Ch. 393.

49. —— —— ——.]—*Re* HULTON, HULTON *v.* LISTER, No. 41, *ante*.

50. —— —— ——.]—(1) Under the Partnership Act, 1890 (c. 39), just as before that Act, though the receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, this is not to be regarded as a presumption which has to be rebutted by other circumstances; but all the circumstances must be considered, & an inference drawn from them as a whole, without attributing undue weight to any one of them.

(2) Partners in a business borrowed money on the security of freehold premises of which they were tenants in common, & expended the money in adding a part of those premises to adjoining workshops in which the business was carried on & of which the partners were co-owners:—*Held:* Partnership Act, 1890 (c. 39), s. 20 (3), applied, & the addition to the workshops did not become partnership property so as upon the death of one of the partners to descend as personalty.

It is not the law that partners in business, who are the owners of the property by means of which the business is carried on, are necessarily partners as regards that property (NORTH, J.).—DAVIS *v.* DAVIS, [1894] 1 Ch. 393; 63 L. J. Ch. 219; 70 L. T. 265; 42 W. R. 312; 8 R. 133.

51. —— —— **Partnership in business concerned.**]—R. being in possession of mines & ironworks, held under leases of unequal duration, by his will bequeathed £25,000 to B., "as a capital for him to become a partner with my exor. of one-fourth share in the trade of all those works, so long as the lease endures," with a devise to H. & his wife of the residue of his estates, real & personal; by a codicil testator gave to W. three-eighths of the concern at the iron-works, "so the partnership will stand at my decease, W. three-eighths, H. three-eighths, B. two-eighths." After testator's death, W., H. & B., carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore & old iron purchased for the purpose of manufacture and resale. B. having then assigned his share to W., the business was carried on in like manner by W. & H. till the death of the latter; no agreement having ever been entered into for the duration of the partnership:—*Held:* (1) the codicil withdrew the trade from the operation of the residuary clause in the will, & vested three-eighths in H. to the exclusion of his wife; (2) the concern was not a mere joint interest in land, but a partnership in trade; (3) the purchase of a leasehold interest as part of a stock in trade, was not evidence of an agreement to contract a partnership commensurate with the duration of the lease. (4) The partnership was dissolved by the death of H.

So death terminates a partnership (LORD ELDON, C.). (5) In a suit instituted by W., praying a sale of the partnership property, the ct. on motion, directed an inquiry whether it would be for the benefit of all parties interested that the works should be sold, or carried on for the purpose of winding up the concern.

(6) Where the contract neither expressly nor by reference limits the duration, the partnership may be terminated at a moment's notice by either party.

(7) For ordinary purposes a lease is no more than stock-in-trade, & as part of the stock may be sold; nor would it be material that the estate purchased by a partnership was freehold, if intended only as an article of stock; though, a question might in that case arise on the death of a partner, whether it would pass as real estate, or as stock, personal estate in enjoyment, though freehold in nature & quality (LORD ELDON, C.).—CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY (1818), 1 Swan. 495; 1 Wils. Ch. 181; 36 E. R. 479.

Annotations:—*As to* (2) **Consd.** Roberts *v.* Eberhardt (1853), Kay, 148. **Refd.** Ricketts *v.* Bennett (1847), 4 C. B. 686. *As to* (5) **Refd.** Griffiths *v.* Bracewell (1865), 35 Beav. 43. *As to* (6) **Refd.** Frost *v.* Moulton (1856), 21 Beav. 596. *As to* (7) **Refd.** Randall *v.* Randall (1835), 7 Sim. 271; Baxter *v.* Brown (1845), 7 Man. & G. 198; Darby *v.* Darby (1856), 3 Drew. 495. *Generally*, **Refd.** Feroday *v.* Wightwick (1829), 1 Russ. & M. 45; Laycock *v.* Bulmer (1843), 2 L. T. O. S. 101; Dale *v.* Hamilton (1846), 5 Hare, 369; Fripp *v.* Chard Ry., Fripp *v.* Bridgwater & Taunton Canal, etc., Co. (1853), 11 Hare, 241; Ekins *v.* Brown (1854), 1 Ecc. & Ad. 400; Wild *v.* Maine (1859), 26 Beav. 504. **Mentd.** Baker *v.* Met. Ry. (1862), 31 Beav. 504.

52. —— —— ——.]—(1) Receiver appointed of mines, in which several persons were interested, the concern, from the nature of the subject, being a species of trade, & not a mere tenancy in common in land.

(2) If persons, as partners, become the purchasers of a lease for forty years, that is not an agreement for a partnership for that term (LORD ELDON, C.).—JEFFERYS *v.* SMITH (1820), 1 Jac. & W. 298; 37 E. R. 389.

Annotations:—*As to* (1) **Consd.** Roberts *v.* Eberhardt (1853), Kay, 148; County of Gloucester Bank *v.* Rudry Merthyr Steam & House Coal Colliery Co., [1895] 1 Ch. 629. **Refd.** Bentley *v.* Bates (1840), 4 Y. & C. Ex. 182; Lees *v.* Jones (1857), 3 Jur. N. S. 954; Burt *v.* Bull & Ward (1894), 64 L. J. Q. B. 232. *Generally*, **Refd.** Tatam *v.* Williams (1844), 3 Hare, 347; Fripp *v.* Chard Ry., Fripp *v.* Bridgwater & Taunton Canal, etc., Co. (1853), 11 Hare, 241. **Mentd.** Whitehouse *v.* Hickman (1823), 2 L. J. O. S. Ch. 59; Albert *v.* Strange (1849), 1 H. & Tw. 1.

53. —— —— ——.]—DAVIS *v.* DAVIS, No. 50, *ante*.

54. —— **Land not used for business purposes.**]—KAY *v.* JOHNSTON, No. 45, *ante*.

As to co-ownership of land generally, *see* REAL PROPERTY.

Sect. 3.—*Co-ownership of property: Sub-sects.* 3 & 4. *Sect.* 4.]

SUB-SECT. 3.—JOINT ADVENTURE.

55. Whole circumstances to be considered.]—GIBSON *v.* LUPTON, No. 66, *post.*

56. Joint purchase of goods — Without agreement for joint sale.]—A., B., C. & D. enter into an agreement to purchase goods in the name of A. only, & to take aliquot shares of the purchase; but it does not appear that they are jointly to resell the goods. On failure of A., the ostensible buyer, B., C. & D. are not answerable to the seller as partners with A.

If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners (LORD LOUGHBOROUGH, C.J.).—COOPE *v.* EYRE (1788), 1 Hy. Bl. 37; 126 E. R. 24.

Annotation:—**Consd.** Jeffrey *v.* Bamford, [1921] 2 K. B. 351.

57. Separate purchase of goods — Agreement for joint sale.]—If it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner, not even an acknowledgment that he is liable or his accepting a bill of exchange drawn on them as partners for the very goods, will make him liable in an action for goods sold & delivered; though he will be liable in an action on the bill of exchange.

Several persons, who had no general partnership, nor any connection with each other in trade, formed an adventure to the East Indies. The outfit of the vessel was a joint concern of all the partners; & that delivers the case from one consideration, namely, the parcel of copper for sheathing the ship; which is admitted to be a partnership concern. But beyond that, I see no partnership between the parties till all the parcels of the cargo were delivered on board; & that made it a combined adventure between all the parties (LORD KENYON, C.J.).—SAVILLE *v.* ROBERTSON (1792), 4 Term Rep. 720; 100 E. R. 1264.

Annotations:—**Distd.** Gouthwaite *v.* Duckworth (1810), 12 East, 421. **Refd.** Ellis *v.* Steele (1855), 25 L. T. O. S. 183.

58. ——— ———.]—A., B. & C. agreed that each should furnish £3,000 worth of goods, to be shipped on a joint adventure, the profits to be divided according to the amount of their several shipments:—*Held:* this did not constitute a partnership between the three, so as to make B. & C. responsible for goods bought by A. to furnish his quota of the cargo.—HEAP *v.* DOBSON (1863), 15 C. B. N. S. 460; 3 New Rep. 42; 143 E. R. 864.

59. Joint adventure for purchase & sale.]—A. & B., general partners in trade, being indebted to C. for advances paid by him on the joint account of the three in the purchase of tobacco, which had been sent out on a special joint adventure to Spain, with a view to liquidate that balance, C. agreed with A. & B. to join with them in another adventure to Lisbon, of which he was to have one moiety; & it was agreed that A. & B. should purchase goods for the adventure to be shipped on board a certain vessel, & pay for them, & the returns of such adventure were to be made to C., to go in liquidation of his demand on them; but C. was to bear his proportion of the loss, if any, & also to receive his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to A. & B.:—*Held:* this agreement constituted a partnership between the three in the adventure at & from the time of the purchase of the goods for the adventure by A. & B.; although C. did not go with them to make the purchase, nor authorise them to purchase on the joint account, but A. & B. alone in fact made the purchase, & although C. also purchased in his own name & paid for goods to be sent out at the same time, in which B. was to share the profit or loss, & these goods were consigned for sales & returns to the same person who went out as supercargo on the joint account of the three.—GOUTHWAITE *v.* DUCKWORTH (1810), 12 East, 421; 104 E. R. 164.

Annotation:—**Consd.** Kilshaw *v.* Jukes (1863), 3 B. & S. 847.

60. ———.]—Where two persons enter into a parol agreement to attend specific sales, to be from time to time determined upon, with a view to purchasing goods for resale, & equally dividing any profit or loss, a partnership, as to such goods, is thereby created.—ALEXANDER *v.* LONG (1884), 1 T. L. R. 145.

61. ———.]—By agreement between pltfs., defts., & Messrs. L., B. & co., a cargo of Californian wheat was to be shipped for their joint account by the correspondents of L., B. & co., at San Francisco, consigned to pltfs. at Liverpool for sale upon certain special terms; the shippers to reimburse themselves for costs & insurance of the cargo by drafts on pltfs. at sixty days' sight to the extent of 45*s.* per quarter, less freight, & for the balance of invoice amount by separate drafts at sixty days' sight upon each of the above parties for one-third of the excess. The cargo was shipped, & a bill was drawn by the San Francisco house for £29,353 18*s.* 1*d.* on account of the invoice price of the wheat less freight, upon pltfs., & was duly accepted & paid by them, together with freight, insurance & other charges in respect of the cargo; & the wheat on arrival was sold by pltfs. at a loss. In Dec. 1883, L., B. & co., became insolvent & compounded with their creditors for 30 per cent. of their liabilities, which composition the pltfs. received, leaving an unpaid balance of £1,760 10*s.* 9*d.* due from that firm for their share of the loss on the adventure:—*Held:* upon further consideration, the judge to draw inferences of fact, the purchase & shipment of the wheat was a joint partnership adventure, each of the three firms to participate equally in the profit or loss; & defts., according to the rule of equity which since Jud. Act, 1873 (c. 66), is to prevail, where liable to contribute equally with pltfs. to make good the default of L., B. & co.—LOWE *v.* DIXON (1885), 16 Q. B. D. 455; 34 W. R. 441.

Annotation:—**Refd.** Morden Rigg & Eskrigge *v.* Monks (1923), 8 Tax Cas. 450.

62. ——— **Payment by one only.**]—A., a merchant in London, by letter, directed B., a broker

PART II. SECT. 3, SUB-SECT. 3.

o. *General rule.*]—OUDAILLE *v.* SUMMERS, [1914] S. R. 91.—**S. AF.**

59 i. *Joint adventure for purchase & sale.*]—DONOGH *v.* MOORE (Man.) (1912), 20 W. L. R. 334; 1 W. W. R. 845; 2 D. L. R. 525.—**CAN.**

59 ii. ———.]—PORTER & SONS, LTD. *v.* ARMSTRONG & FOSTER, [1926] 2 D. L. R. 340; [1926] S. C. R. 328.—**CAN.**

59 iii. ———.]—ANGEHEN *v.* FRIEDMAN, [1903] T. H. 267.—**S. AF.**

59 iv. ———.]—Where certain persons jointly acquired certain property for the purpose of speculation, but did not agree expressly or impliedly to share profits & losses, & each was free to dispose of his interest as he desired for his own separate benefit:—*Held:* there existed no partnership between the parties in respect of such property.—LANGERMANN *v.* CASPER, [1905] T. H. 251.—**S. AF.**

p. *Promoters of company.*]—Promoters of a co. are not partners.—WILKINS *v.* DAVIES (1890), 16 V. L. R. 70.—**AUS.**

q. ———.]—WALKER & JACOBSOHN *v.* NORDEN, 14 C. T. R. 995.—**S. AF.**

in Liverpool, to purchase 1,000 bales of cotton, & stated that B. was to be allowed to be one-third interested therein, acting in the business free of commission. B. agreed to purchase the cotton & to hold one-third interest therein, charging no commission, B. purchased the cotton, & in subsequent correspondence, which continued for upwards of three months, the transaction was referred to as a joint account, joint concern, joint purchase, joint speculation, joint cotton adventure. B. transmitted policies of insurance against loss by fire to A., & stated that the cotton was deposited in rooms rented by him, B., & that he held the key for their joint security:—*Held:* B. was interested as a partner in the cotton, & consequently a pledge of the whole by him, without any fraud or collusion on the part of the pawnee, gave a right to the pawnee to hold the goods as against A.—REID *v.* HOLLINSHEAD (1825), 4 B. & C. 867; 7 Dow. & Ry. K. B. 444; 107 E. R. 1281.

Annotations:—**Distd.** *Re* Thompson, *Ex p.* Copeland (1833), 2 Mont. & A. 177. **Consd.** Alfaro *v.* De la Torre (1876), 34 L. T. 122.

63. Joint interest in & occupation of farm.]—GREENSLADE *v.* DOWER, No. 369, *post.*

64. Joint publication.] — A., B. & C. verbally agreed that they should bring out & be jointly interested in a periodical publication. A. was to be the publisher, & to make & receive general payments, B. to be the editor, & C. the printer; & after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper, & charge it to the account at cost prices. No profits were ever made nor any accounts settled. Pltf. furnished paper to A. for the purpose of being used by him in printing the periodical:—*Held:* B. & C. were not jointly liable with A. for the price of it.—WILSON *v.* WHITEHEAD (1842), 10 M. & W. 503; 12 L. J. Ex. 43; 152 E. R. 569.

Annotation:—**Refd.** Kilshaw *v.* Jukes (1863), 3 B. & S. 847.

65. Joint working of patent — In experimental stages.]—A. entered into an agreement with B. that B. should work his patent at A.'s expense, first, by way of experiment; & if A. was satisfied & expressed his satisfaction in writing then the patent was to be worked on certain terms of payment to B., B. undertaking to devote his time, etc.; & there were provisions for terminating the agreement in case the profit of the manufacture fell below a certain sum. The bill made a case that experiments had been made; that deft. represented the invention would answer, & led pltf. into expense; but it did not allege that pltf. was satisfied or had expressed his satisfaction in writing, nor did it distinctly allege any fraudulent misrepresentation by deft., it prayed a dissolution of the joint concern & a lien on the patents for the money expended by A.:—*Held:* there was no partnership, the agreement was merely for an experiment until A. should have expressed his satisfaction in writing.—OSBORNE *v.* JULLION (1856), 3 Drew. 596; 26 L. J. Ch. 6; 4 W. R. 767; 61 E. R. 1031.

66. Joint order for shipment of goods.]—The mere circumstance of two individuals, not in partnership, joining in giving an order for a shipment of goods, will not render them joint contractors, so as to be liable each for the whole amount, where, upon the reasonable construction of the whole of the correspondence between the parties, & other facts, it may be collected that it was understood between them that the contract should be several, & payment had been made by bills for the amount drawn by the vendors upon the vendees severally, each for a moiety.—GIBSON *v.* LUPTON (1832), 9 Bing. 297; 2 Moo. & S. 371; 2 L. J. C. P. 4; 131 E. R. 626.

SUB-SECT. 4.—PARTNERSHIP WITHOUT JOINT OWNERSHIP.

67. Running common stage carriage — Each party supplying horses for separate stage.]—Pltf. & deft. had been engaged in running a coach from B. to L., pltf. finding horses for one part of the road, deft. for another; & the profits of each party were calculated according to the number of miles covered by his own horses; pltf. received the fares, & rendered an account thereof to deft. every week:—*Held:* (1) pltf. & deft. were partners in this concern; (2) in an action by pltf. against deft. upon a separate transaction, deft. could not set off a balance which had been declared in his favour upon these weekly accounts.

Before there can be an action or a set-off in respect of a claim arising out of a partnership account, there must be a final balance struck (BEST, C.J.).—FROMONT *v.* COUPLAND (1824), 2 Bing. 170; 9 Moore, C. P. 319; 3 L. J. O. S. C. P. 237; 130 E. R. 271.

Annotations:—*As to* (1) **Folld.** Green *v.* Beesley (1835), 2 Bing. N. C. 108. **Consd.** Davis *v.* Davis, [1894] 1 Ch. 393. *As to* (2) **Consd.** Jackson *v.* Stopherd (1834), 2 Cr. & M. 361. **Folld.** Green *v.* Beesley (1835), 2 Bing. N. C. 108. **Distd.** Dixon *v.* Wing (1843), 1 L. T. O. S. 647. **Refd.** Carr *v.* Smith (1843), 5 Q. B. 128.

68. —— ——.]—A., B., etc., were common carriers from L. to F., a separate portion of the road being allotted to each, & it having been stipulated also that no partnership should exist between them. A. for himself & the other parties agreed with the Mint to carry coin from L. to F., & afterwards made another agreement with the Mint to carry other coin to places not on the road:—*Held:* all the parties were entitled to share in the profits of this agreement.—RUSSELL *v.* AUSTWICK (1826), 1 Sim. 52; 57 E. R. 498.

Annotations:—**Consd.** Hancock *v.* Heaton (1874), 30 L. T. 592. **Distd.** Doan *v.* MacDowell (1878), 8 Ch. D. 345.

.]—*See, also,* Nos. 319, 394, *post.*

SECT. 4.—SHARING GROSS RETURNS.

See Partnership Act, 1890 (c. 39), s. 2 (3).

69. Whether partnership constituted — General rule.]—The authorities clearly show that two persons merely receiving payment out of the gross profits of a business does not make a partnership between them even as against the world (CROMPTON, J.).—LYON *v.* KNOWLES (1863), 3 B. & S. 556; 1 New Rep. 270; 32 L. J. Q. B. 71; 7 L. T. 670; 9 Jur. N. S. 774; 11 W. R. 266; 122 E. R. 209; *affd.* (1864), 5 B. & S. 751, Ex. Ch.

Annotations:—**Mentd.** Marsh *v.* Conquest (1864), 17 C. B. N. S. 418; Monaghan *v.* Taylor (1886), 2 T. L. R. 685; Kelly's Directories *v.* Gavin & Lloyds, [1901] 1 Ch. 374; Karno *v.* Pathé Frères (1909), 100 L. T. 260; Performing Right Soc. *v.* Ciryl Theatrical Syndicate, [1924] 1 K. B. 1.

70. —— Ship owned by one person worked by another.]—If the agreement between them is, that B. in consideration of working the lighter shall have half her gross earnings, this does not

PART II. SECT. 4.

70 i. *Whether partnership constituted -Ship owned by one person worked by another.*]—JAMIESON *v.* CLARK (1908), 2 B. W. C. C. 228.—**SCOT.**

r. —— *Growing wheat.*]—HAYDON *v.* CRAWFORD (1834), 3 O. S. 583.—**CAN.**

t. —— *Theatre owner & lessee—Injury to electrician.*]—BRADD *v.* WHITNEY (1907), 14 O. L. R. 415 9 O. W. R. 656.—**CAN.**

Sect. 4.—*Sharing gross returns. Sect.* 5: *Sub-sect.* 1.]

constitute a partnership, being only a mode of paying B. for his labour.—DRY *v.* BOSWELL (1808), 1 Camp. 329; 170 E. R. 975, N. P.

Annotations:—**Apld.** Pott *v.* Eyton (1846), 3 C. B. 32. **Mentd.** Boon *v.* Duance (1909), 102 L. T. 443.

71. —— Owner of cattle & owner of pasturage.]—WISH *v.* SMALL (1808), 1 Camp. 331, n.; 170 E. R. 975.

72. —— Joint owners of race horse—Expenses jointly borne.]—FRENCH *v.* STYRING, No. 40, *ante.*

73. —— Joint interest in ship's earnings—Joint owners of ship worked by one only.]—A. & S. were joint owners of a ship. A. worked the ship, defraying all the expenses & taking the entire management of her, & he took two-thirds of the gross earnings; S. did nothing, & took the remaining one-third of the gross earnings:—*Held:* the result of these facts was, that A. hired the share of S. in the ship, & that he was not the partner or agent of S. so as to render S. liable in an action for damages caused by the negligence of A.—BURNARD *v.* AARON & SHARPLEY (1862), 31 L. J. C. P. 334; *sub nom.* BERNARD *v.* AARON & SHARPLEY, 9 Jur. N. S. 470.

Annotation:—**Consd.** Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1.

74. —— Theatre owner & lessee—Management of lessee.]—K., the licensed proprietor of a theatre, under Theatres Act, 1843 (c. 68), entered into an arrangement with D. whereby D. had the use of the theatre for dramatic entertainments. D. provided the company, had the selection of the pieces to be represented, together with the entire management of their representation, & exclusive control over the persons employed in the theatre. K., on his part, paid for printing & advertising, furnished the lighting, door keepers, scene shifters & supernumeraries, & hired the band, music being a necessary part of the performance. The money taken at the door was taken by servants of K., who retained one-half of the gross receipts as his remuneration for the use of the theatre, & handed the other half to D. Among the pieces represented were two which L. had the sole liberty of representing or causing to be represented, etc., as assignee of the author, under Dramatic Literary Property Acts, 3 & 4 Will. 4, c. 15, & 5 & 6 Vict. c. 45:—*Held:* no action under those statutes was maintainable by L. against K., as the above facts did not show that those pieces had been represented, etc., by him, or that there was a partnership between D. & him so as to render him liable for the representation, etc., of them by D.—LYON *v.* KNOWLES (1864), 5 B. & S. 751; 10 L. T. 876; 12 W. R. 1083; 122 E. R. 1010, Ex. Ch.

Annotations:—**Mentd.** Marsh *v.* Conquest (1864), 17 C. B. N. S. 418; Monaghan *v.* Taylor (1886), 2 T. L. R. 685; Kelly's Directories *v.* Gavin & Lloyds, [1901] 1 Ch. 374; Karno *v.* Pathé Frères (1909), 100 L. T. 260; Performing Right Soc. *v.* Ciryl Theatrical Syndicate, [1924] 1 K. B. 1.

5. SHARING PROFITS AND LOSSES.

SUB-SECT. 1.—IN GENERAL.

See, now, Partnership Act, 1890 (c. 39), s. 2 (3).

75. Whether partnership constituted.]—To make a man liable as a partner, there must either be a contract between him & the ostensible person to share jointly in the profits & loss, or he must have permitted the other to make use of his credit, & to hold him out as one jointly answerable with himself.—HOARE *v.* DAWES (1780), 1 Doug. K. B. 371; 99 E. R. 239.

Annotation:—**Reld.** Coope *v.* Eyre (1788), 1 Hy. Bl. 37.

76. ——.]—GREEN *v.* BEESLEY, No. 2, *ante.*

77. —— Underwriters.]—An agreement between underwriters to act in concert & share equally the profit & loss of all insurances, constitutes a partnership, though each underwrote policies in his own name for distinct sums.—BRETT *v.* BECKWITH (1856), 26 L. J. Ch. 130; 28 L. T. O. S. 214; 3 Jur. N. S. 31; 5 W. R. 112.

78. —— Builder & building owner.]—Deft. agreed with a builder that the builder should find the plant, etc., for building houses, & he would find the funds, the ground landlord granting leases of the houses on completion by which they would become in equity the joint property of deft. & the builder; the houses were then to be sold, & the proceeds brought into account, deft. being credited with advances & debited with receipts of purchase-money, the builder to be debited with certain allowance, etc., & the balance of profit & loss to be divided equally. A joint account was to be opened at a bank, & either party could draw on it for the purposes of the agreement:—*Held:* on a bill of exceptions, deft. & the builder were partners so that the builder could pledge deft.'s credit for plant, etc., for the houses.—NOAKES *v.* BARLOW (1872), 26 L. T. 136; 20 W. R. 388, Ex. Ch.

79. —— Clerk & principal.]—Pltf., having been a clerk in deft.'s firm, entered into a verbal agreement with him for a share of profit & loss in the

PART II. SECT. 5, SUB-SECT. 1.

75 i. *Whether partnership constituted.*]—*Re* LINGHAM TIMBER CO., LTD. (1900), 21 N. S. W. Eq. 52; 16 N. S. W. W. N. 127.—**AUS.**

75 ii. ——.]—To make a partnership it is not necessary that all the partners should contribute money, or in equal proportions. It is sufficient if they contribute what is equivalent to money. Nor is it required that all the partners should share equally in the profits & loss.—THE HERKIMER (1803), Stewart, 17.—**CAN.**

75 iii. ——.]—M'PHERSON *v.* HOSKINS (1841), 3 N. B. R. (1 Kerr) 430.—**CAN.**

75 iv. ——.]—The provision for sharing profits & losses in an ordinary trading assocn., where there is a community of capital & stock-in-trade, & a common undertaking, is conclusive evidence of a partnership.—MERCHANTS BANK *v.* THOMPSON, MALLON *v.* CRAIG (1852), 3 O. R. 541.—**CAN.**

75 v. ——.]—CLARK *v.* MCKELLAR (1862), 12 C. P. 562.—**CAN.**

75 vi. ——.]—GILLIES *v.* COLTON (1875), 22 Gr. 123.—**CAN.**

75 vii. ——.]—FAWSON *v.* NOONAN (1879), R. E. D. 377.—**CAN.**

75 viii. ——.]—HALLETT *v.* ROBINSON (1898), 31 N. S R. 303.—**CAN.**

75 ix. ——.]—MONTAGU SCHOOL TRUSTEES *v.* OLAND (1899), 35 N. S. R. 409.—**CAN.**

75 x. ——.]—LAWTON SAW CO. *v.* MACHUM (1900), 2 N. B. Eq. Rep. 112.—**CAN.**

75 xi. ——.]—HORNE *v.* GORDON (1909), 42 S. C. R. 240.—**CAN.**

75 xii. ——.]—HEMMING *v.* LEMARQUAND (1909), 11 W. L. R. 280.—**CAN.**

75 xiii. ——.]—GORDON *v.* HORNE, C. R., [1911] 2 A. C. 364.—**CAN.**

75 xiv. ——.]—Where two or more persons contribute of their capital to a joint fund for the purpose of purchasing a business as a joint concern, in the profits or loss of which each is to participate, there is formed a partnership in which one partner is bound by the acts of the other in carrying out the purposes for which the partnership is formed.—AGNEW *v.* MCKENZIE ELLIS WOOD CO., LTD. (1913), 26 W. L. R. 113; 5 W. W. R. 733; 14 D. L. R. 909; 7 Sask. L. R. 26.—**CAN.**

75 xv. ——.]—DEYKIN *v.* NORTHERN INTERIOR AMUSEMENT CO. (B. C.) (1914), 29 W. L. R. 241.—**CAN.**

75 xvi. ——.]—CANADIAN BANK OF COMMERCE *v.* PATRICIA SYNDICATE (1921), 64 D. L. R. 663; 51 O. L. R. 42.—**CAN.**

75 xvii. ——.]—The mere fact that a person takes a share in the profits of a firm does not constitute him a partner.—NG TEK TONG *v.* WONG CHEUNG CHE (1909), 6 Hong Kong L. R. 70.—**HONG KONG.**

75 xviii. ——.]—TRUTER *v.* HANCKE, [1923] C. P. D. 43.—**S. AF.**

75 xix. ——.]—RHODESIA RYS. *v.* TAXES COMR., [1925] App. D. 438.—**S. AF.**

proportion of one-fifth to pltf. & four-fifths to deft., it being stipulated that the building in which the business was carried on should remain the property of deft. Pltf. alleged that the agreement was for a partnership, & claimed a dissolution & an account of assets. Deft. denied the partnership, & alleged that pltf. was only manager:—*Held:* the agreement for sharing profit & loss in certain proportions conferred all the rights of partnership *inter se*, subject to the stipulation as to the buildings remaining the property of one partner; deft. could not maintain that the legal effects of partnership should not follow such a contract, & pltf. had a right to a dissolution & sale of the assets of the partnership, including the goodwill: such sale to be conducted by an independent firm of solrs., with power to either partner to bid.—PAWSEY *v.* ARMSTRONG (1881), 18 Ch. D. 698; 50 L. J. Ch. 683; 30 W. R. 469.

Annotation:—**Dbtd.** Walker *v.* Hirsch (1884), 27 Ch. D. 460.

—— ——.]—Although an agreement for participation in profit & loss is *primâ facie* evidence of a partnership between the contracting parties as between themselves, yet the question of partnership must in all cases depend upon the intention of the parties as it appears on the contract. By an agreement between pltf. & the firm of H. & co., the members of which were the two defts., it was agreed that for the part taken by pltf. in the business, he should receive a fixed salary of £180, & in addition should receive one-eighth share of the net profits, & bear one-eighth share of the losses, as shown by the books when balanced; & pltf. agreed to advance £1,500 to the business. The agreement was to be determined on four months' notice on either side. Pltf. had been previously a clerk to defts., & he continued to perform similar duties after the execution of the agreement, & was not introduced to the customers as a member of the firm, & did not sign the name of the firm to bills. Defts. being dissatisfied with pltf. gave him notice to determine the agreement & excluded him from the place of business. Pltf. brought an action for winding-up the partnership, & moved for an injunction & receiver. The judge refused the motion, on the terms of defts. paying £1,500 into ct.:—*Held:* on the true construction of this agreement pltf. was in the position of a servant, & there was no such partnership between pltf. & defts. as to entitle pltf. to an injunction or receiver.—WALKER *v.* HIRSCH (1884), 27 Ch. D. 460; 54 L. J. Ch. 315; 51 L. T. 481; 32 W. R. 992, C. A.

Annotation:—**Mentd.** Sutton *v.* Grey, [1894] 1 Q. B. 285.

81. —— Joint purchase—For division between parties.]—COOPE *v.* EYRE, No. 56, *ante*.

82. —— —— ——.]—GIBSON *v.* LUPTON, No. 66, *ante*.

83. —— —— One party providing purchase-money—Other giving time & skill.]—REID *v.* HOLLINSHEAD, No. 62, *ante*.

84. —— Each person bringing separate parcels of goods—Profits to be divided ratably.]—HEAP *v.* DOBSON, No. 58, *ante*.

85. —— Each party bearing aliquot part of loss.]—Pltf. & deft., together with others, entered into & signed the following special contract:—"Being desirous that the communication between London, Herne Bay & Margate should be kept open during the ensuing winter, by means of a small steam boat, we hereby authorise Mr. G. A. B. to charter the *Brockelbank*, or any other suitable vessel, for that purpose, on the best possible terms, & to make the necessary arrangements for her running on the station during the whole or such part of the winter as may be deemed expedient, on our joint account, each of us taking a proportionate interest in this enterprise, according to the amount subscribed, & the profit or loss to be divided amongst us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid 10 per cent. on the amount of our subscriptions, and we hereby bind ourselves, & agree to pay to Mr. G. A. B. such further instalments, each of us in proportion to his subscription, as it may be necessary to call from time to time, should the earnings of the boat not be sufficient to pay the expenses. It being, however, understood that our liability is not to extend beyond the amount subscribed by us respectively":—*Held:* this agreement constituted a partnership between the parties who signed it; & pltf., who had paid such debts arising from the undertaking as the earnings of the boat were insufficient to satisfy, could not maintain an action for money paid, against deft. who had not paid up his subscription, but that the proper form of action was a special action of *assumpsit* for the non-performance of the undertaking to pay pltf. the instalments from time to time.—BROWN *v.* TAPSCOTT (1840), 6 M. & W. 119; 9 L. J. Ex. 139; 151 E. R. 346.

86. —— ——.]—Pltfs. & four other firms of merchants, by a written memorandum, which was signed by them all, & stated that pltfs. had ordered their agents to contract for 1,200 tons of sugar, agreed that they should "have one-fifth interest each"; that as the bills would be drawn on pltfs. they should have a power of sale; that "the various parties interested agreed to pay their shares of the marginal drafts"; & finally, that "the purchase should be at the risk of the undersigned in the proportion of one-fifth each." The cargo arrived, but the result was a heavy loss, & two of the firms became unable to meet their engagements:—*Held:* this was a joint mercantile adventure on the part of all five firms, & the deficiency arising from the failure of two of them was a loss which must be borne equally by the three solvent firms, & not by pltfs. alone.—MCINROY *v.* HARGROVE (1867), 16 L. T. 509; 15 W. R. 777, L. JJ.

Annotation:—**Mentd.** *Re* Maria Anna & Steinbank Coal & Coke Co., McKewan's Case (1877), 6 Ch. D. 447.

87. —— Purchase-money provided by one party only.]—An agreement between two persons to divide the profit or loss upon a sale of goods which are to be bought & paid for by one of them does not create a joint property in the goods.

Y., a merchant in Costa Rica, obtained from A. an introduction to T., a merchant in London, upon an agreement that A. should share the profit or loss upon all consignments made by Y. to T. Y. purchased produce with his own moneys & consigned it for sale on his account to T., drawing bills against the consignments, & at the same time informing T. of the interest which A. had in the transaction. A., without the knowledge of Y., wrote a letter to T., pledging his interest in the consignment to secure an antecedent debt of his own to T. T. having failed to meet the bills, & the goods consigned not having been resold, T. claims an interest in the goods under the pledge by A.:—*Held:* the arrangement between Y. & A. constituted no such partnership as to entitled A. or any one claiming under him to an interest in the goods themselves as against Y.—ALFARO *v.* DE LA TORRE (1876), 34 L. T. 122; 24 W. R. 510.

88. —— Agreement not conclusive of partnership—Intention of parties to be considered.]—WALKER *v.* HIRSCH, No. 80, *ante*.

Sect. 5.—Sharing profits and losses: Sub-sects. 1

89. —— Agreement to share profit & loss with agent.]—Pltfs., who were stockbrokers, entered into an oral agreement with deft. that he should introduce clients to them, & that pltfs. should transact business on the Stock Exchange for the clients thus introduced, upon the terms that as between pltfs. & deft., deft. should receive half the commission earned by pltfs. in respect of any transactions by them for any clients introduced by deft., & that he should pay to pltfs. half of any loss which might be incurred by them in respect of such transactions. Pltfs. claimed to recover from deft. half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of R., who had been introduced to them by deft. :—*Held :* deft. having an interest in the transactions, equally with pltfs., & the main object of the contract being to regulate the terms of deft.'s employment, the principle of *Couturier* v. *Hastie* (1852), 8 Ex. 40, applied, & the contract was not within Stat. Frauds, s. 4, & the action was maintainable, though the contract was not in writing.—SUTTON & Co. *v.* GREY, [1894] 1 Q. B. 285 ; 63 L. J. Q. B. 633 ; 69 L. T. 673 ; 42 W. R. 195 ; 10 T. L. R. 96 ; 38 Sol. Jo. 77 ; 9 R. 106, C. A.

Annotations :—**Mentd.** Guild *v.* Conrad (1894), 42 W. R. 642 ; Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778 ; Davys *v.* Buswell, [1913] 2 K. B. 47.

90. Share of profit & loss by retiring partner—On dissolution.]—J. & W. carried on business under a deed of partnership dated May 30, 1895. In Oct. 1907, a bank advanced the partners jointly the sum of £11,000. On Sept. 20, 1909, J. & W. purported to dissolve the partnership & W. retired from the business. By the deed of that date W. assigned his share & interest to J., & an account was to be taken of W.'s share as on Dec. 31, 1909, & such share when ascertained was to be credited to W. in the books of the firm & was to remain a loan to the firm for ten years, at 5 per cent. *per annum* interest. If on the taking of this account there was found an insufficiency of assets to meet liabilities, W. was to pay J. half of such deficit. On Nov. 4, 1909, J. suspended payment, & was adjudicated bkpt. on Jan. 7, 1910, & on July 25, 1910, W. was adjudicated bkpt., the two bkpcies. subsequently being consolidated. The trustee of the separate estate of J. claimed a sum of £1,657 lying on current account at the bank on Nov. 4, 1909, in the name of the firm, which sum the bank claimed to retain & set off against the joint liability of W. & J. for £11,000 advanced to the firm :—*Held :* upon the true construction of the deed of Sept. 20, 1909, there was a dissolution of partnership as from that date & not as from Dec. 31, 1909, so that the sum standing to the credit of the firm on Nov. 4, 1909, belonged to the separate estate of J.—*Re* JANE, *Ex p.* THE TRUSTEE (1914), 110 L. T. 556, C. A.

SUB-SECT. 2.—

See Partnership Act, 1890 (c. 39), s. 2 (3).

91. How far conclusive of partnership.]—(1) It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test ; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made, was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, & entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i.e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, & under whose management the profits have been made. Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors ; though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees ; the debtor or the trustees are the persons by or on behalf of whom it is carried on (LORD CRANWORTH).

(2) The liability of one partner for the acts of his co-partner is, in truth, the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from

PART II. SECT. 5, SUB-SECT. 2.

91 i. *How far conclusive of partnership.*]—R. *v.* WILLIS, *Ex p.* MARTIN (1879), 5 V. L. R. (L.) 149.—**AUS.**

91 ii. ——.]—HAWLEY *v.* DIXON (1850), 7 U. C. R. 218.—**CAN.**

91 iii. ——.]—GREAT WESTERN RY. Co. *v.* PRESTON & BERLIN RY. Co. (1859), 17 U. C. R. 477.—**CAN.**

91 iv. ——.]—By articles of agreement entered into by several persons, it was stipulated that one of them should furnish the premises in which to carry on the business at a stipulated rental, & capital for carrying on the business at a certain rate of interest, & that he should receive a stipulated sum annually for his time & expenses, & the others certain stipulated sums together with a certain proportion of the net profits :—*Held :* this contract had the effect of creating a special agency, not a partnership, between the parties.—MUNSON *v.* HALL (1863), 10 Gr. 61.—**CAN.**

91 v. ——.]—MCCALLUM *v.* BUFFALO & LAKE HURON RY. Co. (1868), 19 C. P. 117.—**CAN.**

91 vi. ——.]—PINKERTON *v.* ROSS (1873), 33 U. C. R. 508.—**CAN.**

91 vii. ——.]—STUART *v.* MOTT (1885), 23 N. S. R. 524 ; *affd.* (1886), 14 S. C. R. 734.—**CAN.**

91 viii. ——.]—STEVENSON *v.* BOYD (1897), 5 B. C. R. 626.—**CAN.**

91 ix. ——.]—MARTIN *v.* MARTIN (1898), 1 N. B. Eq. Rep. 515.—**CAN.**

91 x. ——.]—BERG *v.* KERN (Man.) (1907), 6 W. L. R. 757.—**CAN.**

91 xi. ——.] — FISHER *v.* JUKES (Man.) (1908), 7 W. L. R. 731.—**CAN.**

91 xii. ——.]—SMITH *v.* CORBETT (1911), 16 W. L. R. 257.—**CAN.**

91 xiii. ——.]—MCLAWS *v.* SMITH (Man.) (1912), 21 W. L. R. 780 ; 5 D. L. R. 559.—**CAN.**

91 xiv. ——.] — HALLVORSON *v.* BOWES (Man.) (1912), 21 W. L. R. 593 ; 2 W. W. R. 586 ; 5 D. L. R. 693.—**CAN.**

91 xv. ——.]—*Re* DART, DRURY & MADDOCK (1915), 30 W. L. R. 809 ; 25 Man. L. R. 258 ; 8 W. W. R. 173.—**CAN.**

91 xvi. ——.]—A partnership is constituted whenever the parties have agreed to carry on business or to share the profits in some way in common.—

the others to bind them all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partners, & all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate amongst themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons dealing with the firm without notice have no concern. The public have a right to assume that every partner has authority from his co-partners to bind the whole firm in contracts made according to the ordinary usages of trade (LORD CRANWORTH).—COX *v.* HICKMAN (1860), 8 H. L. Cas. 268; 11 E. R. 431; *sub nom.* WHEATCROFT *v.* HICKMAN, 9 C. B. N. S. 47; *sub nom.* COX *v.* HICKMAN, WHEATCROFT *v.* HICKMAN, 30 L. J. C. P. 125; 3 L. T. 185: 7 Jur. N. S. 105; 8 W. R. 754, H. L.; *revsg.* S. C. *sub nom.* HICKMAN *v.* COX (1857), 3 C. B. N. S. 523, Ex. Ch.

Annotations:—*As to* (1) **Apld.** *Re* English & Irish Church & University Assce. Soc. (1863), 1 Hem. & M. 85; Kilshaw *v.* Jukes (1863), 3 B. & S. 847; Bullen *v.* Sharp (1865), L. R. 1 C. P. 86; Holme *v.* Hammond (1872), L. R. 7 Exch. 218; Mollwo, March *v.* Court of Wards (1872), L. R. 4 P. C. 419; Noakes *v.* Barlow (1872), 26 L. T. 136; Ross *v.* Parkyns (1875), L. R. 20 Eq. 331; Pooley *v.* Driver (1876), 5 Ch. D. 458; *Re* Howard, *Ex p.* Tennant (1877), 6 Ch. D. 303; *Re* Megevand, *Ex p.* Delhasse (1878), 7 Ch. D. 511. **Consd.** *Re* Albion Life Assce. Soc. (1880), 16 Ch. D. 83. **Apld.** White *v.* Churchyard (1887), 3 T. L. R. 428; Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238. **Consd.** Adam *v.* Newbigging (1888), 13 App. Cas. 308; Chitty *v.* Boorman (1890), 7 T. L. R. 43. **Apld.** *Re* Whiteley, *Ex p.* Smith (1892), 66 L. T. 291. **Consd.** Davis *v.* Davis, [1894] 1 Ch. 393. **Apld.** King *v.* Whichelow (1895), 64 L. J. Q. B. 801. **Consd.** *Re* Fort, *Ex p.* Schofield, [1897] 2 Q. B. 495; Gosling *v.* Gaskell, [1897] A. C. 575; Nicholls *v.* Knapman (1909), 101 L. T. 746. **Refd.** Easterbrook *v.* Barker (1870), L. R. 6 C. P. 1; Steel *v.* Lester & Lilee (1877), 47 L. J. Q. B. 43; Murray *v.* Scott, Agnew *v.* Murray, Brimelow *v.* Murray (1884), 9 App. Cas. 519; Frowde *v.* Williams (1886), 56 L. J. Q. B. 62; Davies *v.* André (1890), 24 Q. B. D. 598; *Re* Hildesheim, *Ex p.* Hildesheim (1893), 42 W. R. 138; Jamieson *v.* Clark (1908), 2 B. W. C. C. 228; Deyes *v.* Wood, [1911] 1 K. B. 806. *As to* (2) **Consd.** Sawyer *v.* Goodwin (1867), 36 L. J. Ch. 578. **Refd.** Wigfield *v.* Nicholson (1868), 9 B. & S. 261. *Generally*, **Refd.** Mooro *v.* Rawlins (1859), 6 C. B. N. S. 289; Edmondson *v.* Thompson (1861), 10 W. R. 300; Singleton *v.* Selwyn (1865), 13 L. T. 534; Greenberg *v.* Ward (1866), 12 Jur. N. S. 524. **Mentd.** Redpath *v.* Wigg (1866), L. R. 1 Exch. 335; Gill *v.* Manchester Ry. (1873), L. R. 8 Q. B. 186; *Re* Royal Victoria Theatre Syndicate (1874), 22 W. R. 256; Smith *v.* Anderson (1880), 15 Ch. D. 247; Robinson Printing Co. *v.* Chic, [1905] 2 Ch. 123.

92. ——.]—The law of partnership is a branch of the law of agency, & the test of partnership is not simply whether the alleged partner was to receive a share of profits, but whether he constituted his alleged co-partners his agents for carrying on business. The receipt of profits is only important as a consequence of such agency, & a ground for inferring it in certain cases.—*Re* ENGLISH & IRISH CHURCH & UNIVERSITY ASSURANCE SOCIETY (NO. 2) (1863), 1 Hem. & M. 85; 2 New Rep. 107; 8 L. T. 724; 11 W. R. 681; 71 E. R. 38.

Annotations:—**Apld.** Holme *v.* Hammond (1872), L. R. 7 Exch. 218. **Consd.** Pooley *v.* Driver (1876), 5 Ch. D. 458. **Mentd.** *Re* State Fire Insce. (1863), 2 New Rep. 230.

93. ——.]—The test whether a person who is not an ostensible partner in a trade, is nevertheless, in contemplation of law, a partner, is, not whether he is entitled to participate in the profits; although this affords cogent, often conclusive evidence of it, but whether the trade has been carried on by persons acting on his behalf.—KILSHAW *v.* JUKES (1863), 3 B. & S. 847; 2 New Rep. 161; 32 L J Q. B. 217; 8 L. T. 387; 9 Jur. N. S. 1231; 11 W. R. 690; 122 E. R. 317.

Annotations:—**Refd.** Bullon *v.* Sharp (1865), L. R. 1 C. P. 86; Pooley *v.* Driver (1876), 5 Ch. D. 458.

94. ——.]—(1) S., being about to commence business as an underwriter at Lloyd's, through the agency of one F., in consideration of deft., the father of S., engaging with F. to hold a sum of £5,000 available for his son for the purpose of carrying out the arrangement, gave deft. the following memorandum: "In consideration of your guaranteeing me to the extent of £5,000 in my business of underwriter, until by such business I shall make or acquire from the profits thereof £5,000 after providing for all known losses, I hereby promise & agree to pay to you during your life, in case I shall so long live, an annuity of £500, being equal to 10 per cent. *per annum* on £5,000; &, further, that if at the end of three years from the date hereof, it shall appear that one-fourth of the net average annual profits during that period made by me in the said business shall amount to more than £500 the said annuity shall thenceforth be increased to a yearly sum equal to one-fourth of such net average annual profits made by me in the said business during the said three years"; & the memorandum concluded with these words: "Moreover, in no case are you to be considered as a partner with me in the said business of an underwriter":—*Held:* the above memorandum did not constitute deft. a partner with his son.

(2) By a settlement afterwards made on his marriage, S. assigned to deft. & D., as trustees, "all & singular the sums of money, earnings, profits, & emoluments which are now in the hands of F., & all such as shall hereafter come into the hands of F., on account or in respect of the said underwriting business." The deed also contained a power of attorney authorising deft. & his co-trustee to receive the whole proceeds of the business; & the first trust was, to pay deft. £500 a year, with an additional sum when the profits of the business should have realised a given sum, & a covenant that, when the accumulated profits should have reached £8,500, & continued at that amount without reduction for two years, the trustee should re-assign to S. "the said moneys & profits arising from the aforesaid underwriting business." In an action upon a policy signed by Fenn in the name of S., a special case was stated in which were set out the above-mentioned memorandum & marriage-settlement, & by which it was agreed that the ct. should draw any reasonable inferences of fact:—*Held:* the marriage-settlement did not, either alone or in conjunction with the memorandum, render deft. liable as a partner with S. in his underwriting business.

The test . . . is whether it is such a participation of profits as to constitute the relation of principal & agent between the person taking the profits & those actually carrying on the business (BLACKBURN, J.).—BULLEN *v.* SHARP (1865), L. R.

RAMNATTI GAGOI *v.* PITAMBAR DEB GOSWAMI (1916), I. L. R. 43 Calc. 733.—**IND.**

91 xvii. ——.]—BROPHY *v.* HOLMES (1828), 2 Mol. 1.—**IR.**

91 xviii. ——.]—SHAW *v.* GALT (1864), 16 I. C. L. R. 357.—**IR.**

91 xix. ——.]—U. & M., with a view to contracting jointly to build a house for a third person, agreed that U. should superintend the operations & should work himself at a fixed remuneration, that M. should supply the bricks at a fixed price, & that the profits should be divided equally:—*Held:* this agreement constituted a partnership between the parties.—UYE *v.* LE ROUX, [1906] T. S. 429.—**S. AF.**

91 xx. ——.]—LE VOY *v.* BIRCH'S EXECUTORS, [1913] App. D. 102.—**S. AF.**

Sect. 5.—*Sharing profits and losses: Sub-sects.* 2 3.]

1 C. P. 86; Har. & Ruth. 117; 35 L. J. C. P. 105; 14 L. T. 72; 12 Jur. N. S. 247; 14 W. R. 338, Ex. Ch.

Annotations:—*As to* (1) **Refd.** Easterbrook *v.* Barker (1870), L. R. 6 C. P. 1; Mollwo, March *v.* Court of Wards (1872), 9 Moo. P. C. C. N. S. 214; Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238. *As to* (2) **Apld.** Holme *v.* Hammond (1872), L. R. 7 Exch. 218; Noakes *v.* Barlow (1872), 26 L. T. 136; Ross *v.* Parkyns (1875), L. R. 20 Eq. 331. **Consd.** *Re* Howard, *Ex p.* Tennant (1877), 6 Ch. D. 308. **Refd.** Redpath *v.* Wigg (1866), L. R. 1 Exch. 335; Steel *v.* Lester & Lilee (1877), 47 L. J. Q. B. 43; *Re* Young, *Ex p.* Jones (1896), 65 L. J. Q. B. 681.

95. ——.]—In 1872 A. entered into a written agreement to lend B. £2,000 as capital to enable him to develop certain coal & iron mines, the lease of the mines to be deposited with A. as security for the moneys advanced. The agreement also provided that A. was to be paid 3*d.* per ton on all coal & iron-stone by way of commission; that B. was to receive a salary, which was not to commence until all the moneys advanced by A. had been repaid; that "after payment of the above, & the royalties, & rents, & costs of raising & preparing, & delivering to market the produce of the mines." A. was to be entitled to three-fourths, & B. to one-fourth, of the net profits; & A. was "to be free from all liability except in respect of the money advanced by him." B. worked the mines under the name of the L. co. In 1874 A. died, & there was then due to him, £11,000, in respect of advances made by him to B. under the said agreement. The mines proved a failure, & the creditors of the co., B. being insolvent, sent in their claims to the exors. of A., alleging that A. was a partner in the co. by virtue of the agreement, & by reason of his interference in the management & working of the co.:—*Held:* upon the agreement, no partnership existed between A. & B., &, upon the evidence, there was no ground for inferring that A. had held himself out in any way to any person as a partner in the co.—DEAN *v.* HARRIS, HARRIS *v.* BUTTERFIELD (1875), 33 L. T. 639.

96. ——.]—*Re* HOWARD, *Ex p.* TENNANT, No. 134, *post.*

97. ——.]—The objects of a co. were stated by the memorandum of assocn. to be "the carrying on for profit or gain the trades or businesses of discounters, lenders of, & dealers in money" . . . "the advancing & lending of money on real, personal, or mixed securities . . . on stocks & shares of railway, canal, dock, & other joint stock cos., corpns., assocns., & other undertakings of whatever nature or description . . . on ships, goods, merchandise, materials, produce, works, plant, chattels, debts, choses in action, articles & effects, or on any other property of whatever kind & description . . . in the making of purchases, investments, sales, or any other dealings of or in any of the above-named articles or securities . . . & the entering into & carrying on of any monetary & financial arrangements or operations, & the doing of all matters & things which may appear to the co. to be incident or conducive to the objects aforesaid, or any of them":—*Held:* such an agreement did not constitute a partnership between the three parties to it.—LONDON FINANCIAL ASSOCN. *v.* KELK (1884), 26 Ch. D. 107; 53 L. J. Ch. 1025; 50 L. T. 492.

Annotations:—**Consd.** Oppenheimer *v.* Frazer & Wyatt, [1907] 2 K. B. 50. **Mentd.** *Re* Harrison (1886), 55 L. J. Ch. 768; *Re* Oxford Bldg. Soc., *Ex p.* Smith (1886), 56 L. J. Ch. 98; *Re* Liverpool Household Stores Assocn. (1890), 59 L. J. Ch. 616.

98. ——.]—Participation in profits, although strong evidence, is not conclusive evidence of a partnership. The question of partnership must be decided by the intention of the parties, to be ascertained from the contents of the written instruments, if any, & the conduct of the parties. Pltf. advanced money to a contractor to enable him to carry out a contract with a railway co. for the construction of a railway, & the parties executed a deed by which the contractor assigned to pltf. all his machinery, plant, etc., & all shares & debentures he might receive from the co. to secure the repayment of the loan. The deed contained the following provisions: (1) that pltf. should receive 10 per cent. interest on the money advanced & 10 per cent. of the net profits of the contract; (2) that the contractor should apply all the moneys advanced in carrying on the works; (3) that if the contractor should become bkpt., pltf. might enter & complete the works; (4) that pltf. might sell the property in case of default, but that he should not sell the shares or debentures within twelve months after the completion of the contract; (5) that in calculating the net profits the contractor should be allowed to draw out £1,000 a year for his services. Letters passed between pltf. & the contractor in which the money advanced was spoken of as "capital" & "working capital," & expressions were used showing that both parties had a common interest in the works:—*Held:* the stipulations in the deed & the expressions in the correspondence were all consistent with the object of securing repayment of the money advanced, & were not sufficient evidence of a partnership between the parties.—BADELEY *v.* CONSOLIDATED BANK (1888), 38 Ch. D. 238; 57 L. J. Ch. 468; 59 L. T. 419; 36 W. R. 745, C. A.

Annotations:—**Consd.** *Re* Whiteley, *Ex p.* Smith (1892), 66 L. T. 291; Davis *v.* Davis, [1894] 1 Ch. 393. **Apld.** King *v.* Whichelow (1895), 64 L. J. Q. B. 801. **Consd.** *Re* Beard, *Ex p.* Trustee, [1915] H. B. R. 191. **Mentd.** Davis *v.* Freethy (1890), 24 Q. B. D. 519; Gray *v.* Stone & Funnell (1893), 69 L. T. 282; Cole *v.* Eley, [1894] 2 Q. B. 180; *Re* Anglesey, De Galve *v.* Gardner, [1903] 2 Ch. 727 Norton *v.* Yates, [1906] 1 K. B. 112; Vacuum Oil Co. *v.* Ellis, [1914] 1 K. B. 693.

99. ——.]—DAVIS *v.* DAVIS, No. 50, *ante.*

100. —— **Intention of parties.**]—MOLLWO, MARCH & CO. *v.* COURT OF WARDS, No. 25, *ante.*

101. —— ——.]—POOLEY *v.* DRIVER, No. 5, *ante.*

102. —— ——.]—Where money is advanced under a deed to a person engaged, or about to be engaged, in business, the question whether a partnership between the lender & trader has been created, in a case where the only evidence of a partnership is the deed itself, must be determined by ascertaining what, upon the construction of that deed, was the real intention of the parties; & the mere fact that it has been agreed that the lender shall participate in the profits & losses is not of itself conclusive evidence of partnership if it appears from the deed as a whole that it was not the intention of the parties to create a partnership between them.—KING & CO. *v.* WHICHELOW (1895), 64 L. J. Q. B. 801, C. A.

Annotation:—**Expld.** *Re* Beard, *Ex p.* Trustee, [1915] H. B. R. 191.

103. —— **Receipt of profits by executor of deceased partner.**]—By articles of partnership T., W., & S. agreed to carry on the business of auctioneers in partnership for seven years; they were to contribute capital & to share profit & loss equally; & if either died during the partnership term, the surviving members of the firm were to continue the business, & were to pay to the personal representatives of deceased partner the share of the profits to which he would have been entitled if living. T. died during the partnership term. At the time of his death the firm had no capital, except office furniture & fittings worth about £100. They

had in their hands a sum of between £400 & £500 which was the proceeds of debts due to a former firm in which T. was a member, & left in the hands of the new firm for collection; & this sum belonged beneficially to T.; T. was also entitled in respect of his share of profits, beyond the amounts which he had drawn, to a sum of about £200. After the death of T., the surviving members of the firm continued to carry on the business, to collect the debts due to the old firm, & to earn profits. The exors. of T. never interfered in the business, but they claimed, under the articles of partnership, the share of profits to which T. would have been entitled if living. No settlement of accounts in respect of T.'s interest in the partnership business was made between his exors. & the surviving partners. Sums of money amounting in the whole to about £625 were from time to time paid by the firm to the exors.; these payments were made generally, & not on any particular account. After the death of T., the firm were employed by pltf. to sell property; they sold the property & received the proceeds, but did not pay over the same to pltf. In an action brought, after the death of S., against the exors. of T. & W.:—*Held:* the exors. of T. were not liable as partners.—HOLME *v.* HAMMOND (1872), L. R. 7 Exch. 218; 41 L. J. Ex. 157; 20 W. R. 747.

104. —— Receipt of fixed sum out of profits.]—A contract that a person shall receive a fixed sum "out of the profits" of a business is equivalent to a contract that he shall receive "a share of the profits" within Partnership Act, 1890 (c. 39), s. 2 (3) (*d*).

Under a written contract A. lent B. £500 for his business. A. was to have the sole control & management of the business, & an option was given him, which was not exercised, of becoming a partner with B. in the business within a certain time. For the use of his money A. was to be paid the weekly sum of £3, afterwards reduced to £2, "out of the profits" of the business. B. was to draw like weekly sums. B. having become bkpt., A. claimed to prove for the money he had advanced:—*Held:* under the circumstances, A. was not a partner; but he was in the position of a person who was receiving a "share of the profits" of the business within the meaning of the Partnership Act, 1890 (c. 39), s. 2 (3) (*d*), & therefore could not prove until all the other creditors had been satisfied.—*Re* YOUNG, *Ex p.* JONES, [1896] 2 Q. B. 484; 65 L. J. Q. B. 681; 45 W. R. 96; 12 T. L. R. 633; 3 Mans. 213; *sub nom. Re* YOUNG, *Ex p.* JONES *v.* BERRY, 75 L. T. 278.

Annotation:—**Refd.** *Re* Abenheim, *Ex p.* Abenheim (1913), 109 L. T. 219.

105. —— Commission on sale of book.]—L. agreed with G. to print & publish in their own name a diary for merchant shippers in consideration of certain payments & commission on profits. G. obtained certain lists of merchant shippers which were an infringement of the pltfs.' copyright. By agreement with L., & to save time in publication, G. employed another printer who was paid by him to print the pirated portion, & L., without any knowledge of the piracy, included the infringing portion in the diary, which bore on the title-page the words "Printed at L.'s, Royal Exchange, London":—*Held:* there was no partnership between L. & G.—KELLY'S DIRECTORIES, LTD. *v.* GAVIN & LLOYDS, [1901] 1 Ch. 374; 70 L. J. Ch. 237; 84 L. T. 581; 49 W. R. 313; 45 Sol. Jo. 258; *affd.*, [1902] 1 Ch. 631, C. A.

106. Former rule.]—BLOXHAM *v.* PELL (1775), cited in 2 Wm. Bl. 998; GRACE *v.* SMITH (1775), 2 Wm. Bl. 997; WAUGH *v.* CARVER (1793), 2 Hy. Bl. 235; *Ex p.* LANGDALE (1811), 18 Ves. 300; *Ex p.* HODGKINSON (1815), 19 Ves. 291; CHEAP *v.* CRAMOND (1821), 4 B. & Ald. 663; *Re* GILPIN, *Ex p.* ENDERBY (1824), 2 B. & C. 389; RUPPELL *v.* ROBERTS & DEMPSEY (1834), 4 Nev. & M. K. B. 31; BARRY *v.* NESHAM (1846), 3 C. B. 641; HEYHOE *v.* BURGE (1850), 9 C. B. 431.

SUB-SECT. 3.—SHARING PROFITS BY WAY OF ANNUITY.

See Partnership Act, 1890 (c. 39), s. 2 (3).

107. After death of partner—Share of profits payable to assigns of deceased partner.]—A deed of partnership for life between two solrs. contained a covenant that on the death of either the survivor should, during the joint lives of himself & the widow of deceased partner, pay to such person or persons as deceased partner should appoint, an annuity of £200 *per annum*, or one-fourth of the annual profits of the survivor, as the survivor should elect, & also provided for the admission on certain conditions of a son of deceased partner into the "said" partnership business. One of the partners, by an ante-nuptial settlement made shortly after the execution of the partnership deed, exercised the power of appointment in favour of his wife, & several years afterwards died greatly indebted to the firm. The survivor continued to practise as a solr. for some years, & realised profits by his business, if estimated without regard to the former business, but they were insufficient to make good the outstanding liabilities of the late partnership, & he became bkpt. without having made any payment to the widow of deceased partner or electing between the two modes of payment mentioned in the articles:—*Held:* (1) the assignees were entitled to make the election; (2) on their electing not to pay the annuity of £200, the widow had no provable demand, the business carried on by the survivor being, according to the true construction of the deed, a continuation of the partnership business, & the payments made on account of the partnership being properly set off against the profits of the sole business.—*Re* JONES, *Ex p.* HARPER (1857), 1 De G. & J. 180; 26 L. J. Bcy. 74; 29 L. T. O. S. 168; 3 Jur. N. S. 724; 5 W. R. 537; 44 E. R. 692, C. A.

108. After sale of business—Purchase price in part undetermined—Unpaid portion to carry share of profits.]—By a power of attorney, B., who was one of the four partners in a firm of dyers carrying on business at D. under the style of B. & co., appointed his brother E. his attorney to sell or concur in selling any of his real, leasehold or personal property to any person or persons, "upon such terms, subject to such special or other conditions, & in such manner" as the attorney should approve, & also to sign any deeds that ought to be executed" & generally to do, negotiate, transact, & perfect all & any other act, deed, matter, or thing whatsoever . . . for the transacting, settling, & adjusting all other my estate, affairs, tradings, & concerns whatsoever"; & with full power & authority to act as fully & effectually as if he were personally present & did the same himself. E., acting for himself as a partner, & also under his power of attorney on behalf of B., joined with the other partners of the firm in executing a contract for the sale of the business to H. Amongst other things, it was agreed that H. should pay the debts of the business, which were estimated at £15,000; if they did not exceed that amount the vendors were to be entitled to a share of profits calculated on £5,000 "deferred capital"; if

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the debts exceeded £15,000, £5 for every £2 of the excess was to be deducted from the £5,000 deferred capital; the vendors might require H. to take over their deferred capital, paying in cash two-fifths of its nominal amount; if the concern was converted into a limited co., the vendors were to receive shares for their deferred capital; & if the debts were less than £15,000, H. was to pay the difference in cash at the end of two years. It was agreed that H. might carry on the business under the style of B. & co., & that the vendors should not carry on any like business within fifty miles of D. H. brought an action for specific performance:—*Held:* the provisions as to deferred capital were only a way of ascertaining the purchase-money, & did not constitute a partnership; & therefore the agreement was not void against B., on the ground that the power of attorney did not authorise an agreement for a partnership.—HAWKSLEY *v.* OUTRAM, [1892] 3 Ch. 359; 62 L. J. Ch. 215; 67 L. T. 804; 2 R. 60, C. A.

Annotations:—**Mentd.** Lloyd *v.* Nowell, [1895] 2 Ch. 744; *Re* Johnston Foreign Patents Co., *Re* Johnston Die Press Co., *Re* Johnstonia Engraving Co., J. P. Trust *v.* Above Cos., [1904] 2 Ch. 234; Morrell *v.* Studd & Millington, [1913] 2 Ch. 648; North *v.* Loomes, [1919] 1 Ch. 378.

109. —— Payment of annuity as part of purchase price—Payment not stated to be out of profits.]—S. sold to G. the trade name & goodwill of the business carried on by her late husband. Part of the consideration for the sale was the payment to her of an annuity of £2,650 which was not expressed to be payable out of the profits of the business. In G.'s bkpcy. S. put in a proof for the capitalised value of the annuity:—*Held:* the annuity was not a share of the profits of the business within Partnership Act, 1890 (c. 39), s. 3, & therefore the claim of S. was not postponed until the claims of the other creditors had been paid in full.—*Re* GIEVE, *Ex p.* SHAW (1899), 80 L. T. 737; 15 T. L. R. 363; 43 Sol. Jo. 511; 6 Mans. 249, C. A.; *sub nom. Re* GIEVE (TRADING AS SHAW), *Ex p.* SHAW *v.* MASON, 47 W. R. 616.

SUB-SECT. 4.—SHARING PROFITS AS REMUNERATION.

See Partnership Act, 1890 (c. 39), s. 2 (3) (*b*).

110. Whether partnership thereby constituted—Servant.]—R. *v.* HOLME (1811), 2 Lew. C. C. 256.

111. —— ——.]—Distinction as to partners; with reference to third persons, & as between the partners themselves. Partners as to third persons by a specific interest in the profits, as such: not by receiving a sum of money, even in proportion to a given share of the profits.—*Ex p.* HAMPER (1811), 17 Ves. 403; 34 E. R. 156; *sub nom. Re* THOMAS, *Ex p.* ROWLANDSON, 1 Rose, 89.

Annotations:—**Expld.** *Ex p.* Matthews (1814), 3 Ves. & B. 125. **Apld.** Mollwo, March *v.* Court of Wards (1872), 9 Moo. P. C. C. N. S. 214. **Refd.** *Re* Starkey, *Ex p.* Chuck (1832), 8 Bing. 469; *Re* Blenkin, *Ex p.* Digby, *Re* Blenkin, *Ex p.* Buckton (1835), 1 Deac. 341; Pott *v.* Eyton (1846), 3 C. B. 32; Stocker *v.* Brockelbank (1851), 3 Mac. & G. 250; *Re* English & Irish Church & University Assco. Soc. (1863), 1 Hem. & M. 85; Lyon *v.* Knowles (1863), 3 B. & S. 556; Bullen *v.* Sharp (1865), L. R. 1 C. P. 86; Pooley *v.* Driver (1876), 5 Ch. D. 458. **Mentd.** *Ex p.* Tobin (1813), 1 Ves. & B. 308.

112. —— ——.]—GEDDES *v.* WALLACE, No. 248, *post.*

.]—Oyster dredgers agreeing to receive from the owners of the boats, who were their employers, a stipulated share of the profits arising from the sale of the oysters, held not to be co-adventurers with the owners.—PERROTT *v.* BRYANT (1836), 2 Y. & C. Ex. 61; 6 L. J. Ex. Eq. 26.

114. —— ——.]—In pursuance of an agreement between A. & B., A. took premises in his own name, & purchased silk & materials on his own account, to carry on the business of a silk lace maker, & provided all the machinery & implements of trade; & B. was employed to superintend the manufacture of goods. The agreement also stipulated, that all the silk & materials, & all the manufactured goods & all the machinery & implements, should be the sole property of A., & that B. should receive for his remuneration half the profits, as soon as any accrued, & until such time should receive £2 per week from A.:—*Held:* this agreement, when carried into effect, did not constitute a partnership between A. & B. as to the separate creditors of B.; &, therefore, where a sheriff seized goods, manufactured under such agreement, in execution of a writ sued out by a separate creditor of B., & sold the same, the gross receipts of the sale might be recovered by A. in an action on the case for selling the goods against the sheriff.—BURNELL *v.* HUNT (1841), 5 Jur. 650.

115. —— ——.]—KATSCH *v.* SCHENCK, No. 1462.

In June, 1844, A. entered the service of B. as bookkeeper & cashier, & continued as such until Dec. 1848, without coming to any agreement as to the amount of his salary. It was stated by A. that in Dec. 1848, it was agreed between him & B. that the salary should be at the rate of £250 a year, from June, 1844, & that the reason that such arrangement was not made before was that B. was engaged in making experiments in a certain manufacture, from which he hoped to derive a considerable fortune, out of which A. expected to be paid. B. became bkpt. in Feb. 1849:—*Held:* A. was a clerk & not a partner & was entitled to prove for his salary.—*Re* ELLINS, *Ex p.* HICKIN (1850), 3 De G. & Sm. 662; 19 L. J. Bcy. 8; 14 L. T. O. S. 469; 14 Jur. 405; 64 E. R. 651.

117. —— ——.]—By indenture between pltf. of the one part, & defts. who were partners in a certain manufacture, of which pltf. had been the patentee, of the other part, it was stipulated that pltf. should have the conduct & management of the business, & that the remuneration which he should receive in respect of his services should be such a sum of money as would be equal to £40 per cent. upon the net profits, that a reduced amount should be paid to his exors. in the event of his death, until the expiration of the licence, that pltf. might purchase the business on certain terms, that defts. might determine pltf.'s engagement as manager, if he should not in every respect perform the covenants contained in the indenture, but that so long as he continued to observe them his appointment as manager should be irrevocable during the continuance of the licence, & that nothing therein contained should extend to constitute a partnership:—*Held:* there being an absence of every incident of partnership except that of sharing in the profits, that circumstance alone did not constitute the indenture a contract of partnership, but that it amounted only to a

110 i. *Whether partnership thereby constituted—Servant.*]—NORTHERN RY. Co. *v.* PATTON (1865), 15 C. P. 332.—**CAN.**

110 ii. —— ——.]—ORCHARD *v.* DYKEMAN (1915), 43 N. B. R. 181.—**CAN.**

110 iii. —— ——.]—GREENHAM *v.* GRAY (1855), 4 I. C. L. R. 501.—**IR.**

contract of hiring & service.—STOCKER *v.* BROCKELBANK (1851), 3 Mac. & G. 250; 20 L. J. Ch. 401; 18 L. T. O. S. 177; 15 Jur. 591; 42 E. R. 257, L. C.

Annotations:—**Distd.** Moore *v.* Davis (1879), 11 Ch. D. 261. **Reld.** Harrington *v.* Churchward (1860), 29 L. J. Ch. 521; Pooley *v.* Driver (1876), 5 Ch. D. 458. **Mentd.** Lumley *v.* Wagner (1852), 1 De G. M. & G. 604; Brett *v.* East India & London Shipping Co. (1864), 10 L. T. 187; Frith *v.* Frith, [1906] A. C. 254.

118. —— ——.]—Prisoner entered into the following agreement with prosecutor: "S. W. engages to take charge of the glebe-land of the Rev. J. B. B. C., his wife undertaking the dairy & poultry, etc., at fifteen shillings a week, till Michaelmas, 1850, & afterwards at a salary of £25 a year, & a third of the clear annual profit after all expenses of rent, rate, labour, & interest on capital, etc., are paid, on a fair valuation, made from Michaelmas to Michaelmas. Three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by S. W., who occupies it as bailiff, in addition to his salary. March 12, 1850. (Signed) "J. B. B. C." "S. A. W.":—*Held:* his was not a contract of partnership, but an agreement for the hire of a labourer.—R. *v.* WORTLEY (1851), 2 Den. 333; T. & M. 636; 21 L. J. M. C. 44; 18 L. T. O. S 174; 15 J. P. 785; 15 Jur. 1137; 5 Cox, C. C. 382; 169 E. R. 527.

119. —— ——.]—Prisoner was a cashier & collector to commission agents. He was paid partly by salary & partly by a percentage on the profits, but was not to contribute to the losses, & had no control over the management of the business:—*Held:* he was a servant within 7 & 8 Geo. 4, c. 29, s. 47, & not a partner.

Two men may be partners with respect to third persons, & yet not partners *inter se*. Although there might be a partnership *quoad* third persons, there was none *inter se*, so as to entitle prisoner to help himself to his master's property (POLLOCK, C.B.).—R. *v.* M'DONALD (1861), Le. & Ca. 85; 31 L. J. M. C. 67; 5 L. T. 330; 25 J. P. 741; 7 Jur. N. S. 1127; 10 W. R. 21; 9 Cox, C. C. 10, C. C. R.

120. —— ——.]—Statements by one of two persons that another is his partner, he not being so in fact, will not be evidence to render the other liable as an ostensible partner, the statements not having been made to the person who seeks to render the other liable, & not having come to his knowledge as a matter of notoriety, & it not being shown that he has acted on the faith of such statements.

A., after an oral agreement to become the partner of B., having entered into a written agreement, not amounting to a partnership, & having for some time, during which goods were ordered in the way of the business, appeared on the premises, doing acts which might be done either by a partner or a manager, & not having allowed himself to be held out as partner:—*Held:* not liable, either as actual or ostensible partner.—EDMUNDSON *v.* THOMPSON & BLAKEY (1861), 2 F. & F. 564; 31 L. J. Ex. 207; *sub nom.* EDMANSON *v.* THOMPSON & BLAKEY, 5 L. T. 428; 8 Jur. N. S. 235; *sub nom.* EDMONDSON *v.* THOMPSON, 10 W. R. 300.

121. —— ——.]—An agreement dated in Aug. 1864, previously to the passing of 28 & 29 Vict. c. 86, provided that on underwriting account at Lloyd's should be carried on in the name of deft., & the subscription paid in his name; that all policies losses, & averages should be signed & settled by deft., or by pltf. as his agent; that pltf. should apply the whole or such part of his time & attention to the said business as might be required for conducting the same; that proper books of accounts should be kept by pltf., he obtaining such assistance from time to time as he might find necessary, subject to the approval of deft.; that pltf. should be paid or allowed a salary of £150 by deft.; that the profits should be divided between pltf. & deft. in the following proportions, viz., that deft. should be entitled to four fifths & pltf. to one fifth; that if in any one year the business should not yield any profit, but a loss should accrue to deft., then he alone should bear & pay the said loss, & pltf. should be entirely exempt from bearing or paying any part or proportion thereof, & any profit arising from the business of any one year should not be set off against or reduced by the loss in any other year; & that if after the division of profits in any one year any unexpected claim or demand should be made upon the parties, they should advance & pay their respective proportions thereof, nevertheless so that pltf. be not called upon to pay any greater sum of money in respect of the business of any one year than the amount of the sum he should then have received as & for his share of the profits in respect of the business for that same year:—*Held:* the contract was one of hiring & service & not of partnership.

It is clear to my mind, looking at the whole of the agreement from beginning to end, that Parkyns is the owner of the business, & that Ross is his servant. It is not a partnership contract at all, but a contract for hiring & service (JESSEL, M.R.).—ROSS *v.* PARKYNS (1875), L. R. 20 Eq. 331; 44 L. J. Ch. 610; 24 W. R. 5.

Annotation:—**Mentd.** Steel *v.* Lester & Lillee (1877), 47 L. J. Q. B. 43.

122. —— **Agent.**]—An agent who is paid by a proportion of the profits of the adventure is not therefore a partner in the goods.—MEYER *v.* SHARPE (1813), 5 Taunt. 74; 128 E. R. 614.

123. —— **Payment in proportion to profits.**]—*Ex p.* HAMPER, No. 111, *ante*.

124. —— ——.]—C., having contracted with the Govt. for the conveyance of mails by sea, agreed with H. to employ him during the existence of the contract at a fixed yearly salary, payable quarterly, &, in addition thereto, a sum equivalent to 10 per cent. on the profits:—*Held:* this was a contract of hiring & service, & not a partnership.—HARRINGTON *v.* CHURCHWARD (1860), 29 L. J. Ch. 521; 2 L. T. 114; 24 J. P. 484; 6 Jur. N. S. 576; 8 W. R. 302.

125. —— ——.]—BULLEN *v.* SHARP, No. 94, *ante*.

126. —— **Share of losses as well as profits.**]—An agreement between A., a merchant, & B., a broker, that the latter should purchase goods for the former, & in lieu of brokerage, should receive for his trouble a certain proportion of the profits arising from the sale, & should bear a proportion of the losses, does not vest in B. any share in the property so purchased, or in the proceeds of it, although it may render him liable as a partner to third persons.—SMITH *v.* WATSON (1824), 2 B. & C. 401; 3 Dow. & Ry. K. B. 751; 2 L. J. O. S. K. B. 63; 107 E. R. 434.

Annotations:—**Distd.** Reid *v.* Hollinshead (1825), 4 B. & C. 867. **Apld.** Alfaro *v.* De la Torre (1876), 34 L. T. 122. **Reld.** Potts *v.* Eyton & Jones (1846), 7 L. T. O. S. 281; Stocker *v.* Brockelbank (1851), 3 Mac. & G. 250. **Mentd.** *Re* Starkey, *Ex p.* Jennings (1830), Mont. 45; Carpenter *v.* Churchill (1854), 2 W. R. 364; Reynolds *v.* Bowley (1867), 8 B. & S. 406.

127. —— **Commission on sales.**]—One who takes a share of the profits, as such, of a trading concern, thereby becomes a partner as to third persons, on the ground of those profits forming a portion of the fund upon which creditors have

Sect. 5.—*Sharing profits and losses: Sub-sects.* 4

a right to rely for payment. Yet the receipt of a percentage upon the gross amount of sales made to certain customers, by the person who recommended such customers, does not constitute him a partner as against third persons. A., who was concerned in a colliery, in the year 1830, built & stocked a general shop in its neighbourhood, for the purpose of supplying goods to the work-people, placing B. there to conduct the business; A. receiving for his own use 7 per cent. upon the amount of the gross sales made to the miners; & B. taking all the rest of the profits of the concern, from whatever source derived. A.'s name appeared over the shop door, & in the excise licences; &, down to the year 1834, all the goods supplied to the shop were purchased & paid for by or in the name of A. In that year it was agreed between A. & B., that the latter should thenceforward buy all goods that were required for the shop, & that the former should receive only 5 per cent. upon the amount of sales to the miners. After this new arrangement had been come to, B., who had several other shops, opened an account with a bank at Holywell, &, on the failure of the bank in 1839, there was a balance due to the bankers on that account exceeding £2,000. There was no evidence to show that credit was in fact given to A. by the bank, or that they were aware that his name had been placed over the shop door, or that they supposed him to be a partner at the time the debt was contracted. In an action by the assignees of the bankers against A. & B., to recover the balance, the jury having negatived the existence of an actual partnership between A. & B., or that A. had, with his own permission, been held out as a partner, the ct. refused to disturb the verdict.—POTT (OR POTTS) *v.* EYTON & JONES (1846), 3 C. B. 32; 15 L. J. C. P. 257; 7 L. T. O. S. 281; 136 E. R. 13.

Annotations:—**Refd.** Hickman *v.* Cox (1857), 3 C. B. N. S. 523; Mollwo, March *v.* Court of Wards (1872), L. R. 4 P. C. 419.

128. —— ——.]—Pltf. & deft. were tailors; pltf. employed deft. to obtain orders for him, & agreed to allow him a certain share of the profits by way of commission upon such orders. Deft. carried on the business with pltf., but his name was not joined with that of pltf. All goods were ordered & paid for by pltf., & all debts were paid to him alone; deft. set up a partnership; but it was held, that a right to a share of the profits did not necessarily create a partnership; & there was no evidence to prove a partnership on the part of deft.—ANDREWS *v.* PUGH (1854), 24 L. J. Ch. 58; 24 L. T. O. S. 296; 3 W. R. 50.

129. —— **Share of profits after sale of practice—Seller undertaking to introduce patients.**]—A. sold to B., by deed, his interest in the profession & practice of a surgeon & apothecary, carried on by him in Park-street, Camden Town, for £900, £500 to be paid on the execution of the deed, & £400 at the expiration of a year. A. covenanted not to exercise the profession within three miles of his then place of business; & also, that, during the space of one year from the date of the deed, he should continue to reside in Park-street aforesaid, & to carry on & attend to the said profession & practice as he had hitherto done; & that he would, to the utmost of his power, introduce B. to his patients, & do every reasonable act for promoting the interest of the concern, & B. covenanted, in consideration thereof, to allow A., during the year, a moiety of the clear profits of the concern, to be paid at the expiration thereof:—*Held:* the parties were not hereby constituted partners in the trade during the first year, &, therefore, that B. might sue A. for moneys received by him from their patients during that year.—RAWLINSON *v.* CLARKE (1846), 15 M. & W. 292; 15 L. J. Ex. 171; 6 L. T. O. S. 396, Ex. Ch.

Annotations:—**Refd.** *Re* Hall (1864), 11 L. T. 579. **Mentd.** Green *v.* Price (1845), 14 L. J. Ex. 225; Galsworthy *v.* Strutt (1848), 1 Exch. 659.

130. —— **No partnership intended as between parties—Holding out as partners.**]—A partnership between father & son, though admitted to exist as regards the world, held, under the circumstances, not to exist as between themselves.

From 1849 J. resided with his father & assisted him in his business. The signboard, the invoices & the banking account were in the name of "R. & Son." They drew & accepted bills under the same title, & executed a deed which described them as co-partners:—*Held:* nevertheless, after the death of the son, in 1862, upon the evidence, that they were not partners *inter se.* The circumstances relied on were: the absence of any division of profits in the books, which were kept by the son, the absence of proof of the son's having any capital or being entitled to receive any share of the profits, the fact of his having, when he ceased to reside with his father, made no request for an account of the profits, but accepted £1 a week as a remuneration until his death, six months afterwards & the testimony of the members of the family.—RADCLIFFE *v.* RUSHWORTH (1864), 33 Reav. 484; 55 E. R. 456.

131. —— —— **Agreement giving usual partnership rights & liabilities.**]—MOORE *v.* DAVIS, No. 47, *ante.*

SUB-SECT. 5.—SHARE OF PROFIT AS INTEREST ON LOAN.

See Partnership Act, 1890 (c. 39), s. 2 (3) (*d*).

132. Whether lender thereby constituted partner—Payment of fixed weekly sum.]—W., being in difficulties, mortgaged to M. certain patents, to secure advances previously made for the purpose of developing the patents, & paid him, out of the proceeds of the patents, £6 a week:—*Held:* this payment did not constitute a partnership between W. & M.—*Re* WHITTAKER, *Ex p.* MACMILLAN (1871), 24 L. T. 143.

133. —— **Payment of proportion of profits.**]—Arts. of partnership provided that each partner, with the exception of one of them, should devote his whole time & attention to the business, & not directly or indirectly engage in any other business; should be just & faithful in all transactions, & give full information respecting his transactions on account of the firm; & that if any partner should fail to observe or perform any of the arts. or stipulations therein contained, it should be lawful for the other partners to expel such partner. Pltf., one of the partners, entered into an arrangement with Z., a musical instrument maker, whereby he agreed to advance moneys, the interest on which was to consist of half the profits of the business, or at least to amount to 10 per cent. In consequence of this defts. gave notice to pltf. that he had ceased to be a partner, & circulated a letter

PART II. SECT. 5, SUB-SECT. 5.

133 1. ***Whether lender thereby constituted partner—Payment of proportion of profits.***]—Lending money to a firm on condition that the lender shall receive a share in the profits, & a certain control over the business does not necessarily make such person a partner in the firm.—ANDERSON *v.* ROYCE (1895), 2 O. R. 266.—**S. AF.**

among their customers to the same effect. By the arts., in case of such expulsion the expelled partner lost his share in the goodwill. The bill prayed that the notice of expulsion was invalid on the ground of *mala fides*, & because pltf. had no opportunity of being heard in his defence, & that his arrangement with Z. was not a breach of the arts. :—*Held :* (1) pltf.'s transactions with Z. although not amounting to a partnership, were a breach of arts. ; (2) no notice of intention to expel or opportunity of defence was necessary, & the expulsion was valid. This was a breach of a specific clause & analogous, therefore, to a covenant in a lease, which distinguished the case from *Blisset* v. *Daniel & Wood* v. *Woad*, Nos. 1674, 1675, *post*, which were cases of expulsion under a general power in which *bona fides* must be proved & opportunity of defence given.—COOPER *v.* PAGE (1876), 34 L. T. 90.

134. —— ——.]—Participation in profits is not conclusive evidence of the existence of a partnership. It is very cogent evidence, &, if it stands alone, may be conclusive evidence of a partnership. But the effect of participation in profits may be outweighed by other circumstances.

A father, whose son was about to become a member of Lloyd's & to commence the business of an underwriter, became security for him, in compliance with the rules of Lloyd's, to the amount of £10,000. The son executed a written agreement, which contained a recital of the security given by the father, & by which the son covenanted with the father (*inter alia*) that S., & no other person, should underwrite at Lloyd's in the name of the son ; that S. should be paid £200 a year & one-fifth of the net profits of underwriting ; that the father should be at liberty to withdraw the whole of his security on notice being given to the son, & other necessary parties, & immediately after such notice S. should cease to underwrite for the son or in his name ; & that half the net profits of underwriting, deducting the share of S., should together with £25 *per annum*, be considered as owing & should be paid to the father by the son. The business was carried on in the son's name alone, the creditors not knowing that the father was in any way connected with it :—*Held :* no partnership was constituted between the father & the son. —*Re* HOWARD, *Ex p.* TENNANT (1877), 6 Ch. D. 303 ; 37 L. T. 284 ; 25 W. R. 854, C. A.

Annotations :—**Folld.** Meyer *v.* Schacher (1878), 38 L. T. 97. **Apld.** Akt. Iggesunds Bruk *v.* Von Dadelszen (1887), 3 T. L. R. 517. **Consd.** Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238. **Refd.** Adam *v.* Newbigging (1888), 13 App. Cas. 308.

135. —— ——.]—By an agreement entered into in 1871 between M. & the trading firm of S. Brothers, M. agreed to pay S. Brothers the sum of £2,000, which was to be invested by them in the purchase of a steamer, to be used for purposes of trade. For this sum M. was to receive interest at the rate of 5 per cent. *per annum*, & to have one-eighth interest in the steamer ; *i.e.*, to have one-eighth of the annual results after there had been deducted therefrom the above-mentioned 5 per cent., all expenses of equipment, & a further sum of 10 per cent. on account of the annual depreciation in value of the steamer. M. also agreed to pay S. Brothers, within a year from the date of the agreement, a further sum of £4,000 ; &, on payment of the last-mentioned sum, M. was to become interested in all the business of the firm of S. Brothers to the extent of three-sixteenths of the whole, & was to cease to have the said one-eighth interest in the steamer. M. duly paid to S. Brothers to £2,000, & also paid them, at different times, various sums, not however amounting altogether to £4,000 :—*Held :* the above-mentioned agreement did not constitute M. a partner with the firm of S. Brothers in respect of the special venture, *i.e.*, the one steamer.—MEYER *v.* SCHACHER (1878), 38 L. T. 97.

136. —— ——.]—S., a builder, who was engaged in building eight houses under an ordinary building contract, entered into an agreement, dated in 1877, with H., which recited that S. was indebted to H. in the sum of £88, & had requested H. to supply him with 50,000 bricks at a certain price, & to make further advances, & had agreed to enter into that agreement for the purpose of giving security for the repayment of the moneys then owing, & for the 50,000 bricks, & any further advances, & also "certain benefits to H., as a consideration for such advances," & whereby it was agreed that S. would, on demand, pay the £88, the price of the 50,000 bricks, & the further advances ; that S. would forthwith proceed with two of the eight houses, & keep accounts of his expenditure in respect of them, which accounts were to be open to the inspection of H. ; that S. would deposit his building contract with H. as security ; that S. would use the 50,000 bricks in the erection of the two houses only ; that S. would procure the leases of the two houses to be granted to the nominees of H. ; that the leases should be sold at prices to be fixed by H., & the proceeds applied in payment of the moneys owing from S. to H. ; that H. "should be entitled also, as a further consideration, & in addition to the said advances thereinbefore mentioned, absolutely to one moiety of the profit on the said two houses," such profit to be the difference between the net cost price of erection & the proceeds of sale ; & that if the proceeds of sale of the two houses should be insufficient to pay the moneys owing to H., & the moiety of the profit before mentioned, the remaining houses should be charged therewith. Pltfs. had supplied S. with timber for the erection of the two houses :—*Held :* (independently of Partnership Act, 1865 (c. 86), s. 1), the agreement entered into between S. & H. did not constitute H. a partner with S. in respect to the two houses, so as to render H. liable to pltfs. for the timber supplied by them.—KELLY *v.* SCOTTO (1880), 49 L. J. Ch. 383 ; 42 L. T. 827.

137. —— ——.]—DEBENHAM *v.* PHILLIPS (1887), 3 T. L. R. 512.

138. —— ——.]—AKT. IGGESUNDS BRUK *v.* VON DADELSZEN (1887), 3 T. L. R. 517, C. A.

139. —— ——.]—A loan of £4,500 was made to a trader under an agreement which provided that he should pay as interest half-yearly a sum of £462 10*s.*, & that in case he should be unable to pay any portion of such payments "by reason of the deficiency of profits," then & upon every such occasion "a due allowance" should be made by the lender in respect of the same in a fair & reasonable manner. The trader having become bkpt. :—*Held :* the above stipulation was so vague as to be incapable of receiving any certain construction ; as it could not be separated from the rest of the agreement, the ct. could not treat the contract as being one which the lender was to receive "a rate of interest varying with the profits" within Partnership Act, 1865 (c. 86), s. 1 ; & the lender's claim was consequently not one which, by reason of section 5 of that Act, ought to be postponed to those of the other creditors of the bkpt.—*Re* VINCE, *Ex p.* BAXTER, [1892] 2 Q. B. 478 ; 61 L. J. Q. B. 836 ; 67 L. T. 70 ; *sub nom.* *Re* VINCE, *Ex p.* TRUSTEE IN BANKRUPTCY, 41 W. R. 138 ; 36 Sol. Jo. 610 ; 9 Morr. 222, C. A.

Annotations :—**Mentd.** County Hotel & Wine Co. *v.* L. & N. W. Ry., [1918] 2 K. B. 251 ; Dennistoun *v.* (1925), 69 Sol. Jo. 476.

Sect. 5.—*Sharing profits and losses: Sub-sects.* 5 & 6. *Sect.* 6: *Sub-sect.* 1.]

140. —— ——.]—For the purpose of determining whether a person is a partner in a trade firm, the test is whether the trade in question is carried on on behalf of the person who is sought to be charged as a partner.

A loan to a trader for an agreed term, carrying interest at 5 per cent. & a further sum by way of additional interest equal to one-half share of the profits of his business, but repayable as an aggregate debt at any time within the agreed term upon three months' notice by the lender to the trader under certain conditions does not of itself constitute a partnership between them.—HOLLOM *v.* WHICHELOW (1895), 64 L. J. Q. B. 170.

141. —— ——.]—The rights of a person who advances money by way of loan to another engaged in business, on a contract that the lender shall share in the profits of the business, are postponed under Partnership Act, 1890 (c. 39), s. 3, in case the person to whom the money has been advanced is adjudged a bkpt., until the claims of the other creditors have been satisfied, whether the contract to advance the money be oral or in writing.—*Re* FORT, *Ex p.* SCHOFIELD, [1897] 2 Q. B. 495; L. J. Q. B. 824; 77 L. T. 274; 46 W. R. 147 13 T. L. R. 557; 41 Sol. Jo. 698; 4 Mans. 234, C. A.

Annotations:—**Refd.** *Re* Mason, *Ex p.* Bing, [1899] 1 Q. B. 810; *Re* Abenheim, *Ex p.* Abenheim (1913), 109 L. T. 219.

142. —— ——.]—S. in Dec. 1910, lent the firm of R. A. & co. sums amounting to £13,325 for the purposes of a commercial adventure in Mexico, upon the terms that the loan was repayable with interest at 5 per cent. or, at the option of the lender, together with a share in the profits of the venture. S. decided in lieu of interest to receive shares in the proposed co. The co. was never formed, & in Apr. 1911, the terms of the agreement were varied, S. continuing to lend the money in consideration of 5 per cent. interest & a proportion of any profits realised out of the Mexican venture. No profits were ever realised therefrom, & in Aug. 1911, the firm of R. A. & co. became financially embarrassed. Thereupon S. undertook to release the firm from their liability in consideration of the individual members of the firm accepting bills for the amount of the loan, & an ultimate guarantee being given by the firm for their due payment.

In the ensuing bkpcy. S. claimed to prove for the full amount of his debt against the joint estate of the firm:—*Held:* the release of the firm's liability in Aug. 1911, & the substitution therefor of the liability of the several partners, constituted a new agreement, & S. under the guarantee of Aug. 1911, could prove for his debt against the joint estate of the bkpt. firm in competition with the other creditors. *Semble:* the transaction, although originally within the mischief of Partnership Act, 1840 (c. 39), ss. 2, 3, ceased to be so when in Apr. 1911, the source of any intended profits failed & the advance became a mere loan at interest. The term "business" in the Partnership Act, 1890 (c. 39), s. 2 (3) (*d*), applies not merely to a lifelong or universal business but to any separate commercial venture in which a trader or firm of traders embarks.—*Re* ABENHEIM, *Ex p.* ABENHEIM (1913), 109 L. T. 219.

143. —— **Lender with option of becoming partner.**]—Where a negotiation took place between B. & S. V. & E., as to the admission of E. as a partner with them, & E. drew out a sketch of the terms of the intended partnership, two of which were, that E. should bring in £2,000, half in cash & half in goods, & that the firm should be altered to that of B. & S. V. & co.; & E. accordingly advanced the £2,000, upon which the words "& co." were added to the original firm; but no other act was done by E. to show that he considered himself as a partner, & he refused to sign any formal agreement for a partnership:—*Held:* this was not sufficient to constitute him a partner with B. & S. V. so as to prevent him from proving the amount of his advances as a debt due from them to him, under a *fiat* issued against B. & S. V.—*Re* VANDERPLANK, *Ex p.* TURQUAND (1841), 2 Mont. D. & De G. 339; 11 L. J. Bcy. 1; 6 Jur. 67, Ct. of R.

144. —— ——.]—Although the ct. is not bound by the exercise of discretion by the judge who tries the cause, in refusing to certify for costs where the verdict is under the limit, yet it will not upon light grounds interfere. In an action for wrongfully dismissing pltf. from his employment as a Parliamentary reporter for a newspaper, & also for work & labour, it was sought to fix deft. with liability as a partner, upon the ground that he had advanced money for starting the paper, under a written agreement with H., containing very stringent stipulations showing that deft. was to have unlimited control over the publication, with the option of declaring himself a partner at any time within twelve months, & to trust solely to the profits for the re-payment of his advance, with interest, & by parol evidence of personal interference in the management. At the trial it was assumed that the agreement alone did not constitute a partnership between deft. & H.; & the jury, having found that pltf.'s engagement was not for the session, but a weekly engagement only, & negatived that deft. had prior to pltf.'s engagement allowed himself to be held out as a partner, but affirmed that he had done so since, returned a verdict for pltf. for £15 15*s.*—COURTENAY *v.* WAGSTAFF, REED *v.* WAGSTAFF (1864), 16 C. B. N. S. 110; 3 New Rep. 431; 9 L. T. 689; 12 W. R. 431; 143 E. R. 1066.

Annotation:—**Refd.** Bullen *v.* Sharp (1865), 18 C. B. N. S. 614.

145. —— —— **Or power to nominate partner.**]—In 1856 an agreement was entered into between J. & R. under which the former was to carry on business during twenty-one years for the benefit of himself & of any person whom the latter might name within eight years. R. was to make advances, & to become surety to a bank for J.'s drafts, & the profits were to be applied, first, in payment of a salary & allowances to J. then in repayment of the advances made by R. with interest, & subject thereto were to belong as to one-third to J. & as to two-thirds to the nominee of R. R. died in 1861, without exercising his right of nomination, & in 1863, J. became bkpt. On application by the exors. of R. to prove under the bkpcy. for the amount due to his estate under the arrangement:—*Held:* the agreement did not constitute a partnership between J. & R. & the exors. of the latter were entitled to prove.—*Re*

143 i. —— *Lender with option of becoming partner.*]—A person agreeing to give a firm who were indebted to him five years for the payment of the debt, with the understanding that he was to be paid out of the profits, & with the right, when the debt due to him equalled the interest of the members of the firm, to become a co-partner therein, if he chose, or to receive a bonus from the business, did not constitute him a member of the partnership or make him liable for its debts. Such an agreement does not constitute a participation in profits.—HILL *v.* BELLHOUSE, DARLING *v.* BELLHOUSE (1860), 10 C. P. 122.—**CAN.**

a. ——.]—STEWART *v.* BUCHANAN (1903), 6 F. (Ct. of Sess.) 15; 41 Sc. L. R. 11; 11 S. L. T. 347.—**SCOT.**

HARRIS, *Ex p.* DAVIS (1863), 4 De G. J. & Sm. 523 ; 32 L. J. Bcy. 68 ; 8 L. T. 745 ; 9 Jur. N. S. 859 ; 46 E. R. 1022, L. C.

146. —— Agreement giving rights of partner to lender—Notwithstanding disclaimer of partnership relation.]—POOLEY *v.* DRIVER, No. 5, *ante.*

147. —— ——.]—SYERS *v.* SYERS, No. 46, *ante.*

148. —— ——.]—W., a licensed victualler, lent £500 to B., a tailor, to set him up in business as a tailor, upon the terms that W. was to recall the £500, with interest at 5 per cent., at forty-eight hours' notice ; that until the principal sum & interest were paid off he was to receive half the net profits of the business, after allowing B. £4 a week for his services ; that B. should not dispose of the stock-in-trade, or engage in any other business, but should devote the whole of his time to this business, should render proper accounts at certain dates, & give W. every facility for examining them, & should pay the costs of any accountant paid by W. on that behalf :—*Held :* the agreement which embodied these terms constituted a partnership between W. & B. ; & W. was not protected by Partnership Act, 1865 (c. 86), against liability for the debts incurred in the business.—FROWDE *v.* WILLIAMS (1886), 56 L. J. Q. B. 62 ; 56 L. T. 441, D. C.

149. —— ——.]—ADAM *v.* NEWBIGGING, No. 1273, *post.*

150. —— ——.]—Though an agreement is expressed to be an agreement for a loan to a partnership under Partnership Act, 1865 (c. 86), s. 1, & contains a declaration that the lender shall not be a partner, he will nevertheless be a partner if the result of the agreement, fairly construed as a whole, independently of the reference to the Act & the declaration, is to give him the rights & impose on him the obligations of a partner. The Act applies only to a loan made upon the personal responsibility of the trader or traders to whom it is made, & not to a loan made on the security of the business.—*Re* MEGEVAND, *Ex p.* DELHASSE (1878), 7 Ch. D. 511 ; 47 L. J. Bcy. 65 ; 38 L. T. 106 ; 26 W. R. 338, C. A.

Annotations :—**Distd.** Akt. Iggesunds Bruk *v.* Von Dadelszen (1887), 3 T. L. R. 517. **Consd.** Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238. **Refd.** Frowde *v.* Williams (1886), 56 L. J. Q. B. 62 ; Adam *v.* Newbigging (1888), 13 App. Cas. 308 ; King *v.* Whichelow (1895), 64 L. J. Q. B. 801.

Postponement of lender to ordinary creditors.]—*See* BANKRUPTCY, Vol. IV., pp. 483 *et seq.*

SUB-SECT. 6.—SHARING LOSSES.

151. Not constituting partnership—Agreement to share trading losses.]—A partnership is not constituted by an agreement among several persons to share each other's losses in trade.—CAMPBELL *v.* POWNALL (1844), 3 L. T. O. S. 182.

SECT. 6.—HOLDING OUT AS PARTNER.

SUB-SECT. 1.—IN GENERAL.

See, now, Partnership Act, 1890 (c. 39), s. 14 (1).

152. Whether liability created.]—A. & B. ship agents at different ports, enter into an agreement to share, in certain proportions, the profits of their respective commissions, & the discount on tradesmen's bills employed by them in repairing the ships consigned to them, etc. By this agreement they become liable as partners to all persons with whom either contracts as such agent, though the agreement provides that neither shall be answerable for the acts or losses of the other, but each for his own.—WAUGH *v.* CARVER (1793), 2 Hy. Bl. 235 ; 126 E. R. 525.

Annotations :—**Apld.** Hesketh *v.* Blanchard (1803), 4 East, 144 ; Cheap *v.* Cramond (1821), 4 B. & Ald. 663. **Folld.** Bond *v.* Pittard (1838), 3 M. & W. 357 ; Pott *v.* Eyton (1846), 3 C. B. 32. **Apld** Heyhoe *v.* Burge, Marse *v.* Burge (1850), 14 L. T. O. S. 487. **Consd.** Brett. *v.* Beckwith (1856), 26 L. J. Ch. 130 ; French *v.* Styring (1857), 2 C. B. N. S. 357. **Distd.** Cox *v.* Hickman (1860), 8 H. L. Cas. 268. **Consd.** Bullen *v.* Sharp (1865), L. R. 1 C. P. 86 ; Holme *v.* Hammond (1872), L. R. 7 Exch. 218. **Dbtd.** Mollwo, March *v.* Court of Wards (1872), L. R. 4 P. C. 419. **Consd.** *Re* Tew, *Ex p.* Milne (1873), 28 L. T. 171. **Expld.** *Re* Howard, *Ex p.* Tennant (1877), 6 Ch. D. 303. **Dbtd.** Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238. **Consd.** *Re* Fort, *Ex p.* Schofield, [1897] 2 Q. B. 495. **Refd.** Green *v.* Beesley (1835), 2 Scott, 164 ; *Re* Stanton Iron Co. (1855), 21 Beav. 164 ; *Re* National Assce. & Investment Assocn. (Bank of Deposit), *Ex p.* Davies, *Ex p.* Abercorn (1862), 31 L. J. Ch. 828 ; Lyon *v.* Knowles (1863), 3 B. & S. 556 ; Pooley *v.* Driver (1876), 5 Ch. D. 458 ; *Re* Megevand, *Ex p.* Delhasse (1878), 7 Ch. D. 511 ; Adam *v.* Newbigging (1888), 13 App. Cas. 308. **Mentd.** Edmonds *v.* Busholl & Jones (1866), 12 Jur. N. S. 332.

153. ——.]—DE BERKOM *v.* SMITH & LEWIS, No. 181, *post.*

154. ——.]—A father established in business on his son's coming of age tells him he shall have a

PART II. SECT. 6, SUB-SECT. 1.

152 i. *Whether liability created.*]—A. was in the habit of joining B. in signing cheques drawn upon pltf. bank upon the account of a certain business :—*Held :* this was sufficient to constitute A. a partner by estoppel as regards pltfs.—AUSTRALIAN JOINT STOCK BANK *v.* STEEL (2) (1890), 11 N. S. W. L. R. (Eq.) 328 ; 6 N. S. W. W. N. 150.—**AUS.**

152 ii. ——.]—GRADY *v.* OLSEN, 20 C. L. T. 193.—**CAN.**

152 iii. ——.]—SMITH *v.* GEROW (1874), 15 N. B. R. (2 Pug.) 425.—**CAN.**

152 iv. ——.]—BROWN *v.* YATES (1877), 1 A. R. 367.—**CAN.**

152 v. ——.]—*Re* RANDOLPH (1877), 1 A. R. 315.—**CAN.**

152 vi. ——.]—S. was a member of the firm of S. & Co. He purchased goods for the use of the firm, but said that they were for J. S. & Co., of which firm he said that his partners were members :—*Held :* the firm was liable.—HUDSON'S BAY CO. *v.* STEWART (1889), 6 Man. L. R. 8.—**CAN.**

152 vii. ——.]—When a person, not in fact a partner, authorises his name to be used in the firm name of a partnership there is a holding out of himself as a partner to any one who knows or has reason to believe that this represents the name of the person so authorising its use, but a partnership by estoppel or by holding out will not be created if the real position of affairs is known to the creditor.—MCLEAN *v.* CLARK (1893), 20 A. R. 660.—**CAN.**

152 viii. ——.]—WIGLE *v.* WILLIAMS (1895), 24 S. C. R. 713.—**CAN.**

152 ix. ——.]—GRADY *v.* TIERNEY (1899), 20 C. L. T. 193 ; 4 Terr. L. R. 133.—**CAN.**

152 x. ——.]—CODVILLE GEORGESON CO. *v.* SMART (1907), 10 O. W. R. 466 ; 15 O. L. R. 357.—**CAN.**

152 xi. ——.]—*Re* MAIN CLOAK CO., [1925] 1 D. L. R. 290 ; 5 O. B. R. 308.—**CAN.**

152 xii. ——.]—Where a co. holds out an individual as a partner, the co. is responsible to the public as if in fact he were a partner.—MOYES *v.* COOK (1829), 7 Sh. (Ct. of Sess.) 793.—**SCOT.**

152 xiii. ——.]—HERRON *v.* TORQUE ELECTRICAL ENGINEERING CO. (TRUSTEE) (1905), 22 S. C. 432 ; 15 C. T. R. 527.—**S. AF.**

152 xiv. ——.]—Holding out of a person as a partner does not make him a partner but only renders him liable to third parties as such.—GRANGER & CO.'S ESTATE *v.* ANGLO-AFRICAN TRADING CO., LTD., [1912] S. R. 13.—**S. AF.**

152 xv. ——.]—HALL *v.* MILLIN & HUTTON, [1915] S. R. 78.—**S. AF.**

152 xvi. ——.]—One, who is not a partner, who by his words or conduct represents himself to be a partner, or knowingly allows himself to be represented as a partner, will be liable as a partner to any person who has, on the faith of that representation, dealt with or given credit to the firm if such person can show that he was aware of the representation & acted on the faith of it in dealing with the firm.—JELLIMAN *v.* SOUTH AFRICAN MANUFACTURING CO., [1923] C. P. D. 215.—**S. AF.**

share in it, & holds him out to the world as his co-partner. The son acts as such for several years; but there is never anything settled as to the particular share which he shall have. Under these circumstances, the law will consider that there was a partnership between the parties themselves, as well as with respect to strangers; but not that the son is entitled to a moiety of the profits; & it will be referred to a jury to say, to what share he is reasonably entitled.—PEACOCK *v.* PEACOCK (1809), 2 Camp. 45; 170 E. R. 1076, N. P.; *subsequent proceedings*, 16 Ves. 49, L. C.

Annotations:—**Consd.** Thompson *v.* Williamson (1831), 7 Bli. N. S. 432. **Distd.** Stewart *v.* Forbes (1849), 1 Mac. & G. 137. **Refd.** Pearce *v.* Lindsay (1860), 3 De G. J. & Sm. 139. **Mentd.** Taylor *v.* Brewer (1813), 1 M. & S. 290; Bryant *v.* Flight (1839), 5 M. & W. 114; Lake *v.* Campbell (1862), 5 L. T. 582.

155. ——.] — *Ex p.* LANGDALE (1811), 18 Ves. 300; 2 Rose, 444; 34 E. R. 331, L. C.

Annotation:—**Refd.** *Re* English & Irish Church & University Assce. Soc. (1863), 11 W. R. 681.

156. ——.]—WOOLAMS *v.* SHEWBRIDGE (1843), 1 L. T. O. S. 255.

157. ——.]—Persons may be partners towards the world without being partners between themselves; but if they be partners between themselves, they are undoubtedly partners in respect of the public.—*Re* STANTON IRON CO. (1855), 21 Beav. 164; 25 L. J. Ch. 142; 26 L. T. O. S. 252; 2 Jur. N. S. 130; 4 W. R. 159; 52 E. R. 821.

158. ——.]—Goods having been ordered by E. were invoiced to "E. & Son," & a bill was drawn for the price on "E. & Son." The bill was accepted in the handwriting of the son, in name of "E. & Son." The son was not a partner & it was alleged that he accepted the bill only as his father's amanuensis:—*Held:* (1) if the son has so conducted himself that the drawer of the bill might reasonably have believed & did believe that he was a partner, he was liable on the bill; (2) the question should have been left to the jury.—GURNEY *v.* EVANS (1858), 3 H. & N. 122; 27 L. J. Ex. 166; 30 L. T. O. S. 308; 157 E. R. 412.

159. ——.]—MULFORD *v.* GRIFFIN, No. 563, *post*.

160. ——.]—L., a broker, was introduced to P. & co. by A., & was at the interview directed by P. & co. to make purchases under the superintendence of A. Thereupon L. made large purchases under the sole order & direction of A., sending him the bought & sold notes & contracts, & receiving from him the necessary moneys for payments, & generally treating him as principal, no direct communication taking place between L. & P. & co., & such course of dealing was admitted by P. & co. to have been according to their intentions up to a certain period, & no notice was given by them to L. of any determination of the authority of A.:—*Held:* L. had a right from what took place at the interview, & the uniform course of action on the part of A., to consider him as the authorised agent, or a partner of P. & co., until expressly informed of the determination of his authority or the partnership.—POLE *v.* LEASK (1863), 33 L. J. Ch. 155; 8 L. T. 645; 9 Jur. N. S. 829, H. L.

Annotation:—**Mentd.** Clayton-Greene *v.* De Courville (1920), 36 T. L. R. 790.

161. ——.]—MOLLWO, MARCH & CO. *v.* COURT OF WARDS, No. 25, *ante*.

-.]—CHITTY *v.* BOORMAN (1890), 7 T. L. R. 43.

163. ——-.]—*Re* FRASER, *Ex p.* CENTRAL BANK OF LONDON, No. 171, *post*.

164. —— **Question for jury.**]—WOOLAMS *v.* SHEWBRIDGE (1843), 1 L. T. O. S. 255.

165. —— ——.]—A preliminary assocn. was formed for the purpose of establishing a joint stock co., of which A. was named president, & B. vice-president. They both signed an agreement to subscribe for a certain number of shares, & to pay a deposit of £5 per share when shares to the amount of £50,000 should have been subscribed for; & they attended two meetings of the assocn. The co. was never in fact formed. C. did certain work at the request of the secretary to the proposed co. In an action by C. against A. & B.:—*Held:* the jury were properly told to consider (*a*) whether there had been a direct contract by A. & B. with C.; (*b*) whether A. & B. were members of a partnership; & (*c*) whether they had held themselves out as such to C.—WOOD *v.* ARGYLL (DUKE) (1844), 6 Man. & G. 928; 7 Scott, N. R. 885; 13 L. J. C. P. 96; 2 L. T. O. S. 311; 8 Jur. 62; 134 E. R. 1168.

Annotation:—**Refd.** Lake *v.* Argyll (1844), 6 Q. B. 477.

166. —— ——.]—COWAN *v.* DART, No. 452, *post*.

167. —— ——.]—Testator, by his will, directed that his business should be carried on by his exors., of whom H. was one, & that in case of dispute, the decision of H. should be final. H. proved the will, & from time to time went to the place where the business was carried on in the name of "the exors." It did not appear, however, that he took any active part:—*Held:* there was evidence for the jury of his partnership in the business, & of his liability to the business debts.—HARE *v.* HILTON (1849), 14 L. T. O. S. 251.

168. —— ——.]—BATCHELOR *v.* HUNT (1851), 18 L. T. O. S. 75.

169. —— ——.]—GURNEY *v.* EVANS, No. 158, *ante*.

170. —— **Liability founded on estoppel.**]—MOLLWO, MARCH & CO. *v.* COURT OF WARDS, No. 25, *ante*.

171. —— ——.]—A partnership having been dissolved by mutual consent, & proper notices of the dissolution given, the mere fact that the retiring partner allows the continuing partner to carry on business in the old firm name is not such a "holding out" of the former as a partner as will render him liable for a debt of the firm contracted after the dissolution with a person who had not dealt with the old firm, & who had no knowledge of the dissolution.

The doctrine of "holding out" is a branch of the doctrine of estoppel, & it says that, if a man holds himself out to be a partner & makes a man act upon that supposition, he cannot afterwards say that he is not a partner. Estoppel can only be relied upon by a person towards whom some act has been done or to whom some statement has been made, when he has acted upon the faith of such act or statement (LORD ESHER, M.R.).—*Re* FRASER, *Ex p.* CENTRAL BANK OF LONDON, [1892] 2 Q. B. 633; 67 L. T. 401; 36 Sol. Jo. 714; 9 Morr. 256, C. A.

Annotations:—**Mentd.** *Re* Debtor (1915), 113 L. T. 704; *Re* A Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. 60.

172. —— **Infant.**]—GOODE *v.* HARRISON, No. 220, *post*.

173. —— **Right of quasi partner to account.**]—A. agreed to take his nephew H. into partnership with him, & with his own hand made the following entry in a new set of books, viz. Debtor to account of stock-in-trade, for so much stock I put into the company's trade, with my nephew H. £10,000. The name of H. was, for some time, used as a partner in all the transactions of the trade; but

no arts. were ever entered into between his uncle & him, nor was any part of the stock or profits received by or made good to him. This was held to be only a nominal partnership, & H. entitled to no account.—JACOBSEN *v.* HENNEKENIUS (1714), 5 Bro. Parl. Cas. 482 ; 2 E. R. 811, H. L.

174. —— Quasi partner in receipt of salary.]—One, who receives a salary, not charged upon profits, according to a known, though nice, distinction is not by that a partner ; but if, retiring, or coming into the trade, he suffers his name to be used, it is of no consequence whether he has a salary, or sum of money, to be paid by others, or to be got out of the profits. It is the use of the name that makes him liable, as one of the persons, by & to whom every thing is bought & sold (LORD ELDON, C.).—*Ex p.* WATSON (1815), 19 Ves. 459 ; 34 E. R. 587, L. C.

Annotations :—**Consd.** Pott *v.* Eyton (1846), 3 C. B. 32. **Refd.** *Re* English & Irish Church & University Assco. Soc. (1863), 11 W. R. 681.

175. —— Quasi partner indemnified against possibility of loss.]—A. & B. carried on business together as solrs. in partnership, & held themselves out as such, & deft. employed them in that capacity. By the agreement under which A. & B. entered into business together, B. was to receive annually out of the profits the sum of £300, but he was not to be in any manner liable to the losses of the business, & was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner :—*Held :* A. & B. were properly joined as pltfs. in an action for work & labour, as the money, when recovered, would be the joint property of both until the accounts were ascertained & the division took place.—BOND *v.* PITTARD (1838), 3 M. & W. 357 ; 1 Horn. & H. 82 ; 7 L. J. Ex. 78 ; 2 Jur. 183 ; 150 E. R. 1182.

Annotations :—**Distd.** Rawlinson *v.* Clarke (1846), 15 L. J. Ex. 171. **Consd.** Cox *v.* Hickman (1860), 8 H. L. Cas. 268 ; Joffrey *v.* Bamford, [1921] 2 K. B. 351.

176. —— Quasi partner employed merely as servant.]—Where a trader arranged with his paid servant to set up in the name & style of a supposed firm as a merchant, & there was evidence to show that the latter had an interest in the concern : —*Held :* whether or not they were partners they might be jointly liable as contractors for goods ordered by the servant in the name of the supposed firm in the way of its apparent business, the employer as the real principal, the servant as holding himself out as partner.—KIRKWOOD, *Re* CHEETHAM (1862), 10 W. R. 670.

177. —— ——.]—Pltf., having had no previous dealings with the firm, & knowing them only by reputation, applied at the place of business of "Gandell & co." for orders for goods : the firm then consisting of Thomas Gandell only, & being managed by Edward Gandell, a clerk. On pltf. asking to see Messrs. Gandell, Edward Gandell presented himself, & so conducted himself as to lead pltf. to suppose that he was one of the firm of Gandell & co. & had authority to order goods on their behalf, which was not the fact. Pltf. sent goods, according to Edward Gandell's order, to the place of business of Gandell & co., an invoice being made out, by Edward Gandell's direction, to the name of "Edward Gandell & co." Edward Gandell, unknown to pltf., carried on business with one at another place ; & the goods were, within three or four days of their delivery, pledged with deft. with a power of sale, to secure advances *bonâ fide* made by him to Gandell & Todd, & he sold them under the power without notice from pltf. :—*Held :* there was no contract of sale, inasmuch as pltf. intended to contract with Gandell & co. & not with Edward Gandell personally, Gandell & co. were not contracting parties ; no property therefore passed, & pltf. was entitled to recover the value of the goods from deft.—HARDMAN *v.* BOOTH (1863), 1 H. & C. 803 ; 1 New Rep. 240 ; 32 L. J. Ex. 105 ; 7 L. T. 638 ; 9 Jur. N. S. 81 ; 11 W. R. 239 ; 158 E. R. 1107.

Annotations :—**Mentd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354 ; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757 ; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578 ; Cundy *v.* Lindsay (1878), 3 App. Cas. 459 ; Great Western Ry. *v.* London & County Bank (1901), 85 L. T. 152 ; Oppenheimer *v.* Frazer & Wyatt, [1907] 2 K. B. 50 ; Whitehorn *v.* Davison, [1911] 1 K. B. 463 ; Phillips *v.* Brooks, [1919] 2 K. B. 243 ; Folkes *v.* King, [1923] 1 K. B. 282 ; Lake *v.* Simmons, [1926] 1 K. B. 366.

178. —— ——.]—Where a person carries on business in the name of an individual with the addition of the words "& co.," & employs that individual as manager of the business to whom the entire management of the business is left, that does not amount to a holding out of that person as the sole owner of the business. It may amount to a holding out that he is a partner in the business. —BEVAN *v.* NATIONAL BANK, LTD., BEVAN *v.* CAPITAL & COUNTIES BANK, LTD. (1906), 23 T. L. R. 65.

Annotations :—**Mentd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356 ; Souchette *v.* London County Westminster & Parr's Bank, (1920), 36 T. L. R. 195.

179. Person representing himself as sole partner -Whether personally liable.]—To an action for goods sold, deft. pleaded in abatement, that the debt became due from him jointly with S. It appeared at the trial, that the business of deft.'s house was carried on, with the knowledge of pltfs., under the name of "Bush & co.," & that the invoice of the goods in question was made out to "Bush & co.," & also that the real partnership was between deft. S. The judge directed the jury, that the partnership was fully proved ; but still, that, if deft. gave pltfs. reason to believe that he alone constituted the firm of Bush & co., he would be solely liable :—*Held :* the direction was right, & deft. was not liable unless he alone constituted the firm, or so held himself out to pltfs.—BONFIELD *v.* SMITH (1844), 12 M. & W. 405 ; 13 L. J. Ex. 105 ; 2 L. T. O. S. 312 ; 152 E. R. 1254.

Annotation :—**Consd.** Baker *v.* Gent (1892), 9 T. L. R. 159.

180. Identification of alleged partner—Name not mentioned.]—Deft. advanced money to G., who was engaged in getting up a co. to work a mine in Cornwall, receiving as a security a deposit of 250 shares in the mine, with an option to take the shares in satisfaction *pro tanto*, such option to be declared within fourteen days. Deft. never did in terms declare his option to accept the shares : but he went down to the mine, made inquiries & obtained reports as to the condition & prospects of the mine & as to the cost of an engine to be used there, & on one occasion assisted in paying the miners' wages : he also permitted the captain of the mine, without contradiction, to represent him as a capitalist from London who had a large interest in the mine, & intended to work it vigorously. In an action by a person who had supplied goods to the mine upon the faith of representations by the captain that the mine was being worked by a person of substance whose name he was not authorised to give :—*Held :* the above was evidence from which the jury were warranted in inferring that deft. was a partner, although his name was never mentioned, personal identification being sufficient.—MARTYN *v.* GRAY (1863), 14 C. B. N. S. 824 ; 143 E. R. 667.

Sect. 6.—*Holding out as partner: Sub-sects.* 2, 3

SUB-SECT. 2.—SUFFICIENCY OF REPRESENTATION.

181. To constitute general partnership.]—(1) Persons might be partners in a particular concern or business, but notwithstanding, if they did not appear to the world as partners it should not be sufficient to constitute a general partnership & make them liable in other cases not connected with such particular business (LORD KENYON).

(2) Though in point of fact parties are not partners in trade, yet if one so represents himself & by that means gets credit for goods for the other, both shall be liable (LORD KENYON).—DE BERKOM *v.* SMITH & LEWIS (1793), 1 Esp. 29; 170 E. R. 270, N. P.

182. Representation of intention.]—It being in contemplation to form a co. for distilling whisky, the following prospectus was issued in May, 1825: "The conditions upon which this establishment is formed are, the concern will be divided into twenty shares of £100 each, five of which to belong to A. the founder of the works; the other fifteen subscribers to pay in their subscriptions to M. & co., bankers, Liverpool, in such proportions as may be called for. The concern to be under the management of a committee of three of the subscribers, to be chosen annually on Oct. 10; ten per cent. to be paid into the bank on or before June 1 next":—*Held:* this prospectus imported only that a co. was to be formed, not that it was actually formed, & a person who subscribed his name to this prospectus, & who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the distillery, which were afterwards taken, & solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the co.—BOURNE *v.* FREETH (1829), 9 B. & C. 632; L. & Welsb. 1; 4 Man. & Ry. K. B. 512; 7 L. J. O. S. K. B. 292; 109 E. R. 235.

Annotations:—**Refd.** Pitchford *v.* Davis (1839), 5 M. & W. 2; Collingwood *v.* Berkeley (1863), 15 C. B. N. S. 145. **Mentd.** Waterford, Wexford, Wicklow & Dublin Ry. *v.* Pidcock (1853), 8 Exch. 279.

183. ——.]—Deft. from 1829 till 1833 advanced various sums with a view to a partnership in a market about to be erected; knew that the money was applied towards the erection; & was consulted in every stage: in Oct. 1833, by a written agreement, it was settled that the market should be valued, & that deft. should have a seventh share:—*Held:* he was not liable as a partner till Oct. 1833, notwithstanding profits had been made, but not accounted for to him, before that time.—HOWELL *v.* BRODIE (1839), 6 Bing. N. C. 44; 8 Scott, 372; 9 L. J. C. P. 19; 133 E. R. 17.

184. Representation subsequent to transaction sued upon.]—When a party is charged as partner, on the ground of his having held himself out as such, he can only be affected by acts of holding out prior to the contract.

Those acts [subsequent acts] are only to be considered as evidence rendering more likely the acts of holding out before the contract. The holding out which makes a man liable as partner must of course be before the contract (BRAMWELL, B.).—BAIRD *v.* PLANQUE (1858), 1 F. & F. 344, N. P.

185. Participation in business — Claim of interest.]—WHITE & CO. *v.* CHURCHYARD (1887), 3 T. L. R. 428.

SUB-SECT. 3.—HOLDING OUT BY THIRD PARTY.

186. Whether conclusive on party holding out.]—A father who holds out to the world that his son is his partner, & who sends bills & signs receipts in their joint names, in an action brought in his own name is not precluded from showing that his son is not a partner.—GLOSSOP *v.* COLMAN (1815), 1 Stark. 25, N. P.

Annotation:—**Refd.** Barker *v.* Stubbs (1840), 1 Man. & G. 44.

187. ——.]—By an agreement between A., the owner of a ship, & B. & C., the ship was to be placed under the management of B. & C., to load outwards from Liverpool with a cargo for The Cape, Singapore, etc., consigned to their houses at these several ports. Before proceeding on the voyage, the captain received from B. & C., a letter of instructions, desiring him to proceed on his return from Singapore to The Cape, in which letter was the following passage:—"on your arrival there, you will call upon our managing partner D., & follow such directions there as he may give you regarding such part of the cargo as is consigned to his firm, & which he requires to be landed there." At Singapore, B. & C. shipped coffee for London, to be delivered to the shippers' order, pursuant to bills of lading signed by the captain, & indorsed, without his knowledge, to certain persons in London. When the ship arrived at The Cape, the coffee being found to be in a heated state, was, by the orders of D., unshipped & sold. A. was afterwards compelled to pay the consignees of the coffee for the non-delivery thereof. D. being examined upon interrogatories, expressly stated that he was not a partner with B. & C. In case brought by A. against B. & C., for wrongfully unshipping & selling certain coffee at The Cape of Good Hope, the declaration alleged, that "defts., by their agents, at the said several ports, had & exercised the management & direction, ordering, control & government of the ship, touching & in relation to the loading & unloading & freighting the same, & the consignment & disposition of the outward & homeward cargo thereof":—*Held:* the description given of D. by B. & C. in their letter of instructions, was not conclusive on them as to the point of his being a partner.—BROCKBANK *v.* ANDERSON (1844), 7 Man. & G. 295; 7 Scott, N. R. 813; 13 L. J. C. P. 102; 2 L. T. O. S. 458; 135 E. R. 124.

188. Consent of quasi partner—Whether partnership constituted.]—*Re* BADNALL, *Ex p.* ELLIS (1827), 2 Gl. & J. 312; 6 L. J. O. S. Ch. 45, L. C.

Annotations:—**Distd.** *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186. **Refd.** Abbott *v.* Hicks (1839), 7 Scott, 715; *Re* Levey & Robson, *Ex p.* Topping (1865), 34 L. J. Bcy. 13.

189. —— ——.]—An attorney carrying on business under the firm of "K. & Son," his son not being in fact his partner, may sue alone for the amount of his bill for professional business

PART II. SECT. 6, SUB-SECT. 2.

b. *Name appearing on bill of lading.*]—No liability on defts. by reason of their name appearing on heading of bill of lading, there being no partnership between them & owners of ship mentioned in bill of lading.—ROSS *v.* ORIENT STEAM NAVIGATION CO. (1884), 5 N. S. W. L. R. (L.) 30.—**AUS.**

c. *Son held out by father—As partner in firm.*]—DOMINION EXPRESS CO. *v.* MAUGHAN (1910), 15 O. W. R. 237; 20 O. L. R. 310.—**CAN.**

d. *Superintendence of business.*]—*Re* HALL (1864), 11 L. T. 579.—**IR.**

PART II. SECT. 6, SUB-SECT. 3.

e. *Agent.*]—The representation of an agent that his principals are a firm in a distant province, & that such firm is composed of A. & B., coupled with the evidence of receipt by the person

done.—KELL *v.* NAINBY (1829), 10 B. & C. 20; 5 Man. & Ry. K. B. 76; 8 L. J. O. S. K. B. 99; 109 E. R. 358.

Annotation:—**Apld.** Spurr *v.* Cass, Cass *v.* Spurr (1870), L. R. 5 Q. B. 656.

190. —— ——.]—Certain persons proposing to form a co. applied to deft. to become president, to which he assented, & permitted himself to be publicly named as president of such intended co. The co. was never formed; but meetings preliminary to the formation of it were held, at one of which deft. presided:—*Held:* a jury might, if they thought fit, infer that deft. by his conduct held himself out as contracting for work to be done in respect of such preliminary proceedings, though the order for such work & labour was not directly given by deft., & deft., if he so held himself out, was liable for the work performed.—LAKE *v.* ARGYLL (DUKE) (1844), 6 Q. B. 477; 14 L. J. Q. B. 73; 4 L. T. O. S. 171; 9 Jur. 295; 115 E. R. 178.

191. —— ——.]—MULFORD *v.* GRIFFIN, No. 563, *post.*

192. —— ——.]—MOLLWO, MARCH & CO. *v.* COURT OF WARDS, No. 25, *ante.*

193. —— **Necessity for.**]—A prospectus was issued for a distillery co. with a capital of £600,000 & 12,000 shares, & to be conducted pursuant to the terms of a deed to be drawn up. All persons who did not execute the deed within thirty days after it was ready, were to forfeit all interest in the concern. No more than 7,500 shares were ever allotted; only 2,300 persons paid the first deposit; only 1,106 the second, & only 65 signed the deed; & the directors, after the time for paying the second instalment had elapsed, advertised that persons who had omitted to pay had forfeited their interest in the concern:—*Held:* an application for shares, & payment of the first deposit, did not constitute a partner, one, who had not otherwise interfered in the concern, & the insertion of his name by the secretary of the co. in a book containing a list of subscribers was not a holding out as partner.

The holding one's self out to the world as a partner, as contra-distinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership; & is altogether incompatible with the want of knowledge that his name has been so used (TINDAL, C.J.).—FOX *v.* CLIFTON (1830), 6 Bing. 776; L. & Welsb. 300; 4 Moo. & P. 676; 8 L. J. O. S. C. P. 257; 130 E. R. 1479.

Annotations:—**Distd.** Hutton *v.* Upfill (1850), 2 H. L. Cas. 674. **Refd.** Doubleday *v.* Muskett (1830), 7 Bing. 110; Wood *v.* Argyll (1844), 6 Man. & G. 928; Bright *v.* Hutton, Hutton *v.* Bright, *Re* Joint-Stock Companies Winding-up Acts, 1848 & 1849, *Re* Direct Birmingham, Oxford, Reading & Brighton Ry. (1852), 16 Jur. 695; Galvanized Iron Co. *v.* Westoby (1852), 8 Exch. 17; Collingwood *v.* Berkeley (1863), 15 C. B. N. S. 145. **Mentd.** Woolmer *v.* Toby (1847), 11 Jur. 426; London & Continental Assce. Soc. *v.* Redgrave (1858), 4 C. B. N. S. 524; Howbeach Coal Co. *v.* Teague (1860), 5 H. & N. 151; Ornamental Pyrographic Woodwork Co. *v.* Brown (1863), 2 New Rep. 81; North Stafford Steel, etc., Co. *v.* Ward (1868), L. R. 3 Exch. 172.

194. —— ——.]—EDMUNDSON *v.* THOMPSON & BLAKEY, No. 120, *ante.*

195. —— **What amounts to.**]—Defts. had purchased the scrip of a mining co. originated in fraud, & had attended one meeting of the co.; but they never signed the partnership deed, were innocent of the fraud, & transferred their scrip before pltf. commenced an action for goods furnished to the co. after defts. had purchased their scrip:—*Held:* they were liable.—ELLIS *v.* SCHMOECK (1829), 5 Bing. 521; 3 Moo. & P. 220; 7 L. J. O. S. C. P. 231; 130 E. R. 1163.

Annotation:—**Mentd.** Henderson *v.* Royal British Bank, Wilson *v.* Royal British Bank (1857), 3 Jur. N. S. 111.

196. —— ——.]—Where pltf. sued the members of a joint stock co. for goods sold & delivered, & the defence was, that he was himself a member of the co.:—*Held:* his own letters, in which he spoke of himself as a member, were evidence to show that he was a member, although it was provided by the partnership deed, that none should be members who did not execute the deed & it did not appear that pltf. had executed it.—HARVEY *v.* KAY (1829), 9 B. & C. 356; 7 L. J. O. S. K. B. 167; 109 E. R. 132.

197. —— ——.]—The prospectus of a mining co. stated the proposed amount of capital, the number of shares, & the times & mode in which the calls upon the shares subscribed for were to be paid up. The shares were subscribed for & appropriated, but the calls were not paid up as the prospectus directed. Deft., a shareholder, attended occasionally at the office & meetings of the co., & had means of ascertaining that the calls were not paid though the report of the directors represented that they were:—*Held:* sufficient evidence upon which a jury might conclude that deft. had authorised the directors to go on with the co., without the calls having been paid up, & he was liable, as a partner in the concern, upon the contracts entered into by them.—STEIGENBERGER *v.* CARR (1841), 3 Man. & G. 191; 3 Scott, N. R. 466; 10 L. J. C. P. 253; 133 E. R. 1111.

198. Injunction against party holding himself out—Exposure of firm to risk & liability.]—A dealer in cycles having advertised his goods in a manner which satisfied the ct. that he intended the public to believe that the proprietors of *The Times* newspaper were either the vendors, for whom he acted as manager, or partners or in some way responsibly connected with the sale of *Times* cycles:—*Held:* on the authority of *Routh* v. *Webster* (1847), 10 Beav. 561, as pltfs., the proprietors of *The Times*, were exposed to some risk & liability by the unauthorised use of the name of their newspaper by deft., & as there was a reasonable probability of *The Times* being exposed to litigation, & possibly being made responsible, had pltfs. not taken steps to disconnect the name of their newspaper from the advertisement & circulars issued by deft., an *interim* injunction ought to be granted restraining deft. from in any way representing that the cycles offered by him for sale were in fact offered for sale by pltfs. or that he was carrying on business as a department of *The Times*, or in any way holding out *The Times* to be the owners of or connected with his business.—WALTER *v.* ASHTON, [1902] 2 Ch. 282; 71 L. J. Ch. 839; 87 L. T. 196; 51 W. R. 131; 18 T. L. R. 445.

Annotations:—**Consd.** Wertheimer *v.* Stewart, Cooper (1906), 23 R. P. C. 481; Harrods *v.* Harrod (1924), 40 T. L. R. 195; Motor Manufacturers & Traders Soc. *v.* Motor Manufacturers, etc. Insce., [1925] 1 Ch. 675. **Refd.** Clerk *v.* Motor Car Co. (1905), & Ford (1905), 49 Sol. Jo. 418; Dutton Massey (Liverpool) *v.* Dutton Massey (1923), 40 R. P. C. 413.

SUB-SECT. 4.—BY WHOM LIABILITY ENFORCEABLE.

199. Person to whom representation made—Representation by quasi partner under mistaken

to whom the representation is made of letters from one of the alleged members of the firm, written on paper on which the names of such members are printed, in answer to letters from such persons, is *primâ facie* evidence that A. & B. constitute the said firm.—MCDONALD *v.* GILBERT (1889), 16 S. C. R. 700.—**CAN.**

Sect. 6.—*Holding out as partner: Sub-sects.* 4, 5
6. *Part III. Sect.* 1: *Sub-sects.* 1 & 2.]

belief.]—A. pays money for shares in a mine to B., describing himself as treasurer of the mine, & receives from persons calling themselves directors, a memorandum purporting that A. is a proprietor of shares, & that his name is entered in the cost book. A. in writing, & in conversation, acknowledges himself to be a shareholder & receives money from B. as treasurer, on account of supposed profits, but no deed is executed, nor is there an assignment of any interest in the mine from the lessee thereof:—*Held:* A. was not liable for supplies furnished the mine, unless furnished on his credit.—VICE *v.* ANSON (LADY) (1827), 7 B. & C. 409; 3 C. & P. 19; 1 Man. & Ry. K. B. 113; Mood. & M. 96; 6 L. J. O. S. K. B. 24; 108 E. R. 776.

Annotations:—**Distd.** Braithwaite *v.* Skofield (1829), 9 B. & C. 401. **Consd.** Dickinson *v.* Valpy (1829), 5 Man. & Ry. K. B. 126. **Distd.** Ellis *v.* Schmoeck (1829), 3 Moo. & P. 220. **Apld.** Pitchford *v.* Davis (1839), 5 M. & W. 2. **Distd.** Owen *v.* Van Uster (1850), 10 C. B. 318; Steigenberger *v.* Carr (1841), 3 Man. & G. 191; Vivian *v.* Mowatt (1847), 8 L. T. O. S. 480. **Refd.** *Re* Megevand, *Ex p.* Delhasse (1878), 47 L. J. Bcy. 65.

200. —— Acting on representation.]—DICKINSON *v.* VALPY, No. 546, *post.*

201. —— ——.]—S. & others carried on business under the name of the "Plas Madoc Colliery Co." S. withdrew from the firm, which afterwards became indebted to C., no notice having been given to C. or the public of S.'s withdrawing:—*Held:* S. was not liable for the debt, there being no sufficient evidence that he had ever, while a partner, represented himself as such to C., or appeared so publicly in that character that C. must have been presumed to know of it.—CARTER *v.* WHALLEY (1830), 1 B. & Ad. 11; L. & Welsb. 297; 8 L. J. O. S. K. B. 340; 109 E. R. 691.

Annotation:—**Consd.** Anderson *v.* Weston (1840), 8 Scott, 583.

202. —— ——.]—To charge deft. with liability as a partner on the ground of representation of himself as a partner, it must be proved either that he has represented himself as a partner to pltf., or has made such a public representation of himself in that character as to lead the jury to conclude that pltf., knowing of that representation, & believing deft. to be a partner, gave him credit under that belief.—FORD *v.* WHITMARSH (1840), H. & W. 53.

203. —— ——.]—EDMUNDSON *v.* THOMPSON & BLAKEY, No. 120, *ante.*

204. Effect of knowledge that person held out is not partner.]—ALDERSON *v.* POPE (1808), 1 Camp. 404, n.; 170 E. R. 1001, N. P.

205. ——.]—A party is liable on a promissory note made in the name of the firm in which he had been a partner, though it was drawn after the dissolution of the partnership, he having suffered his name to continue in the firm although pltf. knew the facts at the time when he took the note.—BROWN *v.* LEONARD (1816), 2 Chit. 120.

SUB-SECT. 5.—RETIRED AND DECEASED PARTNERS.

Liability of retired partner.]—*See* Part IV., Sect. 2, sub-sect. 3, B., *post.*

Liability of deceased partner.]—*See* Part IV., Sect. 2, sub-sect. 3, C.,

SUB-SECT. 6.—ENFORCEMENT OF LIABILITY OF PERSON HELD OUT OR HOLDING HIMSELF OUT.

206. Judgment against firm—Execution against alleged partner—Issue to determine liability—R. S. C., Ord. 48a, r. 8.]—In an action against deft. firm, appearance was entered by one person as having been sued in the firm's name. Judgment was entered against the firm, & pltf. applied for a summons under above rule, to determine whether another person was liable to have execution issued against him on the judgment:—*Held:* an order for an issue, in which the question should be whether that person "was or had held himself out as a partner in deft. firm," was rightly made.—DAVIS *v.* HYMAN & CO., [1903] 1 K. B. 854; 72 L. J. K. B. 426; 88 L. T. 284; 19 T. L. R. 348; 51 W. R. 598, C. A.

Annotation:—**Expld.** Weir *v.* McVicar (1925), 94 L. J. K. B. 876.

Bankruptcy of ostensible partners—Firm assets treated as joint estate.]—*See* BANKRUPTCY, Vol. IV., pp. 429, 430, Nos. 3878, 3882.

Part III.—Creation and Duration of Partnership.

SECT. 1.—**LEGALITY OF PARTNERSHIP.**

SUB-SECT. 1.—WHAT PARTNERSHIPS ARE LEGAL.

207. Partnership in profits of public office.]—(1) Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits of the office for the other partners, after the term of partnership has expired. (2) Emoluments derived from an office held by one partner not to be considered partnership property, unless expressly mentioned in the partnership arts.—CLARKE *v.* RICHARDS (1835), 1 Y. & C. Ex. 351; 4 L. J. Ex. Eq. 49; 160 E. R. 143.

208. ——.]—A., an attorney, holding the offices of clerk of the peace, clerk to the magistrates, clerk to the comrs. of land & assessed taxes, clerk to the comrs. of sewers, clerk to the deputy-lieutenants, steward of certain manors, coroner for a liberty, secretary to a Conservative assocn., & secretary to a polling district assocn., entered into arts. of partnership with B., by which, after reciting that A. carried on the business of an attorney at, etc., & held many offices, clerkships, & stewardships of manors, & that it had been agreed that B. should enter into partnership with A. "in the said business, & in the emoluments of the said offices, clerkships, & stewardships," upon the terms thereinafter expressed, it was agreed

PART II. SECT. 6, SUB-SECT. 6.

1. *Application of Division Courts Act—To persons holding out.*]—*Re* YOUNG *v.* PARKER & CO. (1888), 12 P. R. 646.—CAN.

PART III. SECT. 1, SUB-SECT. 1.

Civil servant & government contractor.]—Pltf., a civil servant, while supervising the proper performance by a govt. contractor of the work contracted for, entered into an agreement of partnership with the contractor, whereby he was to receive a share in

that they should enter into partnership for twenty years & that "all the profits & emoluments arising from the said offices, clerkships, & stewardships, held by A., as also all such offices, clerkships, & stewardships as should be held by either of them the said A. & B. during the partnership, should be considered as partnership property, & be distributable accordingly"; & the arts. contained this further provision: "that if A. should die during the term, then, if & during such period or periods as, it should happen that no son of A. should be a partner in the said business, B. should be interested in one moiety of the said partnership business, & the exors. or administrators of A. should be entitled to the profits of the remaining moiety thereof, to be applied by them as part of his personal estate":—*Held:* the contract was not void, as being a contract for the sale of an office, either within Sale of Offices Act, 1552 (c. 16), or within Sale of Offices Act, 1809 (c. 126), & that the latter clause was no violation of the 22 Geo. 2, c. 46, s. 11.—STERRY *v.* CLIFTON (1850), 9 C. B. 110; 4 New Mag. Cas. 114; 19 L. J. C. P. 237; 14 L. T. O. S. 488; 14 J. P. 274; 14 Jur. 312; 137 E. R. 834.

Annotation:—**Mentd.** Pugh *v.* Carttar (1851), 17 L. T. O. S. 107.

209. Partnership giving all profits to one partner—On payment of annuity to other partner.]—AUBIN *v.* HOLT, No. 1452, *post*.

210. Partnership in blockade running.]—A contract of partnership in blockade running is not contrary to the municipal law of this country.—*Re* GRAZEBROOK, *Ex p.* CHAVASSE (1865), 4 De G. J. & Sm. 655; 6 New Rep. 6; 34 L. J. Bcy. 17; 12 L. T. 249; 11 Jur. N. S. 400; 13 W. R. 627; 2 Mar. L. C. 197; 46 E. R. 1072, L. C.

Annotations:—**Mentd.** The Helen (1865), L. R. 1 A. & E. 1; Austin Friars Steam Shipping Co. *v.* Strack, [1905] 2 K. B. 315; Caine *v.* Palace Steam Shipping Co., [1907] 1 K. B. 670.

Association of more than twenty persons.]—*See* COMPANIES, Vol. IX., pp. 72, 73, 74, 75, Nos. 255–258, 264–271.

Banking partnerships.]—*See* BANKERS, Vol. III., pp. 139, 140, Nos. 124, 125; COMPANIES, Vol. X., p. 1211, No. 8570.

Betting partnerships.]—*See* GAMING & WAGERING, Vol. XXV., p. 413, Nos. 162–164.

Friendly societies.]—*See* FRIENDLY SOCIETIES, Vol. XXV., pp. 290, 291, Nos. 10–17.

Insurance partnerships.]—*See* INSURANCE, Vol. XXIX., pp. 429, 430, Nos. 3341–3348; COMPANIES, Vol. IX., p. 74, Nos. 265, 266.

Loan societies.]—*See* COMPANIES, Vol. X., p. 1211, No. 8572; LOAN SOCIETIES, Vol. XXXII., p. 556, Nos. 2, 3.

Mutual insurance associations.]—*See* INSURANCE, Vol. XXIX., pp. 430, 431, Nos. 3350–3352.

Partnerships assuming corporate character. *See* COMPANIES, Vol. X., pp. 1209–1211, Nos. 8558–8566.

Partnerships having stock transferable at will.]—*See* COMPANIES, Vol. X., p. 1211, Nos. 8568, 8569.

Pawnbroking partnerships.]—*See* PAWNS & PLEDGES.

Solicitor's partnerships.]—*See* SOLICITORS.

Trading associations.]—*See* TRADE & TRADE UNIONS.

Alien partnerships trading with enemy.]—*See* ALIENS, Vol. II., pp. 162, 164, 170, 172, 177, 183, Nos. 330, 342, 385, 389, 415, 416, 461.

SUB-SECT. 2.—EFFECT OF ILLEGALITY.

211. General rule—Partnership void.]—Where parties enter into a contract of partnership in violation of the law, it is void, & will confer no right on either party as against the other.—ARMSTRONG *v.* LEWIS (1834), 2 Cr. & M. 274; 4 Moo. & S. 1; 3 L. J. Ex. 359; 149 E. R. 763, Ex. Ch.

Annotations:—**Consd.** Gordon *v.* Howden (1845), 12 Cl. & Fin. 237. **Mentd.** Clayton *v.* Nugent (1844), 1 Coll. 362; Cundell *v.* Dawson (1847), 17 L. J. C. P. 311; King *v.* Simmonds (1848), 1 H. L. Cas. 754; Ritchie *v.* Smith (1848), 6 C. B. 462; Barton *v.* Muir (1874), L. R. 6 P. C. 134.

212. —— —— Unlicenced theatre.]—No play can lawfully be acted for hire, gain, or reward, within twenty miles of London, without the authority of letters patent from the King, or of a licence from the Lord Chamberlain; & no such letters patent or licence can be granted so as to authorise the performance of plays at any place, except within the city or liberties of Westminster, or where the King may happen to reside. An agreement therefore, for a partnership in acting plays at a theatre situate within twenty miles of London, but not within the city or liberties of Westminster, or in the place of the King's residence, is one to which the ct. will not give effect.—EWING *v.* OSBALDISTON (1837), 2 My. & Cr. 53; Donnelly, 179; 6 L. J. M. C. 137; 6 L. J. Ch. 161; 1 Jur. 50; 40 E. R. 561, L. C.

Annotations:—**Mentd.** Levy *v.* Yates (1838), 8 Ad. & El. 129; Aberaman Ironworks *v.* Wickens (1867-8), L. R. 5 Eq. 485.

213. Court will refuse recognition—Of partnership—& rights of parties.]—If a partnership be clearly illegal the cts. will not recognise it or enforce any rights which the supposed partners would otherwise have (MCCARDIE, J.).—JEFFREY *v.* BAMFORD, [1921] 2 K. B. 351; 90 L. J. K. B. 664; 125 L. T. 348; 37 T. L. R. 601; 65 Sol. Jo. 580.

Annotations:—**Refd.** Henshall *v.* Porter, [1923] 2 K. B. 193. **Mentd.** Maskell *v.* Hill, [1921] 3 K. B. 157.

214. Whether legal proceedings maintainable.]—COUSINS *v.* SMITH, No. 1367, *post*.

215. —— Action for goods sold—Breach of revenue regulations.]—An action cannot be maintained by several partners for goods sold by one of them living in Guernsey, & packed by him in a particular manner for the purpose of smuggling, though the other partners, who resided in England, knew nothing of the sale; for it is a contract by subjects of this country made in contravention of the laws; & this case must be considered in the same light as if all the partners lived in England.—BIGGS *v.* LAWRENCE (1789), 3 Term Rep. 454; 100 E. R. 673.

Annotations:—**Refd.** Jeffrey *v.* Bamford, [1921] 2 K. B. 351. **Mentd.** Clugas *v.* Penaluna (1791), 4 Term Rep. 466; Lightfoot *v.* Tenant (1796), 1 Bos. & P. 551; Bauerman *v.* Radenius (1798), 7 Term Rep. 663; Fairlie *v.* Hastings (1804), 10 Ves. 123; Hodgson *v.* Temple (1813), 5 Taunt. 181; Langton *v.* Hughes (1813), 1 M. & S. 593; Betham *v.* Benson (1818), Gow, 45; Goss *v.* Watlington (1821), 3 Brod. & Bing. 132; Clifford *v.* Burton (1823), 8 Moore, C. P. 16; Pellecat *v.* Angell (1835), 2 Cr. M. & R. 311; Wharton *v.* Wright (1845), 1 New Pract. Cas. 296; Abbot *v.* Rogers (1855), 16 C. B. 277; Kaufman *v.* Gerson, [1903] 2 K. B. 114.

216. —— —— ——.]—A., B., C., D., & E., carried on trade in partnership, as distillers, & C. alone carried on the business of a retail dealer in spirits, within two miles of the distillery, contrary to the 4 Geo. 4, c. 94, ss. 132, 133, & his name was not inserted as one of the partners in the distillery in the excise book, or licence, as required by the

any profit under the contract:—*Held:* the contract was illegal.—NOBLE *v.* MADDISON (1912), 12 S. R. N. S. W. 435; 28 N. S. W. W. N. 137.—**AUS.**

h. *Medical practitioner & apothecary.*]—S., a licensed medical practitioner, & W. an apothecary, purchased the goodwill of deft.'s practice as a medical man:—*Held:* there was nothing illegal in pltfs. entering into partnership.—SWAN *v.* SCOTT (1864), 23 U. C. R. 434.—**CAN.**

Sect. 1.—*Legality of partnership: Sub-sect.* 2. *Sect.* 2: *Sub-sects.* 1, 2, 3, 4, 5 & 6. *Sect.* 3: *Sub-sect.* 1.]

Excise Licences Act, 1825 (c. 81), s. 7:—*Held:* these being mere revenue regulations, the breach of them by one of the partners, with the knowledge of the others, did not render the trade carried on by the five so illegal as to deprive them of the right to recover the price of spirits sold by them, or for the breach of a guarantee for the due accounting of an agent, to whom they had consigned the spirits for sale.—BROWN *v.* DUNCAN (1829), 10 B. & C. 93; 5 Man. & Ry. K. B. 114; L. & Welsb. 91; 8 L. J. O. S. K. B. 60; 109 E. R. 385.

Annotations:—**Mentd.** Forster *v.* Taylor (1834), 5 B. & Ad. 857; Cope *v.* Rowlands (1836), 2 M. & W. 149; Bailey *v.* Harris (1849), 12 Q. B. 905; Taylor *v.* Crowland Gas & Coke Co. (1854), 10 Exch. 293 Brightman *v.* Tate, [1919] 1 K. B. 463.

—— ——.]—*See, generally*, CONTRACT, Vol. XII., pp. 275, 276, Nos. 2248–2258.

217. —— Recovery of money paid.]—Pltt. & deft. entered into an agreement to become equal sharers in the profits to be derived from acting operas & ballets in an unlicenced theatre of deft.'s. Pltf. having advanced sums for dresses, & for the conveyance of dancers to the theatre, at the request of deft.:—*Held:* pltf. could not recover the sums so paid; on the ground that a contract made in contravention of the provisions of a statute cannot be made the subject of an action.—DE BEGNIS *v.* ARMISTEAD (1833), 10 Bing. 107; 3 Moo. & S. 511; 2 L. J. C. P. 214; 131 E. R. 846.

Annotations:—**Refd.** Ewing *v.* Osbaldiston (1837), 2 My. & Cr. 53. **Mentd.** M'Callan *v.* Mortimer (1842), 9 M. & W. 636; Pidgeon *v.* Burslem (1849), 3 Exch. 465; Wigan *v.* Strange (1865), L. R. 1 C. P. 175; Brightman *v.* Tate, [1919] 1 K. B. 463.

Right to prove in bankruptcy of debtor.]—*See* BANKRUPTCY, Vol. IV., p. 311, Nos. 2907, 2909.

Betting partnership.]—*See* GAMING & WAGERING, Vol. XXV., pp. 399, 413, 414, Nos. 46, 165–179.

Illegal companies.]—*See* COMPANIES, Vol. X., pp. 1212, 1213, 1214, Nos. 8575–8591.

Pawnbroking partnership.] — *See* PAWNS & PLEDGES.

Stock Exchange transactions.]—*See* STOCK EXCHANGE.

Whether illegality must be pleaded.]—*See* CONTRACT, Vol. XII., pp. 302, 303, Nos. 2494–2497.

Right to account.]—*See* Part V., Sect. 13, subsect. 5, II. (*b*), *post.*

SECT. 2.—PERSONAL CAPACITY.

SUB-SECT. 1.—ALIENS.

See ALIENS, Vol. II., pp. 140, 142, 143, 144, 148, 149, 153, 154, 160, Nos. 152, 166–168, 174, 175, 183, 186, 212, 217, 245–247, 304–306, & SUPPLEMENT.

Trading with the enemy.]—*See* ALIENS, Vol. II., pp. 162, 164, 170, 171, 172, 177, 183, Nos. 330, 342, 385, 389, 415, 416, 461.

SUB-SECT. 2.—CLERGYMEN.

See, generally, ECCLESIASTICAL LAW, Vol. XIX., p. 365, Nos. 1824–1828.

Banking partnership.]—*See* BANKERS, Vol. III., p. 139, Nos. 121, 122.

SUB-SECT. 3.—CONVICTS.

See Forfeiture Act, 1870 (c. 23), ss. 12, 21.

SUB-SECT. 4.—INFANTS.

See, generally, INFANTS, Vol. XXVIII., pp. 142 *et seq.*

218. General rule—Infant may be a partner.]—(1) An infant partner is not a debtor for goods supplied to his firm; judgment should therefore be entered either against the firm excepting the infant, or against the adult members alone.

(2) There is nothing to prevent an infant trading or becoming partner with a trader, & until his contract of partnership be disaffirmed he is a member of the trading firm. Though the infant cannot contract debts by such trading the adult partner is entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, & that until these are provided for, no part of them shall be received by the infant partner; &, if the proper steps are taken, this right of the adult partner can be made available for the benefit of the creditors.—LOVELL & CHRISTMAS *v.* BEAUCHAMP, [1894] A. C. 607; 63 L. J. Q. B. 802; 71 L. T. 587; 43 W. R. 129; 11 R. 45; *sub nom. Re* BEAUCHAMP BROTHERS, *Ex p.* BEAUCHAMP, 10 T. L. R. 682, H. L.

Annotations:—*As to* (1) **Apld.** *Re* A. & M., [1926] Ch. 274. **Refd.** *Re* Low, *Ex p.* Gibson (1895), 72 L. T. 450; *Re* Handford, *Ex p.* Handford (1899), 68 L. J. Q. B. 386; Leslie *v.* Sheill, [1914] 3 K. B. 607; Hawkins & Sunderland *v.* Duché (1921), 90 L. J. K. B. 913; *Re* Debtors (No. 807 of 1922), *Ex p.* Debtor (1922), 92 L. J. Ch. 120. *As to* (2) **Refd.** Hawkins & Sunderland *v.* Duché (1921), 90 L. J. K. B. 913. *Generally*, **Refd.** *Re* Farnham (No. 1) (1896), 3 Mans. 109. **Mentd.** *Re* Debtor, [1922] 2 K. B. 109.

219. —— ——.]—There is nothing in English law which disables an infant from being a partner (MCCARDIE, J.).—HAWKINS & SUNDERLAND *v.* DUCHÉ & SONS (1921), as reported in 90 L. J. K. B. 913; 125 L. T. 671; 37 T. L. R. 748; [1921] B. & C. R. 173.

Annotation:—**Mentd.** *Re* Shaer (1926), 42 T. L. R. 620.

220. Effect of attaining majority—Duty to notify disaffirmance.]—Where an infant held himself out as in partnership with S., & continued to act as such till within a short period of his coming of age; but there was no proof of his doing any act as a partner after twenty-one:—*Held:* it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one; & as he had neglected to do so, he was responsible to persons who had trusted S. with goods, subsequently to the infant's attaining twenty-one, on the credit of the partnership.—GOODE *v.* HARRISON (1821), 5 B. & Ald. 147; 106 E. R. 1147.

Annotation:—**Consd.** Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90.

221. Liability in bankruptcy.]—B., a minor, living with A., his father, takes an active part in his father's business, who puts his son's name over his door in conjunction with his own. The father, without any authority from his son, enters into an agreement with C. to become a partner with him in a separate trade, & signs this agreement in his son's name, as well as that of himself. After B. becomes of age, a joint fiat is issued against A., B., & C., upon a debt contracted with that firm before B. attained his majority; & the only evidence to prove that B. was a partner with C. is, the agreement signed by the father, & the fact

PART III. SECT. 2, SUB-SECT. 4.

k. *General rule.*]—WOODS *v.* WOODS (1883), 3 Man. L. R. 33.—**CAN.**

l. *Effect of attaining majority—Affirmation of contract—Bill for specific performance by infant.*]—MILLIKEN *v.* MILLIKEN (1845), 8 I. Eq. R. 16.—**IR.**

of B.'s name appearing over his father's door, but not over the door of C. :—*Held :* B. was not precluded, under these circumstances, from petitioning to annul the fiat on the ground of infancy.—*Re* LEES, SMITH & LEES, *Ex p.* LEES, *Ex p.* HEATHERLY (1836), 1 Deac. 705, Ct. of R.

Right to recover money paid.]—*See* INFANTS, Vol. XXVIII., pp. 163, 164, Nos. 203–208.

SUB-SECT. 5.—LUNATICS.

See, generally, LUNATICS, Vol. XXXIII., pp. 128, 129, 130, 131, Nos. 47–71.

SUB-SECT. 6.—MARRIED WOMEN.

See Married Women's Property Act, 1882, (c. 75), s. 1.

222. Capacity to contract during coverture—Wife living apart—Advance of money for joint adventure—Right of husband to profits.]—A married woman, living in trade without the interference of her husband, residing in a different part of the kingdom, advanced money for the purchase of a share in the lottery; upon an agreement with pltf., that half should be considered a loan to him; & they should be jointly concerned in the adventure :—*Held :* the money belonging to the husband, the produce was his; & the bill was dismissed.—LAMPHIR *v.* CREED (1803), 8 Ves. 599; 32 E. R. 488.

Annotation :—**Distd.** Haddon *v.* Fladgate (1858), 1 Sw. & Tr. 48.

——.]—*See, generally,* HUSBAND & WIFE, Vol. XXVII., pp. 178 *et seq.*

Capacity to sue or be sued.]—*See, generally,* HUSBAND & WIFE, Vol. XXVII., pp. 248, 249, Nos. 2181–2190.

Separate trading by wife.]—*See, generally,* HUSBAND & WIFE, Vol. XXVII., pp. 89–91, Nos. 693–707.

Liability of wife during coverture—Effect of restraint on anticipation.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 120, 121, 122, Nos. 966–982.

Liability to bankruptcy laws.]—*See, generally,* BANKRUPTCY, Vol. IV., pp. 31, 32, 33, Nos. 251–274.

SECT. 3.—EVIDENCE OF FORMATION.

SUB-SECT. 1.—IN GENERAL.

223. Draft articles—Followed by performance.]—A draft of arts. of partnership, together with a stated account, & the payment of money by the acting partner to the others, held to be sufficient evidence of the partnership, whereupon to ground a decree for an account.—WORTS *v.* PERN (1707), 3 Bro. Parl. Cas. 548; 1 E. R. 1490, H. L.

224. —— ——.]—(1) Where partners, who are so under contract for a fixed period, there being no specific power by the contract to dissolve, so conduct themselves that mutual confidence is impossible, the ct. will, of its own authority, dissolve the partnership against the will of one of the partners.

(2) The partnership had been carried on for some time. It was contended for pltf., firstly, that there were no written terms, & that it was a partnership at will. Deft. referred to a memorandum in writing prepared by pltf. & sent to deft. for approval, but never signed; & upon the terms therein expressed the partners had acted. One of the terms was that the partnership was to be for seven years. The ct. held that the partners had treated the memorandum as the basis of their partnership & were bound by it.—BAXTER *v.* WEST (1860), 1 Drew. & Sm. 173; 62 E. R. 344.

225. —— **When no performance.**]—E. experimented in sewage, B. in yeast, & W. supplied both of them with money for the purpose. The three traded ostensibly as partners under the various names of "S. & co.," "W. & co.," & "H. & co.," & ultimately under that of "H., B., E. & co." Prior to 1869, the terms of the ostensible partnership subsisted in parol only, the two businesses being speculative & hazardous; but in 1869, success in the yeast manufacture appearing to have been at last obtained, a draft deed of partnership was prepared, but before its execution a rupture occurred among the partners or intending partners, & the deed remained unexecuted. B. & W. expelled pltf. E. forcibly from the premises, & subsequently took out a patent for the yeast invention in their own names. E. filed his bill claiming to be restored to the partnership & to have the benefit of the patent, an injunction, & account. It was proved by the evidence that no yeast had ever been sold :—*Held :* these circumstances showed no partnership between pltf. E. & defts. W. & B.—ELLIS *v.* WARD (1872), 21 W. R. 100.

226. Agreement for partnership — When not acted on.]—Defts. agreed with pltf. to remunerate him "in the event of their taking into partnership" one M., introduced by pltf. Defts. afterwards entered into a written agreement with M., by which it was agreed that they should enter into partnership, as & from a specified future day, when a formal deed of partnership should be executed, carrying out the terms of the agreement. This agreement recognised & adopted the agreement between pltf. & defts. No partnership deed was ever executed, nor did M. ever in fact act as a partner of defts. :—*Held :* (1) the agreement between M. & defts. did not constitute a present partnership; (2) there was evidence of a "taking into partnership" within the meaning of the agreement between pltf. & defts., so as to entitle pltf. to his commission.—HARRIS *v.* PETHERICK (1878), 39 L. T. 543.

227. —— **All terms not agreed.**]—A. & B. agreed to take C. into partnership at a future date, the agreement required by both sides to be drawn up by solrs. The parties had not considered, & could not afterwards agree upon several terms of the intended partnership :—*Held :* there

PART III. SECT. 3, SUB-SECT. 1.

m. *General rule.*]—A partnership cannot be established by the evidence of the partners & their private communications, the fact must be proved *aliunde.*—O'DONNELL *v.* O'DONNELL (1867), 5 Nfld. L. R. 169.—**NFLD.**

226 i. *Agreement for partnership—When not acted on.*]—In an action for breach of a partnership agreement :—*Held :* as the evidence showed a partnership for a term was contemplated, & no term was fixed, pltf. was properly non-suited on the ground that there was no evidence of a completed agreement.—MAGNUS *v.* MOSS (1903), 3 S. R. N. S. W. 686; 20 N. S. W. W. N. 252.—**AUS.**

226 ii. —— ——.]—DARLING *v.* BELLHOUSE (1860), 19 U. C. R. 268.—**CAN.**

226 iii. —— ——.]—GARRUTT *v.* MARSHALL (Sask.) (1911), 17 W. L. R. 285.—**CAN.**

n. —— *Partnership not intended.*]—KELLY, DOUGLAS & CO., LTD. *v.* SAYLE (1914), 19 B. C. R. 93.—**CAN.**

o. —— *Not executed—Though acted on.*]—Where a partnership agreement has been entered into & acted upon, the fact that a written document embodying the terms of the agreement had never been executed, will not invalidate it.—LANDRY *v.* KIRK (1917), 50 N. S. R. 133.—**CAN.**

p. *Act of partner as evidence o*

Sect. 3.—*Evidence of formation: Sub-sects.* 1 *&* 2, *A. & B.; sub-sect.* 3.]

was no concluded agreement between the parties.—CONNERY *v.* BEST, SAXBY & CO. (1884), Cab. & El. 291.

228. Advertisement of dissolution in London Gazette.]—Partnership by a public declaration in an advertisement of dissolution.

The affidavits represent that these persons were apparent partners & declared themselves to the world as such . . . I cannot possibly decide upon these affidavits, that there was no partnership (LORD ELDON, C.).—*Ex p.* MATTHEWS (1814), 3 Ves. & B. 125; 35 E. R. 426, L. C.

229. Conduct of partners—Holding out.]—*Ex p.* MATTHEWS, No. 228, *ante.*

.]—*See* Part II., Sect. 6, *ante.*

230. —— Personal interest in partnership business.]—MAUDSLAY *v.* LE BLANC (1827), 2 C. & P. 409, N. P.

Annotations:—**Refd.** Beale *v.* Mouls, Ekin & Hullmandel (1847), 11 Jur. 845; Newton *v.* Belcher (1848), 6 Ry. & Can. Cas. 38.

231. —— ——.]—One who stipulates for a share of the clear profits of a particular adventure is, *quoad* third persons, a partner. A. & B., by a memorandum in writing, agreed, "for services performed," to allow C. a fourth share of the clear profits arising from a contract for the construction of a line of railway, & there was evidence to show that C. had acted upon the agreement, though not formally a party to it, & that he had to some extent interfered in the work:—*Held:* sufficient to show that C. was a partner in the transaction, *quoad* third persons.—HEYHOE *v.* BURGE (1850), 9 C. B. 431; 19 L. J. C. P. 243; 137 E. R. 960; *sub nom.* HEYHOE *v.* BURGE, MARSE *v.* BURGE, 14 L. T. O. S. 487.

Annotations:—**Consd.** Hickman *v.* Cox (1857), 3 C. B. N. S. 523. **Refd.** Bullen *v.* Sharp (1865), 12 Jur. N. S. 247.

232. Residence at place of trading—In foreign country.]—Where the question is, whether A., who resides in England, is partner with B. who resides in Spain, it is not even *primâ facie* evidence of the fact to show that B. has long traded at S. in Spain, under the firm of A. & B. & that A. for a long time resided there, & that there was no other person there of that name.—BURGUE *v.* FIRMIN DE TASTET (1821), 3 Stark. 53, N. P.

233. Act of partner as evidence of partnership—Entry at custom house—Licenced premises.]—An entry by A. at the custom house, in the name of A. B., & C., of premises for the keeping of beer for sale, is conclusive where the Crown is concerned, against A., as to his partnership with B. & C., but with respect to private persons it is merely *primâ facie* evidence.—ELLIS *v.* WATSON (1818), 2 Stark. 453, N. P.

234. —— Party to private Act as subscriber.]—By a private Act to enable The Patent Rolling & Compressing Iron co. to purchase certain patents, & to sue & be sued, it was enacted, that, in all actions, etc., to be instituted or prosecuted against the co. "it shall be sufficient to state the name of the secretary or some one of the directors, or, where there shall be no secretary or director, then the name of some one of the shareholders for the time being of the co., as the nominal deft. representing the co. in such proceedings." The Act contained further provisions for the reimbursement, etc., of shareholders who might be sued "in any other manner than under the powers & authorities thereinbefore given": & sect. 31 enacted "that nothing therein contained should extend to incorporate the co., or to relieve or discharge the co., or any of the shareholders thereof, from any responsibility, duty, contract, or obligation whatever to which by law they then were or at any time thereafter might be subject or liable, either as between such co. & other parties, or as between the co. & any of the individual shareholders thereof & others, or as between themselves, or in any manner whatever:—*Held:* the fact of deft. having been party to a contract for the procuring the Act, of his name appearing in the Act as a subscriber to the undertaking, & of his having afterwards executed a deed of settlement which recited that the co. was in operation was evidence whence the jury might reasonably infer that he was a partner in the concern from the commencement.—BEECH *v.* EYRE (1843), 5 Man. & G. 415; 6 Scott, N. R. 327; 134 E. R. 625; *sub nom.* BEACH *v.* EYRE, 12 L. J. C. P. 140.

235. —— Execution of deed of settlement—Reciting company in operation.]—BEECH *v.* EYRE, No. 234, *ante.*

236. Partnership articles & collateral bonds—Executed on same date.]—MORISON *v.* MOAT, No. 1580, *post.*

Record of judicial proceedings.]—*See* EVIDENCE, Vol. XXII., pp. 303, 311, Nos. 2928, 2929, 3029.

Co-ownership of property.]—*See* Part II., Sect. 3, *ante.*

Sharing gross returns.]—*See* Part II., Sect. 4, *ante.*

Sharing profits.]—*See* Part II., Sect. 5, *ante.*

SUB-SECT. 2.—NECESSITY FOR WRITING.

A. Agreement not to be performed within a Year.

See, generally, CONTRACT, Vol. XII., pp. 118–125, Nos. 768–828.

Contract within Statute of Frauds.]—*See* CONTRACT, Vol. XII., p. 119, Nos. 770, 771.

—— Effect of part performance.]—*See, generally,* CONTRACT, Vol. XII., pp. 168–171, Nos. 1233–1255.

B. Partnership to Deal with Land.

See Law of Property Act, 1925 (c. 20), ss. 40, 53–55.

See, generally, LANDLORD & TENANT, Vol. XXX., pp. 375 *et seq.*; SALE OF LAND.

237. General rule—Writing not necessary.]—G., S., & B. were partners in trade under the firm of "G. S. & B." & the partnership assets comprised leaseholds. S. & B. agreed with G. to retire from the business & to assign their respective shares to him & B., signed & gave to G. the following memorandum: "Rough draft. Memorandum from G. S. & B. This is to record that in consideration of G. or his exors. paying B. or his assigns the sum of £100 on Jan. 1, 1890, & the sum

partnership — Declaration of partnership by one partner.]—In an action against two defts., where it is sought to charge them as partners, a declaration made by one is inadmissible to prove the partnership.—BURPEE *v.* SMITH & MANN (1880), 20 N. B. R. (4 P. & B.) 408.—**CAN.**

q. —— *Admission of partnership.*]—DISHER *v.* DONKIN (1913), 24 W. L. R. 955; 3 W. W. R. 1008; 18 B. C. R. 230.—**CAN.**

r. *Sufficiency of proof.*]—As to the sufficiency of proof of partnership, this may vary according to the nature of the demand & residence of the parties.—POLLOK *v.* CUNARD (1843), 4 N. B. R. (2 Kerr) 291.—**CAN.**

t. *Parol agreement — Necessity for corroboration.*]—SIMPSON *v.* TASKER-SIMPSON GRAIN CO., LTD. (Alta.), [1919] 3 W. W. R. 928.—**CAN.**

PART III. SECT. 3, SUB-SECT. 2.—B.

237 i. *General rule — Writing not necessary.*]—An agreement for partnership in land speculation need not be in writing.—KILPATRICK *v.* MACKAY (1878), 4 V. L. R. (Eq.) 28.—**AUS.**

237 ii. —— ——.]—There may be an agreement of partnership without writing, notwithstanding that the partnership is intended to deal with land; & Stat. Frauds will not avail

of £100 on every Jan. 1 for the nine succeeding years B. agrees to withdraw from the firm of G. S. & B." The parties intended that a more formal document should be prepared & signed by them respectively. In an action by G. to enforce specific performance of the above agreement:—*Held:* (1) the memorandum signed by B. was a sufficient acknowledgment by him in writing within the statute, for it meant that he should retire at once & implied that he should assign his share to G., & G. should indemnify him against the liabilities of the partnership; & as the memorandum fairly comprised all the material terms between the parties it was an enforceable contract within the statute notwithstanding that a more formal document was intended. (2) As there was no express agreement to assign the goodwill, G. had no right to continue to use the name of B. by carrying on business under the old partnership name.—GRAY *v.* SMITH (1889), 43 Ch. D. 208; 59 L. J. Ch. 145; 62 L. T. 335; 38 W. R. 310; 6 T. L. R. 109, C. A.

Annotations:—*As to* (1) **Refd.** *Re* De Nicols, De Nicols *v.* Curlier, [1900] 2 Ch. 410. *As to* (2) **Consd.** Jennings *v.* Jennings, [1898] 1 Ch. 378. **Distd.** Burchell *v.* Wilde, [1900] 1 Ch. 551. **Refd.** Thynne *v.* Shove (1890), 45 Ch. D. 577.

238. Agreement to share profits—Subsequent memorandum in writing.]—DALE *v.* HAMILTON, No. 44, *ante*.

239. —— Marriage contract.]—A Frenchman & Frenchwoman married in France without any express marriage contract so that according to the French law their rights as to property were subject to the law of community of goods. Subsequently they came to England & acquired an English domicil, & the husband amassed a large fortune part of which he invested in real & leasehold property here. He died in the lifetime of the wife, having purported to dispose of all his property by an English will. It having been held that as to movables the wife was entitled notwithstanding the change of domicil to a one-half share under the law of community of goods, the question arose whether she was entitled on the same footing to a share of the real & leasehold property:—*Held:* on the authority of *Forster* v. *Hale*, No. 43, *ante*, & *Dale* v. *Hamilton*, No. 44, *ante*, Stat. Frauds did not apply, inasmuch as this was in substance a contract for a partnership, & the property required for the purposes of the partnership was by operation of law held for those purposes; therefore the real & leasehold property was subject to the community of goods.—*Re* DE NICOLS, DE NICOLS *v.* CURLIER, [1900] 2 Ch. 410; 69 L. J. Ch. 680; 82 L. T. 840; 48 W. R. 602; 16 T. L. R. 461; 44 Sol. Jo. 573.

—— Mining contract.] — *See* MINES, Vol. XXXIV., p. 658, Nos. 576, 577.

240. Agreement to continue partnership.]—Two persons seised of freeholds agreed to carry on business in partnership upon the premises for fourteen years, & that if either died during that term, the survivor should purchase the freeholds at a stated price. The fourteen years having expired, they, by parol agreement, continued the partnership "on the old terms." One afterwards died intestate:—*Held:* the stipulation as to purchase was binding, & the freeholds were converted into personal estate, & did not pass to the heir.—ESSEX *v.* ESSEX (1855), 20 Beav. 442; 52 E. R. 674.

Annotations:—**Consd.** Hogg *v.* Hogg (1876), 35 L. T. 792. **Apld.** Cox *v.* Willoughby (1880), 13 Ch. D. 863. **Mentd.** Buckland *v.* Papillon (1866), 15 L. T. 378.

241. Agreement to hold lease in partnership—Part performance—Admissibility of parol evidence.]—ISAACS *v.* EVANS (1899), 16 T. L. R. 113; 44 Sol. Jo. 157.

SUB-SECT. 3.—ADMISSIBILITY OF PAROL EVIDENCE.

242. General rule—Parol evidence admissible.]—In an action against one of several members of a society established under a deed of co-partnership for goods supplied to the society, deft. may be proved to be a partner by parol evidence without producing the deed.—ALDERSON *v.* CLAY (1816), 1 Stark. 405, N. P.

Annotation:—**Refd.** Dickinson *v.* Valpy (1829), 5 Man. & Ry. K. B. 126.

243. —— —— Admissions by one partner.]—Where deft. is charged with a debt as partner in a mining co., but is not shown to have either contracted such debt personally, or represented himself to pltf. as a partner, the fact of his having been partner may nevertheless be shown by evidence short of strict proof that he had executed a deed of co-partnership, or was legally interested in the mine. Admissions made by him, before or after the debt was incurred, may be evidence for this purpose.—RALPH *v.* HARVEY, RICHARDS *v.* HARVEY (1841), 1 Q. B. 845; 10 L. J. Q. B. 337; 113 E. R. 1355.

244. —— ——.]—Prisoner was convicted of embezzling the money of T. B. & others, who carried on business under the name of The Rotherham Coal co., Limited. Some members of the co. were called directors, & others shareholders; the number of members had far exceeded twenty; the name of the co. was over the door; the shares were transferable without the consent of the other shareholders; & a minute book for resolutions was kept. No register of shareholders was produced at the trial:—*Held:* partners in the co. might be proved to be such by parol evidence.—R. *v.* FRANKLAND (1863), Le. & Ca. 276; 1 New Rep. 375; 32 L. J. M. C. 69; 7 L. T. 799; 27 J. P. 260; 9 Jur. N. S. 388; 11 W. R. 346; 9 Cox, C. C. 273; 169 E. R. 1394, C. C. R.

Annotations:—**Refd.** Jeffrey *v.* Bamford, [1921] 2 K. B. 351. **Mentd.** R. *v.* Webb (1893), 9 T. L. R. 199.

245. As to date of commencement of partnership—Where no date fixed by agreement.]—An attorney entered into a written contract, whereby

as a defence to an action to enforce such an agreement.—MACKISSOCK *v.* BROWN (Man.) (1913), 23 W. L. R. 782; 10 D. L. R. 472; 4 W. W. R. 60.—**CAN.**

a. *Agreement to hold lease in partnership—Mining lease.*]—A parol agreement to form a partnership in the leasehold of a mine is enforceable against the owner of the leasehold who is one of the proposed partners.—WARREN & MACDONALD *v.* GALLAGHER (Alta.), [1921] 2 W. W. R. 346; 67 D. L. R. 764.—**CAN.**

b. *Agreement for partnership—Purchase of land by partner in own name.*]—FORD *v.* COMBER (1890), 16 V. L. R. 540.—**AUS.**

c. *Partnership in specific land—Purchase from co-partner.*]—An agreement for partnership whereby one of the partners acquires an interest in land held by the other falls within Stat. Frauds.—CAPORT *v.* DIXON (1904), 6 W. A. L. R. 71.—**AUS.**

d. —— *Joint purchase.*]—IMRIE *v.* NISBET (1908), 27 N. Z. L. R. 783.—**N.Z.**

e. —— ——.]—A parol agreement to become partners in the purchase of a specific parcel of land for speculative purposes, there being no part performance to take it out of Stat. Frauds, s. 4, is unenforceable.—CODY *v.* ROTH (1909), 28 N. Z. L. R. 565.—**N.Z.**

f. *Agreement to hold licence in partnership — Part performance — Admissibility of parol evidence.*]—TILLEY *v.* CLEARY & HENDERSON (1887), 7 Nfld. L. R. 202.—**NFLD.**

PART III. SECT. 3, SUB-SECT. 3.

g. *As to interest of partner.*]—WILLIAMS *v.* ROBINSON (1891), 12 N. S. W. Eq. 34: 7 N. S. W. W. N. 153.—**AUS.**

3.—*Evidence of formation: Sub-sect.* 3. 4, 5 & 6: *Sub-sect.* 1.]

he agreed to take into partnership in the business of an attorney, a person who had not at that time been admitted, no time was expressly fixed for the commencement of the partnership:—*Held:* (1) no time being expressly appointed, the partnership commenced from the date of the agreement; (2) parol evidence was properly admitted to show that the person taken into partnership was not an attorney at the time when the agreement was executed; but it could not be received to show that the agreement was not to take effect until he should be duly admitted, for that would make the agreement different from that which it purported to be; viz. an agreement for a present partnership.—WILLIAMS *v.* JONES (1826), 5 B. & C. 108; 7 Dow. & Ry. K. B. 548; 108 E. R. 40.

Annotations:—Generally, **Refd.** Armstrong *v.* Lewis (1834), 2 Cr. & M. 274. **Menrd.** Cusse *v.* Corfe (1828), 6 L. J. O. S. K. B. 140; Bissell *v.* Beard (1873), 28 L. T. 740.

246. As to status of partner—At time of agreement.]—WILLIAMS *v.* JONES, No. 245, *ante*.

SECT. 4.—COMMENCEMENT OF PARTNERSHIP.

247. No time expressly appointed—Agreement for partnership—Partnership commenced from date of agreement.]—WILLIAMS *v.* JONES, No. 245, *ante*.

SECT. 5.—VARIATION OF TERMS OF ARTICLES.

See Partnership Act, 1890 (c. 39), s. 19.

248. By mode of dealing.]—(1) The manager of a partnership concern, having a salary, with a share of the profits, according to a proportion of capital & stock not advanced by him, but assigned by way of nominal interest, for the purpose of creating an addition to his salary, depending upon the contingency of the success which might be consequent upon his skill & industry, is not a partner subject to loss in account with the other partners. In such a case the manager is not liable for loss, although it is expressed in the arts. of partnership that the partners, not excepting the manager, are to be "subject to profit & loss," & although the manager signed the partnership books, joined in securities given by the partnership, & in most other partnership acts, including the advertisement for a dissolution; because it appeared, from the general structure, & all the provisions of the contract taken & construed together, as well as from the transactions between the parties & the conduct of the other partners, that the provision as to profit & loss was not intended to apply to the manager.

(2) A partner may be liable for loss as to the creditors of the partnership, & not so as to his co-partners.

(3) The most positive expressions as to liability to loss, in arts. of co-partnership, may be controlled & superseded by transactions between the parties, the conduct of the co-partners, & the special circumstances of the case, including non-claim, & inconsistent representations during a protracted litigation, which furnished occasion to make the claim if the right existed.

(4) The transactions between partners may amount to a waiver of a written agreement, or evidence of a new agreement, different from written articles, provided those transactions show a probability, amounting almost to demonstration, that the arts. were otherwise intended.—GEDDES *v.* WALLACE (1820), 2 Bli. 270; 4 E. R. 328, H. L.

Annotations:—As to (2) **Refd.** Jeffrey *v.* Bamford, [1921] 2 K. B. 351. *As to* (4) **Refd.** Auston *v.* Boys (1858), 2 De G. & J. 626. *Generally*, **Refd.** Katsch *v.* Schenck (1849), 13 Jur. 668.

249. ——.]—(1) To entitle one partner to an order for an injunction & receiver, against his co-partner, he must either show a dissolution, or facts which, if proved at the hearing, would entitle him to a decree for a dissolution.

(2) Where a partner does acts inconsistent with the duty of a partner, & of a nature to destroy the mutual confidence which ought to subsist between partners, & makes it impossible that the business can be conducted in partnership with benefit to either party, the ct. will decree a dissolution before the expiration of the term for which the partnership was entered into.

(3) The transactions of partners with each other cannot be considered merely with reference to the express contract between them. The duties & obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends & continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties & obligations, they are implied & enforced by the law; & it is often matter to be collected & inferred from the conduct & practice of the parties, whether they have held themselves, or ought or ought not to be held, bound by the particular provisions contained in their express agreement. When it is insisted that the conduct of one partner entitles the other to a dissolution, the ct. must consider, not merely the specific terms of the express contract, but also the duties & obligations which are implied in every partnership contract.—SMITH *v.* JEYES (1841), 4 Beav. 503; 49 E. R. 433.

Annotation:—Generally, **Refd.** Hall *v.* Hall (1850), 3 Mac. & G. 79.

250. ——.]—(1) Agreement for a partnership decreed to be specifically performed by the execution of a proper partnership deed.

(2) Partners may make constant variations in the terms of their partnership agreement which may be evidenced not only by writing but by their conduct.

(3) Injunction granted to restrain a partner, during the partnership term, from carrying on business with other persons in the name of the old firm, & from publishing notices of dissolution.

(4) To a bill for the specific performance of a partnership, one deft. objected to the misconduct of another partner, who was a co-deft.:—*Held:* this defence could only be made available upon cross-bill.—ENGLAND *v.* CURLING (1844), 8 Beav. 129; 1 L. T. O. S. 409; 50 E. R. 51.

Annotations:—As to (1) **Refd.** Scott *v.* Rayment (1868), L. R. 7 Eq. 112; Byrne *v.* Reid, [1902] 2 Ch. 735. *As to* (2) **Refd.** Sichel *v.* Mosenthal (1862), 30 Beav. 371.

251. —— Waiver of terms in company's deed distinguished.]—A clause of a partnership deed, however precise, may be waived by the conduct of all the partners, but a waiver of the stipulations of a co.'s deed by the directors is not sufficient, unless it is shown that the body at large made the directors their agents for that purpose.—*Re* VALE OF NEATH & SOUTH WALES BREWERY CO., KEENE'S EXECUTORS' CASE (1853), 3 De G. M. & G. 272; 43 E. R. 107; *sub nom. Re* VALE OF NEATH & SOUTH WALES BREWERY CO., *Ex p.* WOOD, 22 L. J. Ch. 365; 20 L. T. O. S. 196; 17 Jur. 813; 1 W. R. 105, L. JJ.

252. ——.]—COVENTRY *v.* BARCLAY, No. 1356, *post*.

253. ——.] — PILLING *v.* PILLING (1865), 3 De G. J. & Sm. 162 ; 46 E. R. 599, L. JJ.

Annotations :—**Refd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1. **Mentd.** Bruner *v.* Moore, [1904] 1 Ch. 305 ; Morrell *v.* Studd & Millington, [1913] 2 Ch. 648.

254. —— Whether single instance of waiver sufficient.]—(1) Although arts. of partnership may be presumed from the dealings of the partners to have been waived, a single instance of departure from them is not a sufficient foundation for such a presumption.

(2) Goodwill in general means the chance of being able to keep a business connected with the place where it has been carried on, but it is in this sense inapplicable to the business of solrs.

Where arts. of partnership between London solrs. provided that either partner might retire, & that in that case the continuing partners should pay the retiring partner for his share & goodwill the fair marketable value, & the retiring partner should not practise within one hundred miles of the General Post Office, but should use his best endeavours to promote the interests of the remaining partners :—*Held :* goodwill must be taken to mean only the interest which the retiring partner would have had if he had remained in the partnership till the expiration of it by effluxion of time.—AUSTEN *v.* BOYS (1858), 2 De G. & J. 626 ; 27 L. J. Ch. 714 ; 31 L. T. O. S. 276 ; 4 Jur. N. S. 719 ; 6 W. R. 729 ; 44 E. R. 1133, L. C.

Annotations :—*As to* (3) **Refd.** Clark *v.* Leach (1863), 1 De G. J. & Sm. 409. *Generally*, **Refd.** Reynolds *v.* Bullock (1878), 47 L. J. Ch. 773. **Mentd.** Corbin *v.* Stewart (1911), 28 T. L. R. 99.

255. —— —— Extension of objects of partnership.]—Partnership is frequently said to be a branch of the law of agency, but it might also be correctly described as a branch of the law of contract when, besides what is expressly provided for by the partnership deed, something *aliunde* was introduced by agreement, that is just as much a part of the partnership, as if it had been provided for by the original deed. In order to ascertain whether the scope of the partnership has been enlarged, one generally looks at the conduct of the partners in relation to the business, extending over a number of years ; though, on the other hand, some one act of great importance might be sufficient to enable the ct. to draw a conclusion that the objects of the business have been extended (KEKEWICH, J.).—PEAT *v.* SMITH (1889), 5 T. L. R. 306.

256. By agreement in writing—All partners must be consulted—Right of majority to vary terms.]—CONST *v.* HARRIS, No. 1502, *post.*

257. ——.]—ENGLAND *v.* CURLING, No. 250, *ante.*

258. By parol agreement—Effect of variation as to taking accounts—Pecuniary interests of partners not altered.]—By arts. of partnership it was agreed that the settlement of accounts should be made half yearly, at Lady Day & Michaelmas, & that on the death of a partner his share of the assets should be taken at the amount settled by the last half yearly account preceding his death. By a subsequent parol agreement it was arranged that the accounts should be settled once a year only, viz., at Michaelmas :—*Held :* this variation in the partnership arts. did not affect the money interests of the partners, & upon the death of a partner in the month of May the accounts must be settled up to the previous Mar. 25.—LAWES *v.* LAWES (1878), 9 Ch. D. 98 ; 27 W. R. 186 ; *sub nom. Re* LAWES, LAWES *v.* LAWES, 38 L. T. 709.

259. By order of the court—Terms unduly onerous to surviving partner—Benefit of infants considered.]—Where the terms of the partnership were unduly onerous to the surviving partner & a more beneficial arrangement offered for the estate of the deceased partner, infants being interested, the arts. of partnership were ordered to be varied. —MARTINDALE *v.* MARTINDALE (1855), 1 Jur. N. S.

SECT. 6.—DURATION OF PARTNERSHIP.

SUB-SECT. 1.—IN GENERAL.

Partnership for indefinite period—Right to determine at any time.]—*See* Part VI., Sect. 1, *post.*

260. —— Whether agreement as to duration implied—From duration of partnership lease.]—CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY, No. 51, *ante.*

261. —— —— ——.]—JEFFERYS *v.* SMITH, No. 52, *ante.*

262. —— —— ——.]—Construction of arts. of partnership with respect to the power of dissolution. The general right which every member of a partnership has to dissolve the partnership, will not be controlled except by clear expressions—that right will not be controlled by the partners taking a lease for years of the premises on which the trade is to be carried on ; nor by provisions in the arts. as to the amount of capital to be brought in by the several partners in successive years ; nor by provision for the event, where the partners are in number more than two, of the exclusion of one of them by the others.—BAXTER *v.* PLENDERLEATH (1824), 2 L. J. O. S. Ch. 119.

263. —— —— ——.]—Pltf. & deft. held some powder mills on a lease, which would expire in 1831. Pltf. filed his bill for a dissolution of the partnership ; it was objected by deft. that the partnership must last during the lease :—*Held :* the partnership dissolved from the time stated in a notice given by the pltf. to deft.—ALCOCK *v.* TAYLOR (1830), Taml. 506 ; 48 E. R. 201.

264. —— —— From provisions as to capital to be brought in.]—BAXTER *v.* PLENDERLEATH, No. 262, *ante.*

265. —— —— From provisions for exclusion of partners.]—BAXTER *v.* PLENDERLEATH, No. 262, *ante.*

266. —— —— From agreement to execute deed under Partnership Act, 1865 (c. 86).]—SYERS *v.* SYERS, No. 46, *ante.*

267. —— —— Sub-partnership — Duration of original partnership.]—Where one of several partners agrees with a stranger for a sub-partnership, it is not to be implied, in the absence of any agreement, that the duration of the sub-partnership is to be co-extensive with the original partnership.—FROST *v.* MOULTON (1856), 21 Beav. 596 ; 52 E. R. 990.

268. —— —— Burden of proof — On party setting up duration.]—(1) Pltf. was lessee of seams of coal for a term of years & had abandoned the working of the upper seams as unprofitable. In 1845 he entered into partnership for working the upper seams with deft., his colliery manager. In 1857 the upper seams having been worked as far as could be done from the existing pits, deft., with the privity & approbation of pltf., sunk a new pit

PART III. SECT. 6, SUB-SECT. 1.

h. *Partnership for indefinite period—Working partnership—Cessation of work by partner.]*—A partnership under which, if one partner does not work, he gets no share, is abandoned by such partner when he ceases work.—JORGENSEN *v.* BOYCE (1896), 22 V. L. R. 408.—**AUS.**

k. —— *So long as profitable.]*—A partnership to continue so long as profitable is not merely a partnership at will, but for a period which, though uncertain at its commencement, & such possibly as might only terminate

Sect. 6.—*Duration of partnership: Sub-sects.* 1 *&* 2, *A. & B.* (*a*) *&* (*b*).]

at considerable expense, which was defrayed out of the partnership moneys. In 1858, differences having arisen, pltf. gave deft. notice to dissolve the partnership, which notice deft. refused to receive, insisting that the understanding had been that the partnership should continue for the whole duration of the lease. The new pit was only just finished. No express agreement as to the duration of the partnership was proved :—*Held :* the burden of establishing that there was more than a partnership at will lay upon deft., & in the absence of such proof pltf. was entitled to dissolve the partnership at his pleasure, & deft. could not claim any interest in the seams of coal ; but an inquiry had rightly been directed whether any & what sum ought to be allowed to deft. in respect of the expenditure on the new pit.

(2) In the absence of any agreement that the stock & plant shall be taken by either party upon termination of the partnership, each is entitled to have the value ascertained by a sale.—BURDON *v.* BARKUS (1862), 4 De G. F. & J. 42 ; 31 L. J. Ch. 521 ; 7 L. T. 116 ; 8 Jur. N. S. 656 ; 45 E. R. 1098, L. JJ.

Annotation :—Generally, **Refd.** Pocock *v.* Carter, [1912] 1 Ch. 663.

269. —— Subsequent voluntary withdrawal of one partner—No interference with business while absent.]—Where two persons had acted in partnership as solrs., & one of them had for some cause voluntarily left the town wherein they had conducted their business, & lived in concealment, &, during the time of his absenting himself, did not interfere with or assist in the business :—*Held :* under the circumstance upon a bill of injunction, the partnership ought to be deemed to have expired from the time he first absented himself, & not from the filing the bill.—PARSONS *v.* BENN (1849), 14 L. T. O. S. 171.

Partnership for single adventure.]—*See* Part VI., Sect. 1, sub-sect. 2, *post.*

SUB-SECT. 2.—PARTNERSHIP CONTINUED WITHOUT EXPRESS AGREEMENT.

A. In General.

See Partnership Act, 1890 (c. 39), s. 27.

270. General rule — Partnership at will.]—BROOKS *v.* BROOKS, No. 286, *post.*

Effect of continuation—Discharge of surety.]—*See* GUARANTEE, Vol. XXVI., p. 177, No. 1332

B. On What Terms.

(*a*) *In General.*

See Partnership Act, 1890 (c. 39), s. 27 (1).

271. General rule—Terms [of original partnership — Presumption from conduct.]—KING *v.* CHUCK, No. 279, *post.*

272. —— —— So far as applicable to altered circumstances.]—HOGG *v.* HOGG, No. 282, *post.*

273. —— —— ——.]—Where partners, after the expiration of the term agreed upon by the arts. of co-partnership, continue to carry on the business at will, without change, this partnership is regulated by the arts., so far as they are applicable to the new state of circumstances, but such of the arts. as are inconsistent with a partnership at will have no application.

By arts. for a partnership for seven years, a partner, upon certain default of his co-partner, had power to dissolve, & thereupon the defaulting partner was to be considered as quitting the business for the benefit of the partner giving the notice, who was to have the option of taking the property & effects of the partnership at a valuation :—*Held :* this clause did not apply to a partnership continued at will after the expiration of the seven years.—CLARK *v.* LEACH (1863), 1 De G. J. & Sm. 409 ; 32 Beav. 14 ; 32 L. J. Ch. 290 ; 8 L. T. 40 ; 27 J. P. 468 ; 9 Jur. N. S. 610 ; 11 W. R. 351 ; 46 E. R. 163, L. C.

Annotations :—**Distd.** Daw *v.* Herring, [1892] 1 Ch. 284 **Refd.** Cope *v.* Cope (1885), 52 L. T. 607.

274. —— —— ——.]—COX *v.* WILLOUGHBY, No. 283, *post.*

275. —— —— ——.]—NEILSON *v.* MOSSEND IRON CO., No. 288, *post.*

276. —— —— So far as applicable to partnership at will.]—CLARK *v.* LEACH, No. 273, *ante.*

277. —— —— ——.]—DAW *v.* HERRING, No. 285, *post.*

278. —— ——.]—PARSONS *v.* HAYWARD, No. 1646, *post.*

(*b*) *Particular Instances.*

279. Provisions as to purchase by survivor.]—Surviving partners held, by inference deduced from their conduct, to have carried on their business on the same terms as the original partners.

In a partnership between A., B. & C., there was a stipulation that if one died, the survivor should take the business & pay his exors. his capital as appearing on the last account. A. died, & B. & C. continued to carry on the business without arts. B. afterwards died. The ct., from the conduct of the parties, inferred that B. & C. carried on their business on the same terms, as to winding up on the death of either, as those which applied to the first partnership between A., B. & C., & decreed C. to pay to B.'s exors. his capital as appearing on the last account.—KING *v.* CHUCK (1853), 17 Beav. 325 ; 51 E. R. 1059.

280. ——.]—A. carried on trade upon land of which he was seised in fee. Afterwards he took one of his sons into partnership for 24 years, & conveyed to him, in fee, certain shares in the land ; &, by their arts. of partnership, they covenanted that the land should, at all times thereafter, be held as partnership property, & be considered & treated as part of the joint stock of the trade ; & it was provided that if either partner died or retired during the twenty-four years, his co-partner might purchase his share, at the sum stated to be its value in the last yearly accounts. In the course of the twenty-four years £1,700 was expended, out of the partnership funds, in building

with the life of one partner, is not an "undefined term" within Partnership Act, 1891, s. 35.—WILSON *v.* KIRKCALDIE (1894), 13 N. Z. L. R. 286.—**N.Z.**

PART III. SECT. 6, SUB-SECT. 2.—A.

270 i. *General rule—Partnership at will.*]—Partnership by deed, continued by the partners after the expiration of the original partnership term, without a new agreement, the effect is that all the old covenants are infused into the new relation, with the exception of the clause for duration ; for either party may instantly dissolve the prolonged partnership, but all the other original stipulations are continued.—BOOTH *v.* PARKS (1828), 1 Mol. 465.—**IR.**

PART III. SECT. 6, SUB-SECT. 2. B. (a).

l. *Terms of original partnership.*] BURN *v.* STRONG (1868), 14 Gr. 651. **CAN.**

PART III. SECT. 6, SUB-SECT. 2. B. (b).

279 i. *Provisions as to purchase by survivor.*] — HIBBEN *v.* COLLISTER (1900), 30 S. C. R. 459.—**CAN.**

279 ii. ——.]—MURPHY *v.* POWER, [1923] 1 I. R. 68.—**IR.**

279 iii. ——.]—TROUTBECK *v.* RICHARDSON (1878), O. B. & F. 80.—**N.Z.**

m. *Right to nominate successor.*]—

on the land. After the expiration of the twenty-four years, & until A.'s death, he & his son continued to carry on their trade on the land, without entering into any new agreement:—*Held:* the son's right of pre-emption as to his father's share of the stock, including the land, expired with the term of twenty-four years, &, all the debts of the partnership having been paid, A.'s share of the land retained its original character & descended to his heir.—COOKSON *v.* COOKSON (1837), 8 Sim. 529; 6 L. J. Ch. 337; 1 Jur. 621; 59 E. R. 210.

Annotations:—**Distd.** Essex *v.* Essex (1855), 20 Beav. 442. **Expld.** Darby *v.* Darby (1856), 3 Drew. 495. **N.F.** Cox *v.* Willoughby (1880), 13 Ch. D. 863. **Refd.** Brooks *v.* Brooks (1901), 85 L. T. 453.

281. ——.]—ESSEX *v.* ESSEX, No. 240, *ante*.

282. ——.]—Where a partnership for a term is continued after its expiration without express renewal, although the assumption is that it is continued on the same general footing as before, this only extends to such of the stipulations in the original arts. as are properly applicable to the new contract.

A. & B. entered into partnership for a term. The arts. provided that, in case either partner should die before the expiration of the partnership term, the surviving partner should settle & adjust all accounts, matters, & things relating to the partnership, & should become the purchaser of the share of the deceased partner, at the amount fixed as the value thereof, on the last annual statement of account, & should pay the same by certain instalments. On the expiration of the term, A. & B. continued to carry on the business without any reference to the partnership arts. A. died. B. then expressed his determination to carry on the business alone, &, under an arrangement with A.'s administratrix, stated an account of the value of the business as a going concern at the death of A., & took over the business & A.'s share, at the amount appearing by the account to be the value thereof, & paid sums on account. On the death of B. the partnership assets were sold at a considerable loss, & it was insisted by B.'s representatives that this loss ought to be borne ratably by A.'s & B.'s estates:—*Held:* as B. had insisted on his right under the arts. to purchase A.'s share at a valuation stated by himself, A.'s administratrix was entitled to prove against B.'s estate for the balance due under the stated account.—HOGG *v.* HOGG (1876), 35 L. T. 792.

283. ——.]—When, after the expiration of the term limited by partnership arts., the business is carried on by the partners without the execution of fresh arts., all those provisions of the old arts. which are not inconsistent with a partnership at will continue to apply to the partnership at will thus constituted. Under such circumstances:—*Held:* a provision in the arts. that, on the decease of one of the partners before the expiration of the partnership term, the surviving partner should pay to his exors. the sum of £1,500, as the purchase-money for his interest in the goodwill of the business, applied to the partnership at will constituted by the carrying on of the business without fresh arts. after the expiration of the partnership term.—COX *v.* WILLOUGHBY (1880), 13 Ch. D. 863; 49 L. J. Ch. 237; 42 L. T. 125; 28 W. R. 503.

Annotations:—**Apld.** Daw *v.* Herring, [1892] 1 Ch. 284. **Consd.** Brooks *v.* Brooks (1901), 85 L. T. 453.

284. ——.]—A. & B. having carried on business in partnership with unequal capitals for a term of years, under arts. which provided for an equal division of profits after payment of interest upon their respective capitals, continued, after the expiration of the arts., to carry on business until A.'s death upon the footing of the arts. At A.'s death his capital was more than three times as large as that of B., & B., who claimed under the expired arts. the right to purchase the business, continued, without the consent of A.'s representatives, to carry it on & to use A.'s capital therein. In 1873, A.'s representatives commenced this suit against B., &, at the hearing in 1875, it was decided that B.'s option to purchase ceased when the arts. expired. The business was then sold under the order of the ct., after having been thus carried on for about three years:—*Held:* after making a proper allowance to B. for managing the business, the profits earned since A.'s death must be divided between A.'s representatives & B., according to the proportion in which the partners were entitled to the capital employed in the business.—YATES *v.* FINN (1880), 13 Ch. D. 839; 49 L. J. Ch. 188; 28 W. R. 387.

Annotations:—**Consd.** Daw *v.* Herring, [1892] 1 Ch. 284. **Refd.** *Re* Aldridge, Aldridge *v.* Aldridge (1894), 63 L. J. Ch. 465.

285. ——.]—A. & B. carried on business under arts. of partnership which contained a clause providing that "within three months after the expiration or determination of the partnership by effluxion of time" B. should have the option, to be signified within three months after the determination of the partnership, of purchasing A.'s share in the business. After the expiration of the term created by the arts. of partnership, A. & B. continued to carry on the business without making any fresh arrangement:—*Held:* the provisions of the clause in the original arts. giving B. the option of purchasing A.'s share remained in force, & were applicable to the partnership at will carried on by them after the expiration of the original term.—DAW *v.* HERRING, [1892] 1 Ch. 284; 61 L. J. Ch. 5; 65 L. T. 782; 40 W. R. 61.

Annotation:—**Folld.** Brooks *v.* Brooks (1901), 85 L. T. 453.

286. ——.]—In an action for a declaration that the partnership between pltf. & deft. was dissolved by the issue of the writ, & that pltf. was entitled to exercise the rights conferred by clause 25 of the partnership arts. for the purchase of the interest of deft., it appeared that by the arts. the partnership was fixed for ten years from Jan. 1, 1889, unless sooner determined as therein provided. By clause 25 pltf. was to be at liberty to determine the partnership by giving deft. six months' notice, & whether so determined or by effluxion of time she should have the right to purchase the share of deft. at a valuation. Since Jan. 1, 1899, the partnership had been carried on on the like terms, as a partnership at will. At the hearing deft. contended that the continued partnership was not a partnership at will, & that in any event clause 25 was now applicable:—*Held:* (1) such continued partnership was a partnership at will, under Partnership Act, 1890 (c. 39), s. 27, & (2) having regard to the observations of LORD WATSON in *Neilson* v. *Mossend Iron Co.*, No. 288, *post*, & the judgment of STIRLING, L.J., in *Daw* v. *Herring*, No. 285, *ante*, clause 25 was not inconsistent with a partnership at will, & accordingly pltf. was entitled to the declaration as asked.—BROOKS *v.* BROOKS (1901), 85 L. T. 453.

CUFFE *v.* MURTAGH (1881), 7 L. R. Ir. 411.—**IR.**

n. *Provisions as to use of retiring partner's name.*]—RUSHERBROOK *v.* BRIDGEMAN (1910), 29 N. Z. L. R. 1184.—**N.Z.**

o. *Right of pre-emption on termination.*]—M'GOWN *v.* HENDERSON, [1914] S. C. 839.—**SCOT.**

Sect. 6.—*Duration of partnership: Sub-sect.* 2, *B.* (*b*). *Part IV. Sect.* 1: *Sub-sect.* 1, *A.*]

287. Provisions as to right of dissolution.]—CLARK *v.* LEACH, No. 273, *ante.*

288. ——.]—When the members of a mercantile firm continue to trade as partners after the expiration of the term limited by the partnership arts., without making any new agreement, the original contract is prolonged by tacit consent, & all its conditions remain in force, except in so far as they are inconsistent with any implied term of the renewed contract. An implied term of such a new contract is that each partner has the right, when acting *bonâ fide* & not for the purpose of obtaining an undue advantage, instantly to determine the partnership.

(2) A clause of a contract of co-partnership provided, *inter alia*, that "If three months before the termination of this contract, the whole partners of the co. shall not have agreed to carry on the business thereof, any one or more of them who may be desirous of retiring shall be entitled to do so, & shall immediately, on the completion of the balance after-mentioned, be paid out, by the partners electing to continue the business, his share in the concern, as the same shall be ascertained by a balance of the co.'s books, as at the termination of the contract to be completed, within not more than three months from said termination; . . . but if the whole partners wish, the property & assets of the copartnery shall be disposed of as follows: It shall be competent for any one of the partners, for himself, or for any one or more of them together, to give in offers for the same as a going concern, & the highest offerer is to be held to be the purchaser; & in case only one offer was made, the party making it was to be the purchaser, at such a price as should be mutually agreed, & in case no offer was made, then the said property & assets should be realised in such manner as should be mutually agreed upon, or as should be fixed by the arbiter named." The business was carried on after the term limited by the contract of copartnery had expired without any new agreement:—*Held:* this clause had no longer any application; & that each partner was at liberty to determine the whole partnership whenever he thought proper.—NEILSON *v.* MOSSEND IRON CO. (1886), 11 App. Cas. 298, H. L.

Annotations:—**Consd.** Daw *v.* Herring, [1892] 1 Ch. 284. **Apld.** Brooks *v.* Brooks (1901), 85 L. T. 453.

289. —— **On assignment of share by partner.**]—A clause in partnership arts. providing that if one partner assigns his share without consent of the other, the partnership shall stand dissolved. is construed not as working an immediate dissolution in the case provided for, but as giving the other partner an option to dissolve, especially where another clause gives either party an option to determine the partnership by notice. *Semble:* such a clause does not continue to apply where a partnership for a term is continued as a partnership at will after the term has expired.—CAMPBELL *v.* CAMPBELL (1893), 6 R. 137, H. L.

Annotation:—**Apld.** Sturgeon *v.* Salmon (1906), 22 T. L. R. 584

——.]—*See, generally*, Part VI., Sect. 1, *post.*

290. Provision as to mode of sale on dissolution.]—At the expiration of arts. of partnership the partnership was carried on without new arts. A particular mode of sale of the partnership assets had been provided by the arts. at the expiration of the term, or upon notice of dissolution by any of the partners:—*Held:* such mode of sale was not applicable to the determination of the continuing partnership at will.—WOODS *v.* LAMB (1866), 35 L. J. Ch. 309.

291. Arbitration clause.]—Arts. for a partnership for one year contained an arbn. clause. The partnership was continued beyond the year & ultimately dissolved:—*Held:* the arbn. clause was in force, & proceedings in a suit for accounts by one of the partners against the other stayed under C. L. P. Act, 1854 (c. 125), s. 11.—GILLETT *v.* THORNTON (1875), L. R. 19 Eq. 599; 44 L. J. Ch. 398; 23 W. R. 437.

Annotations:—**Apld.** Cope *v.* Cope (1885), 52 L. T. 607. **Refd.** Walmsley *v.* White (1892), 67 L. T. 433. **Mentd.** Compagnie du Senegal *v.* Woods (1883), 53 L. J. Ch. 166.

292. —— **Application of provisions — Question for court or arbitration.**]—A partnership was continued after the expiration of the term specified in the arts. of partnership. The arts. contained an arbn. clause, providing, in effect, that all disputes or questions respecting the partnership affairs, or the construction of the arts., should be referred to arbn. There were also clauses providing for the purchasing by the continuing partners of the share of a deceased partner. An action was brought by the exors. of a deceased partner against the surviving partner for the winding up of the partnership. Deft. moved for a stay of proceedings & a reference of the matters in difference between the parties to arbn. One of the questions was, whether it was for the ct. or for the arbitrators to determine which of the clauses in the arts., & in particular whether the purchasing clauses, applied to the partnership so carried on after the expiration of the term:—*Held:* it was for the arbitrators, & not for the ct., to determine which of the arts. applied; & a stay of proceedings must be directed, & a reference of all matters in difference to arbn.—COPE *v.* COPE (1885), 52 L. T. 607.

See ARBITRATION, Vol. II., pp. 337, 338, Nos. 166–172.

293. Power of enforced retirement.]—It was provided [in the partnership arts.] that any partner might retire at any time upon giving twelve months' notice, & that, if a majority of the partners should at any time desire that any of the partners should retire, & should give him six months' notice in writing to that effect, the partnership should, as regarded him, be dissolved at & from the time mentioned in the notice:—*Held:* defts. were not entitled to exclude pltf. without first giving him a full opportunity of explaining his conduct; but upon the evidence, defts. had given pltf. this opportunity before the notice was served upon him.

I have a difficulty in seeing how a notice, valid at the time when it was given, can be rendered inoperative by the subsequent blunder of the persons who gave it in taking accounts upon which the notice was to operate (FRY, J.).—STEUART *v.* GLADSTONE (1878), 10 Ch. D. 626; 47 L. J. Ch. 423; 38 L. T. 557; 26 W. R. 657; *on appeal* (1879), 10 Ch. D. p. 656, C. A.

Annotations:—**Distd.** Green *v.* Howell, [1910] 1 Ch. 495. **Refd.** Cox *v.* Willoughby (1880), 13 Ch. D. 863; Hunter *v.* Dowling, [1895] 2 Ch. 223; Scott *v.* Scott (1903), 89 L. T. 582; Hill *v.* Fearis, [1905] 1 Ch. 466; Smith *v.* Nelson (1905), 92 L. T. 313.

294. Provision as to distribution of profits on expiration of term.]—YATES *v.* FINN, No. 284, *ante.*

Part IV.—Relations between Partners and Third Parties.

SECT. 1.—LIABILITY OF FIRM FOR ACTS OF PARTNER.

SUB-SECT. 1.—GENERAL PRINCIPLES.

A. In General.

See Partnership Act, 1890 (c. 39), s. 5.

295. General rule — Acts or words of one bind the other.]—What one member of a dissolved partnership admits, touching a partnership account with pltf., is an admission as against the firm, & supports a count for an account stated against all its members.

When two parties are partners, whatever the one does binds the other. They may sever as to the future, but they remain partners for ever as to the past transactions of the firm. An admission or a promise by one partner as to the past, is an admission or promise by both. Whatever one partner says after a dissolution is as much evidence against the firm as it would have been before the dissolution (POLLOCK, C.B.).—BROWN *v.* MACALLUM & WORLEY (1848), 10 L. T. O. S. 482.

296. —— ——.]—We are told that a joint stock co., at least if not incorporated, & only empowered by a public Act of Parliament as this is, to sue & be sued by its officers, is in the same situation as any mercantile partnership consisting of two or three individuals carrying on business jointly under an ordinary deed of partnership or by a parol agreement among themselves of which the world is ignorant, in which case what is said or done by any one partner respecting the partnership business affects all the partners, although in violation of their agreement *inter se*. But why is this so? Because, carrying on business jointly under a common form, they hold out to the world that each of them has authority to manage the partnership concerns. Therefore all are bound by what each does in conducting the partnership business. All the members of the firm are liable to the *bonâ fide* holder of a bill of exchange, drawn, accepted, or indorsed by any one of them. But supposing that A., B., & C., entering into partnership, it is expressly stipulated that A. shall not draw, accept, or indorse bills in the partnership firm, & this stipulation is known to X., he would have no remedy against B. & C. on a bill of exchange which he induced A. to draw, accept, or indorse. Therefore on the principle which regulates the liability of common parties, a distinction must be made between a member of a common mercantile partnership & a shareholder in a joint stock co. (LORD CAMPBELL, C.J.). —BURNES *v.* PENNELL (1849), 2 H. L. Cas. 497; 14 L. T. O. S. 245; 9 E. R. 1181; *sub nom.* BURNES *v.* PENNELL, FORTH MARINE INSURANCE CASE, 13 Jur. 897, H. L.

Annotations:—**Refd.** National Exchange Co. *v.* Drew (1855), 25 L. T. O. S. 223; *Re* Royal British Bank, *Ex p.* Brockwell (1857), 26 L. J. Ch. 855; *Re* Royal British Bank, Nicol's Case (1859), 3 De G. & J. 387. **Mentd.** Fuller *v.* Earle (1852), 21 L. J. Ex. 314; Deposit Life Assce. *v.* Ayscough (1856), 6 E. & B. 761; Bailey *v.* Universal Provident Assce., *Re* Copeland (1857), 26 L. J. C. P. 87; Peek *v.* Gurney (1871), L. R. 13 Eq. 79.

297. Partner general agent of firm.]—A partner in an undertaking is, by virtue of that relation, constituted a general agent for his co-partners in all matters relating to the partnership; & he has all the authorities necessary for carrying on the undertaking, & all such as are usually exercised by the partnership.

Any restriction imposed by agreement among the partners on the authority possessed by them, though operative as between the partners themselves, does not limit their authority as to third persons who acquire rights under its exercise, unless such persons knew of the restriction imposed.

Necessary goods were furnished, according to the usual course in such concerns, to the order of an agent of directors, appointed to carry on a mine, for the benefit of shareholders:—*Held:* (1) a shareholder who had paid sums of money towards & interfered in working the mine, was a complete partner with the directors, & liable for the goods supplied. (2) an agreement made by him with the directors, that they should not deal on credit, of which the party who supplied the goods knew nothing, did not exempt him from such liability.—HAWKEN *v.* BOURNE (1841), 8 M. & W. 703; 151 E. R. 1223; *sub nom.* OATEY *v.* BOURNE, HAWKEN *v.* BOURNE, 10 L. J. Ex. 361.

Annotations:—*As to* (1) **Expld.** *Re* German Mining Co., *Ex p.* Chippendale (1854), 4 De G. M. & G. 19. **Refd.** Forbes *v.* Marshall (1855), 3 W. R. 480; Peel *v.* Thomas (1855), 15 C. B. 714; Yorkshire Ry. Wagon Co. *v.* Maclure (1881), 19 Ch. D. 478. *As to* (2) **Refd.** Ricketts *v.* Bennett (1847), 4 C. B. 686. *Generally*, **Refd** Hallett *v.* Dowdall (1852), 18 Q. B. 2; Smith *v.* M'Guire (1858), 3 H. & N. 554. **Mentd.** Smith *v.* Archibald (1849), 14 L. T. O. S. 174; Hambro *v.* Hull & London Fire Insce. (1858), 3 H. & N. 789.

298. ——.]—The general power of partners in ordinary trading partnerships & the restrictions upon such powers appear to us to be stated with great accuracy by Mr. Justice Story in his *Treatises on Partnership & on Agency* & we willingly adopt his language. In the latter of these works, Chap. VI., sects. 124 & 125, the law is thus stated: s. 124. "Every partner is, in contemplation of law, the general & accredited agent of the partnership; or, as it is sometimes expressed, each partner is *præpositus negotiis societatis*; & may, consequently, bind all the other partners by his acts, in all matters which are within the scope & objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, & pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, & procure to be discounted, promissory notes, bills of exchange, cheques, & other negotiable paper, in the name & on account of the partnership." S. 125. "The restrictions of this implied authority of partners to bind the partnership are apparent from what has been already stated. Each partner is an agent only in & for the business of the firm; &, therefore, his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm, bind it, when the other party to the transaction is cognisant of, or co-operates in such breach of duty." That, in ordinary trading partnerships,

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PART IV. SECT. 1, SUB-SECT. 1.—A.

295 i. *General rule—Acts or words of one bind the other.*]—ROSS *v.* CANADIAN BANK OF COMMERCE, ROSS *v.* NORTHERN CANADA SUPPLY CO., ROSS *v.* TAYLOR HARDWARE CO. (Ont.), [1923] 3 D. L. R. 339.—**CAN.**

Sect. 1.—*Liability of firm for acts of partner: Subsect.* 1, *A., B. & C.*]

the power of borrowing money for partnership purposes exists, & that bills or notes given by one of the partners in the partnership firm, for money so borrowed, will bind the firm, is too clear to require any authority (*per* CUR).—BANK OF AUSTRALASIA *v.* BREILLAT (1847), 6 Moo. P. C. C. 152; 13 E. R. 642; *sub nom.* BANK OF AUSTRALASIA *v.* BANK OF AUSTRALIA, 12 Jur. 189, P. C.

Annotations:—**Refd.** Bute *v.* Mason (1849), 7 Moo. P. C. C. 1; Maclae *v.* Sutherland (1854), 3 E. & B. 1. **Mentd.** Lindus *v.* Melrose (1858), 3 H. & N. 177.

299. ——.]—COX *v.* HICKMAN, No. 91, *ante.*

300. —— **Unless transaction exclusive act of partner—Existence of other partners not disclosed.**]—Though there may be cases of partnership in which all the partners will not be liable for all that is done by each individual partner, yet, in such cases, there should be something exclusive in the nature of the transaction; not only the others should not be known in the transaction, but the ordering of the goods should be the exclusive act of the particular partner.

In an action by stationers who supplied paper for two particular works, on the order of the publishers of the works, against the printers of them, on the ground that the printers and publishers were partners in the works:—*Held:* if defts. were partners in the publications at the time when the orders were given, they were liable for the things furnished to complete those publications, although the publishers only were liable in the first instance.—GARDINER *v.* CHILDS (1837), 8 C. & P. 345; 2 Jur. 233.

301. Authority to act for partnership purposes.]—HOPE *v.* CUST (1774), cited in 1 East, at p. 53; 102 E. R. 21.

Annotations:—**Refd.** Shirreff *v.* Wilks (1800), 1 East, 48; *Ex p.* Bonbonus (1803), 8 Ves. 540; Wintle *v.* Crowther (1831), 1 Cr. & J. 316.

302. ——.]—In general, a partnership is bound by the acts of an individual partner in such cases only as in the usual course of dealing are referable to the partnership concerns.—*Ex p.* AGACE, *Ex p.* TATE (1792), 2 Cox, Eq. Cas. 312; 30 E. R. 145.

Annotation:—**Distd.** *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615.

303. ——.]—HAWKEN *v.* BOURNE, No. 297, *ante.*

304. ——.]—PETRIE *v.* LAMONT, No. 495, *post.*

305. ——.]—HASLEHAM *v.* YOUNG, No. 421, *post.*

306. ——.]—BANK OF AUSTRALASIA *v.* BREILLAT, No. 298, *ante.*

307. ——.]—The position of the member of a firm is such that in law he becomes personally responsible for the fraud or moral delinquency of any other member of, or any other person intrusted by the firm to represent and act for it in the business of the firm. Practically each member of a firm becomes, as regards the management & business of the firm, a surety for every other member of it, & for every person intrusted by the firm to act for it, & the act of each in regard to the business is the act of all, thus there may be fraudulent conduct on the part of some member or members of the firm for which the whole firm is legally responsible, though the rest of its members are personally without blame (HAWKINS, J.).—HACKNEY *v.* KNIGHT (ADMINISTRATOR OF GREGORY) (1891), 7 T. L. R. 254.

308. —— **Presumption of authority.**]—— —— *v.* LAYFIELD, No. 329, *post.*

309. —— ——.]—COX *v.* HICKMAN, No. 91, *ante.*

310. —— **As provided in partnership deed.**]—No partner can bind another except in a matter provided for by the partnership deed; or where an authority express or implied is given. The receipt of money in this case was not within the partnership transactions (PARKE, B.).—SIMS, (ABERNETHIE'S EXECUTORS) *v.* BRUTTON & CLIPPERTON (1850), 5 Exch. 802; 155 E. R. 353; *sub nom.* SIMSON (ABERNETHY'S EXECUTORS) *v.* BRUTTON, 16 L. T. O. S. 173.

Annotations:—**Mentd.** Gordon *v.* James (1885), 53 L. T. 641; *Re* Somerset, Somerset *v.* Poulett, [1894] 1 Ch. 231.

311. —— **Under authority express or implied.**]—SIMS (ABERNETHIE'S EXECUTORS) *v.* BRUTTON & CLIPPERTON, No. 310, *ante.*

312. —— **Unless reason to doubt bona fides.**]—*Re* RICHES & MARSHALL'S TRUST DEED, *Ex p.* DARLINGTON DISTRICT JOINT STOCK BANKING CO., No. 347, *post.*

313. —— **Act outside partnership business—Defence by other partner of Statute of Frauds.**]—Partnership Act, 1890 (c. 39), s. 5, does not override above Act, sect. 4 [now Law of Property Act, 1925 (c. 20), s. 40].

G., an estate agent, described as agent for S. C. Mear, hereinafter called the vendor, signed a contract as agent for vendor to sell a house to pltf. for £515, containing provisons for payment of deposit, for completion on a particular day, & for a good & sufficient title to be given. S. C. Mear had instructed C. to sell for £515, & on hearing of the contract ratified it. The house belonged to S. C. Mear & W. W. Mear jointly

301 i. *Authority to act for partnership purposes.*]—One partner cannot bind his co-partner for transactions out of the usual scope of the business; nor for things which are sometimes done by it, but are of unusual or rare occurrence. — FRASER *v.* MCLEOD (1860), 8 Gr. 268.—**CAN.**

301 ii. ——.]—MACKLIN *v.* KERR (1877), 28 C. P. 90.—**CAN.**

301 iii. ——.]—*Held:* the implied authority of one partner to sign the partnership name, or to make & indorse notes, is limited to doing so for the purposes of the partnership.—UNION BANK *v.* BULMER (1885), 2 Man. L. R. 380.—**CAN.**

301 iv. ——.]—In the case of a partnership, the authority which each partner has is an authority given by law to do such things as are necessary for carrying on the partnership. All persons may give credit to the acts of a partner unless they have notice, or reason to believe, that the act done in the partnership name is done for the private purposes or on the separate account of the person doing it.—KAY *v.* CHAPMAN (Sask.) (1913), 24 W. L. R. 80; 4 W. W. R. 448; 11 D. L. R. 726.—**CAN.**

301 v. ——.]—KOSOLOFSKI *v.* GOETZ [1919] 2 W. W. R. 805; 47 D. L. R. 275; 12 Sask. L. R. 315.—**CAN.**

301 vi. ——.]—*Held:* although in ordinary circumstances the purchase of farming-land would not come within the ordinary course of the business of a farming partnership, the facts showed that both partners contemplated the purchase of this land, &, that being so, the purchase was within the ordinary course of the business of defts.' partnership within Partnership Act, 1908, s. 10, & the firm was bound by the contract.—KENNEDY *v.* MALCOLM BROTHERS (1909), 28 N. Z. L. R. 457.—**N.Z.**

311 i. —— *Under authority express or implied.*]—D., one of two partners, in consideration of $100 paid to him, assigned to pltf. a debt of $118, due to the firm for goods sold to deft. in the ordinary course of business, by a deed made & executed in his individual name, without his partner's knowledge, but by which he professed to transfer all debts due to the two partners, naming them, from deft. At the trial his partner swore that he considered himself bound by the assignment, & that he thought that D. had authority to make it:—*Held:* the assignment was within the scope of the partnership business, & covered by the agency of one partner for the other.—HOWELL *v.* MCFARLAND (1877), 2 A. R. 31.—**CAN.**

311 ii. —— ——.]—To entitle a creditor to prove against the joint estate of a firm, for a debt which was originally the separate debt of one partner, there must be either a positive agreement to adopt the debt as that of the firm; or facts from which the ct. will be justified in deducing an agreement or consent to that adoption. —*Re* FERRAR, *Ex p.* ULSTER BANKING CO. (1859), 9 I. Ch. R. 11.—**IR.**

as partners. S. C. Mear acted *bonâ fide*, but it was not proved that by the practice of the partnership S. C. Mear had authority to sell, & W. W. Mear on hearing of the contract repudiated it. In an action against S. C. Mear & W. W. Mear for specific performance:—*Held:* as against W. W. Mear, assuming the facts did not bring the case within the exception in Partnership Act, 1890 (c. 39), s. 5, above Act, sect. 4, afforded a defence, & W. W. Mear was entitled to have the action dismissed.—KEEN *v.* MEAR, [1920] 2 Ch. 574; 89 L. J. Ch. 513; 124 L. T. 19.

314. Authority to act in manner usual in same trade or business—Notwithstanding agreement to contrary.]—When persons constitute a partnership, whether in the form of a joint stock co. or otherwise, the individual or individuals who are authorised to make contracts for the partnership have authority to bind all the partners in the manner usual & customary in the same trade or business, & even to delegate to others the authority so to bind them, if it be usual so to do, notwithstanding an express agreement not so to deal, & it is, I apprehend, upon this principle that partners in a trading co. in a business in which bills of exchange are usually issued can bind their co-partners, notwithstanding the issuing of bills is expressly prohibited by the partnership agreement (MARTIN, B.).—HALLETT *v.* DOWDALL (1852), 18 Q. B. 2; 21 L. J. Q. B. 98; 19 L. T. O. S. 300; 16 Jur. 462; 118 E. R. 1, Ex. Ch.; *affg.* S. C. *sub nom.* DOWDALL *v.* HALLETT (1849), 19 L. J. Q. B. 37.

Annotations:—**Mentd.** Sunderland Marine Insce. *v.* Kearney (1851), 20 L. J. Q. B. 417; *Re* Worcester Corn Exchange Co. (1853), 3 De G. M. & G. 179; *Re* Sea, Fire & Life Assce., Greenwood's Case (1854), 3 De G. M. & G. 459; Evans *v.* Coventry (1856), 25 L. J. Ch. 489; Gordon *v.* Sea, Fire & Life Assce. Soc. (1857), 26 L. J. Ex. 202; King *v.* Accumulative Life Fund & General Assce. (1857), 3 C. B. N. S. 151; Peddell *v.* Gwyn (1857), 1 H. & N. 590; *Re* Athenæum Life Assce. Soc., *Re* Prince of Wales Life Assce. Soc., *Ex p.* Durham (1858), 4 K. & J. 517; Hickman *v.* Cambrian & Universal Insce., *Re* Merriman (1859), 28 L. J. Ex. 379; Churchward *v.* R. (1865), L. R. 1 Q. B. 173; *Re* European Assce. Soc., Horts Case, Grains Case (1875), 1 Ch. D. 307; *Re* Sovereign Life Assce., [1892] Ch. 279.

315. ——.]—Indeed it appears to me common sense, that, if a partnership is formed for carrying on any business, & certain persons have authority to deal on behalf of the partnership, they may conduct their dealings in the ordinary mode in which such business is carried on, & the public has no concern with the manner in which the partners may choose to stipulate amongst themselves in regard to it (MARTIN, B.).—FORBES *v.* MARSHALL (1855), 11 Exch. 166; 3 C. L. R. 933; 24 L. J. Ex. 305; 25 L. T. O. S. 147; 3 W. R. 480; 156 E. R. 788.

Annotation:—**Mentd.** Gordon *v.* Sea, Fire & Life Assce. Soc. (1857), 26 L. J. Ex. 202.

316. Each member surety for others.]—HACKNEY *v.* KNIGHT (ADMINISTRATOR OF GREGORY), No. 307, *ante*.

317. Acts in violation of duty to firm—Co-operation of other party to transaction.]—BANK OF AUSTRALASIA *v.* BREILLAT, No. 298, *ante*.

318. Delegation of authority to bind.]—HALLETT *v.* DOWDALL, No. 314, *ante*.

Authority after dissolution.]—*See* Part VI., Sect. 6, sub-sect. 1, B., *post*.

Shipping partnerships.]—*See* SHIPPING.

B. Effect of Private Agreement between Partners.

See Partnership Act, 1890 (c. 39), ss. 5, 8.

319. General rule—Liability of firm not affected.]—A. & B. are jointly interested in the profits of a common stage waggon, but by a private agreement between themselves each undertakes the conducting & management of the waggon, with his own driver & horses, for specified distances; they are notwithstanding this private agreement jointly responsible to third persons for the negligence of their drivers throughout the whole distance.—WALAND *v.* ELKINS (1816), 1 Stark. 272; *sub nom.* WEYLAND *v.* ELKINS, Holt, N. P. 227, N. P.

320. —— ——.]—HAWKEN *v.* BOURNE, No. 297, *ante*.

321. —— ——.]—FORBES *v.* MARSHALL, No. 315, *ante*.

322. —— ——.]—COX *v.* HICKMAN, No. 91, *ante*.

323. Creditor with notice of agreement.]—ALDERSON *v.* POPE (1808), 1 Camp. 404, n.; 170 E. R. 1001, N. P.

324. ——.]—BURNES *v.* PENNELL, No. 296, *ante*.

Liability of retiring partner.]—*See* Part IV., Sect. 2, sub-sect. 3, C., *post*.

C. Ratification.

See, generally, AGENCY, Vol. I., pp. 396 *et seq.*

325. Effect of acquiescence—Firm bound.]—A guarantee given by one partner, in the partnership's name, unless it was in the regular line of business, could not bind the other partners; but if they afterwards adopted it, & acted on it, it should bind them (LORD ELLENBOROUGH, C.).—CRAWFORD *v.* STIRLING (1802), 4 Esp. 207; 170 E. R. 693, N. P.

Annotations:—**Mentd.** Morley *v.* Inglis (1837), 4 Bing. N. C. 58; Williams *v.* Flight (1842), 7 Jur. 197.

326. —— ——.]—Where one of two partners makes a contract as to the terms on which any business is to be transacted by the firm, although such business is not in their usual course of dealing, & even contrary to their arrangement with each other, & the business is afterwards transacted by or with the knowledge of the other partner:—*Held:* he was bound by the contract made by his partner.

To illustrate this position, a case may be put, where two persons in partnership for the sale of horses, should agree between themselves never to warrant any horse; yet, though this be their course of business, there is no doubt, that if, upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound (ABBOTT, C.J.).—SANDILANDS *v.* MARSH (1819), 2 B. & Ald. 673; 106 E. R. 511.

Annotations:—**Distd.** Brettel *v.* Williams (1849), 4 Exch. 623; Bishop *v.* Jersey (1854), 2 Drew. 143; Bourdillon *v.* Roche (1858), 27 L. J. Ch. 681. **Refd.** Hasleham *v.* Young (1844), 13 L. J. Q. B. 205.

327. —— ——.]—(1) Upon the dissolution of the partnership of A. & B. it was agreed that B. should undertake the business of winding up the affairs of the firm:—*Held:* B. was not solely chargeable with the loss occasioned by the injudicious sale of part of the partnership effects, inasmuch as A. still retained his general rights as a partner, & consequently had full power to prevent the sale.

(2) *Qu.:* whether, upon the dissolution of a

PART IV. SECT. 1, SUB-SECT. 1.—C.

325 i. *Effect of acquiescence—Firm bound.*]—A partner of a firm operating a farm signed under seal in the firm name an agreement for sale of wheat. The other partner, though dissatisfied with the transaction & refusing, when later requested, to sign the agreement, was held, by reason of his attitude of non-repudiation, to have ratified the transaction.—CANADIAN GRAIN CO. *v.* MITTEN, [1921] 1 W. W. R. 829; 57 D. L. R. 464; 14 Sask. L. R. 163.—**CAN.**

Sect. 1.—*Liability of firm for acts of partner: Sub-sect.* 1, *C. & D.; sub-sect.* 2, *A., B., C., D.*

partnership not under articles, a partner has an inherent right in that character, without the assistance of a ct. of equity, to insist upon the sale of the partnership effects.

(3) Under circumstances showing a general acquiescence in the acts of his co-partners:—*Held:* one partner was liable to share the losses arising from certain adventures entered into by the co-partners in breach of the terms of the partnership articles.—CRAGG *v.* FORD (1842), 1 Y. & C. Ch. Cas. 280; 62 E. R. 889.

328. —— ——.]—*Semble:* in a partnership which is not for a fixed period, one partner has no implied authority to enter into a contract for a lease for twenty one years of premises to be used for partnership purposes, so as to bind the other partners.

Three partners agreed, by parol, for a lease of some premises. They entered & paid the rent. A., one of the partners, two years afterwards, signed a contract for a lease on behalf of the firm. Possession was continued & rent paid until a dissolution. The ct., under the circumstances, inferred that A. had authority to sign the contract, though it was denied by the other partners, & made a decree for specific performance against them.—SHARP *v.* MILLIGAN (1856), 22 Beav. 606; 52 E. R. 1242.

D. Disclaimer.

329. Effect of disclaimer — General rule.]—Where pltf. goes upon the credit of both partners, the act of one is evidence against the other, unless he shows a disclaimer.

It should be presumed [that] the act of [deft.] was the act of the other, & should bind them unless they could show a disclaimer (HOLT, C.J.). —— —— *v.* LAYFIELD (1709), 1 Salk. 292; 91 E. R. 259, N. P.

330. —— **Question for jury.**]—Where deft., a part owner of a mine, told pltf. who had supplied the mine on the credit of the firm, that he, deft., had sold his share of the mine to A. & B. who for the future would be his paymasters, & that he, deft., would be no longer responsible:—*Held:* the operation of the notice was a question for the jury.—VICE *v.* FLEMING (1827), 1 Y. & J. 227; 148 E. R. 655.

331. —— **Plaintiff must prove adoption or receipt of benefit.**]—Goods are supplied to A. & B., who are partners, after notice by A. that he will not be answerable for any goods subsequently sent, it is incumbent on pltf., in an action for the amount of such goods, to prove some act of adoption on the part of A. or that he has derived benefit from the goods.—WILLIS *v.* DYSON (1816), 1 Stark. 164, N. P.

Annotation:—**Consd.** Vice *v.* Fleming (1827), 1 Y. & J. 227.

332. —— **After contract made—Liability for consequent loss.**]—L., a partner in a firm at Grenada, employs a firm at St. Thomas to supply articles to fulfil a contract, which the St. Thomas firm do, believing the contract to have been entered into on behalf of the Grenada firm. The other partners in the Grenada firm write to the St. Thomas firm to disclaim this contract:—*Held:* the Grenada firm were liable for all advances in respect of the contract made by the St. Thomas firm, previously to the day of their receipt of the disclaimer, or subsequently to it, in consequence of liabilities which they had previously incurred, & the Grenada firm were entitled to credit for all payments made in respect of the contract prior to that day, or subsequently to it if specifically made in respect of the amount then due, & for the balance of all payments made generally in respect of the contract subsequently to that day, after satisfying the amount due to the St. Thomas house by L. alone.—SMITH *v.* URE (1833), 2 Knapp, 188; 12 E. R. 451, P. C.

SUB-SECT. 2.—PARTICULAR INSTANCES.

A. Acceptance of Shares in Company.

333. Whether firm bound—Transfer of shares by way of security.]—One of two partners in a foreign firm of bankers lent to L. in this country a sum of money, L. executing, by way of security, a transfer to the firm of shares in a co., which was executed by the above named partner in the name of his firm, & the transfer was approved of by the directors. L. at that time held transfers of a corresponding number of shares, but the transfers were not registered. Some time afterwards the transfer deeds were left at the office of the co., & the transfers were registered, the registration of the transfer to the bankers being dated before the registration of the transfers to L., & being in the name of the bankers as a firm. The loan was afterwards repaid, & the shares were retransferred to L. by the same partner, he executing the deed in the name of the firm, & the transfer was duly registered. Within a year from this time an order for winding up the co. was made:—*Held:* under the circumstances the one partner could accept shares so as to bind the firm.—*Re* LAND CREDIT CO. OF IRELAND, WEIKERSHEIM'S CASE (1873), 8 Ch. App. 831; 42 L. J. Ch. 435; 28 L. T. 653; 21 W. R. 612, L. JJ.

Annotations:—**Expld. & Distd.** Niemann *v.* Niemann (1889), 43 Ch. D. 198. **Refd.** *Re* Vagliano Anthracite Collieries (1910), 79 L. J. Ch. 769. **Mentd.** *Re* Printing Telegraph & Construction Co. of Agence Havas, *Ex p.* Cammell (1894), 1 Mans. 274.

334. —— **Shares accepted in satisfaction of debt—No special authority.**]—NIEMANN *v.* NIEMANN, No. 1475, *post.*

B. Acknowledgments of Debt.

Acknowledgments in writing.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 353, 354, 357, Nos. 364, 366–369, 408.

Part payment & payment of interest.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 389, 390, 391, Nos. 707–712, 727.

C. Admissions.

335. General rule—Admission by one partner binds all.]—When once a partnership is established, the admission of one may bind all (LORD KENYON).—GRANT *v.* JACKSON (1793), Peake, 268; 170 E. R. 152, N. P.

Annotation:—**Refd.** Attwood *v.* Small (1840), 6 Cl. & Fin. 232.

336. —— ——.]—BROWN *v.* MACALLUM & WORLEY, No. 295, *ante.*

PART IV. SECT. 1, SUB-SECT. 2.—A.

p. *Whether firm bound.*]—Using partnership money & pleading partnership credit for the purchase of shares in a joint stock co., no matter what its objects may be, are outside the scope of a firm of hardware merchants or of any ordinary trading firm, & there is no implied authority in one partner to make the other members of the partnership liable as shareholders of such a co.—MASECAR *v.* MCKENZIE & SON, [1924] 2 D. L. R. 1242; [1924] 2 W. W. R. 521; 18 Sask. L. R. 321.—**CAN.**

D. Banking Transactions.

337. Opening account—In individual name.]—The name in which the contract is made is *primâ facie* evidence of the party for whom the contract was made; but it is not conclusive, except by the custom of trade in the case of bills of exchange. Therefore where two pltfs. sue on a contract between them & defts. as bankers, & it appears at the trial that the bank account was opened in the name of one only of pltfs., it is competent for pltfs. to prove that the account was opened on behalf of them both; & it is sufficient to maintain the action if it is proved that pltf. who actually opened the account at the time intended it to be the account of the two, without showing that defts. had before the action any notice that he had so intended. It lies on pltf. to prove this intention affirmatively; & the fact that pltfs. were partners, & that the money paid into the account belonged to the partnership, is not alone sufficient evidence to go to the jury that the contract was intended to be made on behalf of the two.—COOKE *v.* SEELEY (1848), 2 Exch. 746; 17 L. J. Ex. 286; 154 E. R. 691.

Annotation:—**Refd.** Alliance Bank *v.* Kearsley (1871), L. R. 6 C. P. 433.

338. —— ——.]—In the absence of the evidence of usage, a partner has no implied authority by law to bind his co-partner by a banking account opened by him in his own separate name, instead of in the name of the firm, although such account be for the purposes of the firm.—ALLIANCE BANK, LTD. *v.* KEARSLEY (1871), L. R. 6 C. P. 433; 40 L. J. C. P. 249; 24 L. T. 552; 19 W. R. 822.

339. Drawing cheques.]—*Qu.:* whether one partner has an implied authority to bind his co-partner by a cheque drawn in the partnership name on the bankers of the firm.—LAWS *v.* RAND (1857), 3 C. B. N. S. 442; 27 L. J. C. P. 76; 30 L. T. O. S. 286; 4 Jur. N. S. 74; 6 W. R. 127; 140 E. R. 812.

Annotation:—**Mentd.** Heywood *v.* Pickering (1874), L. R. 9 Q. B. 428.

340. —— **By new partner—Account continued in name of old firm by agreement with bank.**] A. & B. soon after the partnership commenced, took in another partner, but it was understood, that the account with the bankers, was to continue as before. This partner drew cheques, in the partnership name, & paid them into his private account:—*Held:* the assignees not entitled to charge the cheques so transferred, against the partnership account.—*Ex p.* HANSON (1811), 18 Ves. 232; 34 E. R. 305, L. C.; *sub nom. Re* CASTLE & POWELL, *Ex p.* HANSON, 1 Rose, 156.

341. —— **By surviving partner.**]—(1) Where accounts are kept at a banker's by a firm, each partner having a right to draw cheques, & also by the individual partners of the firm, it is not the duty of the bankers to inquire into the propriety of any transfer of funds which may be made from and to the different accounts.

(2) Upon the death of one partner in a firm having an account at a banker's, the surviving partner has a right to draw cheques upon the partnership account.—BACKHOUSE *v.* CHARLTON (1878), 8 Ch. D. 444; 26 W. R. 504.

Annotation:—*Generally*, **Mentd.** Morison *v.* London, County & Westminster Bank (1913), 108 L. T. 379.

—— **Payment by bank contrary to agreement.**]—*See* BANKERS, Vol. III., p. 187, No. 375.

342. Transfer of account.]—BEALE *v.* CADDICK, No. 344, *post.*

343. —— **From partnership to private account.**]—BACKHOUSE *v.* CHARLTON, No. 341, *ante.*

344. Appropriation of payments in.]—The acting member of a firm has implied authority to assent to the transfer of their account from one banker to another, without the express assent of the others; though *Qu.:* whether the acting partner would have implied authority to borrow money from the party to whom he transferred the account, in order to pay off the original creditor.

Upon such a transfer, however, the actual amount due is alone transferred, & the banker to whom the account is transferred has no other rights than the party from whom it is transferred. In an action by them against the partner, whose express assent to the transfer was not obtained, to recover the alleged balance of the account transferred, the question would be, what was the real & true balance of account as between the original parties, debtor & creditor? & the partner sued is entitled to raise any question as to the amount due from the firm which he might have raised in an action at the suit of the original creditor. But where the balance due from the firm at the time of their transfer of their account has been over-topped by subsequent payments to their credit, as to which there has been nothing to take the case out of the ordinary principle of appropriation of payments to the earlier items, the cause of action is not the balance of account existing at the time of transfer, which has thus been extinguished, but the balance subsequently becoming due.—BEALE *v.* CADDICK (1857), 2 H. & N. 326; 26 L. J. Ex. 356; 29 L. T. O. S. 355; 157 E. R. 135.

E. Bills of Exchange.

(a) In General.

345. Whether firm liable.]—HARRISON *v.* JACKSON, No. 406, *post.*

PART IV. SECT. 1, SUB-SECT. 2.—E. (a).

345 i. *Whether firm liable.*]—Where a partner made a promissory note in the name of his firm, & gave it to his creditor for his own separate debt:—*Held:* the fact that such partner had, during a period of six months previously, so used cheques of the firm which were duly honoured, gave the creditor reasonable ground for believing that such partner had the authority of the firm to make, & so to use, such promissory note; & he might recover the amount from the firm.—LONDON CHARTERED BANK OF AUSTRALIA *v.* KERR (1878), 4 V. L. R. (L.) 330.—**AUS.**

345 ii. ——.]—A note given by a partner for a private debt in the name of the firm, was held not binding on the firm.—BEALS *v.* SHELDON (1836), 4 O. S. 302.—**CAN.**

345 iii. ——.]—A partner in a joint stock co., the notes of which were suppressed by 7 Will. 4, c. 13, having retired their notes which were in circulation after the suppression, cannot put them into circulation again so as to bind the partnership.—HALL *v.* BUCK (1839), 3 Ont. Dig. 5165.—**CAN.**

345 iv. ——.]—When a co. is formed for purposes which do not render the drawing & accepting of bills & notes necessary, it will be sufficient to establish the liability of a partner on bills or notes drawn or accepted in the name of the co. by their secretary that while he was a partner the secretary was in the habit of so drawing & accepting bills, which were afterwards paid with his concurrence & admission of liability.—LEE *v.* MCDONALD (1841), 6 O. S. 130.—**CAN.**

345 v. ——.]—DARLING *v.* MAGNAN (1855), 12 U. C. R. 471.—**CAN.**

345 vi. ——.]—In an action against B. & S., a firm of solrs., on promissory notes indorsed by B. in the name of the firm, it was proved that on other occasions S. had indorsed in the same manner, &, as witness believed, with B.'s knowledge, but it did not appear what the consideration was for the indorsements sued on, or that S. knew of them:—*Held:* sufficient evidence to go to the jury of a mutual authority.—WORKMAN *v.* MCKINSTRY (1862), 21 U. C. R. 623.—**CAN.**

345 vii. ——.]—Pltfs. discounted a note for N., the maker, payable to & indorsed by a firm in the partnership name by one of the partners, pltfs. knowing that it was so indorsed as security for N., & having no reason to suppose that it was in connection with the partnership business:—*Held:* the other partners were not liable.—

Sect. 1.—*Liability of firm for acts of partner: Subsect.* 2, *E.* (*a*) & (*b*).]

346. ——.]—Where one of several partners, with the privity of the others, draws bills of exchange in his own name upon the partnership firm, in favour of persons who advance him the amount, which he applies to the use of the partnership, although the partners are not jointly liable on the bills, they may be jointly sued by the payees for money lent.—DENTON *v.* RODIE (1813), 3 Camp. 493, N. P.

Annotations :—**Distd.** Smith *v.* Craven & Thompson (1831), 9 L. J. O. S. Ex. 174. **Apld.** Bawden *v.* Howell (1841), 3 Man. & G. 638; Maclae *v.* Sutherland (1854), 3 E. & B. 1. **Mentd.** Rhodes *v.* Rhodes (1860), 29 L. J. Ch. 418.

347. ——.]—A partner has, generally, full authority to deal with the partnership property for partnership purposes, & if the business be such as ordinarily requires bills of exchange, he can, unless restrained by agreement, draw, indorse & accept bills in his own name for partnership purposes. But if a person dealing with the individual partner has reason to think that what is done in the partnership name is done for private purposes, he is put upon inquiry to ascertain the extent of the partner's authority; otherwise he must depend on the right of the partner, or rely on circumstances sufficient to repel the presumption of fraud. So that, where a partner drew bills in the name of a partnership firm, & obtained acceptances to them from various persons by fraudulent misrepresentation of what it was that was being signed, & then indorsed the bills, so accepted, with the name of the firm, & again indorsed them over to himself :—*Held :* the partner's private bankers, who discounted the bills, having full notice that their customer was using partnership property for his private purposes, & seeing that all the signatures, except the acceptances, were in his handwriting, were guilty of gross negligence, & could not be allowed to prove in bkpcy. for the loss they had sustained on the fraudulent acceptances against the estate of the surviving partners.—*Re* RICHES & MARSHALL'S TRUST DEED, *Ex p.* DARLINGTON DISTRICT JOINT STOCK BANKING CO. (1865), 4 De G. J. & Sm. 581; 5 New Rep. 287; 34 L. J. Bcy. 10; 11 L. T. 651; 11 Jur. N. S. 122; 13 W. R. 353; 46 E. R. 1044, L. C.

——.]—*See, also*, BILLS OF EXCHANGE, Vol. VI., pp. 49, 50, 98–102, Nos. 368, 369, 372, 689–715.

348. Authority rebuttable by express notice.]—The authority of one partner to bind another by signing bills of exchange & promissory notes in their joint names is only an implied authority, & may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. This, though it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; & though the greater part of it were in fact so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice.—GALLWAY (LORD) *v.* MATHEW & SMITHSON (1808), 10 East, 264; 103 E. R. 775.

Annotations :—**Consd.** Booth *v.* Quin & Janney (1819), 7 Price, 193. **Refd.** Ogilvie *v.* Foljambe (1817), 3 Mer. 53; Jones *v.* Corbett (1842), 2 Q. B. 828; *Re* Clarke, *Ex p.* Buckler (1844), 3 L. T. O. S. 284.

349. ——.]—BURNES *v.* PENNELL, No. 296, *ante*.

350. Authority to alter note—From joint to joint & several.]—The authority of one partner to bind another does not extend to the alteration of a joint note into a joint & several one (BEST, C.J.).—PERRING *v* HONE (1826), 4 Bing. 28; 2 C. & P. 401; 12 Moore, C. P. 135; 5 L. J. O. S. C. P. 33; 130 E. R. 678.

Annotations :—**Refd.** Bourne *v.* Freeth (1829), 4 Man. & Ry. K. B. 512; Dickinson *v.* Valpy (1829), 5 Man. & Ry. K. B. 126; Ellis *v.* Schmoeck (1829), 5 Bing. 521; Fox *v.* Clifton (1830), 6 Bing. 776; Maclae *v.* Sutherland (1854), 3 E. & B. 1.

351. Authority to accept—Express agreement against acceptance—Acceptance in fraud of other partners.]—GRANT *v.* HAWKES (1817), Chitty on Bills of Exchange, 11 ed., p. 40.

Annotation :—**Refd.** Hogg *v.* Skeen (1865), 18 C. B. N. S. 426.

352. —— **After act of bankruptcy—By accepting partner.**]—Where one of two partners in trade had after an act of bkpcy. accepted a bill of exchange in the name of the firm without the priority of his co-partner :—*Held :* in the hands of an innocent indorsee it was an available security. —LACY *v.* WOOLCOTT (1823), 2 Dow. & Ry. K. B. 458; 1 L. J. O. S. K. B. 143.

Annotations :—**Folld.** *Re* Houghton & Watts, *Ex p.* Robinson (1833), 3 Deac. & Ch. 376. **Refd.** Craven *v.* Edmondson (1830), 6 Bing. 734.

353. —— —— **By partner not accepting.**]—One of two partners accepts bills for a previous partnership liability, after his co-partner has committed an act of bkpcy. :—*Held :* these bills were, in the hands of a *bonâ fide* holder, provable against the joint estate, under a subsequent commission issued against both partners.—*Re* HOUGHTON & WATTS, *Ex p.* ROBINSON (1833), 3 Deac. & Ch. 376; 1 Mont. & A. 18; Coop. *temp.* Brough. 162; 47 E. R. 58, L. C.; *revsg.* FEDERAL BANK *v.* NORTHWOOD (1885), 7 O. R. 389.—**CAN.**

345 viii. ——.]—A member of a copartnership who assents to the giving of an acceptance in the firm name for a private debt is bound thereby & is not entitled to be regarded as a surety who can be discharged by the giving of an extension of time, the obligation being a joint & not a joint & several one.—PITFIELD *v.* TROTTER (1899), 32 N. S. R. 125.—**CAN.**

345 ix. ——.]—JOHNSTONE, SHARP & CO. *v.* PHILLIPS (1822), 1 Sh. Sc. App. 244.—**SCOT.**

345 x. ——.]—As between themselves one partner has no authority to draw bills or make promissory notes in the name of the firm, except for partnership purposes.—STANDARD BANK *v.* GOODCHILD & BRITTAIN (1877), Buch. 120.—**S. AF.**

348 i. *Authority rebuttable by express notice.*]—RATTENBURG *v.* CARTER (P. E. I.) (1908), 5 E. L. R. 149.—**CAN.**

348 ii. ——.]—A firm of carriers authorised one of their partners to draw bills on the firm to the extent of R.200 each. The partner, acting in excess of his authority, & without the knowledge of the firm, made two promissory notes, in the name of the firm, for R.1,000 each. Pltf. knew the partner was limited to a particular sum, but also knew that two of his bills for R.300 each had been previously accepted by the firm. In an action on the notes :—*Held :* the firm was not liable for the whole amount drawn. —PREMABHAI HEMABHAI *v.* BROWN (1873), 10 Bom. 319.—**IND.**

351 i. *Authority to accept—Express agreement against acceptance—Acceptance in fraud of other partners.*]—A partner in a firm of builders, who by the contract of copartnery was precluded from signing bills, adhibited the firm name to certain promissory notes in favour of the money lender, with whom he discounted them at the rate of 40 per cent. *per annum*. The notes were not granted in the course of the firm's business & the proceeds were applied to the partner's own use. The firm having been charged upon the note, brought a suspension :—*Held :* the loss occasioned by the fraudulent granting of the notes must fall upon the money-lender, who discounted them in suspicious circumstances without inquiry, & not upon the partners of the firm, as they were ignorant of the transaction, & as the transaction was not in the course of the firm's business or for its behoof.—PATERSON BROTHERS *v.* GLADSTONE (1891), 18 R. (Ct. of Sess.) 403.—**SCOT.**

q. *Partner giving note when member of two firms—Plaintiff ignorant of existence of second firm—Partner in second firm not liable after dissolution.*]—STANDARD BANK *v.* DUNHAM & PARK (1857), 14 O. R. 67.—**CAN.**

r. —— —— ——.]—DUNHAM, Cass. Dig. 2nd ed. 89.

S. C. *sub nom. Re* HOUGHTON & WATTS, *Ex p.* ELLIS, Mont. & B. 249, Ct. of R.

Annotation :—**Mentd.** *Re* Bentley, *Ex p.* Vere (1835), 2 Mont. & A. 123.

354. —— Power to delegate authority.]—A. & B., as joint exors., carry on their testator's trade in co-partnership, for the benefit of his family; & it is arranged between them, that A. should alone draw & accept bills, & manage the cash transactions. A. having refused to accept any more bills drawn by H. & D., B., unknown to A., authorises her son to accept them; & A. & B. afterwards become bkpt. :—*Held :* the holders of these bills could not prove them against the joint estate.

There is no doubt that each partner can accept bills for the purposes of the partnership, so as to bind his partner; but there appears to me as little doubt that he cannot delegate this authority to a third person (SIR JOHN CROSS).—*Re* ROBINSON & FARRAND, *Ex p.* HOLDSWORTH (1841), 1 Mont. D. & De G. 475, Ct. of R.

355. —— Effect of admission by firm.]—In an action on a bill of exchange alleged to have been accepted by defts. under the style & firm of A. & co. an order was made by consent, to admit the handwriting of the acceptance. The notice to admit was as follows: "Bill of exchange for £121 10*s.* drawn by pltf., upon & directed to defts. as A. & co. & accepted by B. for defts. as A. & co., & payable, etc.; & indorsed etc." :—*Held :* this admission precluded defts. from denying the authority of B. to bind the firm of A. & co. by such acceptance & was not a mere admission that he signed an acceptance purporting to bind that firm.—WILKES *v.* HOPKINS (1845), 1 C. B. 737; 3 Dow. & L. 184; 14 L. J. C. P. 225; 5 L. T. O. S. 200; 135 E. R. 732.

356. —— Individual acceptance.]—One who individually accepts a bill addressed to a firm of which he is a member, is individually liable thereon. A bill was addressed to The Allty-Crib Mining Co., & accepted by deft., as follows :—"*Per proc.* The Allty-Crib Mining Co., W. T. Van U., London Manager." It was proved that four persons, one of whom was deft., had agreed to work a mine, under the name of the Allty-Crib Mining Co., & had for some time worked it accordingly; & that the bill in question had been accepted by deft. without the authority of his co-partners :—*Held :* deft. was liable upon the bill, as acceptor.—OWEN *v.* VAN USTER (1850), 10 C. B. 318; 20 L. J. C. P. 61; 16 L. T. O. S. 194; 138 E. R. 128.

Annotations :—**Distd.** *Re* Barnard, Edwards *v.* Barnard (1886), 32 Ch. D. 447. **Refd.** Mathews *v.* Marsland (1858), 27 L. J. Ex. 148.

357. —— Power of new firm to bind the old.]—Taking a bill from a new firm does not *per se* discharge the old firm, & it is a question for the jury whether it was taken in satisfaction, & discharge.

The new firm have not authority to bind the old firm, without the authority of the retiring members, by acceptances in its name, for the debts of the old firm; but when such an acceptance has been given in renewal of a bill given by the old firm, the liability of the retiring members on the old bill remains.—SPENCELEY *v.* GREENWOOD (1858), 1 F. & F. 297.

—— Of bankrupt partner.]—*See* BANKRUPTCY, Vol. IV., p. 457, No. 4131.

—— Fraudulent acceptance.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 100, 177, 178, Nos. 703, 1107–1110.

——.]—*See, further,* BILLS OF EXCHANGE, Vol. VI., pp. 57, 58, 72, Nos. 461–463, 579, 580.

Authority to indorse.]—*See* BILLS OF EXCHANGE Vol. VI., p. 303, No. 2024.

358. —— Bankrupt co-partner.]—After a secret act of bkpcy. committed by one of two co-partners, the other cannot by an indorsement in the name of the firm, transfer a bill of exchange, which existed before the act of bkpcy.—RAMSBOTTOM *v.* LEWIS (1808), 1 Camp. 279, N. P.

Annotations :—**Distd.** Lacy *v.* Woolcott (1823), 2 Dow. & Ry. K. B. 458. **Refd.** *Re* Houghton & Watts, *Ex p.* Robinson (1833), 3 Deac. & Ch. 376.

Completion of inchoate instruments.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 69, No. 561.

Signing by procuration.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 109, 110, Nos. 748–753.

Consideration for acceptance.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 159, No. 1022.

Receipt of notice of dishonour.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 257, Nos. 1674, 1675.

Receipt in discharge.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 345, 349, Nos. 2293, 2321.

Liability of firm in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 430–432, Nos. 3886–3901.

—— Knowledge by creditor of partnership relation.]—*See* BANKRUPTCY, Vol. IV., pp. 446–448, Nos. 4035–4047.

(*b*) *Trading Partnerships.*

359. General rule—Authority confined to trading partnerships.]—The implied authority of one partner to bind another by promissory note or bill of exchange is confined to partnerships for the purpose of trade. One of two attorneys in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt. As, for money handed to the firm by a client to be laid out on mtge. Declaration on a promissory note, with a count on an account stated: particular of demand, specifying that the action is brought to recover £555 due on the note set forth in the first count, with interest from, etc., to the day of payment; & that pltf., for recovery thereof, will avail herself of the whole or any part of the declaration :—*Held :* the note, being invalid, was not, by this particular, made admissible evidence of the account stated.—HEDLEY *v.* BAINBRIDGE (1842), 3 Q. B. 316; 2 Gal. & Dav. 483; 11 L. J. Q. B. 293; 6 Jur. 853; 114 E. R. 527.

Annotation :—**Refd.** Garland *v.* Jacomb (1873), L. R. 8 Exch. 216.

360. —— ——.]—If a bill of exchange or promissory note be drawn, accepted, or indorsed, by one of two persons who are partners in a business which is not a trade, *e.g.* as attornies, in the name of the firm, & the partner, who did not write the names of the firm, by his plea deny the drawing, acceptance, or indorsement respectively, pltf. must give evidence of the authority of the other partner to draw, accept, or indorse in the name of the firm; but in the case of a commercial firm this is not necessary, as there is a general authority.—LEVY *v.* PYNE (1842), Car. & M. 453, N. P.

361. —— ——.]—BANK OF AUSTRALASIA *v.* BREILLAT, No. 298, *ante.*

362. Authority to accept.]—If there be two merchants that have a joint trade, & one of them accept a bill of exchange, if he do not pay it, an action lies against the other (TWISDEN, J.).—ANON. (1653), Sty. 370; 82 E. R. 786.

363. —— After dissolution.]—Order for goods by two partners; afterwards partnership dissolved; a bill drawn on the two partners, but accepted only by one, who carried on a separate trade, & the goods delivered to him, no claim

Sect. 1.—*Liability of firm for acts of partner: Sub-*

be made on the other partner.—*Re* CHRISTOPHER, *Ex p.* HARRIS (1816), 1 Madd. 583; 56 E. R. 214.

364. Authority to draw.]—If several persons trade under a particular firm, & some, without the concurrence of others, draw bills under that firm, all are liable to an indorsee.—BAKER *v.* CHARLTON (1791), Peake, 80, 111, N. P.

Annotations:—**Apld.** Lacy *v.* Woolcott (1823), 2 Dow. & Ry. K. B. 458; Vere *v.* Ashby (1829), 10 B. & C. 288.

365. —— Outside business purposes—Necessity for special authority.]—ALLAN *v.* SIDDAWAY & SON (1892), 9 T. L. R. 20, D. C.

(c) Non-Trading Partnerships.

366. Authority must be express.]—LEVY *v.* PYNE, No. 360, *ante.*

367. —— Auctioneers in partnership.]—An auctioneer is not a trader, & a partner in a firm of auctioneers has no implied authority to bind the firm by his acceptance of a bill of exchange in the firm name.—WHEATLEY *v.* SMITHERS, [1906] 2 K. B. 321; 75 L. J. K. B. 627; 95 L. T. 96; 54 W. R. 537; 22 T. L. R. 591; 50 Sol. Jo. 513, D. C.; *on appeal,* [1907] 2 K. B. 684, C. A.

Annotation:—**Consd.** Higgins *v.* Beauchamp, [1914] 3 K. B. 1192.

368. —— Commission agents in partnership.]—Two partners carried on business together as brokers, under an agreement that they were to get orders on commission & divide the expenses. One of them travelled for orders, &, having incurred expenses, drew a bill, for the first time, in the partnership name, to raise funds to execute an order. The other partner accepted it, but before it was issued, countermanded the authority to negotiate it, & it was negotiated without his knowledge:—*Held:* the mere partnership did not render him liable upon it.—YATES *v.* DALTON (1858), 28 L. J. Ex. 69.

369. —— Farming partnership.]—A joint interest in a farm, is not a partnership, & therefore, will not convey an implied authority to one of two persons, to bind the other by the acceptance of bills of exchange for payments in respect of the farm. Therefore, it is incumbent upon the holder of bills accepted by one party so jointly interested, in the name of both, who seeks to recover against the other, to prove express authority has been given to make such acceptance. Thus, where A. agreed to take a farm, in which B. was to be jointly interested, & stipulated to pay for the stock & crop thereof, in good bills at three months, & B. afterwards, without the knowledge of A. made a new arrangement, relative to such payment, in pursuance of which he accepted bills in the name of himself & A., payable at twelve months, which acceptances were not subsequently ratified by A., it was held, that the holder of the bills was not entitled to recover against A.—GREENSLADE *v.* DOWER (1828), 7 B. & C. 635; 1 Man. & Ry. K. B. 640; 6 L. J. O. S. K. B. 155; 108 E. R. 860.

Annotations:—**Consd.** Hedley *v.* Bainbridge (1842), 3 Q. B. 316. **Apld.** Fisher *v.* Tayler (1843), 2 Hare, 218.

370. —— Mining partnership.]—DICKINSON *v.* VALPY, No. 546, *post.*

—— Solicitors in partnership.]—*See* SOLICITORS.

F. Borrowing Money.

371. General rule—Authority incident to trading partnership.]—BANK OF AUSTRALASIA *v.* BREILLAT, No. 298, *ante.*

372. —— ——.]—It is an incident of a common trading partnership & the managing partners have authority to borrow money for partnership purposes, which include the payment of partnership debts incurred in the ordinary course of business; & this authority is not excluded by special provisions in the partnership deed as to the raising of additional capital, or supplying deficiencies in the funds by contributions of the partners. Therefore, where in such a case the attorney of the managing partners paid partnership debts at their request, & on their promise to give a bill in the name of the firm, & the partnership deed contained a clause, that if any of the partners should for any other purpose than the immediate use of the partnership draw or accept any bill of exchange in the name of the firm, the others might dissolve the partnership:—*Held:* the other partners were liable, either on the bill or for money paid to their use.—BROWN *v.* KIDGER (1858), 3 H. & N. 853; 28 L. J. Ex. 66.

Annotations:—**Distd.** Higgins *v.* Beauchamp, [1914] 3 K. B. 1192. **Refd.** General Auction Estate & Monetary Co. *v.* Smith, [1891] 3 Ch. 432; Jacobs *v.* Morris, [1902] 1 Ch. 816.

373. —— —— Cinematograph theatre business.]—A firm carrying on the business of cinematographic theatre proprietors is not a trading firm for the purposes of the rule that each member of a trading firm has implied authority to borrow

PART IV. SECT. 1, SUB-SECT. 2.—E. (b).

364 i. *Authority to draw.*]—FINNY *v.* BERGUM, [1925] 4 D. L. R. 1020.—**CAN.**

364 ii. ——.]—Every one of the partners in a mercantile firm of ordinary trading partnership is liable upon a bill drawn by a partner in the recognised trading name of the firm for a transaction incident to the business of the firm, although his name does not appear upon the face of the instrument, although he be a sleeping & secret partner.—BUNARSEE DASS *v.* GHOLAM HOSSEIN (1870), 13 W. R. 29; 13 Moo. Ind. App. 358.—**IND.**

PART IV. SECT. 1, SUB-SECT. 2.—F.

371 i. *General rule—Authority incident to trading partnership.*]—The three defts. were in partnership in a business which had two branches. Deft. E., who was in charge of one breach, borrowed money from pltf. for the purposes of the business, & gave pltf. a promissory note therefor, signed by E. in the firm name. The money actually went into the business:—*Held:* E. had authority to borrow for the purposes of the firm & to give a promissory note so as to bind the then members of the firm. The partnership, having received & used the money, would be liable as for money had & received.—THOMAS *v.* MCNAUGHTON (Man.) (1912), 21 W. L. R. 267; 2 W. W. R. 381; 2 D. L. R. 211.—**CAN.**

371 ii. —— ——.]—Where one of several partners has, under arrangement with the other partners, the sole management of the business, he has the power of borrowing as incidental to the power of trade, & the power to pledge partnership assets as incidental to the power of borrowing.—ASAN KANI RAVUTTAR *v.* SAMASUNDARAM CHETTIAR (1908), I. L. R. 31 Mad. 206.—**IND.**

371 iii. —— ——.]—BRYAN *v.* BUTTERS BROTHERS & CO. (1892), 19 R. (Ct. of Sess.) 490.—**SCOT.**

t. ——.]—The power of borrowing is incidental to a partnership in this colony, having regard to the nature of the business & the circumstances which exist in connection with it.—GRAHAM *v.* MURWIN (1862), 1 N. S. W. S. C. R. (L.) 195.—**AUS.**

a. ——.]—Money borrowed by a partner, with the knowledge & assent of his co-partner, is not necessarily chargeable by the creditor against the latter; it must appear that the money was borrowed on partnership account, or used for partnership purposes.—HAMILTON *v.* MCILROY (1868), 15 Gr. 332.—**CAN.**

b. *For partnership purposes — No authority to borrow.*]—The mere fact that money borrowed by a member of the firm has been applied to partnership purposes, is not sufficient of itself to render the firm liable, at law, to repay it when there is no actual or implied authority to borrow, & there has been no ratification of the loan.—ROBERTSON *v.* JONES (1880), 20 N. B. R. (4 P. & B.) 267.—**CAN.**

c. —— ——.]—FOGG *v.* DOWLING (1870), N. B. Dig. 306.—**CAN.**

d. ——.]—The partnership was held liable herein as an undisclosed principal for money which one of the partners borrowed from pltf. for the purpose of paying the freight on automobiles

money on the credit of the firm for partnership purposes.—HIGGINS *v.* BEAUCHAMP, [1914] 3 K. B. 1192; 84 L. J. K. B. 631; 111 L. T. 1103; 30 T. L. R. 687, D. C.

374. For partnership purposes — Payment of partnership debts—Special provision in articles as to meeting deficiencies.]—BROWN *v.* KIDGER, No. 372, *ante*.

375. —— —— On transfer of banking account.]—BEALE *v.* CADDICK, No. 344, *ante*.

376. —— Increase of partnership capital.]—The implied authority of a partner to bind his co-partners for the repayment of money borrowed for partnership purposes, in the ordinary course of partnership transactions, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm; & therefore a party advancing money to one partner, knowing that it was for the latter purpose, cannot as a matter of course charge the other partners with the loan, unless the transaction took place with their express or actual authority.

Two partners in a firm announced their intention of adding £16,000 to their capital, by admitting one or more additional partners. W. entered into a negotiation with one of the partners, then acting on behalf of both, on the subject of the announcement, but afterwards declining to enter into the firm, advanced a sum of £4,000 to that partner by way of loan, on the security of the bills of the firm, & also of the separate estate of such partner:—*Held:* W. had, so far as this evidence went, notice that the loan of £4,000 was an advance, not within the implied authority of the partner obtaining it, the other partner having authorised the capital to be raised in a different mode; but, inasmuch as the original partnership was then existing, & the advance might have been within the scope of the partnership authority, without reference to the proposed increase of capital, liberty was given to W. for the purpose of trying that question, to bring an action on the bills against the exors. of the other partner.—FISHER *v.* TAYLER (1843), 2 Hare, 218; 67 E. R. 91; *on appeal*, 2 L. T. O. S. 205, L. C.

Annotation:—**Expld.** Bank of Australasia *v.* Breillat (1847), 6 Moo. P. C. C. 152.

377. —— On personal credit of co-partner.]—L., K. & W., entered into an agreement to engage in a speculation in land, & agreed to be liable, *pro rata*, according to the value of their shares, for the cost of any land acquired for the purposes of the adventure.

K., who took the active management, borrowed money for the purposes of the adventure, & granted a mtge. bond on the lands of the adventurers, which contained a clause making him personally liable for the debt. At the time of effecting the loan he produced the agreement, & the money was advanced in consideration of its existence:—*Held:* in the absence of any evidence that L. or W. had authorised K. to pledge their personal credit, they were not liable for the debt.—BLAINE *v.* HOLLAND (1889), 60 L. T. 285, P. C.

Annotation:—**Refd.** Laughton *v.* Griffin, [1895] A. C. 104.

378. Misapplication of money borrowed—Appropriation to private purpose.]—Advances made to one partner with the full assent & authority of the others, although the amount may be misapplied by him, is a receipt on behalf of the co-partnership, & a debt is constituted against such co-partnership.—JACKSON *v.* OGG (1859), John. 397; 34 L. T. O. S. 6; 5 Jur. N. S. 976; 7 W. R. 730; 70 E. R. 476.

Annotation:—**Mentd.** *Re* George, Francis *v.* Bruce (1890), 44 Ch. D. 627.

379. —— —— Negligence of lender.]—If money be lent to one of two partners, who says he borrows it for the firm, & he misapply it, & there be proof that pltf. lent it under circumstances of negligence, & out of the ordinary course of business, he cannot recover against the other partner.—LOYD *v.* FRESHFIELD (1826), 2 C. & P. 325; *sub nom.* LLOYD *v.* FRESHFIELD, 9 Dow. & Ry. K. B. 19.

Annotations:—**Consd.** Alliance Bank *v.* Kearsley (1871), L. R. 6 C. P. 433. **Distd.** Okell *v.* Eaton & Okell (1874), 31 L. T. 330. **Mentd.** Tournier *v.* National Provincial & Union Bank of England, [1924] 1 K. B. 461.

380. —— —— ——.]—Where one partner borrows money on the credit of the partnership, & applies it to his own purposes, it is no defence to an action by the lender against the partnership that pltf. negligently omitted to communicate with the other partners, & to make inquiries as to the borrower's authority to pledge the partnership credit, provided pltf. acted *bonâ fide* in advancing the money.—OKELL *v.* EATON & OKELL (1874), 31 L. T. 330.

381. On individual credit—Application of money to partnership purposes.]—LOYD *v.* FRESHFIELD, No. 379, *ante*.

382. —— —— Application to knowledge of firm.]—If a partner borrows a sum of money, & gives his own security only for it, it does not become a partnership debt by being applied for partnership purposes, with the knowledge of the other partner.—BEVAN *v.* LEWIS (1827), 1 Sim. 376; 57 E. R. 618.

383. —— —— Borrowing unknown to firm.]—Where A., B., & C., not being general partners, entered into a joint speculation, & each was to contribute a third:—*Held:* A., who had paid his share, was not liable to the bankers of B., for moneys advanced by such bankers on the individual credit of B., without the knowledge of A., though such moneys were applied in payment of bills drawn upon B. in the course of the joint speculation.—SMITH *v.* CRAVEN (1831), 1 Cr. & J. 500; 1 Tyr. 389; 9 L. J. O. S. Ex. 174; 148 E. R. 1520.

Annotations:—**Refd.** Nicholson *v.* Ricketts (1860), 2 E. & E. 497; *Re* Adansonia Fibre Co., Mile's Claim (1874), 9 Ch. App. 635; Yorkshire Banking Co. *v.* Beatson (1), Leeds & County Banking Co. *v.* Same (1879), 4 C. P. D. 204.

which he, purporting to act on behalf of the firm, had bought from wholesalers with the object of reselling them.—FINNY *v.* BERGUM, [1926] 3 D. L. R. 798; [1926] 2 W. W. R. 810; 20 Sask. L. R. 606.—**CAN.**

e. ——.]—Where a partner has power to borrow money for the purposes of the firm, & to secure the loan by a pledge of the firm's chattels, if such partner borrows the money, & gives security over the chattels in his own name, the firm is liable in the same way as if the name of the firm had been originally used.—*Re* MCINTYRE & EDWARDS, *Ex p.* GILLARD (1895), 13 N. Z. L. R. 735.—**N.Z.**

379 i. *Misapplication of money borrowed—Appropriation to private purpose—Negligence of lender.*]—MCCONNELL *v.* WILKINS (1885), 13 A. R. 438.—**CAN.**

381 i. *On individual credit—Application of money to partnership purposes.*]—MCCORD *v.* FIELD (1877), 27 C. P. 391.—**CAN.**

381 ii. —— ——.]—A partner has power to borrow money for the purposes of the firm, but if borrowed upon his own credit, even if applied for the purposes of the firm, he alone is liable.—HUDSON'S BAY CO. *v.* STEWART (1889), 6 Man. L. R. 8.—**CAN.**

381 iii. —— ——.]—The tenant of a grazing farm entered into an agreement with another person by which the latter became a joint adventurer in the farm. The agreement was kept latent & the original tenant remained in the management of the farm. In the course of his management he obtained an advance upon his individual credit from a third party for the express purpose of paying his rent & the money was so applied:—*Held:* the latent co-adventurer was jointly & severally liable in repayment of this advance.—CAMERON *v.* YOUNG (1871), 9 Macph. (Ct. of Sess.) 786; 43 Sc. Jur. 437.—**SCOT.**

Sect. 1.—*Liability of firm for acts of partner: Subsect.* 2, *F. & G.*]

384. —— —— Whether borrowing effective as mortgage on shares of partners.]—BAXTER v. BROWN, No. 713, *post.*

385. Borrowing from other than specified lender.]—Defts. & H. had dealings on joint account in various bearer securities. For the purposes of the joint account, defts. entrusted H. with bearer securities to the amount of £20,000 for the purpose of being deposited by him as margin in respect of a loan to be borrowed from a specified lender. H. did not borrow from that lender, & he had the £20,000 margins in his possession on Sept. 15, 1911, on which day H. became indebted to pltfs. On subsequently discovering the existence of the joint account transactions between H. & defts. pltfs. sued defts. in debt on the ground that they were partners with H.:—*Held:* the claim failed, inasmuch as H. had no authority to act for the joint adventure by borrowing from any one except the specified lender, & pltfs. did not at the material date know or believe H. to be a partner with defts.—LLOYDS BANK, LTD. *v.* SWISS BANKVEREIN, UNION OF LONDON & SMITHS BANK, LTD. *v.* SWISS BANKVEREIN (1912), 107 L. T. 309; 28 T. L. R. 501; 56 Sol. Jo. 688; 17 Com. Cas. 280; *affd.* (1913), 108 L. T. 143; 29 T. L. R. 219; 57 Sol. Jo. 243; 18 Com. Cas. 79, C. A.

386. Other partners unknown to lender.] — LLOYDS BANK, LTD. *v.* SWISS BANKVEREIN, UNION OF LONDON & SMITHS BANK, LTD. *v.* SWISS BANKVEREIN, No. 385, *ante.*

G. Contracts.

387. General rule — Liability not confined to contracts relating to partnership trade.]—Pltf. was employed as an attorney by the owner of a mill to take the necessary steps for paying off a mtge. thereon. The owner carried on the business of a miller at the mill, in partnership with several other persons, all of whom knew of the mtge., & had ordered their clerk to pay the interest:—*Held:* the partners were liable to the attorney for his bill of costs.

It is quite a fallacy to suppose that partners are not liable except upon contracts relating to the article in which they deal. They must have a place wherein to carry on their business; & if partners take a shop for that purpose, though one only should act, yet both are liable for the use of it. Here one of the partners is owner, subject to a mtge.; the partners are his lessees; & the manager or clerk acts for all. Under these circumstances, therefore, I think that defts. are liable to the attorney (LORD DENMAN, C.J.).—GRIFFITH *v.* HUGHES (1847), 9 L. T. O. S. 147.

388. Contract for sale.] — The sale of one partner is the sale of them both; & therefore although that one of them selleth the goods, or merchandizeth with them, yet the action must be brought in both their names; & in such case deft. shall not be received to wage his law, that the other partner did not sell the goods unto him, as is supposed in the declaration (*per* CUR.). -LAMBERTS CASE (1614), Godb. 244; 78 E. R. 142.

389. —— On behalf of firm—Execution by two partners only—Question for jury.]—In *assumpsit* on a contract for the delivery of coals from a colliery, it appeared that the agreement, for supplying such coals & for the demise of a real wharf purported to be made between pltf. & the partners in the colliery, three in number, & was executed by pltf. & two of the partners:—*Held:* admitting such contract to be one by which partners might bind an absent co-partner or themselves, yet the judge, on trial, ought not to decide, as matter of law, that the contract signed by two bound them, but should desire the jury to say whether it was intended to do so or not, if there are circumstances from which an intention can be inferred that no party should be bound unless all the partners signed.—LATCH *v.* WEDLAKE (1840), 11 Ad. & El. 959; 3 Per. & Dav. 499; 9 L. J. Q. B. 201; 113 E. R. 678.

Annotations:—**Mentd.** Cumberlege *v.* Lawson (1857), 1 C. B. N. S. 709; Coyte *v.* Elphick (1874), 22 W. R. 541; Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362.

390. —— —— Approval by one partner only.]—B. was the chief partner in a partnership of three persons. The word "approved" written by him & signed with his name was treated as an assent binding on all the partners whose names were mentioned in the paper, although the usual form of signature of the partnership was that of "B. & Sons."

A mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms, by sending coals in the quantities & at the prices mentioned in it, amounted to sufficient to show the adoption of the writing previously altered & sent, & to constitute it a valid contract.—BROGDEN *v.* METROPOLITAN RY. CO. (1877), 2 App. Cas. 666, H. L.

Annotations:—**Refd.** Waring & Gillow *v.* Thompson (1912), 29 T. L. R. 154. **Mentd.** Household Fire & Carriage Accident Insce. *v.* Grant (1879), 4 Ex. D. 216; Henthorn *v.* Fraser, [1892] 2 Ch. 27; Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256; Keighley, Maxsted *v.* Durant, [1901] A. C. 240; Coope *v.* Ridout, [1920] 2 Ch. 411.

391. —— Of partnership goods.] — BANK OF AUSTRALASIA *v.* BREILLAT, No. 298, *ante.*

392. Contract for purchase of goods.] —Where one of two partners, with the intention of cheating the other, goes to a shop & purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him & the seller, this is to be considered a partnership transaction, & the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties.—BOND *v.* GIBSON (1808), 1 Camp. 185; 170 E. R. 923, N. P.

393. ——.]—BANK OF AUSTRALASIA *v.* BREILLAT, No. 298, *ante.*

PART IV. SECT. 1, SUB-SECT. 2.—G.

388 i. *Contract for sale.*] — *Qu.:* whether, where there are partners employed in making engines, etc., & pltf. makes an express contract with one for an engine, he, notwithstanding such contract, sue them all.—LOOMIS *v.* BALLARD (1850), 7 U. C. R. 336.—**CAN.**

388 ii. ——.]—Each partner has a power of sale over the effects of the firm, & the mere omission of the vendor to consult his co-partner is no ground of fraud as against the vendee.—FOX *v.* ROSE (1852), 10 U. C. R. 16.—**CAN.**

388 iii. ——.]—O'REGAN *v.* WILLIAMS (1892), 24 N. S. R. 165.—**CAN.**

388 iv. ——.]—Where one partner purports, without authority, to sell outside the ordinary way of carrying on the partnership business the property of another partner used for the purpose of the business, the purchaser obtains no title & the other partner maymaintain an action for conversion against him.—SATTALICK *v.* JARRETT, [1918] 1 W. W. R. 92; 10 Sask. L. R. 432; 38 D. L. R. 63.—**CAN.**

388 v. ——.] — POTCHEFSTROOM DAIRIES *v.* STANDARD MILK SUPPLY Co., [1913] T. P. D. 506.—**S. AF.**

392 i. *Contract for purchase of goods.*] —MOORE *v.* SLATER & BARBOUR (1863), 2 W. & W. 161.—**AUS.**

392 ii. ——.]—MARTIN *v.* BAKER (1875), 15 B. L. R. 372.—**IND.**

f. —— *By individual partner—For partnership purposes—Joint adventure.*] —LOCKHART *v.* MOODIE & CO. (1877), 4 R. (Ct. of Sess.) 859.—**SCOT.**

g. —— —— *For individual purposes.*]—Where a partner without collusion gives orders in the name of the firm for goods in the use of which

394. —— By individual partner—For partnership purposes—Partners in general profits only.]—If several persons horse with horses their several property, the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road.—BARTON *v.* HANSON (1809), 2 Taunt. 49; 127 E. R. 993.

Annotations:—**Refd.** Waland *v.* Elkins (1816), 1 Stark. 272; Fromont *v.* Coupland (1824), 2 Bing. 170; Wilson *v.* Whitehead (1842), 12 L. J. Ex. 43; Kilshaw *v.* Jukes (1863), 3 B. & S. 847.

395. —— —— —— Joint adventure.]—Where persons enter into an agreement constituting a partnership limited to a joint trading adventure & goods are purchased, ostensibly by an individual adventurer but really for the purpose of the joint adventure, the adventurers are liable as partners, but there is no such responsibility for goods purchased upon the credit of an individual adventurer though they are afterwards brought into stock as his contribution to the joint adventure.—KARMALI ABDULLA ALLARAKHIA *v.* VORA KARIMJI JIWANJI (1914), L. R. 42 Ind. App. 48.

396. —— On behalf of firm — Acceptance of bill in individual name.]—One of the members of a foreign firm resident in this country, bought goods on account of the firm, for which he gave his own acceptances. Before the maturity of the bills, the acceptor became bkpt., & the drawer, or those to whom he had indorsed them, proved for the amount against the acceptor's estate, & received dividends:—*Held:* the vendor of the goods, to whom the bills had been returned, had done nothing to prejudice his right to have recourse against the other members of the firm for the unpaid balance. The mere fact of the vendor's dealing with the resident partner, making out the invoices to him individually, & drawing upon him alone though aware that he was a member of a firm, & that the goods were to be shipped for the firm, makes no difference.—BOTTOMLEY *v.* NUTTALL (1858), 5 C. B. N. S. 122; 28 L. J. C. P. 110; 32 L. T. O. S. 222; 5 Jur. N. S. 315; 141 E. R. 48.

Annotations:—**Refd.** Keay *v.* Fenwick (1876), 1 C. P. D. 745; Scarf *v.* Jardine (1882), 7 App. Cas. 345. **Mentd.** Mears *v.* Western Canada Pulp & Paper Co., [1905] 2 Ch. 353.

397. Contract not in accordance with course of business—Free carriage of goods.]—Where it was agreed between pltf. & one of defts. proprietors of a stage coach, to carry certain parcels for pltf. free of expence, which were accordingly carried for two years, but there was no evidence of any knowledge of this agreement by other defts.; & defts. had given notice that they would not be accountable for parcels above the value of £5, unless entered & paid for, etc.:—*Held:* defts. were not liable for the loss of a parcel of above the value of £5, sent by pltf. under this agreement, of which no notice of its value had been given to defts.—BIGNOLD *v.* WATERHOUSE (1813), 1 M. & S. 255; 105 E. R. 95.

Annotations:—**Refd.** Thompson *v.* Speirs (1845), 14 L. J. Ch. 453. **Mentd.** Batson *v.* Donovan (1820), 4 B. & Ald. 21.

398. Contract commencing in name of firm—Subsequent clauses in name of individual partner—Charterparty.]—If a partner who executes a charterparty by the terms of the instrument, in the commencement of it, professes to contract for himself & his partner A., A. will be bound although all the stipulations & obligations in the remaining part of the instrument are made in the name of the freighter.—THOMAS *v.* CLARK (1818), 2 Stark. 450, N. P.

-Mentd. Capper *v.* Forster (1837), 3 Bing. ... 938; Cockburn *v.* Alexander (1848), 6 C. B. 791; Warren *v.* Peabody (1849), 19 L. J. C. P. 43; Morris *v.* Levison (1876), 1 C. P. D. 155; The Resolven (1892), 9 T. L. R. 75.

399. Supply of gas for place of business—Lease of premises in name of individual partner.]—The City of London Gas Light & Coke Co. may maintain *assumpsit* for gas supplied to the occupiers of a wharf; & it is not necessary, in such a case, that there should have been any contract by deed executed by the co. Both of two partners are liable for gas furnished, if they have both had the use of it, although the lease of the wharf upon which it is supplied, is granted only to one of them.—CITY OF LONDON GAS LIGHT & COKE CO. *v.* NICHOLLS (1826), 2 C. & P. 365, N. P.

Annotations:—**Mentd.** Beverley *v.* Lincoln Gas Light & Coke Co. (1837), 6 Ad. & El. 829; Clarke *v.* Cuckfield Union (1852), Bail Ct. Cas. 81.

400. Contract for tenancy—Execution in name of firm—Identity of signatory not proved.]—An agreement for letting premises, under hand only, was signed "H. Curtis & co."; & it appeared that there were two persons trading under that firm, but it was not proved, through the absence of the attesting witness, in whose handwriting it was signed:—*Held:* upon evidence that both persons acted in the business, there was sufficient proof of an execution by the partnership.—EVANS *v.* CURTIS (1826), 2 C. & P. 296, N. P.

401. —— For partnership purposes—Liability for use & occupation.]—GRIFFITH *v.* HUGHES, No. 387, *ante*.

402. —— —— Lease for twenty-one years—Partnership for indefinite period.]—SHARP *v.* MILLIGAN, No. 328, *ante*.

403. Contract for employment — Agreement signed by two of three parties—Liability of all.]—A. agreed in writing with B. & C., on behalf of themselves & D., as partners in trade, to serve them, B. & C., & the survivor of them, for seven years, as their foreman, & not to engage in trade on his own account during that period without their consent; & B. & C. agreed to pay him wages after the rate of £3 3*s.* per week, so long as he should serve them faithfully:—*Held:* the action was maintainable against B., C., & D. jointly, though B. & C. only were parties to the written agreement.—DRAKE *v.* BECKHAM (1843), 11 M. & W. 315; 12 L. J. Ex. 486; 7 Jur. 204, Ex. Ch.; *affg.* S. C. *sub nom.* BECKHAM *v.* DRAKE (1841), 9 M. & W. 79; *subsequent proceedings* (1849), 2 H. L. Cas. 579.

Annotations:—**Apld.** Spurr *v.* Cass, Cass *v.* Spurr (1870), L. R. 5 Q. B. 656. **Refd.** Galsworthy *v.* Strutt (1848), 1 Exch. 659; Robinson *v.* Rudkins (1856), 26 L. J. Ex. 56; Bristow *v.* Whitmore (1861), 4 L. T. 622. **Mentd.** Denton *v.* Williams (1839), 8 Dowl. 123; Hill *v.* Smith (1844), 13 L. J. Ex. 243; Williams *v.* Chambers (1847), 10 Q. B. 337; Bell *v.* Carey (1849), 8 C. B. 887; Wetherell *v.* Julius (1850), 10 C. B. 267; Elliot *v.* Clayton (1851), 16 Q. B. 581; Boddington *v.* Castelli (1853), 1 E. & B. 879; Stanton *v.* Collier (1854), 3 E. & B. 274; Richbell *v.* Alexander (1861), 30 L. J. C. P. 268; Calder *v.* Dobell (1871), L. R. 6 C. P. 486; Bailey *v.* Thurston, [1903] 1 K. B. 137.

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he is himself solely interested, & the goods are of such a nature that strangers cannot tell whether they might not be for the joint business of the firm, such orders will bind the partners.—SIMPSON *v.* MCDONOUGH (1844), 1 U. C. R. 157.—**CAN.**

396 i. —— *On behalf of firm—Acceptance of bill in individual name.*]—JONES *v.* FOSTER (1861), 12 N. B. R. (1 Han.) 607.—**CAN.**

h. *Partnership not in existence at time of contract.*]—In an action by pltfs. to recover damages for breach of contract from the three defts., who, it was alleged, were partners, & as such had entered into a joint adventure with pltfs.:—*Held:* even if the partnership existed, it had not been formed at the time when the contract was alleged to have been made.—LANG *v.* MORRISON (1911), 13 C. L. R. 1.—**AUS.**

Sect. 1.—*Liability of firm for acts of partner: Sub-sect.* 2, *G., H., J. & K.*]

404. —— By one partner—Solicitor's bill of costs—Payment of mortgage on partnership premises.]—GRIFFITH *v.* HUGHES, No. 387, *ante.*

405. Variation of contract—Without knowledge of co-partner.]—A. & B. entered into an agreement with C. for the manufacture by C. within a specified time of a machine of a certain power. The agreement recited that A. & B. had agreed to use & practise for their mutual benefit, as partners, the right of using the said machine. Subsequently, B. without A.'s knowledge, gave to C. an extension of time for the making of the machine, & also instructions for an increase of the mechanical power:—*Held:* as between A. & C., that A. & B. were interested as partners in the subject matter of the contract, & that A. was bound by B.'s instructions to C. & could not treat the contract as rescinded.—LEIDEN *v.* LAWRENCE (1863), 2 New Rep. 283.

Contract by joint ship-owners.]—*See* SHIPPING.

Effect of ratification.]—*See* Part IV., Sect. 1, sub-sect. 1, C., *ante.*

H. Deeds.

See Partnership Act, 1890 (c. 39), s. 6.

406. General rule.]—One partner cannot bind the other partners by deed.

The law of merchants is part of the law of the land; & in mercantile transactions, in drawing & accepting bills of exchange, it never was doubted but that one partner might bind the rest (LORD KENYON, C.J.).—HARRISON *v.* JACKSON (1797), 7 Term Rep. 207; 101 E. R. 935.

Annotations:—**Apld.** Marchant *v.* Morton, Down, [1901] 2 K. B. 829. **Refd.** Hawkshaw *v.* Parkins (1819), 2 Swan. 539; Adams *v.* Bankart (1835), 5 Tyr. 425; Tomlinson *v.* Broadsmith & Stead (1896), 65 L. J. Q. B. 308.

407. ——.]—A partner has no presumed authority to execute deeds for his co-partners; unless you can show that A. was authorised by deed to do so, you cannot make the execution by A. available against B. & C. (LORD ABINGER, C.B.).—GREEN *v.* SUTTON (1840), 2 Mood. & R. 269, N. P.

Annotation:—**Mentd.** Pipe *v.* Steele (1842), 2 Q. B. 733.

408. Authority must be by deed.]—An authority to execute a deed must be by deed; & if one partner acknowledge that he gave another partner authority to execute a deed for him, the presumption is, that it was a legal authority, which must be under seal & produced. An acknowledgment is not sufficient.—STEIGLITZ *v.* EGGINTON (1815), Holt, N. P. 141, N. P.

409. ——.]—GREEN *v.* SUTTON, No. 407, *ante.*

410. Execution in presence of co-partner.]—If A. execute a deed for himself & his partner, by the authority of his partner, & in his presence, it is a good execution, though only sealed once.—BALL *v.* DUNSTERVILLE (1791), 4 Term Rep. 313; 100 E. R. 1038.

Annotations:—**Refd.** Burn *v.* Burn (1798), 3 Ves. 573. **Mentd.** R. *v.* Austrey (1817), 6 M. & S. 319; Cooch *v.* Goodman (1842), 2 Q. B. 580.

411. ——.]—Partners bound by an instrument executed by one in the presence of the others.—BURN *v.* BURN (1798), 3 Ves. 573; 30 E. R. 1162, L. C.

Annotation:—**Mentd.** Ferguson *v.* Gibson (1872), 41 L. J. Ch. 640.

412. Assignment for benefit of creditors—Executed by one partner only—Individual liability.]—Where a deed of assignment, purporting to be made by all three partners of a firm, & to convey all their personal estate & effects whatsoever in trust for the benefit of creditors, was executed by one of them only:—*Held:* it operated to convey the share of the one who so executed.—BOWKER *v.* BURDEKIN (1843), 11 M. & W. 128; 12 L. J. Ex. 329; 152 E. R. 744.

Annotations:—**Refd.** *Re* Douglas, *Ex p.* Snowball (1872), 7 Ch. App. 534. **Mentd.** Gudgen *v.* Besset (1856), 6 E. & B. 986; Pattle *v.* Hornibrook, [1897] 1 Ch. 25; Foundling Hospital *v.* Crane, [1911] 2 K. B. 367.

413. Assignment of partnership debt—Valid as equitable assignment.]—One of the two partners of a firm purported by deed to assign the book debts of the firm as security for a debt due by the firm & signed the deed in his individual name & also, without authority, in the name of his partner:—*Held:* whether or not the deed was valid as a deed it operated as a good equitable assignment, for that it was, within Partnership Act, 1890 (c. 39), s. 6, an act or instrument relating to the business of the firm & done in a manner showing an intention to bind the firm by a partner who by reason of the partnership had authority to bind the firm.—*Re* BRIGGS & Co., *Ex p.* WRIGHT, [1906] 2 K. B. 209; 75 L. J. K. B. 591; 95 L. T. 61; 50 Sol. Jo. 514.

414. —— ——.]—Though one of two partners is not as partner entitled to execute deeds on behalf of the partnership yet an assignment by deed of a partnership debt by a partner is a good equitable assignment & binding on the partnership, though the deed is bad as a deed.—MARCHANT *v.* MORTON, DOWN & Co., [1901] 2 K. B. 829; 70 L. J. K. B. 820; 85 L. T. 169; 17 T. L. R. 640.

Annotation:—**Mentd.** Torkington *v.* Magee, [1902] 2 K. B. 427.

J. Guarantee.

See Partnership Act, 1890 (c. 39), s. 18.

415. Whether partnership bound.]—HOPE *v.* CUST (1774), cited 1 East, at p. 53; 102 E. R. 21.

Annotations:—**Refd.** Shirreff *v.* Wilks (1800), 1 East, 48; *Ex p.* Bonbonus (1803), 8 Ves. 540; Wintle *v.* Crowther (1831), 1 Cr. & J. 316.

PART IV. SECT. 1, SUB-SECT. 2.—H.

406 i. *General rule.*]—LOGAN *v.* STRANAHAN (1854), 12 U. C. R. 15.—**CAN.**

406 ii. ——.]—HARRIS *v.* ROBERTSON (1866), 16 N. B. R. (6 All.) 496.—**CAN.**

406 iii. ——.]—HAMILTON PROVIDENT & LOAN SOCIETY *v.* STEINHOFF (1896), 23 A. R. 184.—**CAN.**

406 iv. ——.]—Although it is a rule of law that a partner has no implied authority to execute a deed on behalf of his firm, & there can be no ratification of such a deed except by the re-delivery of the old deed or the execution of another one, yet a document which is in form a deed, & inoperative as such because executed by one partner only, may, nevertheless, be binding on the firm if a deed is not necessary for the validity of the transaction, & the transaction itself is within the scope of the partner's implied authority.—GILCHRIST *v.* DOUGLAS (Alta.), [1924] 1 D. L. R. 38; [1923] 3 W. W. R. 1367.—**CAN.**

408 i. *Authority must be by deed.* Although one partner cannot bind another by deed, where a deed is necessary, unless himself authorised by deed to do so, yet if the dealing could have been effected without a deed the other partner may be bound.—HURREY *v.* BANK OF NEW SOUTH WALES (1883), 1 N. Z. L. R. C. A. 115.—**N.Z.**

410 i. *Execution in presence of co-partner.*]—*Held:* where one of two partners signed in the name of both in the presence of the other, & for him, with his assent, though there was but one seal, it was the deed of both.—MOORE *v.* BOYD (1864), 15 C. P. 513; 23 U. C. R. 459.—**CAN.**

412 i. *Assignment for benefit of creditors—Executed by one partner only—Individual liability.*]—*Held:* one co-partner in trade cannot, without the express consent of his co-partner, execute a deed disposing of all the stock-in-trade, effects, & assets of the firm to a trustee to dispose of the same for the general benefit of the creditors of the partnership.—CAMERON *v.* STEVENSON (1862), 12 C. P. 389.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 2.—J.

415 i. *Whether partnership bound.*]—DAY *v.* MCLEOD (1859), 18 U. C. R. 256.—**CAN.**

415 ii. ——.]—It is not incident to the general authority of a partner to

416. ——.]—CRAWFORD *v.* STIRLING, No. 325, *ante.*

417. ——.]—Undertaking in writing to guarantee the debt of another sufficient, within Stat. Frauds without stating any consideration as between the creditor & the surety. Partnership bound by the signature of one partner.—*Ex p.* GARDOM (1808), 15 Ves. 286; 33 E. R. 762, L. C.

Annotations:—**N.F.** Brettel *v.* Williams (1849), 4 Exch. 623. **Mentd.** Boehm *v.* Campbell (1819), 8 Taunt. 679; Jenkins *v.* Reynolds (1821), 6 Moore, C. P. 86; Morley *v.* Boothby (1825), 3 Bing. 107.

418. ——.]—In an action on a guarantee for the debt of a third person, signed by one of two partners in the partnership firm, it is necessary to give some evidence beyond the relationship of partners subsisting between them, that the one who signed had authority to bind the other by the guarantee. But for this purpose it would be sufficient to prove a parol acknowledgment from the other partner subsequently to the giving of the guarantee, or to show a previous course of dealing, in which similar guarantees had been given in the partnership firm, with the privity of both partners.—DUNCAN *v.* LOWNDES & BATEMAN (1813), 3 Camp. 478; 170 E. R. 1452, N. P.

Annotations:—**Consd.** Brettel *v.* Williams (1849), 4 Exch. 623. **Refd.** *Re* Wike, *Ex p.* Keighley (1874), 30 L. T. 407.

419. Guarantees must be in course of business.]—CRAWFORD *v.* STIRLING, No. 325, *ante.*

420. ——.]—DUNCAN *v.* LOWNDES & BATEMAN, No. 418, *ante.*

421. ——.]—One of a firm of attorneys had no general authority to bind the firm by a guarantee given to pay debt & costs, in consideration of pltf. discharging his debtor out of custody.

There is no evidence to show that the guarantee was given according to any usual practice of defts., & it certainly was not according to the usual practice of attorneys generally (PATTESON, J.).—HASLEHAM *v.* YOUNG (1844), 5 Q. B. 833; Dav. & Mer. 700; 13 L. J. Q. B. 205; 3 L. T. O. S. 34; 8 Jur. 338; 114 E. R. 1463.

Annotation:—**Consd.** Brettel *v.* Williams (1849), 4 Exch. 623.

422. ——.]—Defts., who were in partnership as railway contractors under the name of W., A. & co., contracted with a railway co. to do certain works. U. & R. made a subcontract with defts. to do part of the work; & for that purpose requiring coals to make bricks, A., without the knowledge or assent of his co-partners, signed in the name of the firm & delivered to pltfs. a guarantee, not addressed to any person, for payment of coals to be supplied to U. & R. Pltfs. having pointed out the omission, a clerk of W., A. & co. by the direction of A. wrote to pltfs., stating that the guarantee was intended for them. The clerk, also without the knowledge of the other partners, wrote to pltfs. certain letters amounting to evidence of an account stated in respect of the amount due on the guarantee:—*Held:* the guarantee did not bind the firm, there being no evidence that it was necessary for carrying into effect the partnership contract, or that the other partners had adopted it.—BRETTEL *v.* WILLIAMS (1849), 4 Exch. 623; 19 L. J. Ex. 121; 14 L. T. O. S. 255; 154 E. R. 1363.

Annotations:—**Refd.** Small *v.* Smith (1884), 10 App. Cas. 119. **Mentd.** *Re* West of England Bank, *Ex p.* Booker (1880), 14 Ch. D. 317.

423. ——.]—S., being desirous to assign a lease which he had deposited with pltf. to secure advances, employed defts., who were in partnership as attorneys, to get the lease from the pltfs. T., one of defts., accordingly arranged with pltfs. that they should give up the lease on receiving from him the following undertaking, signed by him in the name of the firm: We undertake, in consideration of your handing to us the deeds & papers in your possession relating to the Rose & Crown Inn, at Hounslow, so as to enable us to complete the assignment of the lease of such property, to pay you the sum of £200 on the day after the completion of the assignment of such lease, & the further sum of £250 on or before Sept. 3 next. Other deft. was not aware that this undertaking was given; but the whole transaction was entered in the books of the firm, & the purchase-money was paid into the partnership account:—*Held:* this was not a bare guarantee for the debt of a third person, but an undertaking to appropriate money to be received by the firm in the ordinary course of the partnership business, & it was therefore binding on the firm.—ALLIANCE BANK, LTD. *v.* TUCKER (1867), 17 L. T. 13; 15 W. R. 992.

424. ——.]—The general rule, that there is no implied power by one of a firm to bind the partnership by giving guarantees, does not apply in this case, because the guarantee was given in reference to business ordinarily carried on by the firm (CHARLES, J.).—MAYFIELD *v.* SANKEY (1890), 6 T. L. R. 185.

425. When ratification by co-partners necessary.]—CRAWFORD *v.* STIRLING, No. 325, *ante.*

426. ——.]—BRETTEL *v.* WILLIAMS, No. 422, *ante.*

427. —— **Parol acknowledgment.**]—DUNCAN *v.* LOWNDES & BATEMAN, No. 418, *ante.*

K. Legal Proceedings.

428. Authority to retain solicitor—To pay off mortgage debt.]—GRIFFITH *v.* HUGHES, No. 387, *ante.*

429. —— **To recover debts of firm.**]—The active partner in a firm consisting of himself & two dormant partners retained a solr. to conduct an action for the recovery of a debt due to the firm. While the action was pending, the partnership was dissolved, & the dormant partners retired from the business. No notice of the dissolution was given to the solr., who did not know of the existence of the dormant partners, nor did the dormant partners do anything by way of withdrawing the retainer:—*Held:* the dormant partners were liable to the solr. in respect of costs in the action incurred subsequently to the dissolution of partnership.—COURT *v.* BERLIN, [1897] 2 Q. B. 396; 66 L. J. Q. B. 714; 77 L. T. 293; 46 W. R. 55; 13 T. L. R. 567; 41 Sol. Jo. 715, C. A.

Annotation:—**Consd.** *Re* Wingfield & Blew, [1904] 2 Ch. 665.

bind his co-partners by giving guarantees for payment of the debts of third persons; it is therefore necessary for a person taking the note of a firm as a guarantee to prove that the partner who gave the note had authority to bind the firm in that way.—STEWART *v.* PARKER & FOX (1878), 18 N. B. R. (2 P. & B.) 223.—**CAN.**

415 iii. ——.]—MONTGOMERY *v.* MCQUEEN (Alta.) (1915), 31 W. L. R. 769.—**CAN.**

415 iv. ——.]—FORTUNE *v.* YOUNG, [1918] S. C. 1.—**SCOT.**

415 v. ——.]—A partner in a general dealer's business has no implied authority to make representation on behalf of the firm as to the financial stability of a customer who has referred a third person to the firm, & any representation he may make on such a matter is not binding on the firm, even though the representation might indirectly benefit the firm.—STEIN *v.* GARLICK & HOLDCROFT, [1910] T. P. D. 250.—**S. AF.**

419 i. *Guarantees must be in course of business.*]—A guarantee by one partner in the name of the firm for a matter not relating to the partnership business, will not bind the firm.—MARKS *v.* WRIGHT (1828), N. B. Dig. 572.—**CAN.**

1.—*Liability of firm for acts of partner: Subsect. 2, K., L., M. & N.*]

430. —— To defend action against firm—For goods supplied in course of business.]—A managing partner of a business firm has an implied authority to employ a solr. to defend an action brought against the firm for the price of goods supplied to the firm in the ordinary course of business.

A solr. employed by the managing partner of a business firm to defend an action brought against the firm in the firm name has authority to enter an appearance in the names of each of the partners individually, & is not guilty of negligence in not keeping the partners, other than the managing partner by whom he was employed, informed of the progress of the action.—TOMLINSON *v.* BROADSMITH, [1896] 1 Q. B. 386; 65 L. J. Q. B. 308; 74 L. T. 265; 44 W. R. 471; 12 T. L. R. 216; 40 Sol. Jo. 318, C. A.

Annotation:—**Refd.** Rodriguez *v.* Speyer, [1919] A. C. 59.

431. Submission to injunction.]—Exclusive right to a trade name. An agreement by one partner to submit to an injunction obtained against the firm, & pay the costs, is not within the scope of partnership authority; & if not expressly agreed to by all the partners, will not bind even him who signed the agreement.—WARNE *v.* BROMLEY (1844), 3 L. T. O. S. 70.

432. Consent to judgment.]—One partner has no implied authority to consent to an order for a judgment in an action against himself & his co-partner.—HAMBIDGE *v.* DE LA CROUÉE (1846), 3 C. B. 742; 4 Dow. & L. 466; 1 New Pract. Cas. 512; 16 L. J. C. P. 85; 8 L. T. O. S. 163; 10 Jur. 1096; 136 E. R. 297.

433. Compromise of action.]—Deft. was a partner in the firm of G. & co. from Jan. 1 to June 30, 1885, & no notice was ever given to pltf. of his retirement. Between those dates pltf. discounted an acceptance indorsed by G. & co., which was dishonoured. Pltf. sued G. & co. for the amount, & G. & co. brought a cross action against pltf. for recovery of the bill. Both actions were stayed by order of ct. on G. & co. giving to pltf. a second acceptance for the amount of the first & £10 for costs, & pltf. giving up certain securities for the debt which were in his possession. The second acceptance was dishonoured, & pltf. sued deft. upon it as a member of the firm of G. & co.:—*Held:* deft. was not liable, as the bill of exchange was given in settlement of legal proceedings which involved a give & take between the parties, & was made without his knowledge or consent.—CRANE *v.* LEWIS (1887), 36 W. R. 480.

434. ——.]—Pltf., who had been advised by one partner in a firm of solrs., brought an action against him to recover damages for his alleged negligence in giving her advice, & this action was settled on the terms of an agreement under which she received £95 in full satisfaction & discharge of all claims & disputes between the parties. Subsequently pltf. sued the other partner in respect of the same matter:—*Held:* pltf. was precluded from maintaining the action.—HOWE *v.* OLIVER, HAYNES, THIRD PARTY (1908), 24 T. L. R. 781.

435. Arbitration—Authority to bind to submission.]—One of several partners cannot bind the others by a submission to arbn. even of matters arising out of the business of the firm.—STEAD *v.* SALT (1825), 3 Bing. 101; 10 Moore, C. P. 389; 3 L. J. O. S. C. P. 175; 130 E. R. 452.

Annotations:—**Apld.** Adams *v.* Bankart (1835), 1 Cr. M. & R. 681; Hambidge *v.* De la Croúee (1846), 3 C. B. 742. **Refd.** Beckham *v.* Knight (1838), 4 Bing. N. C. 243.

436. —— ——.]—One partner has no implied authority to bind his co-partner to a submission to arbn., respecting the matters of the partnership.—ADAMS *v.* BANKART (1835), 1 Cr. M. & R. 681; 1 Gale, 48; 5 Tyr. 425; 4 L. J. Ex. 69; 149 E. R.

437. —— —— No express authority.]—A. & B. partners, dissolved the partnership upon the terms that all debts due to, & owing by the firm should be received & paid by A. A. employed C. an attorney, in winding up the affairs. A. having brought an action against D. in the names of himself & B. for a debt alleged to be due to the firm, & a plea of set off having been pleaded, all matters in difference between A. & B. & D. were, by a judge's order & by the consent of the attorneys employed in the cause, referred to the award of M. C. acted solely under A.'s instructions, without any express authority from B. In an action brought on the award:—*Held:* the submission was not binding on B.—HATTON *v.* ROYLE (1858), 3 H. & N. 500; 27 L. J. Ex. 486; 157 E. R.

—— ——.]—*See, further*, ARBITRATION, Vol. II., pp. 326, 327, 328, Nos. 99, 100, 107, 118.

L. Mortgages.

See Part IV., Sect. 5, *post.*

M. Notice.

438. General rule—Notice to one is notice to all.]—ALDERSON *v.* POPE (1808), 1 Camp. 404, n.; 170 E. R. 1001, N. P.

439. —— —— When referable to partnership transaction.]—Notice to one partner is notice to all, if given touching a partnership transaction, or in the ordinary course of partnership transactions; not otherwise (SIR GEORGE ROSE).—*Re* BORRON, *Ex p.* PARRATT (1836), 2 Mont. & A. 626; 1 Deac. 696, Ct. of R.

Annotations:—**Mentd.** *Re* Beardsall & Jackson, *Ex p.* Brett (1867), 15 L. T. 679; Mudge *v.* Rowan (1868), L. R. 3 Exch. 85; Brett *v.* Jackson (1869), L. R. 4 C. P. 259.

440. Application of rule—Not to joint stock company.]—The rule, that notice to one partner in an ordinary trading partnership is notice to all the partners, does not apply to a joint stock co.—

PART IV. SECT. 1, SUB-SECT. 2.—K.

432 i. *Consent to judgment.*]—A partner cannot sign a *cognovit* in the name of the firm without special authority, & a judgment entered upon such *cognovit* will be set aside.—HOLME *v.* ALLAN (1826), Tay. 348.—**CAN.**

432 ii. ——.]—HUFF *v.* CAMERON (1856), 1 P. R. 255.—**CAN.**

432 iii. ——.]—BROWN *v.* CINQMARS (1856), 2 P. R. 205.—**CAN.**

432 iv. ——.]—RECORD *v.* RECORD (1881), 21 N. B. R. (5 P. & B.) 277.—**CAN.**

432 v. ——.]—W., one member of a partnership, without the knowledge or consent of O., another member, gave pltf. a warrant to confess judgment, upon which judgment was entered up against the firm:—*Held:* in the absence of evidence of consent to the giving of the warrant to confess, or of subsequent ratification, the order made on the judgment appealed from must be reversed.—PITFIELD *v.* OAKES (1893), 25 N. S. R. 116.—**CAN.**

435 i. *Arbitration—Authority to bind to submission.*]—A declaration that deft. agreed with the pltfs. to refer:—*Held:* not supported by an agreement by one pltf. only on behalf of himself & the others, being his partners.—FRENCH *v.* WEIR (1859), 17 U. C. R. 245.—**CAN.**

k. *Admission by one partner.*]—An admission of a cause of action by some members of a commercial firm will not bind the other members.—HUNT *v.* HUNT, STABB, PRESTON & CO. (1821), 1 Nfld. L. R. 234.—**NFLD.**

PART IV. SECT. 1, SUB-SECT. 2.—M.

438 i. *General rule—Notice to one is notice to all.*]—SNARR *v.* SMALL (1856), 13 U. C. R. 125.—**CAN.**

Re CAREW'S ESTATE ACT (No. 2) (1862), 31 Beav. 39 ; 54 E. R. 1051.

Annotations :—**Refd.** Humphrey & Denman *v.* Kavanagh (1925), 41 T. L. R. 378. **Mentd.** Greenwell *v.* National Provincial Bank (1883), Cab. & El. 56.

One partner member of two partnerships.]—A manufacturer, A. proposed to a firm of B. & C., who were the home agents of A.'s foreign consignees, that they should make advances to him against the consignments, & that "the proceeds of sales, above the advances," should go to the liquidation of an old claim of B. & C. against A. B. & C. assented to this arrangement by a letter which, after stating that there were two ways of making advances : one for A. to draw on B. & C., & take their acceptances, & negotiate them ; the other for B. & C. to advance cash to A., & draw on A., for the amounts, A. to accept, B. & C. to negotiate, concluded thus : & we shall retire that acceptance from proceeds of the sales. In pursuance of this arrangement A. directed his consignees to remit to B. & C. & B. & C. made advances to A. by drawing on him, negotiating his acceptances, & remitting the proceeds to him. Afterwards B. & C. being in want of money, directed the consignees to remit, not to themselves, but to a firm of bankers C. & D., having a common partner with themselves, as a security for advances made by C. & D. to B. & C. Upon B. & C. becoming bkpt. :—*Held :* C. & D. had notice of the arrangement between A. & B. & C., through the fact of the common partner ; & that upon the construction of the contract, the remittances in the hands of C. & D. were appropriated in equity, first to the payment of A.'s acceptances, &, subject thereto, to the discharge of the old claim.—STEELE *v.* STUART (1866), L. R. 2 Eq. 84 ; 14 L. T. 620.

442. —— Notice to clerk or agent.]—The doctrine of constructive notice, as applied to a partnership firm, no doubt makes the clerk or agent of the firm a person whose knowledge will affect the firm as a firm with constructive notice, and in that sense will make every partner liable for the consequences of the constructive notice as a member of the firm, but no one has ever carried that doctrine to this extent, that the knowledge of the agent of the firm shall be the knowledge of the individual partner as between himself and his co-partner ; in fact, all the cases in equity with which I am familiar have proceeded on the opposite doctrine (JESSEL, M.R.).—LACEY *v.* HILL, LENEY *v.* HILL (1876), 4 Ch. D. 537, C. A. ; *affd.* on other grounds *sub nom.* READ *v.* BAILEY (1877), 3 App. Cas. 94, H. L.

Annotations :—**Refd.** *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807. **Mentd.** Mersey Steel & Iron Co. *v.* Naylor Benzon (1882), 51 L. J. Q. B. 576.

443. Presumption as to knowledge of co-partner's acts — When duty to obtain.] — (1) Partners will be deemed, for the protection of those who deal with them, to have such knowledge of the acts of their co-partners, as in the discharge of their plain duty they might & ought to have obtained.

(2) Difficulty in holding a partner who ostensibly takes an active part in the conduct of the business free from responsibility, on the ground of insanity, in respect of the acts of the firm.

(3) Confirmed & incurable insanity is a ground for dissolving a partnership ; but I apprehend, before a decree is made that a partnership shall be dissolved on this ground, it must be shown not only that the party alleged to be insane is not for the time so capable as he had previously been of attending to & conducting the business, but it must be shown clearly & distinctly that he is really insane (LORD LANGDALE, M.R.).—SADLER *v.* LEE (1843), 6 Beav. 324 ; 12 L. J. Ch. 407 ; 1 L. T. O. S. 142 ; 7 Jur. 476 ; 49 E. R. 850.

Annotations :—*As to* (1) **Refd.** Blair *v.* Bromley (1847), 2 Ph. 354 ; Bishop *v.* Jersey (1854), 2 Drew. 143 ; St. Aubyn *v.* Smart (1867), L. R. 5 Eq. 183 ; Moore *v.* Knight, [1891] 1 Ch. 547. *Generally*, **Mentd.** Davenport *v.* Stafford, Frisby *v.* Stafford, Charlesworth *v.* Manners (1851), 14 Beav. 319.

444. What constitutes notice—Not knowledge of fraud.]—I put the case of a clerk knowing it before he became a partner, & not interfering with it afterwards. But it is immaterial that the knowledge was acquired during the partnership. Suppose, either from corruption, that is, from receiving presents or otherwise, or affection, the goods being supplied by a relative, one of the partners knows that the vendor is defrauding the firm. I am satisfied that, according to sound doctrine, that knowledge would not prevent the remaining partners from suing the parties to the fraud, & recovering in a ct. of equity. It appears to me that that kind of notice will not do when it is applied to cases of fraud (JESSEL, M.R.).—WILLIAMSON *v.* BARBOUR (1877), 9 Ch. D. 529 ; 50 L. J. Ch. 147 ; 37 L. T. 698 ; 27 W. R. 284, n.

Annotations :—**Refd.** Gething *v.* Keighley (1878), 9 Ch. D. 547 ; Mutrie *v.* Binney (1887), 56 L. T. 455 ; The Pongola (1895), 73 L. T. 512. **Mentd.** Emma Silver Mining Co. *v.* Grant (1880), 29 W. R. 481 ; Hyman *v.* Helm (1883), 24 Ch. D. 531 ; Ward *v.* Sharp (1884), 53 L. J. Ch. 313 ; Hyman *v.* Helm (1885), 2 T. L. R. 205 ; *Re* Webb, Lambert *v.* Still, [1894] 1 Ch. 73 ; Arnold & Butler *v.* Bottomley, [1908] 2 K. B. 151 ; Stubbs *v.* Slater, [1910] 1 Ch. 195 ; Yourell *v.* Hibernian Bank, [1918] A. C. 372.

N. Payment of Debts.

445. General rule.]—BANK OF AUSTRALASIA *v.* BREILLAT, No. 298, *ante.*

446. ——.]—A. & B. were partners in a firm. A. allowed a debtor to the partnership to set off a separate debt of his own against money due to the firm, the debtor knowing the interest which B. had in the debt. B. filed a bill against the debtor & against A. to have it declared that the debtor had no right to retain his share in the debt towards payment of the separate debt of A. :—*Held :* although one partner could bind another in the receipt & payment of partnership debts, he could not set off his separate debts against debts due to the firm ; & the debtor's knowledge of the co-partners' interest rendered the bill sustainable as against him.—PIERCY *v.* FYNNEY (1871), L. R. 12 Eq. 69 ; 40 L. J. Ch. 404 ; 25 L. T. 237 ; 19 W. R. 710.

447. Whether promise by one binds all—Partners undisclosed—Individual liability of promisor.]—MURRAY *v.* SOMERVILLE (1809), 2 Camp. 99, n. ; 170 E. R. 1094.

448. —— Promise in name of firm—Although after dissolution.]—A. is indebted to B. & Co. for goods sold, & upon being released from his liability, assigns to the latter debt which is due to him from C. & co. ; notice of the assignment is given to a partner in the house of C. & co. who by parol, promises in the name of the firm to pay the debt to B. & co., out of the partnership funds :—*Held :* a promise by one partner was sufficient to bind all, although, as to some of the members, the partnership had been dissolved before the promise was given.—LACY *v.* M'NEILE (1824), 4 Dow. & Ry. K. B. 7.

Annotations :—**Consd.** Beale *v.* Caddick (1857), 2 H. & N. 326. **Mentd.** Andrews *v.* Smith (1835), 2 Cr. M. & R. 627.

Power to borrow to pay debts.]—*See* Nos. 344, 372, *ante.*

Sect. 1.—*Liability of firm for acts of partner: Subsect.* 2, *O., P. & Q.*]

O. Powers of Attorney.

449. Grant to firm—Transaction by one partner—Sole liability of partner acting.]—A power of attorney for the transfer of a sum of Consols standing in the books of the Bank of England in the names of two persons was applied for by a firm of stockbrokers consisting of three partners. By the power of attorney the stock holders purported to appoint two of the partners jointly & severally to act for them in the matter of the transfer. One of the partners alone acted under the power of attorney and signed the transfer in the books of the Bank. The signature of one of the stock holders to the power of attorney was forged, but this was unknown to the stockbrokers & to the bank. In an action by the stock holder whose signature was forged against the Bank to replace the stock so transferred the Bank served a third party notice on the three stockbrokers, claiming an indemnity from them:—*Held:* the Bank were liable to replace the stock; the stockbroker who had acted upon the power of attorney & signed the transfer was liable, under an implied warranty of authority as agent, to indemnify the Bank against the loss caused to them by the breach of that warranty, even though the stockbroker had acted in the honest belief that he had the authority; & the other two partners were not liable.—OLIVER *v.* BANK OF ENGLAND, STARKEY, LEVESON & COOKE, THIRD PARTIES, [1901] 1 Ch. 652; 70 L. J. Ch. 377; 84 L. T. 253; 65 J. P. 294; 49 W. R. 391; 17 T. L. R. 286; *affd.*, [1902] 1 Ch. 610, C. A.; *affd. sub nom.* STARKEY *v.* BANK OF ENGLAND, [1903] A. C. 114, H. L.

Annotations:—**Mentd.** Salvesen *v.* Rederi Akt. Nordstjernan [1905] A. C. 302; Sheffield Corpn. *v.* Barclay, [1905] A. C. 392; A.-G. *v.* Odell, [1906] 2 Ch. 47; Bank of England *v.* Cutler, [1908] 2 K. B. 208; Yonge *v.* Toynbee, [1910] 1 K. B. 215; Edwards *v.* Porter, McNeall *v.* Hawes, [1923] 2 K. B. 538.

Grant to one partner—Limitation to individual donee.]—*See* AGENCY, Vol. I., p. 295, Nos. 233, 234.

To act within scope of partnership.]—*See* AGENCY, Vol. I., p. 304, No. 290.

P. Receipt of Debts.

450. Whether payment to one payment to all.]—Payment to one partner a good discharge.

Bill by assignees of a bkpt., claiming a debt which had been paid to his partner, as paid after notice of dissolution of the partnership, that partner retiring & the bkpt. continuing dismissed.—DUFF *v.* EAST INDIA CO. (1808), 15 Ves. 198; 33 E. R. 729.

Annotation:—**Refd.** Nottidge *v.* Prichard (1834), 2 Cl. & Fin. 379.

451. ——.]—HENDERSON & SMITH *v.* WILD, No. 1817, *post.*

452. ——.]—(1) In an action for flour sold & delivered, pltf. called two witnesses:—one said he did not know that A. was a partner of pltf., but his name might have been on the sacks in which the flour was delivered, in Nov. 1845: the other witness positively said at first that pltf. told him C. had ceased to be a partner in Feb. 1845; he then altered it to Feb. 1846; & finally said, on re-examination, that he could not say whether it was 1845 or 1846:—*Held:* the question whether C. was a partner in Nov. 1845 was purely for the jury & not for the judge.

(2) *Semble:* a verdict recovered by one pltf. suing without his partner would be an answer to a subsequent action by the firm, for the same cause of action.

A payment to one of several partners is a perfect answer to an action by all; & if one partner sues & recovers, the verdict in that action would be a legitimate ground of defence in any subsequent action by the firm for the same demand (POLLOCK, C.B.).—COWAN *v.* DART (1848), 10 L. T. O. S. 466.

453. ——.]—PIERCY *v.* FYNNEY, No. 446, *ante.*

454. ——.]—Payment to one of two joint creditors is a good discharge of a joint debt. A partner has no implied authority to receive payment of a debt due to his co-partner in his individual capacity.—POWELL *v.* BRODHURST, [1901] 2 Ch. 160; 70 L. J. Ch. 587; 84 L. T. 620; 49 W. R. 532; 17 T. L. R. 501; 45 Sol. Jo. 502.

455. —— **Receipt signed by one partner—How far conclusive.**]—In an action brought by partners to recover a debt, if deft., to prove payment, gives in evidence a receipt signed by one of pltfs., they are not concluded, but may show that it was given under circumstances which destroy its effect, as fraud on the partners not signing.—FARRAR *v.* HUTCHINSON (1839), 9 Ad. & El. 641; 1 Per. & Dav. 437; 2 Will. Woll. & H. 106; 8 L. J. Q. B. 107; 112 E. R. 1355.

Annotation:—**Consd.** Wallace *v.* Kelsall (1840), 7 M. & W. 264.

456. —— **Payment by bill of exchange.**]—Where one of several partners takes from a debtor to the firm a bill of exchange, the latter cannot in the interim be sued by the firm for the original debt.—TOMLIN *v.* LAWRENCE (1829), 3 Moo. & P. 555; 8 L. J. O. S. C. P. 29.

457. —— ——.]—A bill of exchange received by a partner in a solr.'s firm from a client is, *primâ facie*, to be deemed to be received on behalf of the firm; & if the solrs. allege the contrary they are bound to prove it by clear evidence.—MOORE *v.* SMITH (1851), 14 Beav. 393; 51 E. R. 338.

458. Of private debt of co-partner.]—POWELL *v.* BRODHURST, No. 454, *ante.*

459. Shares in satisfaction of debt—Absence of special authority—Or special course of dealing.]—NIEMANN *v.* NIEMANN, No. 1475, *post.*

Q. Releases.

460. By partner—Of partnership rights—Release executed by one partner.]—Demurrer to a bill by a surety, stating, that two partners having agreed to execute a release to his principal, in consideration of an assignment of his effects, one alone executed the release, overruled.—HAWKSHAW *v.* PARKINS (1819), 2 Swan. 539; 36 E. R. 723, L. C.

Annotation:—**Apld.** Cooper *v.* Evans (1867), 36 L. J. Ch. 431.

PART IV. SECT. 1, SUB-SECT. 2.—O.

449 i. *Grant to firm—Transaction by one partner—Sole liability of partner acting.*]—BRYCE *v.* DAVIDSON (1866), 25 U. C. R. 371.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 2.—P.

450 i. *Whether payment to one payment to all.*]—BRUNSKILL *v.* CHUMASERO (1849), 5 U. C. R. 474.—**CAN.**

450 ii. ——.]—The solvent partner of a joint adventure is entitled to recover & discharge debts due to the joint adventure.—THOM *v.* NORTH BRITISH BANKING CO. (1850), 13 Dunl. (Ct. of Sess.) 134.—**SCOT.**

PART IV. SECT. 1, SUB-SECT. 2.—Q.

460 i. *By partner—Of partnership rights—Release executed by one partner.*]—In an action by a surviving partner, a verdict was given for deft., on proof of a deed of assignment from him to pltf. & M. in trust for the benefit of creditors, which had been executed by the deceased partner in the name of the firm, & released the debt due from deft.—TISDALE *v.* HARTT (1859), 9 N. B. R. (4 All.) 257.—**CAN.**

460 ii. —— —— ——.]—One partner has power to compound a partnership debt, & may appoint an agent to accept a composition of such debt

461. —— —— In fraud of other partners—Fraud must be clearly established.]—If one of two pltfs. [partners] release a deft. after action brought, without the consent of the other, the ct. will not set aside such release unless fraud be clearly established.—ARTON *v.* BOOTH (1820), 4 Moore, C. P. 192.

Annotations :—**Apld.** Crook *v.* Stephen (1839), 5 Bing. N. C. 688. **Refd.** Barker *v.* Richardson (1827), 1 Y. & J. 362; Herbert *v.* Pigott (1834), 2 Cr. & M. 384.

462. —— —— —— ——.]—The ct. will not set aside a release given by one of two pltfs. to a deft. after action brought, unless fraud can be clearly established.

Where, therefore, two pltfs. [as partners] instructed their attorney to proceed to trial in an action brought by them against deft. for misrepresentation as to their solvency, & a few days before the trial, one of them gave a release to deft., without the knowledge of, or communication with such attorney, the ct. refused to interfere.—FURNIVAL *v.* WESTON (1822), 7 Moore, C. P. 356.

Annotation :—**Refd.** Barker *v.* Richardson (1827), 1 Y. & J. 362.

463. —— —— —— ——.]—Where there are several pltfs. [partners], & one fraudulently gives a release to prejudice real pltf., & that release is pleaded, the ct. will set aside that plea, & order the release given to be delivered up to be cancelled. But the fraud must be clearly made out by the affidavits of the party seeking to set aside the plea.—BARKER *v.* RICHARDSON (1827), 1 Y. & J. 362.

Annotations :—**Consd.** Aspinall *v.* L. & N. W. Ry. (1853), 11 Hare, 325. **Refd.** Phillips *v.* Claggett (1843), 2 Dowl. N. S. 1004.

464. —— —— Under contract of insurance.]—A declaration on a policy of insurance on goods on board a ship, at the suit of D. & A., alleged that the policy was made by them as well in their own name as for & in the name of every other person to whom the same did appertain; & it averred that one T. & pltf. A., or one of them, were or was then, & from thenceforth until the loss, interested in the goods. To this declaration deft. pleaded a release by D. for himself & his partner A. Pltfs. replied, setting out on oyer the deed of release, by the recital in which it appeared that the intention of the parties was to release only the sums set opposite their respective names in the schedule thereto annexed; & the declaration averred, that the money so released was due upon other & different contracts than those mentioned in the declaration :—*Semble :* the replication was bad, as amounting to an argumentative denial of the release mentioned in the plea.—WILKINSON *v.* LINDO (1840), 7 M. & W. 81; 10 L. J. Ex. 94; 151 E. R. 687.

Annotation :—**Mentd.** Griffiths *v.* Perry (1859), 5 Jur. N. S. 1076.

465. —— —— Setting off private debt.]—PIERCY *v.* FYNNEY, No. 446, *ante*.

466. —— —— ——.]—Pltf. & W. were partners, & during the partnership had dealings with defts. W. was indebted to them on his own account, & at his request they applied £1,000 of the partnership money, paid by him to them, to the liquidation of his private debt. Pltf. did not know of or authorise this mode of applying the money, & had not conducted himself in such a manner as to make it reasonable for defts. to believe that he had authorised it, but they did in fact believe he had. Upon the dissolution of the partnership, it appeared from the accounts that the firm owed defts. more than £5,000, & pltf. accepted bills for the whole balance apparently due. These bills were handed to defts. for the purpose of being discounted. Before they arrived at maturity, pltf. discovered the application by defts. of the £1,000 to W.'s private debt. He nevertheless met the bills, at the same time informing defts. that he did so under protest, & only to save his father's credit, whose name was on the bills as drawer. In an action to recover the £1,000, as money paid under a mistake of fact :—*Held :* defts. could not retain the money as against W.'s private debt, pltf. never having authorised its appropriation to that debt, nor conducted himself so as to give them reasonable grounds for believing that he had.—KENDAL *v.* WOOD (1870), L. R. 6 Exch. 243; 39 L. J. Ex. 167; 23 L. T. 309, Ex. Ch.

467. —— Release of separate debts.]—A covenant by A. not to sue deft. for any debt due to him, cannot be set up as a release, in answer to a joint action by A. & another pltf. for a partnership debt.—WALMESLEY *v.* COOPER (1839), 11 Ad. & El. 216; 3 Per. & Dav. 149; 10 L. J. Q. B. 49; 113 E. R. 398.

Annotation :—**Mentd.** Minshull *v.* Oakes (1858), 27 L. J. Ex. 194.

468. —— ——.]—To an action of covenant by a joint stock banking co-partnership, on a guarantee given by defts. of the solvency of M., M. & B., M. having become indebted to the co-partnership, deft. pleaded, that by an indenture between M., M., L., & B. of the first part, W., H., & O. of the second part, the several persons or partnership firms who should execute the said indenture, being creditors of M., M., L., & B., of the third part, H. being a member & partner in the said banking co-partnership & a holder of shares, & authorised by the co-partnership, released M., M., L., & B., from all actions, debts, etc., deft., in support of his plea, gave in evidence a composition deed made between M., M., L., & B. of the first part, W., H., & O. of the second part, & the several persons or partnership firms, being creditors of M., M., L., & B., who should have executed, or should execute the said composition deed, of the third part. The deed, after reciting that M., M., L., & B. were indebted to W., H., & O., & to the several parties to the deed of the third part, & being unable to pay them, had conveyed all their property to W., H., & O. in trust for payment of their debts, stated, that in consideration thereof, each of the said creditors, parties to the said deed of the second & third parts, did for themselves, heirs, executors, etc., & partners, release M., M., L., & B. from all actions, debts, demands, etc. At the time of the release, a separate debt of £2 15s. was due from M. to H. H., at the date of the release, was a shareholder in the joint stock banking co-partnership :—*Held :* the plea was not proved; the release from H. to M., M., L., & B., not including the debt due from M. to the joint stock banking co-partnership.—BAIN *v.* COOPER (1842), 9 M. & W. 701; 11 L. J. Ex. 325; 152 E. R. 296.

469. —— Where share of partnership property seized in execution.]—ASPINALL *v.* LONDON & NORTH WESTERN RY. CO., No. 1672, *post*.

To partner.]—*See* Nos. 639, 640, *post*.

offered by an insolvent debtor.—RAYMOND *v.* M'MACKIN & RITCHIE (1860), 9 N. B. R. (4 All.) 524.—**CAN.**

460 iii. —— —— ——.]—CROWE *v.* LYSAGHT (1861), 4 L. T. 744.—**IR.**

l. —— —— *Mechanics' lien.*]—Where a mechanics' lien has been filed by a partnership, the registrar is justified in insisting that a discharge of the lien be executed by all the partners.—*Re* LAND TITLES ACT, *Re* MECHANICS' LIEN ACT & THE PETITION OF CANADIAN NORTHERN TOWN PROPERTIES CO., LTD. & NATIONAL TRUST CO., LTD. (Sask.), [1918] 1 W. W. R. 411.—**CAN.**

Sect. 1.—*Liability of firm for acts of partner: Subsect.* 2, *R.* (*a*) & (*b*).]

R. Wrongful Acts.

(*a*) *Breach of Trust.*

See Partnership Act, 1890 (c. 39), s. 13 (1).

470. Application of trust money for partnership purposes—With knowledge of other partner.]—Where money belongng to other persons has been brought into the partnership fund by one partner with a knowledge of either of the others, the partners are all liable to make it good.—STONE *v.* MARSH (1827), 6 B. & C. 551; 9 Dow. & Ry. K. B. 643; 5 L. J. O. S. K. B. 201; 108 E. R. 554; *subsequent proceedings, sub nom. Re* MARSH, *Ex p.* BOLLAND (1828), Mont. & M. 315, L. C.

Annotations:—**Distd.** Bishop *v.* Jersey (1854), 22 L. T. O. S. 326. **Mentd.** *Re* Jones, *Ex p.* Jones (1833), 3 Deac. & Ch. 525; Marsh *v.* Keating (1834), 1 Bing. N. C. 198; *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179; White *v.* Spettigue (1845), 1 Car. & Kir. 673; Wickham *v.* Gatrill (1854), 2 Sm. & G. 353; Lee *v.* Bayes (1856), 18 C. B. 599; Dudley & West Bromwich Banking Co. *v.* Spittle (1860), 8 W. R. 351; Chowne *v.* Baylis (1862), 31 Beav. 351; The Princess Royal (1870), L. R. 3 A. & E. 41; *Re* Shepherd, *Ex p.* Ball (1879), 48 L. J. Bcy. 57; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561; Smith *v.* Selwyn, [1914] 3 K. B. 98; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38.

471. —— Liability of partnership assets in bankruptcy.]—A. being in partnership with B. & C. & holding stock, as a trustee, along with two other trustees, forges the signature of his co-trustees to a power of attorney, authorising B. & C. to sell the stock; they sell the stock, & transfer it to the purchaser, & the proceeds are paid in to the bankers of the partnership; commissions of bkpt. issue against B. & C. & against A.; prosecutions are instituted against A. for other forgeries of a similar kind, & he is convicted & executed, but no prosecution is instituted by his co-trustees: —*Held:* the co-trustees are entitled to prove the value of the stock against the partnership estate. —*Re* MARSH, *Ex p.* BOLLAND (1828), Mont. & M. 315; *sub nom. Re* MARSH, *Ex p.* STONE, *Ex p.* BOLLAND, 7 L. J. O. S. Ch. 10, L. C.

Annotation:—**Mentd.** *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179.

-.]—*See, further*, BANKRUPTCY, Vol. IV., pp. 432, 440, 441, 444, Nos. 3900, 3901, 3971–3977, 4016, 4017.

472. —— Power of attorney forged by one partner.]—*Re* MARSH, *Ex p.* BOLLAND, No. 471, *ante.*

473. —— ——.]—F., a partner in a bank, caused stock belonging to a customer to be sold out by a forged power of attorney: the proceeds were paid to the account of the bank, at the house of the bank's agents, & were appropriated by F., who was afterwards executed for other forgeries. The partners of F. were ignorant of the fraud, but might, with common diligence, have known it:—*Held:* the customer could maintain an action against the partners for money had & received.—MARSH *v.* KEATING (1834), 2 Cl. & Fin. 250; 1 Bing. N. C. 198; 1 Mont. & A. 592; 8 Bli. N. S. 651; 1 Scott, 5; 6 E. R. 1149, H. L.; *affg.* S. C. *sub nom.* KEATING *v.* MARSH, 1 Mont. & A. 582, Ex. Ch.; *previous proceedings, sub nom. Re* MARSH, *Ex p.* BOLLAND (1831), 1 Mont. & A. 570, L. C.

Annotations:—**Apld.** Bonzi *v.* Stewart (1842), 4 Man. & G. 295. **Consd.** Sadler *v.* Lee (1843), 6 Beav. 324. **Distd.** Bishop *v.* Jersey (1854), 22 L. T. O. S. 326. **Consd.** Dudley & West Bromwich Banking Co. *v.* Spittle (1860), 1 John. & H. 14. **Apld.** Bailey *v.* Johnson (1871), L. R. 6 Exch. 279; Reid *v.* Rigby, [1894] 2 Q. B. 40; Jacobs *v.* Morris, [1902] 1 Ch. 816. **Consd.** Covell *v.* Scannell (1910), 103 L. T. 535. **Reid.** Vaughan *v.* Matthews (1849), 13 Q. B. 187; Bank of Ireland *v.* Evans' Trustees (1855), 25 L. T. O. S. 272; Lee *v.* Bayes (1856), 18 C. B. 599; Chowne *v.* Baylis (1862), 31 Beav. 351; *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667; Oliver *v.* Bank of England, [1902] 1 Ch. 610; Burdett *v.* Horne (1911), 27 T. L. R. 402. **Mentd.** *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179; White *v.* Spettigue (1845), 13 M. & W. 603; Wickham *v.* Gatrill (1854), 2 Sm. & G. 353; De Witte *v.* Addison (1899), 80 L. T. 207.

474. —— Partner acting as administrator.]—A., being a partner in a mercantile house in India, was entitled to the interest of a sum of money, which was limited to his sons on his dying within a given period. The firm in India, at A.'s death within that period, was greatly indebted to their agents in England, of which firm B., the administrator, was a partner. After A.'s death, notice was given to the firm in England, of there being male issue of A., but not stating their names. B. subsequently received the dividends, & credited the Indian firm with the amount in the books of the English firm:—*Held:* the partners of the English firm were liable to repay such dividends, with interest at 5 per cent.—AGABEG *v.* HARTWELL (1835), 4 L. J. Ch. 190; *subsequent proceedings, sub nom.* COLVIN *v.* HARTWELL (1837), 5 Cl. & Fin. 484.

475. —— Bonds in custody of firm.]—A trustee, one of a firm of stockbrokers, misapplied the trust securities. His partners were, under the circumstances, made responsible.

A., who was in partnership with B., C., & D. as stockbrokers, was one of the trustees of pltf.'s marriage settlement. Some Portuguese bonds belonging to her, which were in A.'s custody, were included in the settlement. After the marriage, the firm bought some Brazilian bonds on account of the trust. The ct., from the course of dealing, considered the bonds to be in the custody of the firm, & A., the trustee, having applied them to his own use:—*Held:* his co-partners were, as custodians, liable to replace them.—DE RIBEYRE (MARQUISE) *v.* BARCLAY (1857), 23 Beav. 107; 26 L. J. Ch. 747; 53 E. R. 42.

Annotation:—**Reid.** Bourdillon *v.* Roche (1858), 27 L. J. Ch. 681.

476. Effect of judgment against defaulting partner.]—Funds, subject to the trusts of a settlement, were invested in Exchequer bills, on the sale of which the proceeds were paid to the account of a firm of solrs.—F., S., & F. at their bankers. The funds were afterwards advanced on a mtge. of house property in a new neighbourhood, & of inadequate value. At that date there were no trustees of the settlement, & the mtge. was taken in the names of S. & two other persons who were then proposed, & shortly afterwards appointed new trustees, & never repudiated the transaction. S. was the member of his firm who acted for them in all the matters, & for the work which he did the firm, by arrangement, received, at the time when the money was advanced, payment for their bill of costs out of the funds. The mtge. proved to be an insufficient security, & in an action against the trustees it was held that they were jointly & severally liable to make good the loss sustained. The property not having been sold, or the trust funds replaced, beneficiaries sought to make the

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PART IV. SECT. 1, SUB-SECT. 2.—R. (a).

m. *Application of trust money for partnership purposes—Misconduct or negligence of other partner.*]—Where one member of a firm of attorneys receives money for investment, & misappropriates it without the knowledge or consent of the other, it ought to be clearly shown that the latter was guilty of personal misconduct, or at least, of neglect of duty as a member of the firm, in consequence of the misconduct of his partner, before the ct. will interfere on a summary application to compel him to pay money.—*Ex p.* FLOOD (1883), 23 N. B. R. 86.—**CAN.**

n. ——.]—Where a firm of attorneys

firm of solrs. liable for the loss of the funds on the ground of negligence, though S.'s partners had not had any personal knowledge of the property at the time when the mtge. transaction was completed :—*Held :* (1) in all that S. had done in the matter of the mtge., he acted within the scope of his authority as a partner, his firm must be taken to have had knowledge that the security was, for trustees, improper, &, consequently, they were implicated in & jointly & severally liable for the breach of trust ; &, further, the judgment which had been recovered against S., as one of the trustees, had not discharged his partners from liability ; (2) the liability extended to the estate of a member of the firm since deceased.—BLYTH *v.* FLADGATE, MORGAN *v.* BLYTH, SMITH *v.* BLYTH, [1891] 1 Ch. 337 ; 60 L. J. Ch. 66 ; 63 L. T. 546 ; 39 W. R. 422 ; 7 T. L. R. 29.

Annotations :—*As to* (1) **Refd.** Mara *v.* Browne, [1895] 2 Ch. 69 ; *Re* Turner, Barker *v.* Ivimey, [1897] 1 Ch. 536.

Solicitor's partnership.]—*See* SOLICITORS.

Banking partnership.]—*See* BANKERS, Vol. III., pp. 124, 125, Nos. 18–20.

Liability of individual partners.]—*See* Sect. 2, sub-sect. 2, C., *post.*

(*b*) *Fraud.*

See Partnership Act, 1890 (c. 39), ss. 10, 11.

477. General rule.] — HACKNEY *v.* KNIGHT (ADMINISTRATOR OF GREGORY), No. 307, *ante.*

478. Fraud unknown to co-partner—Fictitious purchase & sale on commission.]—A. employed B. & C., who were partners as wine & spirit merchants, to purchase wine & sell the same upon commission. C., the managing partner, represented that he had made the purchases, & that he had sold a part of the wines so purchased at a profit ; the proceeds of such supposed sales he paid to A., & rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, C. had neither bought nor sold any wine. The transactions were wholly fictitious, but B. was wholly ignorant of that. Upon the whole account a larger sum had been repaid to A., as the proceeds of that part of the wine alleged to be resold, than he had advanced ; but the other part of the wine, which C. represented as having been purchased, was unaccounted for :—*Held :* B. was liable for the false representations of his partner ; & A. was entitled to retain the money that had been paid to him upon these fictitious transactions, as if they were real.—RAPP *v.* LATHAM (1819), 2 B. & Ald. 795 ; 106 E. R. 555.

Annotation :—**Mentd.** Coleman *v.* Riches (1855), 24 L. J. C. P. 125.

479. —— Obtaining goods by fraud—No property acquired by firm.]—A partnership cannot acquire property in goods obtained by the fraud of one of the partners, to which the rest are not privy.—KILBY *v.* WILSON (1825), Ry. & M. 178, N. P.

480. —— Misappropriation of money—Effect of order of discharge.]—One of two partners in a firm of solrs. misappropriated money entrusted to the firm for investment, & then absconded. The firm subsequently went into liquidation, & the other partner, who was not a party to the misappropriation, received his order of discharge. In an action against the innocent partner to recover the amount of the money misappropriated : —*Held :* deft. was not protected by the order of discharge, for that the partnership was liable for the fraud committed, & 32 & 33 Vict. c. 71, s. 49, does not limit the liability of a partner for partnership debts to those incurred by means of his own personal fraud or breach of trust.—COOPER *v.* PRICHARD (1883), 11 Q. B. D. 351 ; 52 L. J. Q. B. 526 ; 48 L. T. 848 ; 31 W. R. 834, C. A.

481. —— Sale of partnership property — Whether bar to action by firm.]—In *assumpsit* by A., B., & C. against D., upon a money demand, D. pleaded that pltfs. carried on business in partnership ; that pltf. A., with the privity & concurrence of the pltfs. B. & C., requested D. to sell certain property belonging to A., B., & C. as co-partners, which D. thereupon agreed to do ; that, at the time A. requested D. to sell, & also at the time of the sale, & of the making the loans & advances by D. to A. thereinafter mentioned, D. believed A. to be the sole owner of the property, & that he had full authority to dispose of it for his sole use & benefit, D. having no knowledge that B. & C. had any interest in it ; that, after D. had been so retained & employed to sell the property, & before it was sold, & before he had any notice or knowledge that A. was not solely possessed of & interested in the property, D., at the request of A., lent divers sums of money to A. ; that, before D. lent the said money to A., it was agreed between them that D. should retain, deduct, & reimburse himself the full amount out of the proceeds of the property ; that D. was induced to lend & did lend the said money to A. upon the faith & in consideration of such agreement ; & that D. did sell & dispose of the said property for A., other pltfs. suffering & permitting A. to deal therewith as his own sole property, without objection or interference ; & the plea then justified retaining the money to reimburse D. for such advances under the said agreement.

To this plea pltfs. replied that B. & C. did not suffer or permit A. to deal with the said property as his own sole property.

A verdict having been found for pltfs. :—*Held :* enough of the plea remained unanswered to constitute a sufficient bar to pltfs.' right to recover ; the replication traversed an immaterial allegation ; but the proper course was not to arrest the judgment, but to award a repleader.

The rule that a repleader is never awarded in favour of the party who made the first fault, applies only where the issue is found against that party.—GORDON *v.* ELLIS (1844), 7 Man. & G. 607 ; 2 Dow. & L. 308 ; 8 Scott, N. R. 290 ; 13 L. J. C. P. 179 ; 3 L. T. O. S. 204 ; 8 Jur. 670 ; 135 E. R. 244 ; *subsequent proceedings* (1846), 2 C. B. 821.

Annotations :—**Refd.** Baker *v.* Gent (1892), 9 T. L. R. 159. **Mentd.** Jones *v.* Smith (1848), 1 Exch. 831.

482. Proceeds applied to partnership purposes—Fraudulent bills of exchange.]—Where one of two partners, having authority to bind the other by drawing or indorsing bills of exchange, raised money by bills in fictitious names, indorsed by him in the partnership firm, & the money was afterwards applied to the partnership purposes :—*Held :* the other partner was liable to the persons

undertakes to collect money due to an estate, an innocent partner is liable to refund money received on behalf of the estate and misappropriated by his partner.—CROGHAN'S EXECUTRIX *v.* WHITBY & WEBBER, [1904] T. H. 101. —**S. AF.**

PART IV. SECT. 1, SUB-SECT. 2.—R. (b).

477 i. *General rule.*]—A deft. may be liable for the fraudulent misstatement of his partner made in the course of the common business.—SMITH *v.* MACKENZIE (1881), 1 N. Z. L. R. C. A. 1.—**N.Z.**

o. *Fraud unknown to co-partner—Misappropriation of money.*]—NEW MINING & EXPLORING SYNDICATE, LTD. *v.* CHALMERS & HUNTER, [1912] S. C. 126.—**SCOT.**

Sect. 1.—*Liability of firm for acts of partner: Sub-sect.* 2, *R.* (*b*), (*c*) & (*d*). *Sect.* 2: *Sub-sect.* 1.]

from whom the money was so obtained.—THICKNESSE *v.* BROMILOW (1832), 2 Cr. & J. 425; 149 E. R. 180.

Annotation :—**Refd.** Bank of Australasia *v.* Breillat (1847), 6 Moo. P. C. C. 152.

483. Fraud in conjunction with strangers.]—A case may happen in which the governing body of a joint stock co., or the partners of a firm, may so unite with a stranger in practising fraud against the co. for whom they act, as to entitle the co. to repudiate such acts, & to be relieved against them. —VIGERS *v.* PIKE (1842), 8 Cl. & Fin. 562; 8 E. R. 220, H. L.

Annotations :—**Apld.** Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218. **Mentd.** Wilde *v.* Gibson (1848), 1 H. L. Cas. 605.

484. Proceeds applied for benefit of third parties —Partner in more than one firm.]—THE ARIADNE (1842), 1 Wm. Rob. 411; 1 Notes of Cases, 494; 3 L. T. 559; 6 Jur. 513; 166 E. R. 627.

Annotation :—**Mentd.** The Karnak (1868), L. R. 2 A. & E. 289.

485. Partnership security converted to own uses—Negligence of third party.]—*Re* RICHES & MARSHALL'S TRUST DEED, *Ex p.* DARLINGTON DISTRICT JOINT STOCK BANKING CO., No. 347, *ante.*

486. Fraud committed before commencement of partnership—Notice to plaintiff—Election to treat with original partner alone.]—(1) Where A. has a contract with B., & B. takes C. into partnership & gives A. notice, A. has an option whether he will abide by his contract with B. alone or accept the liability of the partnership. If he elect to abide by his contract with B., C. is not liable for a fraud committed by B. against A. in respect of the contract, though B. was acting within the scope of the partnership business.

Pltfs. appointed B. their solr., & instructed him to act for them in a mtge. transaction. While the business was pending, B. took deft. into partnership, & gave pltfs. notice in writing. Pltfs. paid no attention to the notice, continued to correspond with B. in his own name, & finally sent him the money to advance on the mtge. by cheque made payable to his order, & accepted his receipt in his own name. B. paid the money into his own account & misappropriated it :—*Held :* pltfs. had elected to continue to employ B. alone, & deft. was not liable for B.'s fraud.

(2) Pltfs. relied on the sects. [ss. 10, 11] of Partnership Act, 1890 (c. 39), to which I have referred, but that Act is declaratory only. It states the law as it affects partners in relation to third persons, under ordinary conditions & in the absence of special circumstances. It in no wise affects the acts or defaults of third persons contracting with the partners or any individual member of the firm (FARWELL, J.).—BRITISH HOMES ASSURANCE CORPN., LTD. *v.* PATERSON, [1902] 2 Ch. 404; 71 L. J. Ch. 872; 86 L. T. 826; 50 W. R. 612; 18 T. L. R. 676.

487. Transaction not within duties of partnership.]—One of a firm of solrs. received a sum of money to be applied in compounding with a client's creditors, & a receipt was given in the name of the firm. The partner who received the money absconded with it :—*Held :* the other member of the firm could not demur to a bill by the client for want of equity, on the ground that the receipt of the money for such purposes was not within the scope of the partnership business; but he could demur for want of parties, as the absconding partner was not made a party to the suit.—ATKINSON *v.* MACKRETH (1866), L. R. 2 Eq. 570; 35 L. J. Ch. 624; 14 L. T. 722; 14 W. R. 883.

Annotations :—**N.F.** Plumer *v.* Gregory (1874), L. R. 18 Eq. 621. **Refd.** St. Aubyn *v.* Smart (1867), L. R. 5 Eq. 183.

488. —— Private transaction.]—A. lends certain bonds to B., one of the firm with whom he banked, B. agreeing to deposit in A.'s box, of which he had the custody, certain securities to secure the replacement of the bonds. B., without the knowledge of A., afterwards withdraws the securities which he had deposited, & placed in their stead other securities of less value :—*Held :* B.'s partners were not liable for the breach of trust committed by B., in abstracting the securities, although the clerk of the firm delivered out the securities to B., the transaction having been a private one between A. & B.—*Re* BIDDULPH, *Ex p.* EYRE (1841), 2 Mont. D. & De G. 624; 6 Jur. 41.

489. —— Secretaryship of company — Acceptance of conveyances in own name.]—Where a secretaryship held by one partner is included in the partnership business, the partners of the secretary are not liable for fraud committed by him outside his duties as secretary. It is no part of the duties of the secretary of a co. to accept conveyances of the co.'s real estate in his own name. —TENDRING HUNDRED WATERWORKS CO. *v.* JONES, [1903] 2 Ch. 615; 73 L. J. Ch. 41; 52 W. R. 61; 19 T. L. R. 720.

Annotation :—**Mentd.** Lloyd *v.* Grace Smith, [1911] 2 K. B. 489.

Banking partnership.]—*See* BANKERS, Vol. III., pp. 124, 172, 178, Nos. 18, 19, 296, 327.

Solicitors' partnership.]—*See* SOLICITORS.

Liability of individual partner.]—*See* Sect. 2, sub-sect. 2, B., *post.*

Proof in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., p. 468, Nos. 4216–4223.

Application of Statute of Limitations.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 492, No. 1534.

(*c*) *Negligence.*

See Partnership Act, 1890 (c. 39), s. 10.

490. Injury to servant of partnership — Work within scope of partnership.]—If the master is a member of a partnership by whom the servant is employed, & the work in which he so takes part is within the scope of the common undertaking of the partnership, his co-partners are jointly liable with him for the injury thus caused to the servant by his negligence.—ASHWORTH *v.* STANWIX (1861), 3 E. & E. 701; 30 L. J. Q. B. 183; 4 L. T. 85; 25 J. P. 406; 7 Jur. N. S. 467; 121 E. R. 606.

Annotations :—**Apld.** Mellors *v.* Shaw (1861), 1 B. & S. 437. **Mentd.** Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669.

491. —— Negligence of managing partner.]—Where one of two partners in a coal mine acts as manager, & is guilty of personal negligence, his co-partner is jointly liable for the injury resulting from such negligence.—MELLORS *v.* SHAW (1861), 1 B. & S. 437; 30 L. J. Q. B. 333; 25 J. P. 806; 7 Jur. N. S. 845; 9 W. R. 748; 121 E. R. 778.

Annotations :—**Mentd.** Clarke *v.* Holmes (1862), 7 H. & N. 937; Davies *v.* England & Curtis (1864), 33 L. J. Q. B. 321; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669; Brown *v.* Accrington Cotton Co. (1865), 3 H. & C. 511; Watling *v.* Oastler (1871), L. R. 6 Exch. 73; Britton *v.* Great Western Cotton Co. (1872), L. R. 7 Exch. 130; Williams *v.* Birmingham Battery & Metal Co., [1899] 2 Q. B. 338; Abbott *v.* Isham (1920), 90 L. J. K. B. 309.

Negligent driving.]—*See* MASTER & SERVANT, Vol. XXXIV., p. 143, Nos. 1120, 1121.

Negligence by solicitors.]—*See* SOLICITORS.

Liability of individual partner.]—*See* Sect. 2, sub-sect. 2, B., *post.*

(d) Other Cases.

See Partnership Act, 1890 (c. 39), s. 10.

492. Non-payment of import duty—Importation by one partner.]—Partners in merchandising, each of them is liable to pay the whole duty to the King.—A.-G. *v.* STRANYFORTH (1721), Bunb. 97 ; 145 E. R. 608, Ex. Ch.

493. Malicious prosecution — Alleged theft of partnership property.]—It seems that where a partner of a firm prosecutes for an alleged theft of property belonging to the partnership, & an action is brought for a malicious prosecution & wrongous imprisonment, neither the co. nor the other individual partners can be dealt with as prosecutors merely because the property belonged to the firm.—ARBUCKLE *v.* TAYLOR (1815), 3 Dow, 160 ; 3 E. R. 1023, H. L.

494. Conspiracy to injure — Collusion with partner of another firm.]—If a partner of one firm collude with a partner of another, in a matter within the regular course of dealing between the two films, whereby the other partners in the latter firm sustain an injury, the innocent partners of the person so colluding are liable for damages to the injured firm.—LONGMAN *v.* POLE (1828), Dan. & Ll. 126 ; Mood. & M. 223, N. P.

Annotations :— **Consd.** Wallace *v.* Kelsall (1840), 10 L. J. Ex. 12 ; Metropolitan Saloon Omnibus Co. *v.* Hawkins (1859), 4 H. & N. 87.

495. Trespass — Nature of taking available to partnership — Question for jury.] — Defts. were partners in business as brewers ; & one of them, in the name of the others, wrongfully ejected the tenant of a canteen, who held under a lease from the Board of Ordnance, they, defts., being sureties for the payment of his rent & for his quiet tenantship. It was ruled that one partner has no right to involve another, unless in the ordinary course of their business, not, for instance, in a trespass, as above stated.

The exception to this doctrine is in the case where the trespass is in the nature of a taking which is available to the partnership ; & in such case the jury should find, not only whether defts. were partners, but also whether, before the trespass, they all joined in ordering it, or whether, afterwards, they concurred, & received the benefit of it.—PETRIE *v.* LAMONT (1841), Car. & M. 93, N. P.

Annotations :—**Mentd.** Pratt *v.* British Medical Assocn., [1919] 1 K. B. 214 ; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762 ; The Koursk, [1924] P. 140 ; Falcon *v.* Famous Players Film Co., [1926] 1 K. B. 393.

496. Breach of statutory regulations—Omission to send certificate — Under local Act.] — A local Act enacted that every fitter, or other person vending or delivering coals for the port of London, should send to the clerk of the coal market in London a certain certificate & a declaration made before a magistrate verifying it, & in case he omitted to do so, should forfeit £100. In an action against two persons in partnership as fitters, for omitting to send such certificate, in a case where a defective certificate had been sent:—*Held :* since it was within the scope of the partnership authority to put coals on board the ship, & the cause of action was an act of omission, they were each equally guilty of it, notwithstanding the defective certificate & declaration were in fact made by one only.—GRANT *v.* MATHEWSON (1843), 1 L. T. O. S. 625, N. P. ; *subsequent proceedings* (1844), 8 Scott, N. R. 135.

497. Conversion — Refusal to deliver up — Managing partner of mine.] — The managing partner conducting the business of a mining co-partnership, refused to deliver up ore belonging to the former tenants of the mine, on the ground that it was partnership property, & there was subsequently a notice by the attorney for defts., offering to deliver up tools that were in the same building with the ore, but the notice was silent as to the ore :—*Held :* evidence of conversion by all the partners.—LLOYD *v.* BELLIS (1856), 27 L. T. O. S. 203.

498. Bribery of servant — Disclosure of secrets of employer—Course of business to obtain information from competing firms.]—Where it was in the course of the business of defts., a firm of grain merchants, which consisted of two partners, to obtain by legitimate means information in regard to contracts made or tendered for with brewers or with buyers of grain by competing firms, & one of the partners obtained such information by bribing a clerk of pltf., a competitor in business, to break his contract of service by dishonesty & improperly communicating to him knowledge obtained in the course of the clerk's employment : —*Held :* both the partners were responsible in damages to pltf. for the action of one of them as aforesaid, on the ground that it was within the general scope of the authority given to him as a partner to conduct the business of the firm.—HAMLYN *v.* HOUSTON & Co., [1903] 1 K. B. 81 ; 72 L. J. K. B. 72 ; 87 L. T. 500 ; 51 W. R. 99 ; 19 T. L. R. 66 ; 47 Sol. Jo. 90, C. A.

Liability of individual partner.]—*See* Sect. 2, sub-sect. 2, B.,

SECT. 2.—LIABILITY OF INDIVIDUAL PARTNERS.

SUB-SECT. 1.—IN GENERAL.

499. General rules — No power to repudiate general liabilities.]—Whatever stipulations partners may make *inter se*, they cannot absolve themselves from the general liabilities arising out of the partnership, as between themselves & third persons.—*Re* SEA, FIRE & LIFE ASSURANCE CO., GREENWOOD'S CASE (1854), 3 De G. M. & G. 459 ; 2 Eq. Rep. 260 ; 23 L. J. Ch. 966 ; 22 L. T. O. S. 338 ; 18 Jur. 387 ; 2 W. R. 322 ; 43 E. R 180, L. C. & L. JJ.

Annotations :— **Mentd.** Royal British Bank *v.* Turquand (1855), 5 E. & B. 248 ; Gordon *v.* Sea, Fire & Life Assce. Soc. (1857), 26 L. J. Ex. 202 ; Athenæum Life Assce. Soc. *v.* Pooley (1859), 1 Giff. 102 ; Balfour *v.* Ernest (1859), 5 C. B. N. S. 601 ; *Re* European Assce. Soc., Dowse's Case (1876), 35 L. T. 653.

500. —— Liability of principal for acts of agent.]—COX *v.* HICKMAN, No. 91, *ante*.

501. Liability of dormant partner.]—A creditor is entitled to sue a dormant partner of his debtor,

PART IV. SECT. 1, SUB-SECT. 2.—R. (d).

p. *Excise offences.*]—One of the partners of a distillery co. having been found liable in excise penalties, in consequence of the other partners, & the manager having, without his knowledge, engaged in illicit distillation, verdict in an action of relief found against them.—CAMPBELL *v.* CAMPBELL (1834), 12 Sh. (Ct. of Sess.) 573.—**SCOT.**

PART IV. SECT. 2, SUB-SECT. 1.

q. *General rule.*]—Although as a general rule every partner is liable for the acts & defaults of his co-partners, yet the liability of one partner for the acts of others in connection with the keeping of the accounts & entries of receipts & payments is a matter that should be dealt with on the facts of each particular case.—*Re* MCINTYRE (1885), 11 V. L. R. 312.—**AUS.**

r. ——.]—Partners are each liable *in solidum* for the debts of the firm.—BENINGFIELD & SON *v.* HOOPER (1870), N. L. R. 41.—**S. AF.**

501 i. *Liability of dormant partner.*]—SILVER *v.* SILVER (1878), R. E. D. 189.—**CAN.**

Sect. 2.—Liability of individual partners: Sub-sects. 1 & 2, A. & B.]

if unknown to him to be so at the time of furnishing the subject-matter of the debt, for whatever had been supplied to the firm during the partnership.—ROBINSON *v.* WILKINSON (1817), 3 Price, 538; 146 E. R. 345.

502. Liability for loss—Liability to creditors & co-partners distinguished.]—GEDDES *v.* WALLACE, No. 248, *ante*.

503. Liability of insane partner—Taking active part in control of business.]—SADLER *v.* LEE, No. 443, *ante*.

504. Partner liable for pre-partnership debt—Liable also for partnership debt—Appropriation of payment by creditor—Money paid from partnership funds.]—When a partner in trade liable for a sole debt contracted before his partnership, & also liable for partnership debts, pays money to the creditor on account, the creditor cannot apply such payment to the first debt, if the money paid was in fact the money of the partnership.—THOMPSON *v.* BROWN & WESTON (1827), Mood. & M. 40, N. P.

Annotation:—**Distd.** Smith *v.* Wigley (1833), 3 Moo. & S. 174.

505. Existence of partner not disclosed—At time of contract.]—DYKE *v.* BREWER, No. 551, *post*.

SUB-SECT. 2.—NATURE OF LIABILITY.

A. In Contract.

See Partnership Act, 1890 (c. 39), s. 9.

506. Whether liability joint or several.]—Joint traders are jointly charged, unless special agreement.—ANON. (1701), 12 Mod. Rep. 446; 88 E. R. 1441.

Annotation:—**Mentd.** Dibb *v.* Brooke, [1894] 2 Q. B. 338.

507. ——.]—Where one partner is out of the kingdom, the partner before the ct. shall pay the whole of a joint demand.—DARWENT *v.* WALTON (1742), 2 Atk. 510; 26 E. R. 707, L. C.

508. ——.]—STACEY, ROSS, ETC. *v.* DECY (1789), 2 Esp. 469, n.; *sub nom.* STRACEY, ROSS, ETC. *v.* DEEY, 7 Term Rep. 361, n.; 101 E. R. 1021, N. P.

Annotations:—**Distd.** Coldwell *v.* Gregory (1814), 1 Price, 119; Gordon *v.* Ellis (1846), 2 C. B. 821. **Reld.** Baker *v.* Gent (1892), 9 T. L. R. 159. **Mentd.** Warner *v.* M'Kay (1836), 2 Gale, 86; Ferraud *v.* Bischoffsheim (1858), 4 C. B. N. S. 710.

509. ——.]—BARTON *v.* HANSON, No. 394, *ante*.

510. ——.]—Where a promissory note beginning "I promise to pay" was signed by one member of a firm for himself & his partners:—*Held:* the party signing was severally liable to be sued upon the note.—HALL *v.* SMITH (1823), 1 B. & C. 407; 2 Dow. & Ry. K. B. 584; 1 L. J. O. S. K. B. 142; 107 E. R. 151.

Annotations:—**Dbtd.** *Re* Clarke, *Ex p.* Buckley (1845), 14 M. & W. 469; Maclae *v.* Sutherland (1854), 3 E. & B. 1.

511. ——.]—Messrs. J. C., R. M., J. P., & T. S., carrying on business as bankers, a promissory note in the following form was signed by R. M. "I promise to pay the bearer, on demand, five pounds, value received." "For J. C., R. M., J. P., & T. S." "R. M.":—*Held:* the holder of this note had not a separate right of action against the party so signing, but the firm were liable.—*Re* CLARKE, *Ex p.* BUCKLEY (1845), 14 M. & W. 469; 14 L. J. Ex. 341; 153 E. R. ....

Annotations:—**Distd.** Nicholls *v.* Diamond (1853), 9 Exch. 154. **Apld.** Maclae *v.* Sutherland (1854), 3 E. & B. 1.

512. ——.]—*Re* SMITH, FLEMING & CO., *Ex p.* HARDING, No. 18, *ante*.

513. ——.]—DOYLE *v.* COOKE (1896), 12 T. L. R. 508.

514. ——.]—In the winding up of a co. the liquidator sought to set off against a debt due by the co. to a creditor a debt alleged to be due to the co. by a partnership firm of which the creditor was a member:—*Held:* alleged debt of the partnership firm being a joint & not a joint & several debt could not be set off against the separate debt due by the co. to the partner.—*Re* PENNINGTON & OWEN, LTD., [1925] Ch. 825; 95 L. J. Ch. 93; 134 L. T. 66; 41 T. L. R. 657; 69 Sol. Jo. 759; [1926] B. & C. R. 39, C. A.

515. —— **Promissory note to co-partner as indemnity—Assignment of note to creditors of firm.**]—Deft., & C., his partner, having an account

505 i. *Existence of partner not disclosed—At time of contract.*]—An anonymous partner is not liable to the creditors of the partnership for the debts incurred to them by the known partner, but he remains liable to the known partner who has contracted such debts in his own name for the benefit of the partnership.—SELLAR BROTHERS *v.* CLARKE (1892), 10 S. C. 168; 3 C. T. R. 197.—**S. AF.**

t. *Liability of foreign partner.*]—Where a partnership was formed for the purpose only of dealing with goods remitted by one partner from abroad to the other in Melbourne on behalf of the firm:—*Held:* the foreign partner was not liable for the debts thus incurred.—*Re* OPPENHEIMER (1872), 3 V. R. (L.) 20.—**AUS.**

u. *Note signed by one partner—Right of accommodation indorser.*]—A. & B., representing themselves as partners, obtained C.'s accommodation indorsement to a note made by A. alone, but stated by B. to be made for their joint benefit, & on their joint liability. The note was discounted at a bank, & C. was subsequently obliged to pay it, A. having in the meantime absconded:—*Held:* C. could not recover against B. on the note, but he might maintain his action on the count for money paid.—ANNIS *v.* LOWES (1836), 5 O. S. 198.—**CAN.**

a. *Whether partner personally liable—Question of fact.*]—RAYMOND *v.* HAY (1840), 3 N. B. R. (1 Kerr) 99.—**CAN.**

b. ——.]—Where a question arises as to whether a contract has been made with a person individually, or with the firm of which he is a member, the test to be applied is "to whom was credit given."—TORIEN *v.* HORWITZ (1906), 23 S. C. 613.—**S. AF.**

c. *Partner acting outside scope of his authority.*]—M. was not a party to the suit, & the declaration alleged that deft. executed the agreement in the firm name of M. & C., of which he was a member, but had no authority from M. to use his name in making & executing it, of which want of authority W. had no knowledge, but that deft. acted therein on his own authority only:—*Held:* deft. might be sued on such contract separately from M.—WARK *v.* CURTIS (1894), 10 Man. L. R. 201.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 2.—A.

506 i. *Whether liability joint or several.*]—A surviving partner is bound by the covenant of himself & his deceased partner to teach an apprentice until the end of the term for which he was apprenticed.—CONNELL & SON *v.* OWEN (1854), 4 C. P. 113.—**CAN.**

506 ii. ——.]—In the case of a nominal corpn. which has no legal status as such, the ostensible corporators are partners; & their liability as partners on the contracts of the co. is a joint, & not a joint & several, liability.—GILDERSLEEVE *v.* BALFOUR (1893), 15 P. R. 293.—**CAN.**

506 iii. ——.]—At law, as well as in equity, before Judicature Act, a partnership debt was in strictness, joint & not several, & upon the death of one partner the only liability existing at law was that of the surviving partner.—CAMPBELL *v.* FARLEY (1898), 18 P. R. 97.—**CAN.**

506 iv. ——.]—KALAI KHAN *v.* MADHO PERSHAD (1871), 3 N. W. 129.—**IND.**

506 v. ——.]—MACBRIDE *v.* CLARK, GRIERSON & CO. (1865), 4 Macph. (Ct. of Sess.) 73; 38 Sc. Jur. 50.—**SCOT.**

506 vi. ——.]—All the assets of a partnership with the exception of book debts had been sold, but there was no express dissolution nor any arrangement as to the collection of the book debts by any of the partners:—*Held:* the partnership was still in existence for the purpose of liquidating the business & one of the partners could not be sued in respect of a partnership debt.—DU TORT *v.* AFRICAN DAIRIES, LTD., [1922] T. P. D. 245.—**S. AF.**

d. *Release to one partner.*]—A release by creditors to one of two partners of all actions & causes of action, suits, debts, etc., which they now have, or ever had, or are entitled to in respect of any act, matter, or thing from the

with pltfs., who were bankers, C. gave them his promissory note for £2,000 that they might be allowed to overdraw the partnership account. C. afterwards required from deft. his note for £1,000, to indemnify him for a moiety of the sum for which he had thus become separately responsible to pltfs., &, having obtained it, he indorsed & gave it to pltfs. The firm subsequently becoming indebted to pltfs., for advances, to the amount of £1,300, they sued deft. on his note :—*Held :* they were entitled to recover.—HEYWOOD *v.* WATSON (1828), 4 Bing. 496 ; 1 Moo. & P. 268 ; 6 L. J. O. S. C. P. 72 ; 130 E. R. 859.

516. —— Accounts settled between partners—Individual agreement to pay.]—Where one of two partners, who had duly accounted between themselves on being applied to for a debt due from the partnership, stated that in the account with his partner he, deft., had taken that debt upon himself, & would pay it :—*Held :* sufficient to support a count upon an account stated with one partner alone.—HARRISON *v.* MARSH (1849), 12 L. T. O. S. 353.

517. —— ——.]—A shipowner by settling accounts with his managing owner, does not relieve himself from liability in respect of goods supplied on the order of the managing owner for the use of the ship, even though his share of the cost of such goods is debited to him in such accounts, & thereby paid for by him.

T., who was ship's husband & managing owner, purchased beef on credit from pltf. in Sept. 1877, for the use of the ship. Deft. was part owner of the ship, & was also interested jointly with T. in the voyages for which the ship was being fitted out. Pltf. applied to T. for payment, but did not obtain it. In Dec. 1877, & Dec. 1879, deft. settled accounts with T. & gave him credit for the price of the goods, supposing he had paid for them. T. having become bkpt. in 1881, pltf. applied for payment to deft., & brought his action for the price of the beef :—*Held :* deft. was liable.—DAVISON *v.* DONALDSON (1882), 9 Q. B. D. 623 ; 47 L. T. 564 ; 31 W. R. 277 ; 4 Asp. M. L. C. 601, C. A.

Annotation :—**Apld.** The Huntsman, [1894] P. 214.

518. —— Bill drawn personally on partner—Acceptance on behalf of firm.]—Where a bill is drawn personally on one of several partners & he accepts it, on behalf of the partnership, he is individually liable.—NICHOLLS *v.* DIAMOND (1853), 9 Exch. 154 ; 2 C. L. R. 305 ; 23 L. J. Ex. 1 ; 2 W. R. 12 ; 156 E. R. 67 ; *sub nom.* NICOLLS *v.* DIAMOND, 22 L. T. O. S. 79.

Annotations :—**Apld.** Marc *v.* Charles (1856), 5 E. & B. 978. **Distd.** Mathews *v.* Marsland (1858), 27 L. J. Ex. 148. **Apld.** Jones *v.* Jackson (1870), 22 L. T. 828. **Refd.** Alexander *v.* Sizer (1869), 20 L. T. 38.

519. —— Special contract—Guarantee.]—*Re* SMITH, FLEMING & CO., *Ex p.* HARDING, No. 18, *ante.*

520. —— —— Covenant.]—D. & H., who were partners, covenanted to be jointly & severally liable to P. for payment of a debt by instalments. The earlier instalments were paid out of the partnership assets, & later ones by D., after judgment for them had been recovered. D. demanded from P. that, in order to enforce his right to contribution against H., the judgments should be delivered to him as provided by Mercantile Law Amendment Act, 1856 (c. 60), s. 5, but H. informed P. that D.'s right to contribution depended on the equitable rights between D. & himself, in respect of a partnership action then pending between them ; upon which P. declined to hand over the judgments. D. then brought an action against P. claiming (*a*) delivery of the judgments ; (*b*) damages for non-delivery ; (*c*) a declaration that by reason of the refusal to assign the judgments D. was released from all liability in respect of any future instalments :—*Held :* D. was not released from liability in respect of future instalments, inasmuch as there had been no alteration of the original conditions as to the liability of the parties ; & the failure to assign the judgments would have only operated to release him if & so far as the delay in handing over might have made them less valuable.—DALE *v.* POWELL, POWELL *v.* DALE & HOOD (1911), 105 L. T. 291.

Annotation :—**Mentd.** Kayley *v.* Hothersall, [1925] 1 K. B. 607.

521. —— Unsatisfied judgment against partnership—Action against subsequently disclosed partner.]—KENDALL *v.* HAMILTON, No. 592, *post.*

522. —— Partnership agreement not carried out—Subsequent contract with the partner only.]—DEVENISH *v.* WATERS (1892), *Times*, Feb. 27, C. A.

Annotation :—**Refd.** Macpherson *v.* Warner (1893), 9 T. L. R. 397.

523. —— Successful defence by one partner—Enures for benefit of co-partners—Sued on same cause of action.]—Pltf. sued deft. R. for damages for breach of a contract entered into by pltf. with a firm in which R. was at the time a partner. The partnership had been dissolved before the issue of the writ. The former partners E. & P. were subsequently added as defts., & each put in a separate defence. P. pleaded & proved that pltf. had not on his part complied with the conditions of the contract, & as against P. the action was dismissed. R. & E. did not in their defences raise the plea upon which P. was successful. The trial judge refused leave to R. & E. to amend, & gave judgment against them jointly for the sum claimed. On appeal :—*Held :* inasmuch as three defts. were joint contractors, pltf. had but one & the same cause of action against them all ; the fact established by P., which was common to the whole contract & fatal to any claim upon it, enured to the benefit of the other joint contractors, whether they had pleaded it or not ; & accordingly judgment must be given dismissing the action against R. & E. also.—PIRIE *v.* RICHARDSON, [1927] 1 K. B. 448 ; 96 L. J. K. B. 42 ; 136 L. T. 104 ; 70 Sol. Jo. 1023, C. A.

—— **Estate of deceased partner.**]—*See* Sub-sect. 3, C., *post.*

Insurance partnerships.]—*See* INSURANCE, Vol. XXIX., p. 430, Nos. 3345–3347.

B. In Tort.

See Partnership Act, 1890 (c. 39), ss. 10, 11, 12.

524. Joint & several liability—Penalty.]—Partners concerned in run goods, the Crown may come against any one for the penalty.—A.-G. *v.* BURGES (1726), Bunb. 223 ; 145 E. R. 654.

Annotation :—**Consd.** R. *v.* Manning (1739), 2 Com. 616.

beginning of the world, is a release of individual as well as partnership [illegible] HALL *v.* IRONS (1855), [illegible] P. 351.—**CAN.**

e. ——.]—JOHNSON & CO. *v.* FINKLE[illegible] & MCKENZIE, [1926] 2 D. L. R. ; 37 B. C. R. 95.—**CAN.**

f. *Necessity for assent of co-partner.*]—REID *v.* SMITH (1882), 2 O. R. 69.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 2.—B.

524 i. *Joint & several liability—Penalty.*]—MCSWEENEY *v.* WALLACE (1870), 8 N. S. R. (2 G. & O.) 83.—**CAN.**

524 ii. ——.]—A partner is responsible for the wrongful acts of his co-partner in a matter connected with the partnership business done for the joint benefit, though he himself personally had nothing to do with the tortuous acts.—BREWING *v.* BERRYMAN (1875), 15 N. B. R. (2 Pug.) 515.—**CAN.**

Sect. 2.—Liability of individual partners: Sub-sect. 2, B. & C.; sub-sect. 3, A. (a).]

525. —— ——.]—A.-G. *v.* CARBOLD (1732), Bunb. 223, n.; 145 E. R. 654.

Annotation:—**Consd.** R. *v.* Manning (1739), 2 Com. 616.

526. —— **Negligence—Separation of partnership duties.**]—WALAND *v.* ELKINS, No. 319, *ante*.

527. —— ——.]—Case against three defts., proprietors of a stage coach. The declaration stated that defts. so carelessly managed their coach & horses, that the coach ran against pltf. & broke his leg. It appeared in evidence that one of defts. was driving at the time when the accident happened, & the jury found that it happened through his negligent driving:—*Held:* pltf. might maintain case against all the proprietors, although he might perhaps have been entitled to bring trespass against the one that drove the coach.—MORETON *v.* HARDERN (1825), 4 B. & C. 223; 6 Dow. & Ry. K. B. 275; 107 E. R. 1042.

Annotations:—**Refd.** Williams *v.* Holland (1833), 10 Bing. 112; Ashworth *v.* Stanwix (1861), 3 E. & E. 701. **Mentd.** Wells *v.* Ody (1836), 1 M. & W. 452.

528. —— ——.]—A London cab, which belonged to a firm consisting of two partners, was licenced & registered under the statutes relating to hackney carriages in the name of one partner only. The cab was hired out to a driver in the usual way, & pltf. was injured by his negligent driving:—*Held:* both the partners were liable for the negligence of the driver.—GATES *v.* BILL (R.) & SON, [1902] 2 K. B. 38; 71 L. J. K. B. 702; 87 L. T. 288; 50 W. R. 546; 18 T. L. R. 592; 46 Sol. Jo. 498, C. A.

Annotations:—**Mentd.** Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336; Smith *v.* General Motor Cab Co., [1911] A. C. 188; Kemp *v.* Elisha, [1918] 1 K. B. 228.

529. —— **Fraud—Transaction within scope of business.**]—ATKINSON *v.* MACKRETH, No. 187, *ante*.

530. —— ——.]—Where one partner in a firm has received a sum of money in the ordinary course of the partnership business, & misappropriated it, all the partners are jointly & severally liable to make good the amount; &, therefore, one or more of them may be made defts. to a suit for that purpose, without suing all.—PLUMER *v.* GREGORY (1874), L. R. 18 Eq. 621; 43 L. J. Ch. 616; 31 L. T. 17; *subsequent proceedings*, L. R. 18 Eq. 629.

531. —— —— **Transaction not within scope of business.**]—It is not part of the ordinary business of a solr., to receive money for the purpose of investment generally, &, therefore, one partner is not liable for the misappropriation of money so received by another without his knowledge. *Secus*, where the money is received for the purpose of being invested in a particular security.

A. & B. were in partnership together as solrs. Pltf. advanced a sum of money to A., upon his statement that the firm had a client, F., who wished to borrow that sum on the security of land. B. knew nothing of the loan, & the money never reached the hands of the firm. No mtge. was ever executed: A. misappropriated the money, & died insolvent:—*Held:* the receipt of the money by A., on the mere statement that it was to be lent on mtge. to a client was not a receipt of money for the purpose of being invested in a particular security, & therefore B. was not liable to replace the money.—PLUMER *v.* GREGORY (1874), L. R. 18 Eq. 629; 43 L. J. Ch. 803; 31 L. T. 80.

Annotations:—**Refd.** Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394; Biggs *v.* Bree (1881), 51 L. J. Ch. 64; Cleather *v.* Twisden (1883), 24 Ch. D. 731; Hughes *v.* Twisden (1886), 55 L. J. Ch. 481.

532. —— —— **Right of creditor to elect.**]—Where a partnership debt has been incurred by means of a fraud on the part of the partners, the defrauded creditor has a right to prove at his election against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners.—*Re* COLLIE, *Ex p.* ADAMSON (1878), 8 Ch. D. 807; 47 L. J. Bky. 103; 38 L. T. 917; 26 W. R. 890, C. A.

Annotations:—**Refd.** Watson *v.* Holliday (1882), 20 Ch. D. 780; *Re* Parkers, *Ex p.* Sheppard (1887), 19 Q. B. D. 84; *Re* Giles, *Ex p.* Stone (1889), 6 Morr. 158; *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817. **Mentd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394; Griffith *v.* Pound (1890), 45 Ch. D. 553; *Re* Newton, *Ex p.* National Provincial Bank of England (1896), 3 Mans. 200; Whitechurch *v.* Cavanagh, [1902] A. C. 117; Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820.

Breach of trust.]—*See* Sub-sect. 2, C., *post*.

C. For Breach of Trust.

See Partnership Act, 1890 (c. 39), s. 13.

533. Whether liability joint or joint & several—Partners direct trustees.]—By a marriage settlement a sum of money was to be received by the trustees, & invested in govt. or real securities, & the interest was to be paid to the wife for life for her separate use, without a power of anticipation, with remainder to the children. One of the trustees receives the money, & advances it to a partnership of merchants, without taking any security. He receives the interest from the partnership, & pays it over to the wife regularly up to the time of his death; afterwards, the partnership pays the interest to the wife directly, & without the intervention of the surviving trustee. In the partnership books the accounts relating to the whole transaction are entered, as between the wife & the partnership only. Upon the partnership becoming bkpt.:—*Held:* the partners had constituted themselves directly trustees, & the proof on behalf of the trust estate might be made either against the joint estate, or the separate estates. *Qu.:* whether there would have been a right of proof against the separate estates, if the firm had been constructive trustees only; or whether the term "constructive trust" is sufficiently definite to admit of any general rule being laid down upon the point.—*Re* ACRAMAN, *Ex p.* WOODIN (1843), 3 Mont. D. & De G. 399.

534. —— **Partners constructive trustees.**]—*Re* ACRAMAN, *Ex p.* WOODIN, No. 533, *ante*.

535. —— **Liability of co-partner of defaulting trustee.**]—A., a partner in a house of agency in India, died, having by his will directed his estate to be called in, & invested on certain trusts, & appointed two of his co-partners his exors. They, however, suffered his share in the partnership to remain in the house. After A.'s death B. & C. were admitted as partners, & they knew that A.'s share was remaining in the house, & that it was subject to the trusts of his will. They afterwards retired, & other partners were admitted. The house ultimately failed:—*Held:* B. & C. were not responsible for the breach of trust committed by their co-partners, the exors.—TWYFORD *v.* TRAIL (1834), 7 Sim. 92; 58 E. R. 771; *subsequent proceedings* (1838), 3 My. & Cr. 645, L. C.

Annotations:—**Mentd.** Rendall *v.* Rendall (1841), 1 Hare, 152; Bond *v.* Graham (1842), 11 L. J. Ch. 306; *In the Goods of* Gaynor (1869), L. R. 1 P. & D. 723.

536. —— ——.]—DE RIBEYRE *v.* BARCLAY, No. 475, *ante*.

537. —— ——.]—In a joint stock assocn. created for the purpose of carrying into effect loans & other financial operations C., who carried on business as a stockbroker, was a director.

C. had a partner K. who was not in any way connected with the assocn.; the transaction, however, had been a partnership transaction:—*Held:* the partners were liable, jointly & severally, to make good to the assocn. the profits which it ought to have received in the increased amount of the commission.—IMPERIAL MERCANTILE CREDIT ASSOCN. (LIQUIDATORS) *v.* COLEMAN (1873), L. R. 6 H. L. 189; 42 L. J. Ch. 644; 29 L. T. 1; 21 W. R. 696, H. L.

Annotations:—**Refd.** Bagnall *v.* Carlton (1877), 6 Ch. D. 371. **Mentd.** Dunne *v.* English (1874), L. R. 18 Eq. 524; *Re* Coal Economising Gas Co., Gover's Case (1875), 1 Ch. D. 182; Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520; Chesterfield & Baythorpe Colliery Co. *v.* Black (1877), 26 W. R. 207; New Sombrero Phosphate Co. *v.* Erlanger (1877), 5 Ch. D. 73; Emma Silver Mining Co. *v.* Grant (1879), 11 Ch. D. 918; Boston Deep Sea Fishing & Ice Co. *v.* Ansell (1888), 59 L. T. 345; Turnbull *v.* West Riding Athletic Club, Leeds (1894), 70 L. T. 92; Silkstone & Haigh Moore Coal Co. *v.* Edey (1899), 69 L. J. Ch. 73; Costa Rica Ry. *v.* Forwood, [1901] 1 Ch. 746; Cackett *v.* Keswick (1902), 2 Ch. 456; Transvaal Lands Co. *v.* New Belgium (Transvaal) Land & Developing Co., [1914] 2 Ch. 488.

538. —— Breach by partner not being trustee.]—A trustee under a will permits the trust fund, as the moneys are from time to time realised, to be paid into the hands of certain bankers, who have knowledge of the trusts. One of the partners, without the assent of the trustee, deals with a portion of the fund, by investing it on mtge.:—*Held:* the bankers were not jointly & separately liable in the character of trustees, but they only incurred a liability as between banker & customer; &, on the bkpcy. of the bankers, the trustee could only prove against their joint estate, for such balance as was in their hands at the time of the bkpcy.—*Re* BIDDULPH, *Ex p.* BURTON (1843), 3 Mont. D. & De G. 364, Ct. of R.

539. —— Acts within scope of partnership business.]—BLYTH *v.* FLADGATE, MORGAN *v.* BLYTH, SMITH *v.* BLYTH, No. 476, *ante*.

Liability of estate of deceased partner.]—*See* No. 467, *ante*, Nos. 609–612, *post*.

SUB-SECT. 3.—DURATION OF LIABILITY

A. From Date of Association.

(a) What Amounts to Association.

See Partnership Act, 1890 (c. 39), s. 17 (1).

Formation of partnership, generally, *see* Part III., *ante*.

540. Agreement to associate.]—To make a partnership liable to a demand in respect of a separate transaction an agreement must appear.—*Ex p.* PEELE (1802), 6 Ves. 602; 31 E. R. 1216, L. C.

Annotations:—**Refd.** *Re* Riches & Marshall's Trust Deed, *Ex p.* Darlington, etc. Banking Co. (1865), 4 De G. J. & Sm. 581; Rolfe & Bank of Australasia *v.* Flower, Salting (1866), L. R. 1 P. C. 27.

541. ——.]—GOUTHWAITE *v.* DUCKWORTH, No. 59, *ante*.

542. —— Evidence of parol agreement to keep as escrow.]—WILLIAMS *v.* JONES, No. 245, *ante*.

543. —— No acts in furtherance of agreement—Refusal to execute partnership deed.]—*Re* VANDERPLANK, *Ex p.* TURQUAND, No. 143, *ante*.

544. —— With option to withdraw—Exercise of option within agreed time.]—In May, 1839, A., a creditor of the firm of B. & S., proposed to become a partner with them, the terms of the intended partnership being, that A. should bring in £1,000 in money & £1,000 in goods, & should be entitled to one-third of the profits, & be a dormant partner; the name of the firm was to be changed to B., S. & Co., & the partnership was to date from Apr. 1, 1839, but A. reserved to himself the option of determining, at any period within twelve months from that day, whether he would become a partner. The name of the firm was altered accordingly, & a new banking account was opened in the name of B., S. & Co.; & A. advanced the £2,000 to the firm; but within the twelve months he declared his determination not to enter into the partnership:—*Held:* A. was not liable for goods supplied to the firm after May, 1839, for that he never became a complete partner.—GABRIEL *v.* EVILL (1842), 9 M. & W. 297; 11 L. J. Ex. 371; 152 E. R. 125.

Annotation:—**Refd.** Courtenay *v.* Wagstaff, Reed *v.* Wagstaff (1864), 16 C. B. N. S. 110.

545. Acts of partnership—Formal date of commencement not fixed.]—WILLIAMS *v.* JONES, No. 245, *ante*.

546. —— Holding out as partner.]—In an action on a bill of exchange, purporting to be drawn & accepted by a mining co., wherein pltf., an indorsee for value, sought to charge deft. as a member of that co., it was proved that the bill had been drawn & accepted by order of the directors of the co. It was proved further, that the co. had entered into a contract for the purchase of mines, taken a counting house in London, engaged clerks, & also an agent to reside in the country, & had worked some of the mines; that deft. having applied to the secretary of the co. for shares, some were appropriated to him; that he paid an instalment of £15 per share; that he attended at the counting house of the co., & there signed some deed, & afterwards attended a general meeting of the shareholders:—*Held:* assuming this to be sufficient evidence of deft.'s being a partner in the co., it was incumbent on pltf. to prove that the directors of that co. had authority to bind the other members, by drawing & accepting bills of exchange; & pltf. not having produced the deed of co-partnership, nor given any evidence to show that it was necessary, for the purpose of carrying on the business of that mining co., or usual for other mining cos. to draw or accept bills of exchange, there was no evidence to go to the jury of such an authority to draw or accept any bills, & still less to draw or accept bills in this form, which in effect were promissory notes. *Semble:* there was not sufficient evidence to show that the deft. had ever become a complete partner in the co., or that he had held himself out to the world as such partner.

If it could have been proved that deft. had held himself out to be a partner, not "to the world," for that is a loose expression, but to pltf. himself, or under such circumstances of publicity as to satisfy a jury that pltf. knew of it & believed him to be a partner, he would be liable to pltf. in all transactions in which he engaged & gave credit to deft., upon the faith of his being such partner. Deft. would be bound by an indirect representation to pltf., arising from his conduct, as much as if he had stated to him directly & in express terms that he was a partner, & pltf. had acted upon that statement (PARKE, J.).—DICKINSON *v.* VALPY (1829), 10 B. & C. 128; L. & Welsb. 6; 5 Man. & Ry. K. B. 126; 8 L. J. O. S. K. B. 51; 109 E. R. 399.

Annotations:—**Folld.** Ford *v.* Whitmarsh (1840), H. & W. 53. **Consd.** Ricketts *v.* Bennett (1847), 4 C. B. 686. **Refd.** Thicknesse *v.* Bromilow (1832), 2 Cr. & J. 425; Dickenson *v.* Teague (1834), 4 Tyr. 450; Bramah *v.* Roberts (1837), 3 Bing. N. C. 963; Tredwen *v.* Bourne (1840), 6 M. & W. 461; Steigenberger *v.* Carr (1841), 10 L. J. C. P. 253; Reynell *v.* Lewis, Wyld *v.* Hopkins (1846), 10 Jur. 1097; Martyn *v.* Gray (1863), 14 C. B. N. S. 824; Edmonds *v.* Bushell & Jones (1866), 12 Jur. N. S. 332; Garland *v.* Jacomb (1873), L. R. 8 Exch. 216; Farquharson *v.* King, [1902] A. C. 325. **Mentd.**

Sect. 2.—Liability of individual partners: Sub-sect. 3, A. (a) & (b), & B. (a).]

Pitchford *v.* Davis (1839), 5 M. & W. 2; Galvanised Iron Co. *v.* Westoby (1852), 8 Exch. 17; London & Continental Assce. Soc. *v.* Rodgrave (1858), 4 C. B. N. S. 524.

547. Payment of deposit on partnership share—Partnership deed executed subsequently.]—A party paying a deposit on shares in a trading co., & afterwards signing the deed of partnership, is to be considered as a partner from the time of his paying the deposit. *Qu.:* if the mere payment of the deposit, without the subsequent signature of the deed, would make him a partner.—LAWLER *v.* KERSHAW (1827), Mood. & M. 93, N. P.

Annotation:—**Mentd.** Newton *v.* Belcher (1840), 6 Ry. & Can. Cas. 38.

548. Agreed date of execution of partnership deed—Execution postponed—Acts between agreed date & actual execution.]—A. & B. agree to become partners from a subsequent day, upon certain terms which are to be embodied in a deed to be executed on such subsequent day. The deed is executed on a day later than that appointed. B. is bound by the contract of A., entered into in the name of the firm between the day appointed for the execution of the deed & that on which it was actually executed. So, though alterations are introduced into the deed at the time of its execution.—BATTLEY *v.* LEWIS (1840), 1 Man. & G. 155; 133 E. R. 286; *sub nom.* BATTLEY *v.* BAILEY, 1 Scott, N. R. 143; 4 Jur. 537.

(*b*) *Transactions Previous to Association.*

See Partnership Act, 1890 (c. 39), s. 17 (1).

549. Whether new partner liable—Sale of goods.]—SAVILLE *v.* ROBERTSON, No. 57, *ante.*

550. —— ——.]—Where one person purchases goods, & another is afterwards permitted to share in the adventures, the vendors cannot recover against such other person for the price of the goods.—YOUNG *v.* HUNTER (1812), 4 Taunt. 582; 128 E. R. 458.

Annotations:—**Consd.** Cothay *v.* Fennell (1830), 10 B. & C. 671. **Refd.** Gardiner *v.* Childs (1838), 8 C. & P. 345.

551. —— —— **Series of orders constituting successive contracts.**]—A., in 1817, agreed with B., to supply him with bricks whenever he wanted them, for 28*s.* per 1000, ready money. In 1828, B. & C. became partners; & after that, B. from time to time ordered bricks of A. which were used for a partnership purpose:—*Held:* C., as the partner of B., was liable for the price of these bricks, each order being a new contract: but if the contract of A. & B. had been for the supply of a certain number of bricks, at so much per 1000, a subsequent partner would not have been liable.

(2) Where two persons are in partnership, & one supplies goods necessary for the carrying on of the partnership business & supplies them to one of the partners for that purpose, & he finds out afterwards that that person has a partner, the other partner is liable (ERLE, J.).—DYKE *v.* BREWER (1849), 2 Car. & Kir. 828.

552. —— **Bill of exchange.**]—SAVILLE *v.* ROBERTSON, No. 57, *ante.*

553. —— —— **Assent of new partner.**]—Two of three, partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor upon the firm in their joint names; but such security is fraudulent & void as against the third partner, & cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action.

If one of several partners pledge the partnership fund for his individual debt that will not bind the rest (LE BLANC, J.).—SHIRREFF *v.* WILKS (1800), 1 East, 48; 102 E. R. 19.

Annotations:—**Consd.** *Ex p.* Peele (1802), 6 Ves. 602. Ridley *v.* Taylor (1810), 13 East, 175. **Consd.** Kendal *v.* Wood (1870), 23 L. T. 309. **Refd.** *Ex p.* Bonbonus (1803), 8 Ves. 540; Lloyd *v.* Ashby (1825), 2 C. & P. 138; Wintle *v.* Crowther (1831), 1 Cr. & J. 316; *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615; *Re* Riches & Marshall's Trust Deed, *Ex p.* Darlington, etc. Banking Co. (1865), 4 De G. J. & Sm. 581; Ellston *v.* Deacon (1866), L. R. 2 C. P. 20.

554. —— —— **No association at time of discounting.**]—On June 24, 1824, C. agreed to become a partner with A. & B., the business to be carried on in the names of A. & B. for the benefit of A., B. & C.; that the partnership should be considered as commencing on May 18, preceding. Before June 24, A. & B. had opened an account with certain bankers, which was continued in their names till Sept. 22, when the partnership as to B. was dissolved. All the business with the bankers was transacted by B., & the bankers did not know that C. was a partner till the account was closed. B. used the accounts for the purposes of the firm of which C. was a member, as well as for others. On May 21, he indorsed a bill of exchange in the partnership names of A. & B. to the bankers, who discounted it, & placed it to the credit of the account. On July 13, he indorsed two others in a similar manner:—*Held:* as the bankers did not know that the money raised by these bills was intended to be applied to other than partnership purposes, C. was liable on the last two bills, but not on the first, he not having been an actual partner at the time when it was discounted.—VERE *v.* ASHBY (1829), 10 B. & C. 288; L. & Welsb. 20; 8 L. J. O. S. K. B. 57; 109 E. R. 457.

Annotations:—**Distd.** Battley *v.* Lewis (1840), 1 Man. & G. 155. **Refd.** Forester *v.* Bell (1847), 9 L. T. O. S. 133; Yorkshire Banking Co. *v.* Beatson (1), Leeds & County Banking Co. *v.* Same (1879), 4 C. P. D. 204. **Mentd.** Keighley, Maxsted *v.* Durant, [1901] A. C. 240.

555. —— ——.]—In an action by A., the drawer & payee of a bill of exchange against B., C., & D. as acceptors, D. pleads that B., C., & D. were partners, & that the bill was accepted by B. & C. without his knowledge, privity, or consent,

PART IV. SECT. 2, SUB-SECT. 3.—A. (b).

552 i. *Whether new partner liable—Bill of exchange.*]—OSBORNE *v.* HENDERSON (1889), 18 S. C. R. 698.—**CAN.**

g. —— *Fraud prior to association.*]—When a solr., representing that money of a client has been invested, misappropriates it, & afterwards takes a partner, payment of interest by the firm does not establish such negligence or misconduct on the part of the incoming partner as to make him responsible for the antecedent fraud.—ARDEN *v.* ROY (1883), 1 N. Z. L. R. C. A. 365.—**N.Z.**

h. —— *Agreement by new partner.*]—An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm may be, & in practice generally is, established by indirect evidence.—GALT, LTD. *v.* CRONSBERRY (Alta.) (1914), 27 W. L. R. 44.—**CAN.**

k. —— ——.]—Where a person was admitted as a partner into an existing firm under an agreement between him & the partners *inter se*, whereby he agreed to be liable for transactions incurred prior to the agreement, he is not liable to the creditors of the firm in respect of such prior transactions, notwithstanding the agreement by virtue of Indian Contract Act, s. 249.—RUSSA ENGINEERING WORKS, LTD. *v.* KANARA TRANSPORT CO. (1926), I. L. R. 49 Mad. 930.—**IND.**

l. ——.]—Where a contract was made with one person, who subsequently admitted another to share in the contract:—*Held:* the payment to the original contractor was sufficient, & no notice need be taken of the subsequent co-partnership.—CARLISLE *v.* NIAGARA DOCK CO. (1838), 5 O. S. 660.—**CAN.**

m. ——.]—NISBET *v.* TAPPE (Man.) (1915), 31 W. L. R. 449.—**CAN.**

n. ——.]—A co., consisting of two

in respect of a debt contracted by B. & C. before the partnership, & not in respect of a debt relating to the partnership. Upon a replication *de injuriâ* to this plea, the issue must be found for pltf. if it appear that the consideration of the bill was a debt which had arisen partly before, & partly after, the commencement of the partnership.—WILSON *v.* LEWIS (1840), 2 Man. & G. 197; Drinkwater, 18; 2 Scott, N. R. 115; 133 E. R. 719; *sub nom.* WILSON *v.* BAILEY, POTTER & LEWIS, 9 Dowl. P. C. 18; 10 L. J. C. P. 17; 4 Jur. 1062.

556. —— General course of business — No dissent expressed.] — If a carrier, who has endeavoured to limit his responsibility by what is called "a £5 notice," pay a sum above £5 demanded of him for the loss of a parcel, his doing so will be evidence of a special contract to govern future dealings between him & the person whom he so pays, & will consequently be a waiver of the notice. Such a special contract as to the course of dealing will bind persons who afterwards become partners with that carrier; an incoming partner being bound by the existing course of dealing, unless he express his dissent.—HELSBY *v.* MEARS (1826), 5 B. & C. 504; 8 Dow. & Ry. K. B. 289; 4 L. J. O. S. K. B. 214; 108 E. R. 188.

Annotation:—**Refd.** Beale *v.* Mouls (1847), 10 Q. B. 976.

557. —— Taxation of bill of costs.]—C. had acted as solr. for X. & before his bill was paid he took P. into partnership. X. then paid the bill by cheque to the order of C. & P. & received an acknowledgment in their joint names, but in P.'s handwriting. He then took out an order to tax the bill as against C. & P. They then wrote to him that C. alone was interested in the bill, & requested him to get the order altered so as to be against C. alone, but this he declined to do:—*Held:* the order must be discharged, C. consenting to an order against himself alone.—*Re* CURNOT & PARKINSON (1871), 40 L. J. Ch. 608.

558. —— Necessity for novation.]—Where an individual has entered an appearance in an action against a firm, there must be a novation to render him liable for a debt contracted before he was a member.—CRIPPS *v.* TAPPIN & Co. (1882), Cab. & El. 13.

559. —— Fraud prior to association—Election of creditor to sue original partner.] — BRITISH HOMES ASSURANCE CORPN., LTD. *v.* PATERSON, No. 486, *ante*.

—— **Banking partnerships.**]—*See* BANKERS, Vol. III., p. 171, Nos. 287, 288.

B. Liability of Retired Partners.

(*a*) *In General.*

See Partnership Act, 1890 (c. 39), ss. 17, 36.

560. What amounts to retirement—Firm converted to private company.]—EARLE *v.* COW (1920), 36 T. L. R. 713.

561. Whether liability continuing — Partner holding himself out as such—Name allowed to remain as partner.] — After the dissolution of partnership between A. & B., & the advertisement of it in the *Gazette*, A. accepts a bill, bearing a date previous to the dissolution for the accommodation of a third person who indorses it for value, B. who permits his name to remain over the shop in the Poultry, as a member of the firm till after the dissolution of partnership & notice of it, & indorsement of the bill, is liable as a partner to a *bonâ fide* holder.—WILLIAMS *v.* KEATS (1817), 2 Stark, 290, N. P.

562. —— —— ——.]—(1) An indorsee of a bill of exchange cannot recover against acceptors of a bill accepted by one who was formerly a partner, if such person had ceased to be a partner at the time of the accepting of the bill, even though the bill was accepted for a partnership debt, unless the person still held himself out to the world as a partner, as if he allowed his name to remain on the door of the house of business, or the like.

(2) If one of the partners gave notice to a witness that they had ceased to be partners, that might be evidence for defts., but a conversation between the witness & one of defts., in which he so stated, is clearly not so.—DOLMAN *v.* ORCHARD (1825), 2 C. & P. 104, N. P.

563. —— —— Acting as partner.]—(1) Where party is sued, on a liability as partner, & he is shown to have been once a partner, then, even although it appears that the partnership has been dissolved, & if there has been no notice of the dissolution, any evidence that he has continued to give orders & bills in the name of the firm, & to act as if he were partner with the same person, though in a different business, & notwithstanding that it is proved that he was in fact only a paid servant, will be sufficient to render him liable for goods ordered by him in the name of the supposed firm.

(2) A party is liable as a partner, if he has held himself out or allowed another to hold him out as a partner (ERLE, J.).—MULFORD *v.* GRIFFIN (1858), 1 F. & F. 145, N. P.

564. —— Joinder in conveyance of partnership property — On bankruptcy of remaining partners.]—Where the party sued as a partner for the value of goods furnished for "the owners of a ship," was neither a partner in fact at the time, having parted before with his share some time before, nor held himself out as such, having before withdrawn his name from the description of the firm at the counting house, & sent circular letters to the correspondents of the house, notifying the change; he cannot be charged merely because having defectively conveyed his whole share in the ship before that time, he had subsequently joined with the assignees of the bkpt. partners in the ship in making a good title to it to a purchaser from the assignees.—M'IVER *v.* HUMBLE (1812), 16 East, 169; 104 E. R. 1053.

Annotations:—**Refd.** Baker *v.* Buckle (1822), 7 Moore, C. P. 349; Harrington *v.* Fry (1824), 2 Bing. 179; Briggs *v.* Wilkinson (1827), 7 B. & C. 30.

565. —— Contract with servant—Servant dismissed.]—A., B., & C., who were co-partners, engaged D., by agreement in writing, to serve them for a certain period. Before this period had elapsed, C. retired from the concern, & D., individuals, having assumed four partners, without any stipulation or entries in the books to instruct a distinction betwixt the old & new firms, or to separate their claims & liabilities:—*Held:* in a question of accounting among the partners, the four assumed partners were not entitled under the circumstances to charge the two original partners with the whole loss arising out of a transaction which commenced with the original firm.—MERCER *v.* PEDDIE (1832), 10 Sh. (Ct. of Sess.) 405.—**SCOT.**

PART IV. SECT. 2, SUB-SECT. 3.—B. (a).

o. *Whether liability continuing.*]—JORDAN *v.* SMITH (1859), 17 U. C. R. 590.—**CAN.**

p. ——.]—Action against two partners, A. & B., for goods sold & delivered. Pltf. drew on B., the partner whom they were informed assumed the firm's liabilities on dissolution, but did not give up an old draft on the firm:—*Held:* there was no intention to release A., who was held liable.—FAIR *v.* HUME (1909), 11 W. L. R. 28.—**CAN.**

q. ——.]—PATRICK, ETC. (SMITH'S TRUSTEES) *v.* SMITH (1900), 37 Sc. L. R.

Sect. 2.—*Liability of individual partners: Sub-sect.* 3, *B.* (*a*) & (*b*).]

with notice of that fact, continued in the service of A. & B. A. & B. subsequently became bkpt., whereupon D. was dismissed from their employment:—*Held:* D. could still sue A., B., & C. on the original agreement.—DOBBIN *v.* FOSTER (1844), 1 Car. & Kir. 323, N. P.

566. —— Continuing contract — Retirement with indemnity—Variation of original continuing contract.]—Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract; & although after notice of the retirement the retiring partner is in a sense a surety on the principle of *Oakeley* v. *Pusheller* (1836), 10 Bli. N. S. 548, that authority will not be extended so far as to discharge him from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract.

Continuing partners under such a contract, which (*inter alia*), gave the firm the power of appointing an arbitrator in case of dispute, entered into an agreement by which they waived a very doubtful point of construction on the original contract, & referred differences to arbitrators, one of whom was selected by themselves instead of by the firm as constituted at the date of the contract:—*Held:* this was not such a variation of the original contract as to discharge the retired partner.—OAKFORD *v.* EUROPEAN & AMERICAN STEAM SHIPPING CO., LTD. (1863), 1 Hem. & M. 182; 2 New Rep. 103; 9 L. T. 15; 1 Mar. L. C. 370; 71 E. R. 80.

Annotations:—**Refd.** Swire *v.* Redman (1876), 1 Q. B. D. 536; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32.

567. —— Breach of trust.]—A general devisee in trust for testator's widow & children having received from the widow, who was extrix., on her going abroad to recover part of the property, bonds for a debt from him & his partners to the estate, in settling the affairs of the partnership on the retirement of one partner who had notice of the trust, delivered to him the bonds to be cancelled without the privity of the *cestuis que trust*; continuing to make remittances on that account from the funds of the new partnership: the partner, who retired, is not discharged.—DICKENSON *v.* LOCKYER (1798), 4 Ves. 36; 31 E. R. 19, L. C.

568. —— ——.]—P., who had been a partner in a firm of solrs., & had during that time attended to the management of a certain trust, continued to act in relation to a change of investment of part of the trust funds after he had retired from the firm as if he were still a partner, & wrote to the trustees from the office of the firm saying that he had obtained a power of attorney authorising "our brokers" to sell the stock, & asked them to sign it, & send it to the office of the firm. The trustees did as requested, & the stock was sold, & the money received by P.'s late partners, who misapplied it, & it was lost to the trust. It appeared that the tenant for life was aware at this time that P. had retired from the firm, but the trustees were not:—*Held:* P. was liable to make good to the trust the capital sum lost, & interest from the last day on which any was paid.—SLACK *v.* PARKER (1886), 54 L. T. 212.

569. —— .]—Testator who had been a partner in the firm of A. & W. Smith & Co. nominated his wife & two of the three remaining partners in the firm as his trustees, & he specially authorised his trustees to allow his share of the capital to remain as a loan to the firm so long as his trustees should think it safe to allow it to remain. The wife died. The amount of the capital was ascertained & continued as a loan to the firm, but without any bond or other obligation being given for it. The third partner, not a trustee, was dissatisfied with the conduct of the firm's business, the result being that he agreed to retire under an agreement by which the two trustee partners paid him a sum of £9,000 for his interest in the firm, & by which the trustee partners undertook to meet all the liabilities of the firm, take over all the assets, & relieve the third partner of all debts. The new firm was carried on by the two trustee partners under the old name, & it paid a half-year's interest on the debt due to the trust estate. A year after the retirement of the third partner, the trustee partners, as trustees, granted to the old firm & the third partner a discharge of the debt due to the trust. About a month afterwards the new firm became insolvent & the two partners bkpt. The trustee partners resigned their trusteeship, & new trustees were appointed, who acted as creditors on the new firm, & received a dividend out of the new firm's assets. They then raised against the retired third partner this action, claiming reduction of the discharge & payment of the balance of the trust debt:—*Held:* the discharge was a breach of trust on the part of the trustee partners from which the third partner could not profit, the discharge being gratuitous; the actings of the new trustees in ranking as creditors on the new firm's assets did not discharge the liability of the old firm; & the third partner was liable to make good the loss to the trust estate.—SMITH *v.* PATRICK, [1901] A. C. 282; 70 L. J. P. C. 19; 84 L. T. 740; 17 T. L. R. 477, H. L.

570. —— Negligent execution of trust.]—A. having a reversionary interest under the will of W. deceased, agreed before his marriage to assign it to a trustee of a post-nuptial settlement which he duly executed in 1871. A firm of solrs., who were employed in 1874 to file a bill in Chancery for the removal of the trustee under that deed & to obtain the appointment of new trustees & a conveyance of the trust funds, failed to give notice before Apr. 1879, of this to the trustees under W.'s will. A. fraudulently assigned in Feb. 1879, his reversionary share to B. & notice of this assignment was at once given on B.'s behalf to the trustees under W.'s will. The trust funds being thus lost to the new trustees, they brought an action, which as against two of the solrs. was only commenced in Feb. 1883, to recover the principal sum so lost, & interest. H., one of defts., had left the firm just before the conveyance to the new trustees had been executed:—*Held:* though the solrs. had been paid out of the trust funds, there had been a retainer of them by the trustees, in not giving notice of the conveyance to the new trustees,

557; *affd.* (1901), 38 Sc. L. R. 613; 3 F. (Ct. of Sess.) (H. L.) 14.—**SCOT.**

r. ——.] — ROUGHEAD *v.* WHITE, [1913] S. C. 162.—**SCOT.**

t. —— *Dissolution not registered.*]—A partnership was dissolved, but the dissolution was not registered. One of the partners continued the business under the partnership name & committed a tort:—*Held:* the retiring partner was not liable, there being no evidence that he consented to, or knew of, the continuance of the firm name.—BURT *v.* CLARKE (1888), 5 Man. L. R. 150.—**CAN.**

a. *Retiring partner released—Rights against continuing partner.*]—On a dissolution of a co-partnership between deft. & pltf., deft. agreed to assume the liabilities of the firm. Pltf. & deft. were sued jointly by one of the partnership creditors. Deft. agreed with pltf. that the latter should pay the debt, & that he would repay him the whole amount. Pltf. paid the

defts. with the exception of H. had been guilty of negligence, & pltfs.' claim was not barred by Stat. Limitations, as no damage had been done by the negligence of defts. until Apr. 1879, when B. had given notice to the trustees under W.'s will of the assignment to him by A. &, therefore, pltfs. were entitled to recover against all defts., excepting H., the amount of the principal sum so lost, but not the interest.—BEAN *v.* WADE (1885), 1 T. L. R. 404 ; *revsd.* on other grounds, 2 T. L. R. 157, C. A.

Annotation :—**Refd.** Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337.

571. —— Transactions partly during membership of firm.]—A Scotsman in Calcutta opened an account with a banking & agency house there in 1786 ; & died in 1810, having been insane from 1793. A partner in the house, being in Scotland in 1812, inclosed, in a letter to the customer's relatives there, an account current with him from 1787 to 1810, signed by the firm, bringing out annual balances in his favour, composed of annual accumulations of Indian interest, the last balance expressed "to bear interest at 9 per cent. *per annum*." In 1835, the customer's relatives obtained administration of his estate, & prosecuted actions, which were before commenced in the Scottish Cts., on the account current, against another partner who joined the firm in 1793, & continued a partner through several changes till 1820 ; & they claimed interest at 9 per cent., upon the last balance in 1810 :—*Held :* a debt was sufficiently constituted against the firm by the account rendered by them, together with interest at 9 per cent. on the last balance in 1810, down to final decree ; & one partner was bound by the account so rendered.—FERGUSSON *v.* FYFFE (1841), 8 Cl. & Fin. 121 ; 8 E. R. 49, H. L.

Annotations :—**Mentd.** Crosskill *v.* Bower, Bower *v.* Turner (1863), 32 Beav. 86 ; Williamson *v.* Williamson (1869), 20 L. T. 389 ; Barfield *v.* Loughborough (1872), 8 Ch. App. 1.

572. Bill of exchange—Dishonoured after retirement—Notice to continuing partner—Whether notice to retired partner.]—Where a bill drawn by partners is dishonoured after the dissolution of the partnership notice of dishonour to the continuing partner is sufficient notice to the retiring partner.

A bill of exchange dated Aug. 11, 1913, & drawn by a partnership firm consisting of two partners, B. & K. upon & accepted by a French co. was indorsed to pltfs. by the two partners on Aug. 21, 1913, in payment of a previously dishonoured bill. On Aug. 27, shortly after the bill of Aug. 11 was given to pltfs., the partnership between B. & K. was dissolved ; the assets thereafter belonged to B., who carried on the business in the firm name. B. covenanting with K. to discharge all the debts & liabilities of the firm. Notice of the dissolution & of the fact that B. would discharge the liabilities of the firm was given to pltfs. The bill became due on Oct. 11, 1913, but shortly before that date B. gave to pltfs. another bill dated Oct. 1, & payable upon Oct. 31, drawn in the firm name upon & accepted by the same French co. for an amount exceeding the amount of the bill of Aug. 11, & at the same time B. asked the pltfs. not to present the bill of Aug. 11 for payment. The bill of Aug. 11 was notwithstanding presented for payment & dishonoured, & notice of dishonour was given by pltfs. to B. The bill of Oct. 1 was also not paid ; it was, however, not noted or protested, & no notice of dishonour was given to either B. or K. Pltfs. sued K. upon the bill of Aug. 11, & alternatively upon the consideration for the bill :—*Held :* the notice of dishonour of the bill of Aug. 11 which was given by pltfs. to B. was a sufficient notice to K. within Bills of Exchange Act, 1882 (c. 61), s. 49, notwithstanding that the partnership between them had been previously dissolved, but K. was not liable on the bill inasmuch as by the terms of the dissolution of partnership & by the notice to pltfs. he had ceased to be a principal debtor, & had become a surety only, & had been discharged through pltfs. giving time to B. by taking the bill of Oct. 1 in lieu of payment of the bill of Aug. 11. —GOLDFARB *v.* BARTLETT & KREMER, [1920] 1 K. B. 639 ; 89 L. J. K. B. 258 ; 122 L. T. 588 ; 64 Sol. Jo. 210.

(*b*) *Notice of Retirement.*

See Partnership Act, 1890 (c. 39), ss. 17, 36.

Notice of dissolution generally, *see* Part VI., Sect. 4, *post*.

573. Sufficiency of notice—Public notice.]—Three persons entered into partnership in the trade of sugar boiling, & it was agreed, that no sugars should be bought without the consent of the majority ; one of them afterwards withdraws himself from the partnership, of which he gives public notice ; &, subsequent to this, the two other partners make a contract with A. for a large quantity of sugar, who had full notice that the third partner had withdrawn :—*Held :* such third partner was not answerable for any part of the sugar so purchased.—MINNIT *v.* WHINERY (1721), 5 Bro. Parl. Cas. 489 ; 2 E. R. 815, H. L.

574. —— No notice in Gazette.]—Where a partnership has existed, but one of the partners has retired without notice being given in the *Gazette*, & the name of the firm is still preserved ; a person dealing with the firm after the dissolution, may still call upon all the original parties, unless he had notice, or knew that one of them had retired.

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debt & sued deft. in *assumpsit :*—*Held :* pltf. could recover, notwithstanding the former relation of partnership.—FOYLE *v.* BINGHAM (1883), 4 R. & G. 404.—**CAN.**

b. —— *By incoming partner.*]—Upon a covenant by an incoming partner to indemnify & save harmless a retiring partner against the liabilities, contracts, & agreements of the firm, no cause of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought against the firm.—SUTHERLAND *v.* WEBSTER (1894), 21 A. R. 228.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 3.—B. (b).

573 i. *Sufficiency of notice—Public notice.*]—Where a known member of a firm retires from it, & credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware as one of the public that it existed, & has not become aware of his retirement, the retiring member of the firm is liable unless he shows that he has given reasonable public notice of his retirement.—REID *v.* COLEMAN BROTHERS (1890), 19 O. R. 93.—**CAN.**

573 ii. —— ——].—Where goods were delivered to a firm by persons who had previous dealings with the firm :—*Held :* mere publication of a notice of dissolution in the public press was not sufficient to relieve the retiring partner from liability.—MOSES *v.* RUSSA ENGINEERING WORKS, LTD. (1913), I. L. R. 1 Ran. 47.—**IND.**

c. —— *Constructive notice.*]—B., a latent partner in a business carried on by A. in his own name, retired therefrom, but gave no public or other notice of the dissolution of the partnership. A. continued the business, & six months after issued a circular to all his creditors & customers stating that he had taken C. into partnership, & that "the business at present carried on by me on my own account will for the future be carried on by me & my partner" under the firm of A. & Co. :—*Held :* the circular sent by A. was sufficient intimation to the public that B. was not a partner of A. & Co. & that B. was not liable.—MANN *v.* SINCLAIR (1879), 6 R. (Ct. of Sess.) 1078 ; 16 Sc. L. R. 630.—**SCOT.**

d. ——.]—*Held :* the notice of the change of the constitution of a partnership required by Partnership Act, s. 38, enacting that where a person deals with a firm after a change in its

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—PARKIN *v.* CARRUTHERS (1800), 3 Esp. 248; 170 E. R. 604, N. P.

575. —— Parol statement.] — DOLMAN *v.* ORCHARD, No. 562, *ante*.

576. —— Constructive notice — Continuing partner also member of creditor company.]—D. who carried on business under the G. P. & co., in with a banking co. established under Country Bankers Act, 1826 (c. 46), Joint Stock Banks Act, 1838 (c. 96), & 5 & 6 Vict., c. 85. In 1842 A. retired from the firm, but this fact was not advertised in the *London Gazette*, nor was any alteration made in the pass book:—*Held:* the mere fact of D., one of the firm of G. P. & co., being also a director of the banking co., but having as such no share in the management of or interference in the banking accounts, did not amount to notice, actual or constructive, to the bank, of the dissolution, so as to discharge A. in respect of a debt subsequently accruing, a banking co. so established, differing in this respect from an ordinary trading partnership.—POWLES *v.* PAGE (1846), 3 C. B. 16; 15 L. J. C. P. 217; 7 L. T. O. S. 257; 10 Jur. 526; 136 E. R. 7.

Annotations:—**Refd.** *Re* Carew's Estate Act (No. 2) (1862), 31 Beav. 39; Swift *v.* Winterbotham (1873), L. R. 8 Q. B. 244. **Mentd.** *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468.

577. Necessity for notice—To avoid liability.]—In the case of a partner whose name does not appear in the firm, he is liable for goods furnished only during the time he receives a share of the profits, unless he has been known to be a partner; in which case, he shall be liable, after he has actually ceased to be a partner, unless he has given notice of his quitting the concern.—EVANS *v.* DRUMMOND (1801), 4 Esp. 89; 170 E. R. 652, N. P.

Annotations:—**Distd.** Bedford *v.* Deakin (1818), 2 B. & Ald. 210. **Consd.** Thompson *v.* Percival (1834), 5 B. & Ad. 925; Mills *v.* Boyd (1842), 6 Jur. 943.

578. —— ——.]—MULFORD *v.* GRIFFIN, No. 563, *ante*.

579. —— —— Dormant partner.]—If the fact of a man being a dormant partner in a firm become known, & on his retiring from the firm notice of that circumstance be not given to those persons who were aware of his being such partner, he will be liable to those persons for debts contracted by the firm after his retirement therefrom.—FARRAR *v.* DEFLINNE (1843), 1 Car. & Kir. 580, N. P.; *subsequent proceedings* (1844), 2 L. T. O. S. 401.

580. —— —— ——.]—A party who had been a member of a trading firm, non-resident, & in general not taking any ostensible part in its affairs, retiring, but giving no notice of his retirement:—*Held:* liable for bills afterwards discounted to the managing partner in the ordinary way, & for the purposes of the firm.—WESTERN BANK OF SCOTLAND *v.* NEEDELL (1859), 1 F. & F. 461, N. P.

581. Creditor without notice—Business transactions with firm continued—Option to sue retired partner or existing firm—Estoppel.]—A firm of two partners dissolved; one retired & the other carried on the business with a new partner under the same style. A customer of the old firm sold & delivered goods to the new firm after the change but without notice of it. After receiving notice he sued the new firm for the price of the goods, & upon their bkpcy. proved against their estate; & afterwards brought an action for the price against the late partner:—*Held:* the liability of the late partner was a liability by estoppel only, & not jointly with the members of the new firm; the customer might at his option have sued the late partner or the members of the new firm, but could not sue all three together; & having elected to sue the new firm he could not afterwards sue the late partner.—SCARF *v.* JARDINE (1882), 7 App. Cas. 345; 51 L. J. Q. B. 612; 47 L. T. 258; 30 W. R. 893, H. L.

Annotations:—**Refd.** Fell *v.* Parkin (1882), 52 L. J. Q. B. 99; *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50; Burgess *v.* Morton (1894), 10 T. L. R. 339; British Homes Assce. Corpn. *v.* Paterson, [1902] 2 Ch. 404; *Re* Law, Law *v.* Law (1904), 92 L. T. 1; *Re* West Coast Gold Fields, *Ex p.* Salaman (1905), 75 L. J. Ch. 23; Willis, Faber *v.* Joyce (1911), 104 L. T. 576. **Mentd.** Jones *v.* Ashwin & Ivory (1883), Cab. & El. 159; James *v.* Young (1884), 27 Ch. D. 652; Griffith *v.* Pound (1890), 45 Ch. D. 553; Longman *v.* Hill (1891), 7 T. L. R. 639; *Re* Crook, *Ex p.* Collins (1892), 66 L. T. 29; *Re* Snyder Dynamite Projectile Co., Skelton's Case (1893), 68 L. T. 210; Morel *v.* Westmorland, [1904] A. C. 11; French *v.* Howie (1905), 93 L. T. 202; Moel Tryvan Ship Co. *v.* Weir, [1910] 2 K. B. 844; Codling *v.* Mowlem (1913), 83 L. J. K. B. 445; Harrisons & Crossfield *v.* L. & N. W. Ry., [1917] 2 K. B. 755; Bradford Old Bank *v.* Sutcliffe, [1918] 2 K. B. 833; *Re* Gunsbourg, [1920] 2 K. B. 426; Moore *v.* Flanagan, [1920] 1 K. B. 919; R. *v.* Paulson, [1921] 1 A. C. 271; Anderson *v.* Equitable Assce. Soc. of United States (1926), 134 L. T. 557; Bennett *v.* Whitehead, [1926] 2 K. B. 380.

(*c*) *Liability of Continuing Partners accepted by Creditor.*

See Partnership Act, 1890 (c. 39), ss. 17, 36.

582. Whether liability continuing.]—A retiring partner is liable for the debts due by the partnership on his retirement, although the creditor may

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constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change, must be given after the dissolution, &, therefore, a conversation prior to the dissolution, of something that might occur in the future has no effect.—WOODSIDE *v.* GRANT & KEATLEY (Sask.) (1914), 30 W. L. R. 77; 7 W. W. R. 724.—**CAN.**

e. ——.]—A person ceasing to be a member of a partnership is not liable on the partnership note when his withdrawal was known to the holder who took other securities & released the liability.—NORTHERN CROWN BANK *v.* ELFORD & CORNISH, [1917] 2 W. W. R. 109; 10 Sask. L. R. 96; 34 D. L. R. 280.—**CAN.**

f. ——.]—MALKIN CO., LTD. *v.* CROSSLEY, [1923] 3 D. L. R. 1189; 32 B. C. R. 207; [1923] 1 W. W. R. 1348.—**CAN.**

g. ——.]—A bank having granted a cash credit, to be operated on by a co. consisting of three partners, on security of a bond to which the co., & the individual partners as such, & as individuals, were parties, & having continued to make advances to the co. after the retirement of one of the partners, duly notified in the *Gazette*, & specially to the Bank:—*Held:* the retired partner was not liable under the bond for a balance arising on advances so made.—PADON *v.* BANK OF SCOTLAND (1826), 5 Sh. (Ct. of Sess.) 175; 2 Fac. Coll. 115.—**SCOT.**

577 i. *Necessity for notice—To avoid liability.*]—RYERSON *v.* LYONS (1871), 8 N. S. R. (2 G. & O.) 458.—**CAN.**

577 ii. —— ——.] — OAKVILLE CORPN. *v.* ANDREW (1905), 10 O. L. R. 709; 6 O. W. R. 454.—**CAN.**

577 iii. —— ——.] — TRUSTS & GUARANTEE CO. *v.* BRYDEN & KILPATRICK (1910), 15 W. L. R. 212.—**CAN.**

577 iv. —— ——.]—*Held:* in the absence of notice to pltf. of his retirement, R. would be liable; the *onus* did not rest on pltf. of establishing that he was unaware of R.'s retirement from the firm of B. & Co., but it rested upon R. to prove either direct notice thereof or, at least, facts & circumstances from which knowledge of such retirement might fairly be inferred.—HUFFMAN *v.* ROSS, [1926] 1 D. L. R. 603; [1926] S. C. R. 5.—**CAN.**

577 v. —— ——.]—GUNGA RAM *v.* GUNGA DHUR (1866), 1 Agra, 198.—**IND.**

577 vi. —— ——.] — MONROE *v.* FAILE (1882), 6 Nfld. L. R. 384.—**NFLD.**

581 i. *Creditor without notice—Business transactions with firm continued—Option to sue retired partner or existing firm—Estoppel.*]—Where there is a change of firm, an original partner having retired & a new partner having come into the firm, a customer who has dealt with the firm in ignorance of the change may proceed against either the old or the new firm, at his election. Having made his election by suing the new firm, he cannot afterwards make the retired partner liable.—SMITH *v.* GREGORY (1888), 6 N. Z. L. R. 319.—**N.Z.**

PART IV. SECT. 2, SUB-SECT. 3.—B. (*c*).

582 i. *Whether liability continuing.*]—MCKEAND *v.* MORTIMORE (1854), 11 U. C. R. 428.—**CAN.**

assent to the carrying of the debt into a new account with the remaining partners.—DAVID *v.* ELLICE (1826), 5 B. & C. 196; 7 Dow. & Ry. K. B. 690; 4 L. J. O. S. K. B. 125; 108 E. R. 73.

Annotations:—**Dbtd.** Kirwan *v.* Kirwan (1834), 2 Cr. & M. 617. **Distd.** & **Dbtd.** Thompson *v.* Percival (1834), 5 B. & Ad. 925. **Dbtd.** Hart *v.* Alexander (1837), 2 M. & W. 484; Winter *v.* Innes (1838), 4 My. & Cr. 101; *Re* Walden, *Ex p.* Bradbury (1839), 4 Deac. 202; Mills *v.* Boyd (1842), 6 Jur. 943; Lyth *v.* Ault (1852), 7 Exch. 669. **Refd.** Blair *v.* Bromley (1846), 5 Hare, 542. **Mentd.** *Re* European Assurance Society Arbitration Acts, Hort's Case, Grain's Case (1875), 34 L. T. 766.

583. ——.]—Partners being indebted to their bankers, it was agreed between them that one should retire, that the assets should be transferred to the continuing partners, who were to take upon themselves the partnership liabilities, & that the bankers should release the retiring partner from his liability. The bankers signed a memorandum acceding to the agreement, & having afterwards attempted by means of the debt to make the retiring partner a bkpt., they were restrained from so doing by an injunction.—ATTWOOD *v.* BANKS (1839), 2 Beav. 192; 9 L. J. Ch. 99; 4 Jur. 100; 48 E. R. 1153.

Annotations:—**Mentd.** Anon. (1844), 8 Jur. 1085; Pim *v.* Wilson (1848), 2 Ph. 653; Cadiz Waterworks Co. *v.* Barnett (1874), L. R. 19 Eq. 182.

584. ——.]—A retired partner averred by his answer to a bill for an account against the partnership that pltf. had adopted his successors in the partnership as his, pltf.'s, exclusive debtors; but stated no facts in proof of such adoption. The accounts were directed against him, as well as the other partners, without prejudice to the question of whether the retired partner was or was not discharged from the debt by the acts of pltf.—BENSON *v.* HADFIELD (1844), 4 Hare, 32; 67 E. R. 549.

Annotations:—**Refd.** *Re* Smith, Knight, *Ex p.* Gibson (1869), 4 Ch. App. 662; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32. **Mentd.** Ford *v.* Beech (1848), 11 Q. B. 852; *Re* Commercial Bank Corpn. of India & the East, Jones' Claim (1868), 18 L. T. 668.

585. ——.]—To a declaration in debt for goods sold & delivered A. one of defts. pleaded that, at the time of the debt accruing, he & B. carried on business as partners, & that the goods for which the action was brought were bought by them as partners; & that he A. was about to retire from the partnership, of all which pltf. had notice; & that it was agreed that £12 should be paid pltf., & that she should relinquish & abandon her claim against deft. A. for the residue, & that deft. B. should become solely & separately liable to pay pltf. the said residue:—*Held:* a good defence.—LYTH *v.* AULT (1852), 7 Exch. 669; 21 L. J. Ex. 217; 19 L. T. O. S. 124; 155 E. R. 1117.

Annotation:—**Refd.** Brinsmead *v.* Locke (1889), 5 T. L. R. 542.

586. ——.]—BRINSMEAD & SON *v.* LOCKE & SON (1889), 5 T. L. R. 542.

587. Constructive acceptance.]—H., an officer serving in the King's Forces in India, in 1815, deposited money with A., B., C., & D., bankers in Calcutta, trading under the firm of A. & Co. In 1818, A. came to England, having executed a deed whereby he was to cease to be a partner in the firm in 1822, & E. was to be admitted a partner in his room. In 1822, A. accordingly retired from, & E. came into the partnership, & the dissolution was announced in the *Calcutta Gazette*. It appeared to be the practice of the firm to give notice of changes of partnership to their customers by circular letters; there was, however, no proof that any letter reached H. announcing A.'s retirement. In 1822, A. became a candidate for a seat in the direction of the East India co., & repeatedly published an address to the proprietors of East India Stock in several newspapers, stating that his connection with mercantile concerns in India had ceased. Two of these newspapers were taken in at the reading room of a town where H. who had returned to England, was then resident. The accounts current of A. & co. were transmitted yearly to H., from 1817 to 1832, & the rates of interest allowed on them varied several times after the year 1822. In 1831, H. executed a power of attorney to the then members of the firm of A. & Co., to collect the effects of a testator in India. In 1832, A. & co. failed. In 1833, H. executed another power of attorney to C., who also had then retired from the firm, to prove debts against the estate of the bkpts., naming them, & describing them as carrying on business under the firm of A. & co., & to receive dividends:—*Held:* these facts constituted sufficient evidence to go to the jury to show that H. knew that A. had retired from the firm, & E. had come in in his place; & he had agreed to discharge A. from liability & take the new firm as his debtors.—HART *v.* ALEXANDER (1837), 2 M. & W. 484; Murp. & H. 63; 6 L. J. Ex. 129; 150 E. R. 848.

Annotations:—**Distd.** Benson *v.* Hadfield (1844), 4 Hare, 32; Harris *v.* Farwell (1851), 15 Beav. 31. **Refd.** Lyth *v.* Ault (1852), 7 Exch. 669; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32. **Mentd.** Ford *v.* Beech (1848), 11 Q. B. 852; Cochrane *v.* Green (1860), 9 C. B. N. S. 448; Redpath *v.* Wigg (1866), L. R. 1 Exch. 335; Maxted *v.* Paine (1871), L. R. 6 Exch. 132.

588. —— Acceptance of rent.]—W. & H. by agreement in Mar. 1827, became tenants to pltf. for three years, of premises occupied by them as partners, with the power to them to extend the term to seven years, by giving pltf. a notice to that effect. In Jan. 1829, W. & H. gave notice accordingly. At Midsummer, 1828, W. retired from the partnership, & in Jan. 1829, H. entered into partnership with S. & H. & S. carried on the business under the firm of H. & S. until 1831. Pltf. gave receipts for the rent as received from H. after W. retired, & as received from H. & S. after S. became partner with H. In Feb. 1829, pltf. gave to H. a letter to pltf.'s attorney, signifying, that a lease might be made to H. & S. but this letter was kept by H. & not acted upon & no lease was prepared:—*Held:* W. remained liable to pltf. for the rent accruing in 1831.—GRAHAM *v.* WHICHELO (1832), 1 Cr. & M. 188; 3 Tyr. 201; 2 L. J. Ex. 70; 149 E. R. 368.

Annotation:—**Refd.** M'Donnell *v.* Pope (1852), 9 Hare, 705.

589. —— Knowledge of change of partners.]—A clerk in a house lent money to the partnership composing it, two of them signed an acknowledgment for it agreeing to pay 5 per cent. interest. Various changes took place in the house, in the

582 ii. ——.]—WATTS *v.* ROBINSON (1872), 32 U. C. R. 362.—**CAN.**

582 iii. ——.]—BRESSE *v.* GRIFFITH (1894), 24 O. R. 492.—**CAN.**

582 iv. ——.] — HOUGH LITHOGRAPHING CO. *v.* MORLEY (1910), 15 O. W. R. 571; 20 O. L. R. 484.—**CAN.**

582 v. ——.]—MASON & CO., LTD. *v.* TURNBULL (1914), 28 W. L. R. 511; 24 Man. L. R. 465.—**CAN.**

582 vi. ——.]—THOMPSON *v.* DENNY (B. C.) (1916), 34 W. L. R. 483.—**CAN.**

582 vii. ——.]—CUMMINS *v.* CUMMINS (1845), 3 Jo. & Lat. 64.—**IR.**

582 viii ——.]—PEARSTON *v.* WILSON (1856), 19 Dunl. (Ct. of Sess.) 197; 29 Sc. Jur. 94.—**SCOT.**

582 ix. ——.]—BLACKS *v.* GIRDWOOD (1885), 13 R. (Ct. of Sess.) 243; 23 Sc. L. R. 161.—**SCOT.**

582 x. ——.]—SMITH'S TRUSTEES *v.* SMITH (1900), 7 S. L. T. 286.—**SCOT.**

587 i. *Constructive acceptance.*] — WATSON MANUFACTURING CO. *v.* BOWSER (1911), 18 W. L. R. 235; 21 Man. L. R. 21.—**CAN.**

Sect. 2.—*Liability of individual partners: Sub-sect.* 3, *B.* (*c*), *& C.* (*a*).]

course of which one of the parties who signed the acknowledgment retired from it. The interest was paid from time to time by the different firms, till the last became bkpt. The clerk continued to serve all the different firms, & was cognisant of the different changes:—*Held:* he might, notwithstanding, recover the money he had advanced from the two persons who signed the acknowledgment.—BLEW *v.* WYATT (1832), 5 C. & P. 397, N. P.

590. —— New security accepted.]—(1) A contract to discharge a retiring partner from a debt due from the firm may be proved either by an express agreement, or by facts & conduct from which it may be fairly inferred.

(2) Taking a new security is not of itself sufficient to discharge the retiring partner, but there must also be an agreement, either express or to be fairly inferred, to discharge the old firm.—HARRIS *v.* FARWELL (1851), 15 Beav. 31; 51 E. R. 447; *previous proceedings* (1846), 13 Beav. 403.

Annotations:—As to (2) **Distd.** *Re* Head, Head *v.* Head (No. 2) (1894), 63 L. J. Ch. 549. **Refd.** Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32. *Generally*, **Refd.** Bilborough *v.* Holmes (1876), 5 Ch. D. 255.

591. —— —— Question for jury.]—SPENCELEY *v.* GREENWOOD, No. 357, *ante*.

C. Liability of Estate of Deceased Partner.

(*a*) *In General.*

See Partnership Act, 1890 (c. 39), s. 9.

592. General rule—Estate severally liable.] The rule in equity that a partnership contract is to be treated as joint & several applies only to the case of the administration of the estate of a deceased member of a partnership; & consequently a judgment recovered against one or more of several joint contractors is, even without satisfaction, a bar to an action against another joint contractor sued alone. This rule is not affected by the operation of Jud. Acts.

W. M. & H. were jointly interested in certain speculations in iron, & it was agreed between the parties that "the financial arrangements should be managed entirely" by W. & M. K. advanced money to W. & M. for the purpose of these speculations, & brought an action to recover the debt, & obtained judgment, but W. & M. became bkpt., & the judgment remained unsatisfied. K. afterwards discovered that H. had been a partner in the speculations, & brought a second action against him:—*Held:* the second action was not maintainable, the first judgment being a bar to it, though still unsatisfied.—KENDALL *v.* HAMILTON (1879), 4 App. Cas. 504; 48 L. J. Q. B. 705; 41 L. T. 418; 28 W. R. 97, H. L.

Annotations:—**Consd.** *Re* Hodgson, Beckett *v.* Ramsdale (1885), 31 Ch. D. 177. **Apld.** Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337. **Refd.** *Re* McRae, Forster *v.* Davis, Norden *v.* McRae (1883), 25 Ch. D. 16; *Re* Outram, *Ex p.* Ashworth & Outram (1893), 63 L. J. Q. B. 308; *Re* Pennington & Owen, [1925] 1 Ch. 825. **Mentd.** *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50; Munster *v.* Cox (1885), 10 App. Cas. 680; Badeley *v.* Consolidated Bank (1886), 34 Ch. D. 536; Leduc *v.* Ward (1886), 54 L. T. 214; Cambefort *v.* Chapman (1887), 19 Q. B. D. 229; Odell *v.* Cormack (1887), 19 Q. B. D. 223; Pilley *v.* Robinson (1887), 20 Q. B. D. 155; Beck *v.* Pierce (1889), 23 Q. B. D. 316; *Re* Crook, *Ex p.* Collins (1891), 66 L. T. 29; Hammond *v.* Schofield, [1891] 1 Q. B. 453; Hoare *v.* Hiblett, [1891] 1 Q. B. 781 Westmoreland Green & Blue Slate Co. *v.* Feilden, [1891] 3 Ch. 15; British South Africa Co. *v.* Companhia de Mocambique, [1893] A. C. 602; Weall *v.* James (1893), 68 L. T. 515; Wilson *v.* Balcarres Brook SS. Co., [1893] 1 Q. B. 422; *Re* Errington, *Ex p.* Mason, [1894] 1 Q. B. 11; Hall *v.* Sim (1894), 10 T. L. R. 463; Robinson *v.* Geisel (1894), 64 L. J. Q. B. 52; Wigram *v.* Cox, Buckley, [1894] 1 Q. B. 792; Wegg Prosser *v.* Evans, [1895] 1 Q. B. 108; McLeod *v.* Power, [1898] 2 Ch. 295; *Re* Ritson, Ritson *v.* Ritson (1898), 67 L. J. Ch. 365; Eccl. Comrs. *v.* Pinney, [1899] 2 Ch. 729; McCheane *v.* Gyles (No. 2), [1902] 1 Ch. 911; Morel *v.* Westmorland (1902), 87 L. T. 635; Codling *v.* Mowlem, [1914] 2 K. B. 61; Isaacs *v.* Salbstein, [1916] 2 K. B. 139; Goldrei, Foucard *v.* Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180; Norbury Natzio *v.* Griffiths, [1918] 2 K. B. 369; Rodriguez *v.* Speyer, [1919] A. C. 59; Moore *v.* Flanagan, [1920] 1 K. B. 919; Clarkson *v.* Davies, [1923] A. C. 100; Parr *v.* Snell, [1923] 1 K. B. 1; Duffner *v.* Bowyer (1924), 40 T. L. R. 700; The Koursk, [1924] P. 140; Bennett *v.* Whitehead, [1926] 2 K. B. 380; Firm of R. M. K. R. M. *v.* Firm of M. R. M. V. L., [1926] A. C. 761; Pirie *v.* Richardson (1926), 70 Sol. Jo. 1023.

593. ——.]—The creditor of a partnership firm, although not strictly a joint & several creditor, has concurrent remedies against the estate of a deceased partner & the surviving partner; & it makes no difference which remedy he pursues first. But it is necessary that the surviving partner should be present at taking the accounts of the estate of deceased partner, & that the partnership creditor should not come into competition with the separate creditors of deceased partner.

A father & son being in partnership, became indebted to pltfs. who were bankers. The son died, & the father brought an action & obtained judgment for the administration of his son's estate. Pltfs. carried in a claim for the debt against the separate estate, being at that time unable to prove the existence of a partnership, & were declared entitled to a dividend. Afterwards the father died, & pltfs. having obtained proof of the partnership, brought an action to make his estate liable for the partnership debt:—*Held:* (1) the proceedings in the previous action did not constitute a *res judicata* or estoppel so as to prevent pltfs. from recovering the debt; but they were put under an undertaking to postpone their dividend on the son's separate estate to the claims of his separate creditors.

(2) Where persons have had dealings with a partnership firm the mere publication of the dissolution in the *Gazette* is not sufficient to affect such persons with notice, if they continue to give credit on the footing of the continuance of the partnership. It is necessary in such a case that actual knowledge should be brought home to the persons who had previously given credit to the firm (SIR J. HANNEN).—*Re* HODGSON, BECKETT *v.* RAMSDALE (1885), 31 Ch. D. 177; 55 L. J. Ch. 241; 54 L. T. 222; 34 W. R. 127; 2 T. L. R. 73, C. A.

Annotations:—As to (1) **Refd.** Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337; Moore *v.* Knight, [1891] 1 Ch. 547. *Generally*, **Mentd.** *Re* Farman, Farman *v.* Smith (1887), 57 L. J. Ch. 637; Wildish *v.* Fowler (1888), 5 T. L. R. 113; Wegg-Prosser *v.* Evans (1894), 64 L. J. Q. B. 1; McLeod *v.* Power, [1898] 2 Ch. 295; Rawlinson *v.* Scholes (1898), 79 L. T. 350; Isaacs *v.* Salbstein, [1916] 2 K. B. 139.

594. Foundation of creditor's right—Equitable rights of partners inter se.]—Creditors, as such, independent of the effect of any special contract, have no lien or charge upon the effects of their debtor; & in all these cases of distribution of joint effects, it is by force of the equities of the

PART IV. SECT. 2, SUB-SECT. 3.—C. (a).

593 i. *General rule.*]—The estate of a deceased partner is not liable to a creditor for a debt incurred by the surviving partner subsequent to the death of the former, although the debt was incurred to take up bills of lading for, & obtain delivery of, goods which had been ordered by the partners during the lifetime of the deceased partner, but did not come forward until after his death.

The creditor will be entitled in respect of such a debt to a decree against the surviving partner personally & against the assets of the partnership in his hands.—SESHI AMMAL *v.* VAIRAVAN CHETTIAR (1919), I. L. R. 42 Mad. 15.—**IND.**

partners among themselves that creditors are paid not by force of their own claim upon the assets (LORD ELDON, C.).—*Ex p.* KENDALL (1811), 17 Ves. 514; 34 E. R. 199; *sub nom. Re* DAWES, *Ex p.* KENDALL, 1 Rose, 71, L. C.

Annotations:—**Refd.** Devaynes *v.* Noble Sleechs Case (1816), 1 Mer. 529; Devaynes *v.* Noble, Baring *v.* Noble (1831), 2 Russ. & M. 495; Thorpe *v.* Jackson (1837), 2 Y. & C. Ex. 553; Winter *v.* Innes (1838), 4 My. & Cr. 101; Brown *v.* Gordon (1852), 16 Beav. 302; Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610. **Mentd.** Lyth *v.* Ault & Wood (1852), 7 Exch. 669; Kendall *v.* Hamilton (1879), 4 App. Cas. 504; *Re* Stratton, *Ex p.* Salting (1883), 49 L. T. 694.

595. Use of deceased's name.]—It is impossible that using testator's name in the trade can subject his name to the trade debts (LORD THURLOW, C.).—WEBSTER *v.* WEBSTER (1791), 3 Swan. 490, n.; 36 E. R. 949, L. C.

Annotations:—**Refd.** *Re* David & Matthews, [1899] 1 Ch. 378. **Mentd.** Hall *v.* Barrows (1863), 1 New Rep. 543; Leather Cloth Co. *v.* American Leather Cloth Co. (1863), 4 De G. J. & Sm. 137; Levy *v.* Walker (1879), 10 Ch. D. 436; Friend *v.* Young, [1897] 2 Ch. 421.

See, now, Partnership Act, 1890 (c. 39), s. 14 (2).

596. Effect of want of notice of death.]—(1) V., a customer of the banking-house of D. & co., transferred to N. a partner in the firm, a sum of stock by way of security for money borrowed of them, & gave notes for the amount, payable on the stock being retransferred to him. He paid off these notes, & afterwards borrowed a further sum on the joint note of himself & his son, without calling for a retransfer. The stock so transferred having been blended with other stock, of which N. was in like manner possessed by way of security for other customers, was sold by the partnership, & the produce applied to the use of the partnership, except a small balance still remaining in the name of N. D., another of the partners, afterwards died, & the partnership was carried on without any alteration of firm till the surviving partners became bkpt. On the bill of V. against the assignees of bkpts., & against the representatives of D. it was decided that he was entitled to the stock remaining in the name of N., the other creditors in respect of stock transferred having been satisfied their demands, as being sufficiently appropriated; to set off, against the joint note of himself & his son, so much of the money received by the partnership out of the sale of the remainder of the stock as was equal to the amount of such joint note; to prove the residue as a debt against the estate of bkpts.; & to receive from D.'s estate the amount of the deficiency.

(2) The death of a partner of itself works a dissolution of the partnership & the mere want of notice does not, it seems, make the estate of deceased partner liable to the debts of the continuing partners. *Secus*, if one of the surviving partners is an exor. of deceased.—VULLIAMY *v.* NOBLE (1817), 3 Mer. 593; 36 E. R. 228, L. C.

Annotations:—*As to* (1) **Refd.** Braithwaite *v.* Britain (1836), 1 Keen. 206. *As to* (2) **Refd.** Chapman *v.* Beckinton (1842), 3 Q. B. 703. *Generally*, **Mentd.** Winter *v.* Innes (1838), 4 My. & Cr. 101; Jones *v.* Mossop (1844), 3 Hare, 568; Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610; Middleton *v.* Pollock, *Ex p.* Knight & Raymond (1875), L. R. 20 Eq. 515.

597. Liability to joint creditors.]—A joint creditor by simple contract may go against the assets of a deceased partner but cannot before the account retain separate property of that partner in his possession.—STEPHENSON *v.* CHISWELL (1797), 3 Ves. 566; 30 E. R. 1158, L. C.

Annotation:—**Consd.** Addis *v.* Knight (1817), 2 Mer. 117.

598. —— In priority to separate creditors.]—Joint creditors of a partnership are not entitled to have the separate estate of a deceased partner applied in payment of their joint debts, until separate creditors of such deceased partners are paid.

A joint creditor of a partnership is entitled to a decree in one suit, on behalf of himself & all other creditors, against the representatives of several deceased partners & the surviving partners, for the administration of estates of all deceased partners.—BROWN *v.* DOUGLAS (1840), 11 Sim. 283; 10 L. J. Ch. 14; 4 Jur. 1200; 59 E. R. 883.

Annotation:—**Mentd.** Brown *v.* Weatherby (1841), 10 L. J. Ch. 190.

599. Transaction in partnership name—Indorsement of bill of exchange.]—(1) A. & B., who were partners, & C., as their surety, gave a joint & several promissory note to D., by which they "jointly & severally promise to pay" to D. the amount of a partnership debt, due from A. & B. The note was signed by A. & B., not as individuals, but in their partnership firm, & by C. the surety:—*Held:* this note could not be treated as the several note of each one of the three, but as the several note only of the surety; & the joint note of A. & B.; &, on the bkpcy. of A., who had survived his partner B., the holder of the note could only rank as a creditor against the joint estate.

It follows, if I am right, that it is only as the surviving partner of his firm that bkpt. became severally indebted upon the note, & the proof therefore must rank, for the purposes of dividend, among the partnership debts, & not among those which in the lifetime of his partner were merely the separate debts of A., or which were incurred by A. after the death of B. (KNIGHT BRUCE, V.-C.).

(2) A. survived B. his partner, & continued the business in the same firm of "A. & B."; at the time of B.'s death, a large balance was owing by them to their bankers, to whom A., some time after B.'s death, indorsed several bills in the partnership firm of A. & B.:—*Held:* it could not be inferred from this circumstance alone, that the bills were so indorsed upon a partnership transaction of A. & B., & the bankers might prove the amount of the bills against the separate estate of A.—*Re* MANLEY, *Ex p.* WILSON (1842), 3 Mont. D. & De G. 57.

Annotation:—*Generally*, **Refd.** *Re* Carwood, *Ex p.* Bingley (1848), De G. 635.

600. Fraudulent conduct by surviving partner—Transaction within scope of business.]—On the occasion of a mtge. a firm of solrs. acted for the mtgor. One of the partners conducted the matter, & delivered an abstract of title, suppressing all reference to prior mtges. within his knowledge affecting part of the proposed security. The other partner having died, & the security appearing to be deficient:—*Held:* his estate was liable to a claim on the part of the transferees of the mtge., inasmuch as the loss accrued by the default of the surviving partner within the scope of the partnership business.—SAWYER *v.* GOODWIN (1867), 36 L. J. Ch. 578; 16 L. T. 622; 15 W. R. 1008.

Annotation:—**Mentd.** Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337.

601. Personal liability of personal representative—When receiving share of profits—On behalf of beneficiary.]—Where the exors. of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter:—*Held:* they were liable upon a bill drawn for the accommodation of the partnership, & paid in discharge of a partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, & the exors., when they divided the profits & loss of the trade, carried the same to the account of the infant, & took no

Sect. 2.—*Liability of individual partners: Sub-sect.* 3, *C.* (*a*) & (*b*).]

part of the profits themselves.—WIGHTMAN *v.* TOWNROE (1813), 1 M. & S. 412; 105 E. R. 154.

Annotations:— **Apld.** Labouchere *v.* Tupper (1859), 11 Moo. P. C. C. 198. **Refd.** Holme *v.* Hammond (1872), L. R. 7 Exch. 218. **Mentd.** Hickman *v.* Cox (1857), 3 C. B. N. S. 523; Bullen *v.* Sharp (1865), 12 Jur. N. S. 247.

602. —— —— On behalf of deceased partner.]—HOLME *v.* HAMMOND, No. 103, *ante*.

603. Breach of trust by deceased partner.]—BLYTH *v.* FLADGATE, MORGAN *v.* BLYTH, SMITH *v.* BLYTH, No. 476, *ante*.

604. Business carried on abroad — Action brought in England—Defence based on foreign law.]—Creditors of a firm carrying on business in Spain brought an action in England, on behalf of the firm's creditors, against the exors. of a member of the firm, who had died in England leaving property there, claiming that his estate, after payment of his funeral & testamentary expenses & separate debts, was liable for the firm's debts, & asking for administration on that footing. The defence was that the rights of the parties were governed by the law of Spain, under which the firm's creditors were not entitled to proceed against the separate estate of deceased partner until after they had exhausted the property of the firm:—*Held:* the matter stated in the defence was mere procedure, & the defence was bad.—*Re* DOETSCH, MATHESON *v.* LUDWIG, [1896] 2 Ch. 836; 65 L. J. Ch. 855; 75 L. T. 69; 45 W. R. 57; 40 Sol. Jo. 685.

605. No obligation incurred — During period of partnership.]—Prior to 1895, E. & co., manufacturers, had employed F. & co. to sell goods for them on commission. The course of business was for E. & co. to send goods to F. & co., who would forward them to the purchasers, receive the purchase-money, &, after deducting their commission, account to E. & co. for the balance. In Jan. 1895, one of the partners in F. & co. died, & the business was then carried on by the surviving partner. Shortly before the death F. & co. had procured an order for goods, none of which were delivered until after the death, when they were sent to the surviving partner, who forwarded them to the purchaser & received the purchase-money, but did not account for it. In 1896 E. & co. obtained judgment against the surviving partner for the balance of the account due to them from F. & co., but nothing was recovered under that judgment. On a claim by E. & co. to prove against the estate of deceased partner:—*Held:* as to the transactions which took place after the death, the contract of agency between F. & co. & E. & co. was determined by the death, & consequently no "debt or obligation" within Partnership Act, 1890 (c. 39), s. 9, had been incurred while deceased was a partner, & his estate was not liable.—FRIEND *v.* YOUNG, [1897] 2 Ch. 421; 77 L. T. 50; 46 W. R. 139; 41 Sol. Jo. 607; *sub nom. Re* FRIEND, FRIEND *v.* FRIEND, 66 L. J. Ch. 737.

Annotations:—**Follд.** Bagel *v.* Miller, [1903] 2 K. B. 212. **Mentd.** North American Land & Timber Co. *v.* Watkins, [1904] 1 Ch. 242; Seymour *v.* Pickett, [1905] 1 K. B. 715; *Re* Boswell, Merritt *v.* Boswell, [1906] 2 Ch. 359; Henry *v.* Hammond, [1913] 2 K. B. 515.

606. Goods ordered in lifetime of deceased partner—Delivered after death.]—The estate of deceased partner is not liable in an action for the price of goods sold & delivered where the order for the goods is given in the lifetime of deceased partner but delivery does not take place till after his death.—BAGEL *v.* MILLER, [1903] 2 K. B. 212; 72 L. J. K. B. 495; 88 L. T. 769; 8 Com. Cas. 218, D. C.

607. Debt barred by lapse of time—Equitable right of partners to adjustment inter se—Right of creditor to recover thereunder.] — Creditor of a partnership, against whose debt the estate of deceased partner is in a suit directly instituted against that estate entitled to the protection of Stat. Limitations, cannot, on a bill against the surviving partners & the representatives of the estate of deceased partner, alleging that the surviving partners are indebted to deceased partner, recover his debt against the separate estate of such deceased partner, on the ground of the equity of the partners amongst themselves to enforce an adjustment of the partnership transactions; for creditor can at the utmost only stand in the place of the surviving partners as against the estate of deceased partner, & in such a case the surviving partners have no claim on the estate of deceased.—WAY *v.* BASSETT (1845), 5 Hare, 55; 15 L. J. Ch. 1; 6 L. T. O. S. 118; 10 Jur. 89; 67 E. R. 825.

Annotations:—**Refd.** Brown *v.* Gordon (1852), 16 Beav. 302. **Mentd.** Fordham *v.* Wallis (1853), 10 Hare, 217; *Re* Macdonald, Dick *v.* Fraser, [1897] 2 Ch. 181.

——.]—*See, further,* LIMITATION OF ACTIONS, Vol. XXXII., pp. 354, 388–389, 515–516, Nos. 369, 700, 702, 703, 1736–1739.

Partners as joint lessees.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 420, Nos. 5665–5666.

Administration of estate by Court.]—*See* EXECUTORS, Vol. XXIV., p. 793, Nos. 8231–8236; p. 807, Nos. 8358–8359.

(*b*) *On Bankruptcy of Survivors.*

See Partnership Act, 1890 (c. 39), s. 9.

608. New partnership formed by survivors—Payment by them of interest on debt.]—Bankers upon a deposit of money with them gave notes bearing interest; the partnership was dissolved: one of the partners soon afterwards died; & his creditors were called by advertisement: another partnership was formed by the survivors & others; who re-issued notes of the former partnership, & paid the interest of the deposit notes for near two years; when they failed: the assets of deceased partner are not discharged.—DANIEL *v.* CROSS (1796), 3 Ves. 277; 30 E. R. 1009, L. C.

Annotations:—**Apld.** Devaynes *v.* Noble, Sleech's Case (1816), 1 Mer. 539; Gough *v.* Davies & Gibbons (1817), 4 Price, 200.

609. Sale of stock—Breach of trust — Application to partnership uses—Inference of adoption of survivors as debtors.] — Deposit with the partnership of Exchequer bills which were sold in D.'s lifetime & the produce applied to the use of the house: D.'s estate is responsible in respect of the breach of trust; & not discharged by subsequent acts from which an inference might be drawn of creditor's adopting the surviving partners as his debtor's.—DEVAYNES *v.* NOBLE, CLAYTON'S CASE (1816), 1 Mer. 529, 572; 8 L. J. Ch. 256; 35 E. R. 767, 781.

Annotations:—**Distd.** *Re* Biddulph, *Ex p.* Eyre (1843), 3 Mont. D. & De G. 12. **Refd.** Bodenham *v.* Purchas (1818), 2 B. & Ald. 39; Brooke *v.* Enderby (1820), 2 Brod. & Bing. 70; Simson *v.* Ingham (1823), 2 B. & C. 65; *Re* Tills, *Ex p.* Alexanders (1824), 2 L. J. O. S. Ch. 159; Pemberton *v.* Oakes (1827), 4 Russ. 154; Sims *v.* Bond (1833), 5 B. & Ad. 389; Smith *v.* Ure (1833), 2 Knapp, 188; Smith *v.* Wigley (1833), 3 Moo. & S. 174; Wilson *v.* Hirst (1833), 4 B. & Ad. 760; Nottidge *v.* Prichard (1834), 8 Bli. N. S. 493; Toulmin *v.* Copland (1834), 2 Cl. & Fin. 681; Whittington *v.* Jennings (1834), 6 Sim. 493; Toulmin *v.* Copland (1836), 3 Y. & C. Ex. 625; Walker *v.* Hardman (1837), 11 Bli. 229; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214; Wickham *v.* Wickham (1855), 2 K. & J. 478; Scott *v.* Beale & Bishop (1859), 6 Jur. N. S. 559; Merriman *v.* Ward (1860), 1 John. & H. 371; Denison *v.* Avison (1865), 12 L. T. 340; Laing *v.* Campbell (1865), 36 Beav. 3; Hooper *v.* Keay

(1875), 1 Q. B. D. 178; Lacey *v.* Hill, Leney *v.* Hill (1876), 4 Ch. D. 537; *Re* Head, Head *v.* Head (No. 2) (1894), 63 L. J. Ch. 549; *Re* Bourne, Bourne *v.* Bourne, [1906] 2 Ch. 427. **Mentd.** Williams *v.* Rawlinson (1825), 3 Bing. 71; Stoveld *v.* Eade (1827), 4 Bing. 154; Field *v.* Carr (1828), 5 Bing. 13; Proctor *v.* Brain (1828), 2 Moo. & P. 284; Solarte *v.* Maes, Hilbers (1832), 1 L. J. K. B. 196; Taylor *v.* Kymer (1832), 3 B. & Ad. 320; Chitty *v.* Naish (1834), 2 Dowl. 511; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Mills *v.* Fowkes (1839), 5 Bing. N. C. 455; Smith *v.* Nicolls (1839), 8 L. J. C. P. 92; Bower *v.* Marris (1841), Cr. & Ph. 351; Henniker *v.* Wigg (1843), 4 Q. B. 792; Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Jones *v.* Broadhurst (1850), 9 C. B. 173; Pennell *v.* Deffell (1853), 4 De G. M. & G. 372; Harford *v.* Lloyd (1855), 20 Beav. 310; Nash *v.* Hodgson (1855), 6 De G. M. & G. 474; Bell *v.* Buckley (1856), 11 Exch. 631; Cavendish *v.* Geaves (1857), 24 Beav. 163; *Re* Medewe's Trust (1859), 26 Beav. 588; Hipkins *v.* Amery (1860), 2 Giff. 292; Siebel *v.* Springfield (1863), 3 New Rep. 36; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; Brown *v.* Adams (1869), 21 L. T. 71; *Re* Boys, Eedes *v.* Boys, *Ex p.* Hop Planters Co. (1870), L. R. 10 Eq. 467; Thompson *v.* Hudson (1871), 6 Ch. App. 320; *Re* Devonport & South Devon Steam Flour Mill Co., Bateman's Case (1873), 42 L. J. Ch. 577; City Discount Co. *v.* McLean (1874), L. R. 9 C. P. 692; Fenton *v.* Blackwood (1874), L. R. 5 P. C. 167; *Re* Hamilton, *Ex p.* Smith (1877), 25 W. R. 760; *Re* Taurine Co., Anning & Cobb's Claim (1877), 38 L. T. 53; Kinnaird *v.* Webster (1878), 10 Ch. D. 139; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377; Browning *v.* Baldwin (1879), 40 L. T. 248; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696; London & County Banking Co. *v.* Ratcliffe (1881), 6 App. Cas. 722; Blackburn Bldg. Soc. *v.* Cunliffe, Brooks (1882), 22 Ch. D. 61; *Re* Sherry, London & County Banking Co. *v.* Terry (1884), 25 Ch. D. 692; Parr *v.* Bradbury (1885), 1 T. L. R. 285; *Re* Companies Acts, *Ex p.* Watson (1888), 21 Q. B. D. 301; Hancock *v.* Smith (1889), 41 Ch. D. 456; Parkinson *v.* Wakefield (1889), 5 T. L. R. 562; Dreyfus *v.* Peruvian Guano Co., Peruvian Guano Co. *v.* Dreyfus (1892), 66 L. T. 536; *Re* Miller, *Ex p.* Official Receiver, [1893] 1 Q. B. 327; *Re* Hallett, *Ex p.* Blane, [1894] 2 Q. B. 237; *Re* Wood, Anderson *v.* London City Mission, [1894] 2 Ch. 577; *Re* London & General Bank (No. 2), [1895] 2 Ch. 673; *Re* Stenning, Wood *v.* Stenning (1895), 73 L. T. 207; Cory *v.* Mecca, The Mecca, [1897] A. C. 286; Mutton *v.* Peat (1900), 82 L. T. 440; Bank of New South Wales *v.* Goulburn Valley Butter Co., Proprietary, [1902] A. C. 543; Egg *v.* Craig (1903), 89 L. T. 41; *Re* Oatway, Hertslet *v.* Oatway, [1903] 2 Ch. 356; Smith *v.* Betty, [1903] 2 K. B. 317; Seymour *v.* Pickett, [1905] 1 K. B. 715; Bannatyne *v.* MacIver, [1906] 1 K. B. 103; Davis *v.* Petrie, [1906] 2 K. B. 786; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135; Ascherson *v.* Tredegar Dry Dock & Wharf Co., [1909] 2 Ch. 401; Galula *v.* Pintus (1911), 27 T. L. R. 382; *Re* O'Shea, *Ex p.* Lancaster, [1911] 2 K. B. 981; Deeley *v.* Lloyds Bank, [1912] A. C. 756; *Re* British Red Cross Balkan Fund, British Red Cross Soc. *v.* Johnson, [1914] 2 Ch. 419; Sinclair *v.* Brougham, [1914] A. C. 398; Roscoe, Bolton *v.* Winder, [1915] 1 Ch. 62; Bradford Old Bank *v.* Sutcliffe (1918), 88 L. J. K. B. 85; *Re* Hodgson's Trusts, Public Trustee *v.* Milne, [1919] 2 Ch. 189.

610. —— —— ——.]—Creditors, in respect of stock standing in the name of the partners, which was sold in breach of trust, & the proceeds applied to the use of the partnership, entitled as against the estate of deceased partner, either to consider it as a debt, or to have the stock specifically replaced, at their option. It makes no difference that the stock stood in the names of, & was sold by, one of the partners only, the proceeds having been applied to the partnership use.—DEVAYNES *v.* NOBLE, BARING'S CASE (1816), 1 Mer. 529, 611; 35 E. R. 767, 794.

Annotations:—**Distd.** *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12. **Refd.** Sims *v.* Bond (1833), 5 B. & Ad. 389; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214. **Mentd.** Taylor *v.* Kymer (1832), 3 B. & Ad. 320; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Bower *v.* Marris (1841), Cr. & Ph. 351; Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Harford *v.* Lloyd (1855), 20 Beav. 310; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

611. —— —— ——.]—DEVAYNES *v.* NOBLE, JOHNES'S CASE (1816), 1 Mer. 529, 619; 35 E. R. 767, 797.

Annotations:—**Refd.** Sims *v.* Bond (1833), 5 B. & Ad. 389; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214; *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12. **Mentd.** Taylor *v.* Kymer (1832), 3 B. & Ad. 320; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Bower *v.* Marris (1841), Cr. & Ph. 351; Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Harford *v.* Lloyd (1855), 20 Beav. 310; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

612. —— ——.]—Transfer of stock to the partnership, as a security for advances under an agreement not to sell without notice. D.'s estate liable to the full extent of stock sold contrary to such agreement, & not only to the extent of the stock sold beyond the amount of the debt due to the partnership in respect of advances made by them.—DEVAYNES *v.* NOBLE, WARDE'S CASE (1816), 1 Mer. 529, 624; 35 E. R. 767, 799.

Annotations:—**Distd.** *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12. **Refd.** Sims *v.* Bond (1833), 5 B. & Ad. 389; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214. **Mentd.** Taylor *v.* Kymer (1832), 3 B. & Ad. 320; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Bower *v.* Marris (1841), Cr. & Ph. 351; Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Harford *v.* Lloyd (1855), 20 Beav. 310; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

613. —— **After decease of partner.**]—VAYNES *v.* NOBLE, BRICE'S CASE (1816), 1 Mer. 529, 620; 35 E. R. 767, 797.

Annotations:—**Consd.** *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12. **Refd.** Sims *v.* Bond (1833), 5 B. & Ad. 389; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214. **Mentd.** Taylor *v.* Kymer (1832), 3 B. & Ad. 320; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Bower *v.* Marris (1841), Cr. & Ph. 351; Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Harford *v.* Lloyd (1855), 20 Beav. 310; Lodge *v.* Prichard (1863), 1 De G. J. Sm. 610; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

614. —— —— **No notice of death.**]—Deposit of bills with the house in D.'s lifetime, which were sold by the house, part in his lifetime, & part after his death. The estate of D. is not answerable in respect of the latter, though in this particular case it appeared that the party who deposited them had no notice of the death of D.—DEVAYNES *v.* NOBLE, HOULTON'S CASE (1816), 1 Mer. 529, 616; 35 E. R. 767, 796.

Annotations:—**Consd.** *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12; Friend *v.* Young, [1897] 2 Ch. 421. **Refd.** Sims *v.* Bond (1833), 5 B. & Ad. 389; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214. **Mentd.** Taylor *v.* Kymer (1832), 3 B. & Ad. 320; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Bower *v.* Marris (1841), Cr. & Ph. 351; Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Harford *v.* Lloyd (1855), 20 Beav. 310; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

615. Creditors continuing to deal with firm—Cash balance at bank.]—DEVAYNES *v.* NOBLE, JOHNES'S CASE (1816), 1 Mer. 529, 619; 35 E. R. 767, 797.

Annotations:—**Consd.** *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12. **Refd.** Sims *v.* Bond (1833), 5 B. & Ad. 389; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214. **Mentd.** Taylor *v.* Kymer (1832), 3 B. & Ad. 320; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Bower *v.* Marris (1841), Cr. & Ph. 351; Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Harford *v.* Lloyd (1855), 20 Beav. 310; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

616. —— **Debts reduced, increased or remaining stationary.**]—Creditors, at the death of D., who continued to deal with the surviving partners, & were paid by them in part. Including, also, creditors whose debts remained unaltered, either by receipt or payment, & those whose debts had been subsequently increased by payments to the surviving partners:—*Held:* no discharge of deceased partner's estate.—DEVAYNES *v.* NOBLE,

Sect. 2.—*Liability of individual partners: Sub-sect.* 3, *C.* (*b*) & (*c*); *sub-sects.* 4 & 5. *Sect.* 3: *sect.* 1.]

SLEECH'S CASE (1816), 1 Mer. 529, 539; 35 E. R. 767, 771.

Annotations:—**Apld.** Wilkinson *v.* Henderson (1833), 1 My. & K. 582. **Consd.** *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12. **Refd.** Sumner *v.* Powell (1816), 2 Mer. 30; Sims *v.* Bond (1833), 5 B. & Ad. 389; Thorpe *v.* Jackson (1837), 2 Y. & C. Ex. 553; Winter *v.* Innes (1838), 4 My. & Cr. 101; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214; Beresford *v.* Browning, Browning *v.* Beresford (1875), L. R. 20 Eq. 564; Kendall *v.* Hamilton (1878), 3 C. P. D. 403; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32. **Mentd.** Taylor *v.* Kymer (1832), 3 B. & Ad. 320; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Bower *v.* Marris (1841), Cr. & Ph. 351; Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Harford *v.* Lloyd (1855), 20 Beav. 310; Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

617. —— ——.]—Creditors at the death of D., who continued to deal with the surviving partners, both by drawing out & paying in money, whereby their debts were increased, but never at any time reduced:—*Held:* no discharge of deceased partner's estate.—DEVAYNES *v.* NOBLE, PALMER'S CASE (1816), 1 Mer. 529, 623; 35 E. R. 767, 798.

Annotations:—**Consd.** *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12. **Refd.** Sims *v.* Bond (1833), 5 B. & Ad. 389; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214. **Mentd.** Taylor *v.* Kymer (1832), 3 B. & Ad. 320; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Bower *v.* Marris (1841), Cr. & Ph. 351; Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; Foley *v.* Hill (1844), 1 Ph. 399; Harford *v.* Lloyd (1855), 20 Beav. 310; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

618. Liability to equitable creditors.]—Equitable creditors cannot prove their debts under a decree for the proof of debts, without a declaration of their right by the ct., or some special direction to the master. Therefore one partner having died, & the surviving partners afterwards becoming bkpt., creditors, by promissory notes of the original partnership, cannot, under a common decree, prove their claims against the estate of deceased partner.—BOWLES *v.* YORK (1823), 1 L. J. O. S. Ch. 134.

619. Liability of deceased's estate for balance.]—VULLIAMY *v.* NOBLE, No. 596, *ante*.

620. ——.]—Joint creditor by simple contract may proceed against a clear residue of the assets of deceased partner, the survivor being insolvent; & may set off against a debt to deceased, from the survivor & himself as his surety, a debt to the survivor from deceased, which was agreed to be applied in liquidation of the debt secured.—CHEETHAM *v.* CROOK (1825), M'Cle. & Yo. 307; 148 E. R. 429.

621. —— **Retirement of partner before decease.**]—A. & B., partners, were indebted to pltf. on a promissory note. A. retired from the partnership. At the time of his retirement a large sum was due to him from the concern; for securing the payment of which B. gave him his bond, & it was agreed between them that B. should take on himself all the liabilities of the firm. For some years, pltf. received interest from B., dealing wholly with him. A. died. B. became bkpt., & pltf. proved his debt under the bkpcy., & filed his bill against A.'s exor. for the difference. It did not clearly appear whether pltf. was privy to the agreement between A. & B., or whether A. left assets in B.'s hands sufficient to meet the partnership liabilities. An issue was directed to try whether A. was indebted to pltf. at the time of filing the bill, upon an admission that he was living at that time:—*Semble:* the acceptance of the sole security of the continuing partner for a debt due from the firm may be a sufficient consideration for the discharge of a retiring partner.—MILLS *v.* BOYD (1842), 6 Jur. 943.

622. No joint assets.]—In creditor's suit for administering the assets of B., joint creditor of A. & B. was permitted to prove, A. having become bkpt., & it appearing that there were no joint assets of A. & B.—COWELL *v.* SIKES (1827), 2 Russ. 191; 38 E. R. 307.

Annotations:—**Distd.** Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610. **Refd.** Thorpe *v.* Jackson (1837), 2 Y. & C. Ex. 553; Winter *v.* Innes (1838), 4 My. & Cr. 101; Crossley *v.* Dobson (1848), 2 De G. & Sm. 486. **Mentd.** Jones *v.* Beach (1852), 2 De G. M. & G. 886.

623. Liability not dependent on bankruptcy.]—In a suit by joint creditor against the representatives of deceased partner & the surviving partner:—*Held:* pltf. entitled to satisfaction out of the assets of deceased partner, though it was not proved that the surviving partner was insolvent.

The surviving partner is properly joined as deft. in such a suit, being interested to contest the demand of pltf., & of all joint creditors, but the remedy against him is altogether at law.—WILKINSON *v.* HENDERSON (1833), 1 My. & K. 582; 2 L. J. Ch. 190; 39 E. R. 801.

Annotations:—**Apld.** Thorpe *v.* Jackson (1837), 2 Y. & C. Ex. 553. **Consd.** Brown *v.* Douglas (1840), 11 Sim. 283; Brown *v.* Weatherby (1841), 12 Sim. 6; Brett *v.* Beckwith (1856), 26 L. J. Ch. 130. **Apld.** *Re* Doetsch, Matheson *v.* Ludwig, [1896] 2 Ch. 836. **Refd.** Braithwaite *v.* Britain (1836), 1 Keen, 206; Winter *v.* Innes (1838), 4 My. & Cr. 101; Mills *v.* Boyd (1842), 6 Jur. 943; Way *v.* Bassett (1845), 5 Hare, 55; Brown *v.* Gordon (1852), 16 Beav. 302; Lyth *v.* Ault & Wood (1852), 7 Exch. 669; Lee *v.* Flood (1853), 2 W. R. 26; Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610; Bower *v.* Soc. des Affréteurs du Great Eastern (1867), 17 L. T. 490; Kendall *v.* Hamilton (1878), 3 C. P. D. 403; *Re* McRae, Forster *v.* Davis, Norden *v.* McRae (1883), 25 Ch. D. 16.

624. ——.]—(1) Every joint loan, whether contracted in relation to mercantile transactions or not, is in equity to be deemed joint & several; therefore, where four persons had opened a joint account with certain bankers, who had advanced to them money on such joint account:—*Held:* upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or showing that the latter were unable to pay by reason of their insolvency.

(2) But to a bill filed by joint creditors for the purpose of obtaining relief against the assets of deceased partner or joint contractor, the surviving partners or jont contractors must be made parties, though no decree is sought against them; such persons being necessarily interested in taking the accounts.—THORPE *v.* JACKSON (1837), 2 Y. & C. Ex. 553; 160 E. R. 515.

Annotations:—*As to* (1) **Refd.** Jones *v.* Beach (1852), 2 De G. M. & G. 886; Beresford *v.* Browning, Browning *v.* Beresford (1875), L. R. 20 Eq. 564. *As to* (2) **Dbtd.** Slater *v.* Wheeler (1838), 2 Jur. 887. **Refd.** Lyth *v.* Ault (1852), 7 Exch. 669. *Generally*, **Refd.** Other *v.* Iveson (1855), 3 Drew. 177.

625. Promissory note signed in name of firm—Additional signature of surety.]—*Re* MANLEY, *Ex p.* WILSON, No. 599, *ante*.

(*c*) *Creditor dealing with Survivor.*

See Partnership Act, 1890 (c. 39), s. 9.

626. Liability of survivor accepted by creditor.]—The estate of one of two partners is not, after his death, discharged from a partnership debt by the circumstance that creditor continues his transactions with the survivor, & forbears, for some

years, at the survivor's request, to take any steps to enforce payment of his debt.

Secus: where the transactions show that creditor has accepted the liability of the survivor in discharge of the liability of the partnership.—WINTER *v.* INNES (1838), 4 My. & Cr. 101; 2 Jur. 981; 41 E. R. 40, L. C.

Annotations:—**Apld.** Mills *v.* Boyd (1842), 6 Jur. 943. **Distd.** Way *v.* Bassett (1845), 5 Hare, 55. **Consd.** Harris *v.* Farwell (1851), 15 Beav. 31. **Refd.** Brown *v.* Gordon (1853), 22 L. J. Ch. 65; Thompson *v.* Waithman (1856), 3 Drew. 628; *Re* Smith, Knight, *Ex p.* Gibson (1869), 4 Ch. App. 662. **Mentd.** Fordham *v.* Wallis (1853), 10 Hare, 217.

627. ——.]—R. B. deposited £110 with Messrs. H. B. L., C. F., E. L., & C. S. F., bankers, upon a deposit note, payable twenty days after sight. In June, 1833, H. B. L., died, having, by his will, devised his real & personal estate to trustees, one of whom was his son, H. L., upon trust to raise money to pay his debts, etc., & subject thereto upon trust for H. L., whom he appointed sole exor. H. L., was admitted a partner in the bank. In 1835 E. L. died, & in 1843 C. F. died. C. S. F., & H. L., continued the business, but became bkpts. in 1847. R. B., from the death of H. B. L., received interest at the bank upon his deposit note until the bkpcy., when he proved his debt against the bkpt.'s estate; & on a bill filed to make the real & personal estate of H. B. L. liable to the payment of the £110:—*Held:* (1) the interest was not paid by the continuing partners, as agents of H. B. L., testator; no agency could be implied; the interest was paid on account of the firm; (2) R. B., had accepted the surviving partners as his debtors, & the devise made by H. B. L., for payment of debts, was satisfied, & the bill was dismissed, with costs.—BROWN *v.* GORDON (1852), 16 Beav. 302; 22 L. J. Ch. 65; 20 L. T. O. S. 75; 1 W. R. 2; 51 E. R. 795.

Annotations:—*As to* (2) **Apld.** Lee *v.* Flood (1854), 2 W. R. 348. **Distd.** Rouse *v.* Bradford Banking Co. (1894), 63 L. J. Ch. 337.

628. —— **Delay in making demand.**] — If creditor, being also one of the exors. of his original debtor, makes no demand for many years upon the new firm, to pay the sum to original debtor's estate, he will not be allowed, after the bkpcy. of the new firm, to claim it as a debt due to him from his testator's assets.—CAMPBELL *v.* CAMPBELL (1825), 3 L. J. O. S. Ch. 129.

629. —— **Novation—Banker & customer.**]—R. left £1,400 on deposit with the E. Bank, for which she received the usual deposit note from the firm. One of the partners died, & she subsequently withdrew some of her money at different times, & finally received a fresh deposit note in precisely similar terms for the balance of £850. The bank having stopped payment, its assets being insufficient, & the surviving partner being bkpt., R. claimed to prove against the estate of deceased partner for the amount remaining due to her on the deposit note:—*Held:* she was entitled so to prove, the acceptance of the fresh deposit note being insufficient evidence of novation to discharge the estate of original debtor, deceased partner.—*Re* HEAD, HEAD *v.* HEAD, [1893] 3 Ch. 426; 63 L. J. Ch. 35; 69 L. T. 753; 42 W. R. 55; 3 R. 712.

Annotations:—**Distd.** *Re* Head, Head *v.* Head, Tester's Case (1894), 38 Sol. Jo. 216; Friend *v.* Young, [1897] 2 Ch. 421. **Refd.** Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32.

630. —— —— ——.]—A customer of a banking partnership, after the death of one of the partners, removed money from his current account to a deposit account bearing interest at the same bank, & received a deposit note from the surviving partner:—*Held:* there was sufficient evidence of novation to discharge the estate of deceased partner from liability for the amount placed on deposit.—*Re* HEAD, HEAD *v.* HEAD (No. 2), [1894] 2 Ch. 236; 63 L. J. Ch. 549; 70 L. T. 608; 7 R. 167; *sub nom. Re* HEAD, HEAD *v.* HEAD, TESTER'S CASE, 42 W. R. 419; 38 Sol. Jo. 385, C. A.

631. —— ——.]—Prior to Apr. 1872, a firm of bankers, consisting of two partners, A. & B., received money on deposit at interest, for which they gave deposit notes in the usual form to the depositors, who, when the amount on deposit was increased or diminished, gave up their old notes & received fresh ones for the new amount. In Apr. 1872, X. & Y. were admitted into the partnership, & notice of the change in the firm was given to the depositors. A fortnight afterwards A. died, & the business was carried on under the same firm by B., X., & Y. In 1874 B. died, & the business was carried on by X. & Y., still under the same firm, until 1875, when the bank stopped payment, & went into liquidation. The depositors all knew of A.'s death, & none of them made any claim against his estate. Some of them had not altered the amount of their deposit, but retained the notes they had received in his lifetime. They had, however, received interest from X. & Y. Others had increased & others had diminished the amount of their deposit after A.'s death, receiving in each case fresh deposit notes; & they had all proved in the bkpcy. of X. & Y. for the amount due on their notes as money "advanced & lent" to bkpts.:—*Held:* in each case there had been a complete novation, & that none of the depositors were entitled to prove against the estate of A.—BILBOROUGH *v.* HOLMES (1876), 5 Ch. D. 255; 46 L. J. Ch. 446; 25 W. R. 297; *sub nom.* BILLBOROUGH *v.* HOLMES, 35 L. T. 759.

Annotations:—**Consd.** Scarf *v.* Jardine (1882), 7 App. Cas. 345. **Distd.** *Re* Head, Head *v.* Head, [1893] 3 Ch. 426; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32.

Novation generally, *see* CONTRACT, Vol. XII., pp. 596 *et seq.*

——.]—*Compare* Sub-sect. 3, B. (*c*), *ante*; Sect. 3, sub-sect. 2, *post.*

632. Forebearance by creditor to sue—At survivor's request.]—WINTER *v.* INNES, No. 626, *ante.*

Bankruptcy of survivors.]—*See* Sub-sect. 3, C. (*b*), *ante.*

SUB-SECT. 4.—RIGHT OF CONTRIBUTION.

See Part V., Sect. 9, *post.*

SUB-SECT. 5.—BANKRUPTCY.

See Part IX., *post.*

SECT. 3.—EFFECT OF DISSOLUTION.

SUB-SECT. 1.—IN GENERAL.

Dissolution generally, *see* Part VI., *post.*

633. Agreement by one to meet liabilities. Rights of creditor against remaining partners.]-

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PART IV. SECT. 3, SUB-SECT. 1.

h. *General rule.*]—Immediately on the dissolution or insolvency of a firm, each partner individually becomes instantly & directly liable, & may immediately be sued individually for all debts contracted by the firm prior to its dissolution.—SIMPSON & Co. *v.* FLECK (1833), 3 Mon. 213.—**S. AF.**

k. ——.]—Where a debt is incurred by a partnership which is subsequently

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A. & B., partners in a goldsmith's trade, are bound in a bond to J. A. & B. break off the partnership & divide their stock; J., the obligee in the bond, knows this, & that A. took upon him to pay the debts, & after a great distance of time brings a bill against the exors. of B., yet J. shall recover.—HEATH *v.* PERCIVAL (1720), 1 P. Wms. 682; 2 Eq. Cas. Abr. 630; 1 Stra. 403; 24 E. R. 570, L. C.

Annotations:—**Distd.** *Ex p.* Ruffin (1801), 6 Ves. 119. **Consd.** *Re* Walden, *Ex p.* Bradbury (1839), 4 Deac. 202. **Refd.** David *v.* Ellice (1826), 5 B. & C. 196; Wilson *v.* Lloyd (1873), 42 L. J. Ch. 559. **Mentd.** Brown *v.* Blount (1830), 9 L. J. O. S. Ch. 74; *Re* Head, Head *v.* Head (No. 2) (1894), 63 L. J. Ch. 549.

634. —— ——.]—A. & B., partners, were solrs. to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years A. & B., upon an agreement that A. should pay all the debts, dissolved partnership; & the assignee, with knowledge of this fact, continued to employ A. alone as the solr. to the commission, & no attempt was made to charge B. with the moneys received by A. & B. till very lately, viz., when an official assignee was appointed. Nor had B. ever acknowledged any liability to account:—*Held:* (1) as between B. & the creditors, neither the Stat. Limitations, nor laches, nor other conduct of the assignee, would operate as a bar, A. & B. being solrs. to the commission; (2) as the assignee was able to recoup the estate, he could not under such circumstances of conduct on his part, call on B. to account.—*Re* ROBERTSON, *Ex p.* GOULD (1834), 4 Deac. & Ch. 547; 4 L. J. Bcy. 7, Ct. of R.

635. —— —— **Rights reserved.**]—Where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, & that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, & retained possession of the original bills:—*Held:* the separate notes having proved unproductive, he might still resort to his remedy against the other partners, & the taking under these circumstances the separate notes, & even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt.—BEDFORD *v.* DEAKIN (1818), 2 B. & Ald. 210; 106 E. R. 344.

Annotations:—**Consd.** Winter *v.* Innes (1838), 4 My. & Cr. 101; Harris *v.* Farwell (1851), 15 Beav. 31. **Refd.** Thompson *v.* Percival (1834), 5 B. & Ad. 925.

636. —— —— **Assent of creditor to agreement.**]—Upon the dissolution of a partnership, it was agreed between the partners that one of them should take upon himself to discharge a debt to A.; A. was informed of this, & expressly agreed to exonerate the other partner from all responsibility:—*Held:* these circumstances did not constitute any defence to the latter in an action by A. against both partners.—LODGE *v.* DICAS (1820), 3 B. & Ald. 611; 106 E. R. 784.

Annotations:—**Dbtd.** Kirwan *v.* Kirwan (1834), 2 Cr. & M. 617. **Distd.** Thompson *v.* Percival (1834), 5 B. & Ad. 925. **Dbtd.** Hart *v.* Alexander (1837), 2 M. & W. 484; Winter *v.* Innes (1838), 4 My. & Cr. 101; *Re* Walden, *Ex p.* Bradbury (1839), 4 Deac. 202. **Consd.** Harris *v.* Farwell (1851), 15 Beav. 31. **Distd. & Dbtd.** Lyth *v.* Ault (1852), 7 Exch. 669. **Refd.** Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156; Mills *v.* Boyd (1842), 6 Jur. 943.

637. —— —— ——.]—*Assumpsit* against two defts., S. & M., for money had & received. Plea, as to £25, parcel, etc., that on, etc., defts. were carrying on business in partnership, & employing many servants; that while they were such partners, pltf. deposited with them, as such partners, the said sum of £25 as a security for his faithfully accounting for all moneys received by him as their servant, to be repaid to him on quitting their employ; that they dissolved partnership, & it was thereupon agreed between them that deft. S. should take upon himself the payment of part of the debts, & retain in his employ certain of the servants; & that deft. M. should take upon himself the payment of other debts, & retain in his employ others of the servants; & that, in pursuance of such agreement, M. took upon himself the payment of the £25 to pltf., & retained pltf. in his sole employ; that pltf. had notice of all the premises, & assented to such agreement & retainer by M., & in consideration thereof discharged S. from his promise as to the £25. Replication, that M. did not retain pltf. in his sole employ, nor did pltf. assent to such agreement & retainer, or discharge deft., etc., & issue thereon. After verdict for deft. on this issue:—*Held:* pltf. was entitled to judgment *non obstante verdicto*, on the ground that no contract was shown which made M. solely liable to the plaintiff.—THOMAS *v.* SHILLIBEER (1836), 1 M. & W. 124; 1 Gale, 371; Tyr. & Gr. 290; 5 L. J. Ex. 138; 150 E. R. 372.

638. —— —— ——.]—Upon a dissolution of partnership, deft. agreed to pay his co-partners £6,817 9*s.* 8*d.* as his share of the liabilities of the firm, they taking the effects & assets, & undertaking to pay a debt of £51,891 12*s.* due from the firm, to H. After the dissolution, they became bankrupts, & never paid H. In an action by their assignees for the £6,817 9*s.* 8*d.*:—*Held:* deft. could not set off their undertaking to pay the £51,891 12*s.* to H.—ABBOTT *v.* HICKS (1839), 5 Bing. N. C. 578; 7 Scott, 715; 8 L. J. C. P. 314; 3 Jur. 871; 132 E. R. 1222.

Annotation:—**Refd.** Hinton *v.* Acraman (1845), 2 C. B. 367.

639. Release to one partner—Rights of creditor against remainder.]—Two partners, A. & B., on Aug. 26, 1809, agree to dissolve partnership as from Jan. 1, 1810, & that neither of them shall after signing the deed of dissolution, make any purchase to bind the other; but that every such purchase shall be on his own private account. On Oct. 27, 1810, A. assigns his property to his creditors, who covenant not to sue him, & that if they do, the deed of assignment shall be a release to him, which deed is signed by B. A. after signing the deed of dissolution, having contracted debts in the name of the firm, B. pays them:—*Held:* (1) B. was liable for those debts, the covenant not to sue A. not operating as a release to B.; (2) supposing it had, the creditors would have had an equitable claim on B., which would have justified his paying the money; &, therefore, B. was entitled to recover it from A. as money paid to his use.—HUTTON *v.* EYRE (1815), 6 Taunt. 289; 1 Marsh. 603; 128 E. R. 1046.

Annotations:—*As to* (1) **Consd.** Walmesley *v.* Cooper (1840), 10 L. J. Q. B. 49. **Refd.** Ford *v.* Beech (1848), 11 Q. B. 852; Willis *v.* De Castro (1858), 4 C. B. N. S. 216; Duck *v.* Mayer, [1892] 2 Q. B. 511. *Generally*, **Mentd.** Cocks *v.* Nash (1832), 9 Bing. 341.

dissolved by reason of the insolvency of one of the partners, the remaining partners are ultimately liable *singuli in solidum*, & a creditor is entitled to sue a remaining solvent partner for the whole amount of the partnership debt.—STOLTENHOF'S ESTATE *v.* HOWARD (1907), 24 S. C. 693.—**S. AF.**

1. *Release to one partner—General words confined to matters contemplated.*]—JOFFE *v.* FRIEDMAN, [1909] T. S. 775.—**S. AF.**

640. —— —— Ostensible partner.]—Though creditor has a right to sue jointly with his debtor a person who has held himself out as a partner with debtor, yet, as between themselves, the ostensible partner is a surety only, not liable to contribution, & therefore a release of the ostensible partner by creditor does not release debtor.

J. gave to a bank a guarantee for £1,000 in favour of A. & co., representing at the same time to the bank manager that he was a partner in that firm, but that he wished the fact of his partnership to be kept secret. The guarantee described him as a partner in the firm. Some time afterwards A. alone, as A. & co., filed a liquidation petition, & the bank tendered a proof in the liquidation for advances which they had made to A. & co. after the guarantee. After this the bank sued J. at law for £5,059, alleging him to have been a partner with A. J. filed a bill in Chancery to restrain the proceedings in the action, denying the alleged partnership. A compromise was entered into between the bank & J., by which £2,818 was paid to them in satisfaction of their claim against J. & of a claim which they made against S., who had also given them a guarantee on behalf of A. & co. J.'s guarantee was given up to him, a receipt for £1,000 being indorsed on it by the bank manager "in payment & discharge of the within guarantee, & also of all claims against J. in reference to or in connection with A. & co." :—*Held:* J. must be taken to have been an actual partner with A., but that the receipt did not operate to release J. so as to preclude the bank from maintaining a proof against A.'s estate.—*Re* ARMITAGE, *Ex p.* GOOD (1877), 5 Ch. D. 46; 46 L. J. Bcy. 65; 36 L. T. 338; 25 W. R. 422, C. A.; *affg.* on other grounds S. C. *sub nom. Re* ARMITAGE & Co., *Ex p.* HALIFAX JOINT STOCK BANKING CO. (1876), 35 L. T. 554.

Annotations:—**Refd.** *Re* Wolmershausen, Wolmershausen *v.* Wolmershausen (1889), 62 L. T. 541; *Re* E. W. A., [1901] 2 K. B. 642. **Mentd.** *Re* Tait, *Ex p.* Harper (1882), 47 L. T. 421.

641. Creditor unaware of dissolution—Joint liability—Bankruptcy of one partner.]—A., B., & C. having dissolved partnership, C., after such dissolution, drew bills in the partnership firm in favour of D., he not knowing of such dissolution, upon which D. brought his action against all the former partners, & C. having pleaded his bkpcy., D. entered a *nolli prosequi* as to him, & recovered judgment against A. & B., which was afterwards satisfied by the attorney of A. & B., who advanced part, & borrowed the rest of the money on their joint credit:—*Held:* the sum so paid in satisfaction of the judgment might be recovered in a joint action by A. & B. against C.—OSBORNE *v.* HARPER (1804), 5 East, 225; 1 Smith, K. B. 411; 102 E. R. 1056.

Annotation:—**Mentd.** Mills *v.* Alderbury Union Grdns. (1849), 3 Exch. 590.

642. —— Publication of notice—Gazette & circulation of customers.]—If after a dissolution of partnership & notice of this published in the *London Gazette*, & sent round to the customers of the house, one of the partners carries on the business under the old firm, & draws & accepts bills in that firm, the other partners are not bound to apply for an injunction against his doing so, & are not liable upon such bills to a person ignorant of the dissolution of partnership.—NEWSOME *v.* COLES (1811), 2 Camp. 617; 170 E. R. 1271, N. P.

Annotation:—**Apld.** *Re* Fraser, *Ex p.* Central Bank of London, [1892] 2 Q. B. 633.

643. Appropriation of payments.]—Where pltfs. had dealt for a long time with two partners, not knowing that they had a third partner during part of the time, & furnished them with goods, & received payments on account generally: & previous to the time when the secret tri-partnership was dissolved, goods had been furnished, to cover which bills had been paid to pltfs. by the two ostensible partners, which were dishonoured after the secret dissolution of the tri-partnership, & then other goods were furnished as before; yet as the dishonoured bills were afterwards delivered up by pltfs. upon the receipt of the subsequent good bills which latter were more than sufficient to cover the debts of the tri-partnership, though not to cover, in addition, the goods furnished after the dissolution of it:—*Held:* such delivering up of the old dishonoured bills, upon receipt of the new good bills, was evidence of a particular appropriation of such new bills in payment & discharge of the old debt; of which the secret third partner might avail himself in an action on the case for goods sold & delivered, brought against him jointly with the other two partners. But as the other two partners had suffered judgment to go by default, pltfs. could not be nonsuited, but the third partner, who defended, was entitled to a verdict.—NEWMARCH *v.* CLAY (1811), 14 East, 239; 104 E. R. 592.

Annotations:—**Distd.** Robinson *v.* Wilkinson (1817), 3 Price, 538. **Refd.** Devaynes *v.* Noble, Clayton's Case (1816), 1 Mer. 572. **Mentd.** Parker *v.* Guinness (1910), 27 T. L. R. 129.

644. ——.]—W. & T., partners, were indebted to the pltf., &, after the dissolution of the partnership, T. also became indebted on his separate account to pltf.:—*Held:* in the absence of any specific appropriation by either party, payments made by T. after the dissolution must go in reduction of the entire account, & consequently must discharge the earlier items.—SMITH *v.* WIGLEY (1833), 3 Moo. & S. 174; 2 L. J. C. P. 118.

Annotation:—**Consd.** Hooper *v.* Keay (1875), 1 Q. B. D. 178.

See, generally, CONTRACT, Vol. XII., pp. 474 *et seq.*

645. Property conveyed to trustees for creditors—Two partners appointed agents to complete contract—Liability of third partner.]—Three partners, A., B. & C. order goods from abroad, & then dissolve partnership, & make over their property to trustees for their creditors, leaving A. & B. as agents, to settle the affairs of the firm. The goods arrive, & are delivered to A. & B. In an action against A., B. & C. for the freight:—*Held:* C. was not liable.—PINDER *v.* WILKS (1814), 5 Taunt. 612; 1 Marsh. 248; 128 E. R. 829.

646. Liability for rent—Determination of relationship of landlord & tenant—Evidence of determination.]—Where two persons partners, occupied premises under an agreement for a lease to be granted to them jointly, but after some time dissolved partnership, when one of them quitted the premises, & the landlord subsequently received rent from & several times distrained upon, the partner who continued to occupy, making no application to the partner who had quitted for five years, nor proceeding against him for twelve years:—*Held:* there was good evidence for a jury, to conclude that the relationship of landlord & tenant with respect to the partner who had left

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643 i. *Appropriation of payments.*]—Deft. being indebted to a firm, of which one of pltfs. was a member, after the transfer of the deeds & business of that firm to pltfs. continued to deal with & make remittances to the new firm, with a knowledge of the transfer:—*Held:* the jury were warranted in finding that the remittances were intended to be & were properly applied by pltf. to pay the debts due the old firm.—ESSON *v.* DUNN (1862), 10 N. B. R. (5 All.) 417.—**CAN.**

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the premises had been determined, & the landlord could not recover against him in an action for use & occupation.—PAGE *v.* MANN & GARDINER (1827), 6 L. J. O. S. K. B. 63.

647. Continuing personal contract.]—A person made a contract with one partner alone, not knowing of the other; it was to be a continuing contract, for the hire of a carriage; the partnership was afterwards dissolved, & the partner, with whom the contract was made, left the business, which was continued by the other:—*Held:* the person making the contract was not bound to go on upon it with the other partner.—ROBSON *v.* DRUMMOND (1831), 2 B. & Ad. 303; 9 L. J. O. S. K. B. 187; 109 E. R. 1156.

Annotations:—**Consd.** British Waggon Co. *v.* Lea (1880), 5 Q. B. D. 149. **Apld.** Jaeger's Sanitary Woollen System Co. *v.* Walker (1897), 77 L. T. 180. **Distd.** Phillips *v.* Alhambra Palace Co., [1901] 1 K. B. 59. **Refd.** Wentworth *v.* Cock (1839), 10 Ad. & El. 42; Beckham *v.* Drake (1841), 9 M. & W. 79; Humble *v.* Hunter (1848), 12 Q. B. 310; *Re* Edwards, *Ex p.* Chalmers (1872), 42 L. J. Bcy. 2; International Fibre Syndicate *v.* Dawson (1901), 84 L. T. 803. **Mentd.** Rhymney Ry. *v.* Brecon & Merthyr Tydfil Ry. (1900), 83 L. T. 111; Whiteley *v.* Hilt, [1918] 2 K. B. 808.

648. Liability of dormant partner.]—S. & E. were partners in alum works for an indefinite period. E. was a dormant partner. In Jan. 1829, it was agreed that the settlement of the partnership accounts, & all questions concerning the respective liabilities, & the mode of winding up the affairs, & the manner & time of dissolving the partnership, should be referred to an arbitrator; & it was afterwards agreed that S. & E. should respectively bid for the plant, utensils, & fixtures, & the referee was to declare the highest bidder to be the purchaser. In Apr. 1829, S. having been declared the highest bidder, became the purchaser, & the works were entirely given up to him:—*Held:* the partnership was then determined, although the referee had made no order as to the dissolution; & S. had no authority, after that time, to bind E. by a promissory note.

It must be taken upon the evidence that the partnership was to continue for an indefinite period, there being no proof to the contrary, & then either party might, at any time, have put an end to the partnership by a simple notice to his co-partner (PARKE, J.).—HEATH *v.* SANSOM (1832), 4 B. & Ad. 172; 1 Nev. & M. K. B. 104; 2 L. J. K. B. 25; 110 E. R. 420; *previous proceedings* (1831), 2 B. & Ad. 291.

Annotations:—**Consd.** Sturgeon *v.* Salmon (1906), 22 T. L. R. 584. **Refd.** Emanuel *v.* Symon, [1907] 1 K. B. 235.

649. —— **Creditor without knowledge of existence.**]—COURT *v.* BERLIN, No. 429, *ante*.

650. Receipt of insurance money—For goods destroyed while in possession of partnership—Policy in name of individual partner.]—One of two partners, after the dissolution of the partnership, received from an insurance office, under a policy effected in his own name, the value of goods belonging to pltf. which had been deposited with the firm for the purpose of manufacture, & destroyed by fire:—*Held:* the sum so obtained from office was not money had & received by defts. to the use of pltf.—ARMITAGE *v.* WINTERBOTTOM (1840), 1 Man. & G. 130; 1 Scott, N. R. 23; 133 E. R. 276.

651. Contract of service—Whether dissolution a breach—Dismissal of servant by remaining partner.]—It is questionable whether a dissolution of partnership is, *per se*, a breach of a contract by the firm to employ a person in their service, though a dismissal by a partner remaining would be so; but even assuming that the dissolution would be a breach, yet if the person they have retained accepts, upon the dissolution, an agreement with a new firm, comprising members of the old partnership & also new partners, that will be evidence to support a plea of exoneration, in an action against the members of the old firm on the original agreement, even apart from any express agreement to cancel it; because there cannot be two co-existent agreements by the same person to serve different firms, composed of different parties; & the second agreement is thus an implied surrender of the first.—HOBSON *v.* COWLEY (1858), 27 L. J. Ex. 205; 6 W. R. 334.

652. —— ——.]—Defts., a partnership consisting of four members, agreed to employ pltf. as manager of a branch of their business for a certain period. Pltf. entered into their service under the agreement, but, before the period had expired, two of the partners retired, & the business was transferred to & carried on by the other two. The continuing partners were willing to employ pltf. on the same terms as before for the remainder of the period, but he declined to serve them. In an action for wrongful dismissal:—*Held:* the dissolution of the partnership operated as a wrongful dismissal of pltf., but he was only entitled to nominal damages.—BRACE *v.* CALDER, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582; 72 L. T. 829; 59 J. P. 693; 11 T. L. R. 450; 14 R. 473, C. A.

Annotations:—**Refd.** Jaeger's Sanitary Woollen System Co. *v.* Walker (1897), 77 L. T. 180. **Mentd.** Ogdens *v.* Nelson, Ogdens *v.* Telford, [1903] 2 K. B. 287; Midland Counties District Bank *v.* Attwood, [1905] 1 Ch. 357; Payzu *v.* Saunders, [1919] 2 K. B. 581.

653. —— —— **Contract for theatrical performance.**]—A partnership, consisting of defts. & another person, carried on the business of music hall proprietors under the name of the A. co. Pltfs., a troupe of music hall performers, entered into a contract with the A. co. to give certain performances at the co.'s music hall. Pltfs. had no knowledge of the persons of whom the co. consisted. After the making of the contract

651 i. *Contract of service—Whether dissolution a breach—Dismissal of servant by remaining partner.*]—An agreement was entered into between a firm & their clerk, whereby the clerk was engaged for five years at a salary of £300 & a percentage on the profits. The firm was dissolved by the death of one of the partners, & the surviving partner declined to continue the clerk's services. In an action at the clerk's instance concluding for implement or damages:—*Held:* the contract being one of personal service to the co. was terminated by its dissolution, the dissolution by the partner, owing to death, was not a breach of contract & therefore pursuer was not entitled to damages.—HOEY *v.* MACEWAN & AULD (1867), 5 Macph. (Ct. of Sess.) 814; 39 Sc. Jur. 450.—**SCOT.**

m. *Misappropriation by partner after dissolution.*]—HAMMOND *v.* HEWARD (1860), 20 U. C. R. 36; 11 C. P. 261.—**CAN.**

n. *Continuing partner indemnified by retiring partner.*]—Upon a bond by the retiring partner on a dissolution, conditioned to save harmless & keep indemnified the continuing partner against all actions, charges, damages, etc., which might be commenced against him, or which he might have to pay or become subject or liable to, by reason of the debts of the late firm:—*Held:* the obligee was entitled to recover the full amount of judgments obtained against him afterwards for partnership debts, though he had paid nothing on them.—SMITH *v.* TEER (1862), 21 U. C. R. 412.—**CAN.**

o. *Partner continuing business—Settlement of firm debts—Blended accounts.*]—BIRKETT *v.* MCGUIRE, 19 C. L. J. 275.—**CAN.**

p. *Liability of new firm.*]—OSBORNE *v.* HENDERSON (1889), 18 S. C. R. 698.—**CAN.**

q. ——.]—A certain firm was indebted to pltfs. Another firm bearing the same name, but composed of different individuals, assumed its liabilities, as between itself & the former firm, & continued the business, & made certain payments to pltfs., & also asked for time to pay the balance. There was no evidence of any assets of the first firm being taken over by the second:—*Held:* the above was not sufficient to create a new obligation as between pltfs. & the new

& before the time for performance arrived defts.' partner died :—*Held :* the contract was not of such a personal character on the part of the partnership as to be put an end to by the death of deceased partner, & it could be enforced against defts., the surviving partners. — PHILLIPS *v.* ALHAMBRA PALACE Co., [1901] 1 K. B. 59 ; 70 L. J. Q. B. 26 ; 83 L. T. 431 ; 49 W. R. 223 ; 17 T. L. R. 40 ; 45 Sol. Jo. 81.

Annotation :—**Refd.** Servais Bouchard *v.* Prince's Hall Restaurant (1904), 20 T. L. R. 574.

654. —— Agreement to serve new firm.]—HOBSON *v.* COWLEY, No. 651, *ante*.

—— **Apprenticeship.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 517, 518, Nos. 4339–4343.

655. Agreement by firm to act as creditors' agents—Whether term implied against dissolution.]—Pltfs. entered into a contract with defts., who carried on business in partnership, whereby the latter were appointed sole buying agents for pltfs. for a certain district in England, the intention being that the whole district should be represented by defts. for a period of five years. Pltfs. agreed that defts. should retain the agency so long as they met their engagements & kept strictly to the terms of the engagement for a period of five years, & in consideration defts. agreed to act as buying agents for the district on the terms stated in the agreement, & to accept delivery & pay for a minimum quantity of pltfs.' products during each year of the term. Defts. had the option of renewing the agreement at its termination. During the five years defts. dissolved partnership, & pltfs. sued for damages for breaches of the contract committed after the dissolution :—*Held :* there was no implied term in the contract that defts. would not dissolve partnership during the term & thus disable themselves from carrying out the contract, & therefore defts. were not liable.—BOVINE, LTD. *v.* DENT & WILKINSON (1904), 21 T. L. R. 82.

Annotation :—**Mentd.** Lazarus *v.* Cairn Line of Steamships (1912), 106 L. T. 378.

Contracts of guarantee.]—*See* GUARANTEE, Vol. XXVI., pp. 173–174, 205–207, Nos. 1306–1311, 1609–1613, 1619–1622.

Assignment of leaseholds.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 375, 376, Nos. 5214–5216.

Estate & other death duties.]—*See* ESTATE DUTY, Vol. XXI., pp. 104, 124, Nos. 765, 925.

SUB-SECT. 2.—WHERE NEW FIRM CREATED.

656. Whether old firm discharged — Creditor continuing business with new firm.]—A person depositing money with bankers, & taking their accountable receipts, does not, by continuing to leave his money in the bank after a dissolution of the original firm & the constitution of a new one, which consists of some of the members of the old bank & of other persons, discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, & continues to transact business with them in the common course, & that for a period of four years, & until they become insolvent. Nor are those circumstances sufficiently strong to justify such a case being left to a jury.—GOUGH *v.* DAVIES & GIBBONS (1817), 4 Price, 200 ; 146 E. R. 439.

Annotation :—**Distd.** David *v.* Ellice (1825), 7 Dow. & Ry. K. B. 690.

657. —— Acceptance of new firm by creditor—When acceptance inferred.] — A. & B. being partners, A. retires, & B. continues the business, having the partnership effects. C., a creditor, being told by B. that he must look for payment to him alone, draws a bill of exchange on B. for his debt. The bill is dishonoured, & C. gives B. time to pay. These facts raise a question for the jury, whether there was not an agreement between B. & C. that C. should accept B. as his sole debtor, & should take the bill of exchange from him alone, by way of satisfaction for the debt due from both. Such an agreement, followed by the receipt of the bill from B. would be a good defence by way of accord & satisfaction, in an action by C. against A. & B. jointly.—THOMPSON *v.* PERCIVAL (1834), 5 B. & Ad. 925 ; 3 Nev. & M. K. B. 167 ; 3 L. J. K. B. 98 ; 110 E. R. 1033.

Annotations :— **Apld.** Winter *v.* Innes (1838), 4 My. & Cr. 101. **Distd.** *Re* Walden, *Ex p.* Bradbury (1839), 4 Deac. 202. **Consd.** Mills *v.* Boyd (1842), 6 Jur. 943. **Apld.** Benson *v.* Hadfield (1844), 4 Hare, 32. **Distd.** Blair *v.* Bromley (1846), 5 Hare, 542. **Apld.** Harris *v.* Farwell (1851), 15 Beav. 31. **Distd.** *Re* Head, Head *v.* Head, [1893] 3 Ch. 426. **Refd.** Kirwan *v.* Kirwan (1834), 4 Tyr. 491 ; Hart *v.* Alexander (1837), 2 M. & W. 484 ; Brown *v.* Gordon (1852), 16 Beav. 302 ; Brinsmead *v.* Locke (1889), 5 T. L. R. 542. **Mentd.** Wollen *v.* Smith (1839), 9 Ad. & El. 505 ; Ford *v.* Beech (1848), 11 Q. B. 852 ; Lyth *v.* Ault (1852), 7 Exch. 669.

658. —— —— ——.]—Where bkpt. deposited title deeds with his bankers, to secure future advances, &, after a change in the partnership, continued for six years the same mode of dealing with them, & the same running account :—*Held :* this was a tacit recognition of the deposit of the deeds with the new firm upon the same terms as with the old.—*Re* WORTERS, *Ex p.* OAKES (1841), 2 Mont. D. & De G. 234 ; 10 L. J. Bcy. 69 ; 5 Jur. 757.

659. —— —— ——.]—S. & K. gave to G. promisory notes to secure moneys advanced by him to them to enable them to carry on the works of a railway for which they were contractors. The notes were payable at five years from the completion of the railway. The moneys advanced were carried to the credit of S. & K. in their banking account with G. & co., in which firm G. was a

firm.—CANADIAN BANK OF COMMERCE *v.* MARKS (1890), 19 O. R. 450.—**CAN.**

r. *Contract not determined.*]—Defts. contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, & defts. refused to carry out their contract. In an action brought in the individual names of the three partners for damages for non delivery :—*Held :* the dissolution of the firm was no justification in law for defts.' refusal to carry out their contract.—MCCRANEY *v.* MCCOOL (1890), 19 O. R. 470, *affd.* (1891), 18 A. R. 217.—**CAN.**

PART IV. SECT. 3, SUB-SECT. 2.

656 i. *Whether old firm discharged—Creditor continuing business with new firm.*]—Where from facts & circumstances, a creditor is aware of the dissolution of a partnership which is debtor to him on open account for merchandise, & continues to supply merchandise to the business as carried on after the dissolution he has no claim for payment of the price as against the former partnership or partners thereof as such.—GRANT *v.* MATSUBAYASHI (B. C.) (1922), 70 D. L. R. 553 ; (1922] 3 W. W. R. 679. —**CAN.**

657 i. —— *Acceptance of new firm creditor—When acceptance inferred.*]—Where there is a change in a firm & the agreement between the new & the old firm is that the new firm shall take over the liabilities of the old firm, very slight evidence of knowledge & assent on the part of a creditor of the old firm will be sufficient to substitute a liability of the new firm to such creditor for the liability of the old firm.—*Re* GUTHRIE & Co., *Ex p.* BANK OF AUSTRALASIA (1884), 2 N. Z. L. R. 425 (S. C.)—**N.Z.**

t. *Agreement by new firm to pay debts.*]—SEYFANG *v.* MANN (1898), 25 A. R. 179.—**CAN.**

a. ——.]—ZAICHKOWSKY *v.* BIRKETT & LAMB (Sask.), [1923] 3 D. L. R. 1087 ; [1923] 2 W. W. R. 868.—**CAN.**

b. ——.]—A partner in a manufacturing firm agreed to retire on an undertaking by the remaining partners to pay him an annuity " during such period as he shall survive, & they or their successors in the works & business shall carry on the same." They afterwards sold the whole works to

Sect. 3.—*Effect of dissolution: Sub-sect.* 2. *Sect.* 4: *Sub-sect.* 1, *A. & B.*]

partner. The promissory notes were none of them given until after S. & K. had made over their business to a co., though some of the advances were made before. At the time when the notes were given G. stated by letter that he looked to S. & K., & knew nothing of the co. in the matter. The co. had the benefit of the advances. More than a year afterwards G. applied to the co. for a year's interest, which the co. paid, & at the same time sent to G. & co. a cheque by S. & K. for the whole sum remaining to their credit, directing G. & co. to place it to the credit of the co.:—*Held:* having regard to G.'s express repudiation of the co. as his debtors, the subsequent circumstances were not enough to make them such, & he had no right of proof against the estate of the co. when wound up.—*Re* SMITH, KNIGHT & Co., *Ex p.* GIBSON (1869), 4 Ch. App. 662; 38 L. J. Ch. 673; 20 L. T. 835; 17 W. R. 833, L. JJ.

660. —— —— ——.]—Although slight evidence is sufficient in the case of ordinary firms to show that creditor who continues his dealings with incoming partners accepts the new firm as his debtors instead of the old firm, yet strict proof will be required before it is held that creditor of a co., under a special contract, has accepted the liability of another co. with which the first is amalgamated.—*Re* FAMILY ENDOWMENT SOCIETY (1870), 5 Ch. App. 118; 39 L. J. Ch. 306; 21 L. T. 775; 18 W. R. 266, L. C. & L. J.

Annotations:—**Mentd.** *Re* Manchester & London Life Assce. & Loan Assocn. (1870), 5 Ch. App. 640; *Re* Medical Invalid & General Life Assce. Soc., Spencer's Case (1870), 40 L. J. Ch. 455; *Re* National Provincial Life Assce. Soc. (1870), L. R. 9 Eq. 306; *Re* Times Life Assce. & Guarantee Co. (1870), 5 Ch. App. 381; *Re* India & London Life Assce. (1872), 27 L. T. 191.

661. —— —— ——.]—An agreement, dated Apr. 1, 1891, was entered into between a co. & T. W., W. R. W., & R. J. W., trading as "R. W. & Sons," thereinafter called "the manufacturers," which provided (*inter alia*) that the co. should purchase from the manufacturers & from no other person or firm all the goods therein specified which the co. might require over & above orders to the amount of £10,000 *per annum* reserved for another firm. On Jan. 1, 1893, the firm of R. W. & Sons was by the retirement therefrom of R. J. W. dissolved, & T. W. & W. R. W. alone continued to trade under the style of "R. W. & Sons." The co. brought an action against T. W. & W. R. W., claiming a declaration that the agreement was determined on Jan. 1, 1893, & that the co. were not bound thereby since that date. Defts. alleged that the co. had had repeated notices of the retirement of R. J. W., but had nevertheless treated the agreement as subsisting between them & the defts. until April, 1896, when they first attempted to repudiate it; & that the co. had by these acts adopted the agreement with defts., & affected a novation thereof, if any adoption or novation was in fact required:—*Held:* as the agreement required on the part of the manufacturers a certain amount of skill, knowledge, & supervision in its performance, the work agreed to be done not being capable of being performed by everyone, it was clearly of a personal nature, & therefore non-assignable, & was determinable at the option of the co. on the retirement of R. J. W.; but, as the co. had elected to continue doing business with the manufacturers on the terms of the agreement, notwithstanding the change in the firm, it must be treated as still subsisting & binding.—JAEGER'S SANITARY WOOLLEN SYSTEM CO., LTD. *v.* WALKER & SONS (1897), 77 L. T. 180; 41 Sol. Jo. 695, C. A.

662. —— ——. **Payment on account by new firm.**]—Pltfs. supplied goods to K. & D. who were in partnership & they gave pltfs. their acceptance for £132, the amount. Before the bill was due K. & D. dissolved partnership & gave notice to pltfs. with the intimation that K. would carry on the business & would receive & pay the accounts due to & from the old firm. Pltfs. continued to supply K. with goods & he gave them his acceptance for the amount & also paid them several sums on account but without any specific appropriation. After some months pltfs. sent in their account to K. beginning on the debit side with the acceptance for £132 &, after giving him credit for the sums paid showing a balance against K. of £92. After this K. paid pltfs. two other sums which, with the sums already paid amounted to more than £132. Pltfs. having sued K. & D. on their acceptance for £132, D. pleaded payment:—*Held:* pltfs. having sent in the statement to K. treating the whole as one account, the subsequent payments must be appropriated to the earlier items of the account; & consequently the plea was proved.—HOOPER *v.* KEAY (1875), 1 Q. B. D. 178; 34 L. T. 574; 24 W. R. 485.

663. —— **Concurrent liability of new firm.**]—In July, 1820, W. advanced to S. & S., then carrying on business in partnership as brewers, the sum of £24,000, & all three executed a deed, by the express terms whereof a partnership stock was created, in which they had all a joint property; W. however was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, so as to get £2,000 or £2,400 a year, as the case might be, out of the clear profits: W.'s name never appeared to the world as a partner:—*Held:* W. was a partner; & the new firm having become bkpt. in 1826, creditors of the old firm & creditors of the new firm were both entitled to prove against the property of the new firm.—*Re* STARKIES & WHITESIDE, *Ex p.* CHUCK (1832), 8 Bing. 469; 1 Moo. & S. 615; 1 L. J. Ch. 197; 131 E. R. 473.

Annotation:—**Refd.** Reynolds *v.* Bowley (1866), 7 B. & S. 67.

664. —— ——.]—In 1844, A. lent to C. & co. a sum of £4,000, for which he received a promissory note payable six months after demand with interest at 5 per cent. *per annum.* Between the date of the note & the demand for payment five changes in the partnership firm had taken place, by the deaths of some & the admission of new partners. The partnership was carried on during the whole time under the original style of C. & co., & interest

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another firm, who continued the same manufacture, one of the selling firm binding himself to give his whole time & attention to the business, as manager of the works, for three years:—*Held:* the firm so acquiring the business were the successors of the previous firm in the sense of the agreement, & the obligation to pay the annuity still continued on the remaining partners of the previous firm.—ALEXANDER *v.* CLARK (1862), 24 Dunl. (Ct. of Sess.) 323; 34 Sc. Jur. 161.—**SCOT.**

c. ——.]—When the whole estate of a going concern is taken over by a new partnership, the new partners contributing no capital, & the business being continued on the same footing as before, the presumption is that the liabilities are taken over with the stock, & that the new partnership undertakes liability for all the trade debts previously contracted.—HEDDLE'S EXECUTRIX *v.* MARWICK & HOURSTON'S TRUSTEE (1888), 15 R. (Ct. of Sess.) 698; 25 Sc. L. R. 553.—**SCOT.**

d. ——.]—MENZIES'S TRUSTEES *v.* BLACH'S TRUSTEES, [1909] S. C. 239; 46 Sc. L. R. 205; 16 S. L. T. 580.—**SCOT.**

e. ——.]—The outgoing partners may transfer all the rights & liabilities of the partnership concern to the incoming partners, & such transfer will be binding as between themselves. As regards the transfer of liabilities the creditors are not bound to accept the incoming partners as debtors in substitution for the members of the

at 5 per cent. was duly paid by cheques drawn by the firm of C. & co. & paid by them from time to time to A.'s bankers to his account. In Feb. 1858, A. required repayment of the £4,000; & a correspondence ensued with the then partners of the firm, which in effect asked A. to reduce the rate of interest from 5 to 4 per cent. & to allow the firm to proceed under a deed of inspectorship, A. not to demand the principal money for two years. A. assented to this arrangement & signed the inspectorship deed. At a subsequent period, as difficulties arose as to the partnership being carried on under the deed, the new partners objected to the payment of the interest on the note, on the ground that the old partners alone, or their estates, were liable to the debt to A.:—*Held:* the effect of the treaty, & the subsequent signature by A. of the inspectorship deed, was to make the members of the new partnership, as well as the old, or their estates, liable to the debt & interest to A. according to the terms of the deed of inspectorship.—LONGMORE *v.* CALVERT (1859), 32 L. T. O. S. 310.

SECT. 4.—MORTGAGES.

SUB-SECT. 1.—AUTHORITY TO MORTGAGE PARTNERSHIP PROPERTY.

A. In General.

See Limited Partnerships Act, 1907 (c. 24), s. 6.

665. Mortgage executed by one partner only—For benefit of firm—Binding on other partner.]—Mtge. of a village which was partnership property, made by some of the partners for the benefit of the firm, held binding on a member of the firm, though not executed by him.—JUGGEEWUNDAS KEEKA SHAH *v.* RAMDAS BRIJBOOKUNDAS (1841), 2 Moo. Ind. App. 487; 18 E. R. 386, P. C.

666. —— Purporting to be made by both partners—Security binding on firm.]—One of two partners procured the discount of a promissory note of the firm, on an agreement for a mtge. of shares belonging to the firm in certain ships & their freight, & of the policies of insurance effected by the firm on the shares. A mtge. deed was prepared, purporting to be made by both partners, but was only executed by one of them. At the time of the execution of the deed, one of the ships was lost, but this fact was not then known to the parties:—*Held:* the security was binding on the firm; notwithstanding the execution of the deed by one partner only, & passed the insurance money, although the deed was not registered according to the shipping Acts.—*Re* BOYD, *Re* WILSON & VAUSE, *Ex p.* BOSANQUET (1847), De G. 432, Ct. of R.

667. Right of part owner of ship to bind co-owners—Ship's husband—Mortgage of freight.]—S. & co. were owners of seven-eighths of an American vessel, & ship's husbands. T. was the owner of the remaining eighth, & was captain of the vessel, which was despatched on a voyage to Liverpool. Before the voyage, S. & co. spent a large sum in repairs, & for the purpose, as was alleged, of taking up bills which they had accepted on account of the repairs, they borrowed a sum of money from pltfs., & assigned the freight to them by way of security. On the arrival of the vessel in Liverpool, pltfs. obtained an injunction to prevent T. from receiving the freight:—*Held:* a part owner who is ship's husband has not the right as against other part owners of making an assignment of the whole freight to secure moneys advanced to him, the legal right to receive the freight was in the captain, & in the absence of any sufficient allegation & proof that he was about to misapply it, the injunction ought not to have been granted.—GUION *v.* TRASK (1860), 1 De G. F. & J. 373; 29 L. J. Ch. 337; 1 L. T. 469; 6 Jur. N. S. 185; 8 W. R. 266; 45 E. R. 403, L. JJ.

B. For What Purposes.

See Partnership Act, 1890 (c. 39), s. 5.

668. Not to secure personal debt.]—Assignment by one partner of joint property to secure his separate debt, must be subject to the joint debts.—YOUNG *v.* KEIGHLY (1808), 15 Ves. 557; 33 E. R. 865; *subsequent proceedings* (1809), 16 Ves. 348, L. C.

Annotation:—**Refd.** *Re* Douglas, *Ex p.* Greener, *Re* Same, *Ex p.* Snowball (1872), 26 L. T. 295.

669. ——.]—Partnership property cannot, as against the partners, be pledged as a security for the private debts of a member of the firm.—WILKINSON *v.* EYKYN (1866), 14 L. T. 158; 14 W. R. 470.

670. —— Property known to be partnership property.]—C. & B., tenants in common in fee, in equal shares, of a messuage & premises, entered into partnership, & it was agreed by the arts. that this property should be partnership assets; & it became the place where the business of the firm was carried on. After this B. made a legal mtge. in fee of one moiety to secure his private debt to a person who knew that the property was the place of business of the firm. Some years afterwards B. absconded, & C. was obliged to pay the debts of the firm, all of which had been contracted since the mtge., & a large balance thus became due to him:—*Held:* as the mtgee., when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, & his claim must be postponed to that of C.; & the circumstance of the debts paid by C. having been incurred since the mtge. did not affect the case.—CAVANDER *v.* BULTEEL (1873), 9 Ch. App. 79; 43 L. J. Ch. 370; 29 L. T. 710; 38 J. P. 213; 22 W. R. 177, L. JJ.

Annotation:—**Refd.** *Re* Bourne, Bourne *v.* Bourne, [1906] 1 Ch. 113.

671. For objects of partnership.]—BUTCHART *v.* DRESSER, No. 677, *post.*

672. —— Mortgage of trade fixtures.]—A., who was a partner with B., deposited with their bankers, the deeds of a freehold cotton mill belonging to A., as a security for advances made by the bankers for the use of the firm of A. & B.; & in the memorandum of deposit it was stated, that the buildings were insured for £2,000 & "the machinery, etc.,

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old firm with whom they had contracted.—PATERSON'S EXECUTORS *v.* WEBSTER, STEEL & Co. (1882), 1 S. C. 350.—**S. AF.**

PART IV. SECT. 4, SUB-SECT. 1.—A.

f. *Squatting partnership.*] — The power of a partner to borrow money so as to bind the firm is incidental to a squatting, as it is to be a mercantile, partnership.—GLASS TO HIGGINS (1871), 2 V. R. 28.—**AUS.**

g. ——.]—WHITE *v.* COLONIAL BANK OF AUSTRALASIA (1871), 2 V. R. (Eq.) 96.—**AUS.**

h. *Against unknown partner.*]—A mtge. with distress clause, by the legal owner of property of which, at the time, he is in possession, & to all appearance in sole possession, is valid at law & in equity against an unknown partner, whose only claim to the possession, when the mtge. was executed, was as tenant at will.—MASON *v.* PARKER (1869), 16 Gr. 230.—**CAN.**

PART IV. SECT. 4, SUB-SECT. 1.—B.

k. *For objects of partnership.*]—One partner of a firm authorised the other to obtain an indorser, in order to raise money from a bank:—*Held:* if express authority was required this empowered the partner to mortgage all the stock-in-trade of the firm to secure such indorser.—PATERSON *v.* MAUGHAN (1876), 39 U. C. R. 371.—**CAN.**

Sect. 4.—*Mortgages: Sub-sect.* 1, *B. & C.; sub-sects.* 2, 3 & 4.]

for £2,000 more"; a steam engine & other machinery having been, previous to the deposit, erected by A. & B. for the purposes of their trade. A. & B. continued in possession of the premises, with all the machinery, up to the period of their bkpcy.:—*Held:* the bankers had a lien on the steam engine & machinery, as well as on the building.—*Re* OGDEN, *Ex p.* LOYD (1834), 3 Deac. & Ch. 765; 1 Mont. & A. 494; 3 L. J. Bcy. 108, Ct. of R.

Annotations:—**Refd.** *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703; *Re* M'Neill, *Ex p.* Broadwood (1841), 1 Mont. D. & De G. 631.

673. —— Mortgage of ship.]—A. & B. being in partnership & joint owners of a ship, A. requested C. & D. to accept two bills, amounting together to £2,600 on the security of the ship, which they agreed to do, & A. accordingly executed a bill of sale to them & the ship was registered in their names, A. agreeing that they might sell the ship, & indemnify themselves out of the proceeds, if he neglected to provide for the bills when due. A. became bkpt., & the bills were paid by C. & D., who thereupon assumed the ownership of the ship, writing specific directions to the captain in command of her at the Cape, as to procuring intermediate & homeward freight, & for his general govt. in the prosecution of a voyage to various parts of the Indian seas, & back to London; & these directions were from time to time renewed. The ship, on her arrival, became lessened in value, & C. & D. had been put to expense in her necessary disbursements:—*Held:* (1) C. & D. were not to be considered as mtgees., but as absolute owners of the ship; (2) the ship's expenses, therefore, after they assumed such ownership, must fall on them; & they could only prove for the balance of the £2,600 after deducting the value of the ship at the time they first took on themselves to act as owners; (3) the ship, being the partnership property of A. & B., & registered in the name of the partnership firm, was within 3 & 4 Will. 4, c. 55, s. 32, & A. had therefore a right to deal with her as with any other partnership property, & consequently could sell or mtge. her, without a power of attorney from his partner B.—*Re* LITHERLAND, *Ex p.* HOWDEN (1842), 2 Mont. D. & De G. 574; 11 L. J. Bcy. 19, Ct. of R.

674. —— Mortgage of freight.]—GUION *v.* TRASK, No. 667, *ante*.

675. —— Necessity for power of attorney—From other partner.]—*Re* LITHERLAND, *Ex p.* HOWDEN, No. 673, *ante*.

C. Duration of Authority.

See Partnership Act, 1890 (c. 39), s. 38.

676. Right of continuing or surviving partner—To mortgage partnership property—To secure partnership debt.]—The legal maxim "*jus accrescendi inter mercatores locum non habet*" applies to prevent a right of survivorship in partnership chattels. The rule applies to manufacturers as well as merchants.

At law, the "*jus disponendi*" does not give the surviving partner the power to dispose of such part of the property of deceased partner as would rightly go to his exor., by way of mtge. for the payment or in satisfaction of the debts of the partnership.—BUCKLEY *v.* BARBER (1851), 6 Exch. 164; 20 L. J. Ex. 114; 16 L. T. O. S. 463; 15 Jur. 63; 155 E. R. 498.

677. —— —— ——.]—(1) After the dissolution of a partnership between two sharebrokers one of them deposited with the bankers of the firm shares contracted to be purchased by the firm before dissolution with power to sell the shares in order to raise the requisite funds to complete the purchase:—*Held:* the power of sale was not an unauthorised delegation of the powers of a member of a dissolved firm but was valid & effectual. The authority of a partner continues after a dissolution for all purposes of winding up & if it be unduly exercised the remedy is by applying to the ct. for the appointment of a receiver.

(2) That a partner has during the partnership power to pledge the partnership assets for partnership purposes cannot be denied (TURNER, L.J.).—BUTCHART *v.* DRESSER (1853), 4 De G. M. & G. 542; 10 Hare, 453; 43 E. R. 619; *affg.* S. C. *sub nom.* BUTCHART *v.* DRESSER, BUTCHART *v.* TEMPEST, 1 W. R. 178, L. JJ.; *subsequent proceedings* (1854), Kay, App. xxvii.

Annotation:—*As to* (1) **Folld.** *Re* Clough, Bradford Commercial Banking Co. *v.* Cure (1885), 31 Ch. D. 324.

678. —— —— ——.]—By a deed executed on a dissolution of partnership in 1825, reciting that it was thereby intended finally to settle all disputes & controversies between the partners, the retiring partner agreed to assign his interest in the partnership property to the continuing partner, subject to the payment of the former's share in the partnership debts, & the continuing partner agreed to enter into a covenant to pay the partnership debts, & indemnify the outgoing partner against them. In 1831, a policy of assurance, part of the partnership assets, was assigned by the continuing partner to a mtgee., with notice of the deed of dissolution. The retiring partner died, & the continuing partner became bkpt., whereupon partnership debts left unpaid by him were proved in a suit for the administration of the estate of deceased partner:—*Held:* (1) on the true construction of the whole deed, a lien was not intended to be created on the policy in respect of the unpaid partnership debts; (2) if it had been, still the mtgee. of the policy from the surviving partner was not bound to see to the application of the mtge. money, & was justified in supposing that it would be properly applied.—*Re* LANGMEAD'S TRUSTS (1855), 7 De G. M. & G. 353; 3 Eq. Rep. 913; 24 L. J. Ch. 589; 25 L. T. O. S. 250; 1 Jur. N. S. 1058; 3 W. R. 602; 44 E. R. 138, L. JJ.

Annotations:—**Apld.** *Re* Bourne, Bourne *v.* Bourne, [1906] 1 Ch. 113. **Mentd.** Power *v.* Banks, [1901] 2 Ch. 487.

679. —— —— ——.]—The surviving partner can give a valid charge on property of the partnership, by way of security for a debt incurred by the partners during the life of deceased partner.—*Re* CLOUGH, BRADFORD COMMERCIAL BANKING CO. *v.* CURE (1885), 31 Ch. D. 324; 55 L. J. Ch. 77; 53 L. T. 716; 34 W. R. 96; 2 T. L. R. 75.

Annotation:—**Folld.** *Re* Bourne, Bourne *v.* Bourne, [1906] 2 Ch. 427.

680. —— —— ——.]—A surviving partner, for the purpose of winding up the partnership affairs may continue the business & may mortgage the partnership property, whether real or personal to secure a partnership debt.

A surviving partner carried on the business in the partnership name & continued the partnership banking account which was overdrawn at the death of deceased partner & remained overdrawn until the final winding up of the business. After paying certain moneys into this account & drawing certain moneys out, he deposited with the bank the title deeds of certain partnership real estate to secure the overdraft:—*Held:* in the absence of evidence to the contrary, the bank were entitled to assume that the dealings with the account

were for the purpose of winding up the partnership, & their mtge. was a valid security & took priority over the lien of deceased partner's exors., on the surplus assets for his share in the partnership.—*Re* BOURNE, BOURNE *v.* BOURNE, [1906] 2 Ch. 427; 75 L. J. Ch. 779; 95 L. T. 131; 54 W. R. 559; 50 Sol. Jo. 575, C. A.

SUB-SECT. 2.—EFFECT OF CHANGE IN FIRM.

681. Legal mortgage to three partners—Changed to equitable mortgage to four.]—Bkpt. kept an account with A., B. & C., bankers, who afterwards took into partnership C.'s son; after which bkpt. executed a legal mortgage to A. & B. & C. for securing the repayment of a loan of £6,000. Subsequently bkpt. wrote a letter addressed "To Messrs. A., B. & C." authorising them to consider all the securities they then held "as responsible for any advances you have, or may make to the bkpt.," etc.:—*Held:* this letter must be taken to have been addressed by bkpt. to the *four* partners, & amounted to an equitable mtge. to the four of the previous legal mtge. to the three, operating as a security for all the advances made either by the three or the four partners.—*Re* BORRON, *Ex p.* PARR (1835), 4 Deac. & Ch. 426, Ct. of R.

682. Legal mortgage by three partners—Property belonging to one partner—Death of owner.]—ROYAL BANK OF SCOTLAND *v.* CHRISTIE, No. 1829, *post*.

683. Separate debt converted into joint.]—A parol agreement is sufficient to convert a separate into a joint debt, such an agreement not being "a promise to answer the debt of another" within Stat. Frauds, but the creation of a new debt in consideration of the former being extinguished.

Where A. was a creditor of B. & B. & C. entered into partnership & by verbal agreement among the parties A. was treated as the creditor of B. & C., such an agreement was held not to be affected by the Stat. Frauds & B. & C. having subsequently become bkpts. A. was permitted to prove against the joint estate.—*Re* LENDON & LENDON, *Ex p.* LANE (1846), De G. 300; 16 L. J. Bcy. 4; 7 L. T. O. S. 118; 10 Jur. 382, Ct. of R.

Equitable mortgage by deposit.]—*See* MORTGAGE, Vol. XXXV., pp. 260, 261, Nos. 189–200.

SUB-SECT. 3.—MORTGAGE OF SEPARATE PROPERTY OF PARTNER.

684. Mortgage to secure personal debt—Whether security for partnership debt.]—A deposit of private deeds by one partner made under a written agreement to secure payments made for him, will cover payments made on behalf of the firm, if there be evidence that the deposit was really made in respect of the partnership debts.—CHUCK *v.* FREEN (1828), Mood. & M. 259, N. P.

Annotation:—**Distd.** City Bank Case (1861), 3 De G. F. & J. 629.

—— ——.]—M., the senior partner of M. & L., was the owner of certain railway shares, which he deposited with a bank where the firm had a joint account, & where he also had a separate account. The deposit was accompanied with a written memorandum, that the shares were to be held as a collateral security for a promissory note of his own which had been discounted by the bank, or for any other sum or sums of money in which he might thereafter become indebted to them; & he thereby empowered the bank to sell the shares should the promissory note, or any other advance, not be regularly paid at maturity. The shares subsequently became the property of the firm. M. & L. became bkpt. On their bkpcy. there was a large sum due from them to the bank which was unsecured:—*Held:* the bank were not entitled to hold & retain the shares as security for the debt due from bkpts. jointly.—*Re* LAURENCE & MORTIMORE, *Ex p.* M'KENNA, CITY BANK CASE (1861), 3 De G. F. & J. 629; 30 L. J. Bcy. 20; 7 Jur. N. S. 588; 9 W. R. 490; 45 E. R. 1022; *sub nom. Re* STREATFEILD, LAWRENCE & CO., *Ex p.* MACKENNA, CITY BANK CASE, 4 L. T. 164, L. C. & L. JJ.

Annotation:—**Mentd.** *Re* Bentham Mills Spinning Co. (1879), 11 Ch. D. 900.

686. Mortgage to secure partnership debt—Creditor may prove against joint estate—& retain security.]—One of three partners deposits with a joint creditor a bond belonging to himself, to secure the partnership debt:—*Held:* on the bkpcy. of the partners, the creditor could prove the amount of his debt against the joint estate, without giving up the bond.—*Re* RIDGE, *Ex p.* HALLIFAX (1842), 2 Mont. D. & De G. 544, Ct. of R.

687. Mortgage of partnership premises—What passes to mortgagee—Trade fixtures.]—A. & B. were in partnership as iron merchants; the freehold of the premises in which the partnership was carried on belonged to A. A. executed a mtge. of the freehold to C. Subsequently A. & B. for the purposes of the partnership business, put up certain machinery & fixtures, which were affixed to the freehold:—*Held:* they passed to the mtgee.—CULLWICK *v.* SWINDELL (1866), L. R. 3 Eq. 249; 36 L. J. Ch. 173; 31 J. P. 228; 15 W. R. 216.

Annotations:—**Consd.** Sanders *v.* Davis (1885), 15 Q. B. D. 218. **Refd.** Gough *v.* Wood, [1894] 1 Q. B. 713. **Mentd.** Climie *v.* Wood (1868), L. R. 3 Exch. 257; Longbottom *v.* Berry (1869), L. R. 5 Q. B. 123; Begbie *v.* Fenwick, Fenwick *v.* Begbie (1871), 8 Ch. App. 1075, n.

SUB-SECT. 4.—MORTGAGE OF SHARE IN PARTNERSHIP.

688. Effect of mortgage of share—No interest in partnership effects conveyed.]—BENTLEY *v.* BATES, No. 1326, *post*.

689. Rights of mortgagee—Effect of dissolution—Bankruptcy of continuing partner—Though separate collateral security substituted.]—The right of an equitable mtgee. of partnership property is not varied by a subsequent dissolution

PART IV. SECT. 4, SUB-SECT. 3.

l. *Mortgage to secure partnership debt.*]—One partner of a firm gave as security for half of the partnership indebtedness a mtge. on his separate real estate; the other partner gave an indorsed note for the remaining portion of the debt. Subsequently payments were made to the creditor on account of the joint debt, which he credited on the note, claiming to hold the mtge. for the entire balance:—*Held:* an assignee of the mtgor. was entitled to have one-half of all sums which had been paid out of the partnership assets on account of the debt credited on the mtge. security.—MOORE *v.* RIDDELL (1864), 11 Gr. 69.—**CAN.**

m. ——.]—Where a mtge. bond has been passed by one member of a firm in his own name, specially hypothecating property registered in his name, though the consideration given for the bond had been advanced to the firm, & the estate of the firm & the separate estate of the partner were both placed under sequestration, the holder of the mtge. bond was held entitled to prove the bond on the separate estate of the partner, in competition with the private creditors. — BENJAMIN *v.* BENJAMIN (1881), 1 E. D. C. 274.—**S. AF.**

PART IV. SECT. 4, SUB-SECT. 4.

n. *Effect of mortgage of share.*]—PALMER *v.* THOMPSON (1879), O. B. & F. 182.—**N.Z.**

o. ——.]—CARTER & SON *v.* QUINN (1898), 17 N. Z. L. R. 374.—**N.Z.**

of partnership between the mtgors., & a bkpcy. of the continuing partner, notwithstanding there had been the substitution of a separate collateral security, for a joint collateral security, given before the dissolution.—*Re* DRAPER, *Ex p.* BOOTH (1832), 2 Deac. & Ch. 59; 1 L. J. Bcy. 81, Ct. of R.

690. —— Account from date of dissolution—Mortgage by joint lessee.]—BENTLEY *v.* BATES, No. 1326, *post.*

691. —— —— Account of interest in partnership from date of possession.]—When a partner mortgages his share in the partnership, & the mtgee. brings an action to realise his mtge., the proper order is to direct an account of what the mtgor.'s interest in the partnership was at the date when the mtgee. proceeded to take possession under his mtgee., *i.e.*, at the date of the writ; but if a dissolution of the partnership has previously taken place, the date of the dissolution is the date at which the account is to be taken. -WHETHAM *v.* DAVEY (1885), 30 Ch. D. 574; 53 L. T. 501; 33 W. R. 925.

scoll, [1901] 1 Ch. 294.

692. —— —— Partnership Act, 1890 (c. 39), s. 31.]—The mtgee. or assignee of a share in a partnership is not bound by a sale subsequently made of the share by the mtgor. partner to his co-partners on a dissolution or by any agreement then made between the partners themselves purporting to alter the amount or value of the share as fixed by the arts. So long as the partnership continues, the mtgee. or assignee is precluded by above sect., sub-sect. 1, from interfering in the management or administration of the partnership or requiring accounts or inspecting the books, & he must accept the accounts of profits agreed to by the partners; but immediately upon a dissolution he becomes entitled, under sub-sect. 2, to have an account taken, as from the date of the dissolution, for the purpose of ascertaining & receiving the actual share of the mtgor. in the partnership assets, quite irrespective of any dealing with such share as between themselves.

One of two partners who were carrying on a business under a partnership deed mortgaged his share with the knowledge of his co-partner, & afterwards, without the mtgee.'s consent, agreed to a dissolution on the terms that he should sell his share to his co-partner for a sum which was less than the amount of the mtge. debt:—*Held:* the agreement was not binding upon the mtgee., & he was entitled, under above sect., sub-sect. 1, to an account, as from the date of the dissolution, for ascertaining the actual share of the mtgor.-partner in the partnership assets, & to payment of the amount of the share when so ascertained. —WATTS *v.* DRISCOLL, [1901] 1 Ch. 294; 70 L. J. Ch. 157; 84 L. T. 97; 49 W. R. 146; 17 T. L. R. 101; 45 Sol. Jo. 98, C. A.

693. —— —— ——.]—A partnership deed between three partners contained a power for any two partners by notice to determine the partnership so far as the third partner was concerned if he did not keep up his capital. It also contained a clause providing for arbn. in the usual way "if any difference shall arise between the said partners or between one or more of them & the exors. or administrators of the others or other of them or between their respective exors., or administrators." Two of the partners had given notice to the third, & it was admitted that the partnership had been determined so far as he was concerned. Before this determination the outgoing partner had mortgaged his share. Questions had arisen as to the right of the continuing partners to purchase the outgoing partner's share & the amount of his interest in the goodwill, which depended on the construction of the partnership deed. The continuing partners gave notice to the outgoing partner that they had appointed an arbitrator & requiring him to do the same. He did this, & the arbitrators agreed on an umpire, but nothing more had been done in the arbn. The mtgees. brought this action against all three partners for an account of the outgoing partner's share from the date of dissolution. The continuing partners moved for a stay of proceedings under Arbitration Act, 1889 (c. 49), s. 4:—*Held:* (1) the right of the mtgees. to an account was an independent right, given by the Partnership Act, 1890 (c. 39), & not depending upon the partnership deed; (2) the arbn. clause not including in terms persons claiming under the partners, the mtgees. were not bound by the clause & would not be bound by any account taken in the arbn., & therefore their action for an account could not be stayed.—BONNIN *v.*

L. T. 705.

Annotation:—*Generally*, **Mentd.** Rowe *v.* Crossley (1912), 108 L. T. 11.

694. —— Equitable mortgagee of share in mining partnership — Foreclosure not sale.]—Foreclosure, & not sale, is the remedy of an equitable mtgee. of a share in a mining partnership.—REDMAYNE *v.* FORSTER (1866), L. R. 2 Eq. 467; 35 Beav. 529; 35 L. J. Ch. 847; 14 W. R. 825; 55 E. R. 1002.

Annotations:—**Consd.** Whetham *v.* Davey (1885), 30 Ch. D. 574. **Refd.** Cavander *v.* Bulteel (1873), 28 L. T. 620.

695. Priority of debt to partnership—Over mortgage debt—Where mortgagor partner bankrupt.]—Where a lease of mines is taken by six persons, for the purpose of working them in partnership, & the managing partner becomes, in the course of such management, indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern.—FEREDAY *v.* WIGHTWICK (1829), 1 Russ. & M. 45; Taml. 250; 39 E. R. 18.

Annotations:—**Consd.** Darby *v.* Darby (1856), 3 Drew. 495. **Refd.** Phillips *v.* Phillips (1832), 1 My. & K. 649; Randall *v.* Randall (1835), 7 Sim. 271; Dale *v.* Hamilton (1846), 5 Hare, 369; Ricketts *v.* Bennett (1847), 4 C. B. 686. **Mentd.** Ferguson *v.* Sprang (1834), 3 Nev. & M. K. B. 665; Chillingworth *v.* Chillingworth (1837), 8 Sim. 404.

696. —— —— Constructive notice of mortgagee—Mortgage of real estate of partnership.]—CAVANDER *v.* BULTEEL, No. 670, *ante.*

697. Whether mortgagee bound by equities between partners—Subsequent sale to co-partner on dissolution—Agreement altering value of share as fixed by article.]—WATTS *v.* DRISCOLL, No. 692, *ante.*

698. —— Agreement entitling to salaries.]—Three partners were carrying on business under the terms of a deed which provided that they should be entitled to the profits in equal shares, but contained no affirmative clause defining the duties of the partners, nor any provision for the payment of a salary to any partner. By a settlement made in 1889 one of the partners charged his share in the undertaking with payment to trustees of £10,000, & interest, & also covenanted to pay to them all the rest of his share of the profits after making certain payments. Subsequently to the date of this settlement the partners came to an agreement under which, in consideration of their doing more work for the business, they received salaries. It was proved that this was done *bonâ fide*, & that the partners did work for their salaries:—*Held:* payment of the salaries

was part of the "management or administration" of the business within Partnership Act, 1890 (c. 39), s. 31, & was binding on the assignees under the settlement.—*Re* GARWOOD'S TRUSTS, GARWOOD *v.* PAYNTER, [1903] 1 Ch. 236; 72 L. J. Ch. 208; 51 W. R. 185; 47 Sol. Jo. 147.

——.]—*See* CHOSES IN ACTION, Vol. VIII., pp. 490, 491, Nos. 578, 587.

SUB-SECT. 5.—MORTGAGE TO PARTNERSHIP.

699. Sale by one partner—Under power in mortgage—Not binding on co-partners or mortgagor.]—Where a mtge. in the ordinary form is made to partners in trade to secure a partnership debt one of such partners takes no authority to bind the others or the mtgor. by a sale under the power in the mtge.; & if a person to whom he has contracted to sell the property expend money in repairs on the faith of such contract the money so expended cannot be recovered from the firm.—WARR *v.* JONES (1876), 24 W. R. 695.

SECT. 5.—PLEDGE OF PARTNERSHIP PROPERTY.

700. Whether pledge binding on other partners—Made without consent.]—SHIRREFF *v.* WILKS, No. 553, *ante*.

701. —— ——.]—If this were distinctly the case of a pledging by one partner of a partnership security for his own separate debt without the authority of the other partner . . . we should have no hesitation to pronounce a bill drawn & indorsed under such circumstances void (LORD ELLENBOROUGH, C.J.).—RIDLEY *v.* TAYLOR (1810), 13 East, 175; 104 E. R. 336.

Annotations:—**Consd.** *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615; Leverson *v.* Lane (1862), 13 C. N. B. S. 278. **Refd.** Lloyd *v.* Ashby (1825), 2 C. & P. 138; Frankland *v.* M'Gusty (1830), 1 Knapp, 274; Wintle *v.* Crowther (1831), 1 Cr. & J. 316; *Re* Riches & Marshall's Trust Deed, *Ex p.* Darlington, etc. Banking Co. (1865), 4 De G. J. & Sm. 581.

702. —— ——.]—WILKINSON *v.* EYKYN, No. 669, *ante*.

703. —— —— **Pledgee without notice that property joint—Absence of fraud.**]—A pledge by one partner of partnership property will bind his co-partners, although the pledge is made without their privity & consent, provided the pledgee had no notice that the property was joint property, & there be no fraud in the transaction.—RABA *v.* RYLAND (1819), Gow, 132, N. P.

Annotations:—**Apld.** Reid *v.* Hollinshead (1825), 4 B. & C. 867. **Refd.** Williams *v.* Barton (1825), 3 Bing. 139.

704. —— —— —— ——.]—In the absence of collusion & fraud, one partner may pledge joint property so as to bind his co-partner, although the latter is ignorant of the pledge.—TUPPER *v.* HAYTHORNE (1815), Gow, 135.

Annotation:—**Apld.** Reid *v.* Hollinshead (1825), 4 B. & C. 867.

705. —— —— —— ——.]—REID *v.* HOLLINSHEAD, No. 62, *ante*.

706. —— —— —— ——.]—*Re* ACRAMAN, *Ex p.* BUSHELL (1844), 3 Mont. D. & De G. 615; 3 L. T. O. S. 264; 8 Jur. 937, Ct. of R.

Annotation:—**Refd.** *Re* Riches & Marshall's Trust Deed, *Ex p.* Darlington, etc. Banking Co. (1865), 4 De G. J. & Sm. 581.

707. —— —— **Balance at bank—As security for advance to third persons.**]—B., a partner in the firm of B., M., & co., opened an account with certain bankers in the partnership name. B. was one of the comrs. under an Act of Parliament for paving, etc., a township, who also had an account at the same bank, & were considerably in advance. The comrs. being desirous of a further advance, the manager of the bank wrote to B., offering to make it, on condition that he would not withdraw an equal amount of his account. B. wrote in reply, that he wished to have £5,000 advanced on those terms, adding, "I undertake not to remove my funds to the extent of this extra advance, until the same is repaid by the comrs."

The bank made the advance, & subsequently there was a balance on B.'s account of £4,876: the extra advance not having been paid:—*Held:* assuming that this was a partnership account, B., M., & co. could not recover the balance as money received for their use; & this defence was available under the general issue.—BROWNRIGG *v.* RAE (1850), 5 Exch. 489; 15 L. T. O. S. 233; 155 E. R. 214.

708. —— **Knowledge of lender.**]—I cannot accede to [the principle] that if a partner for his own accommodation pledges the partnership as the money comes to the account of the single partner only, the partnership is not bound. I agree, if it is manifest to the persons advancing money, that it is upon the separate account, & so that it is against good faith that he should pledge the partnership, then they should show that he had authority to bind the partnership (LORD ELDON, C.).—*Ex p.* BONBONUS (1803), 8 Ves. 540; 32 E. R. 465, L. C.

Annotations:—**Consd.** Leverson *v.* Lane (1862), 13 C. B. N. S. 278. **Refd.** *Ex p.* Wenslay (1813), 2 Ves. & B. 254; *Re* Barrow, *Ex p.* Moult (1832), Mont. 321; *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615; *Re* Deane & Youle, *Ex p.* Goldsmid & King (1857), 1 De G. & J. 257; *Re* Riches & Marshall's Trust Deed, *Ex p.* Darlington, etc. Banking Co. (1865), 4 De G. J. & Sm. 581.

709. —— —— **Contract with government.**]—One of several partners in a contract with govt. cannot pledge goods consigned to him by another partner for the purpose of performing the contract.—SNAITH *v.* BURRIDGE (1812), 4 Taunt. 684; 128 E. R. 499.

Annotation:—**Refd.** Heilbut *v.* Nevill (1870), 39 L. J. C. P. 245.

710. —— **Pledge for partnership purposes.**]—BUTCHART *v.* DRESSER, No. 677, *ante*.

711. Right of pledgee to recover loss on advance—Against partner subsequently discovered.]—A. & B. trading under the firm of A. & co. agreed with C. to purchase coffee on a joint account, A. & co. to have the management of it. A. & co. purchased the coffee, & C. paid them for his share. A. & co. without the consent of C. deposited the coffee with D., who advanced money on it, & being ignorant that C. was concerned in it, debited A. & co. with the advance. The coffee was sold at a loss. A commission issued against A. & B. & another against C.:—*Held:* D. entitled to prove his balance beyond the proceeds, against the estate of C., as well as against the estate of A. & B.—*Re* HUTCHINSON, *Ex p.* GELLAR (1812), 1 Rose, 297, L. C.

712. Right of lien on partnership property—Valid for partnership debt only.]—Three firms, A., B. & C., purchased corn in America, in which

PART IV. SECT. 5.

702 i. *Whether pledge binding on other partners.*]—HAARHOFF *v.* CAPE OF GOOD HOPE BANK, 4 H. C. 304.—**S. AF.**

p. *Partner entrusted with goods—For purposes of sale.*]—A partner entrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally.—DINGWALL *v.* MCBEAN (1900), 30 S. C. R. 441.—**CAN.**

q. *Partner having authority to borrow money.*]—Power to borrow money

Sect. 5.—*Pledge of partnership property.* *Sect.* 6: *Sub-sect.* 1, *A.*]

purchases they were jointly interested; part was remitted to England; the bills of lading thereof, being indorsed in blank, were put into the hands of C. on account of the three firms. C. consigned such part to defts. for sale by them, who sold the same, & realised a net sum of £8,960 10*s.* 7*d.* C. previously to this consignment, had made other large consignments of corn for sale to them, being partly corn which they held as factors, & partly corn belonging to themselves. These cargos so consigned were sold by defts., who received their proceeds. C. drew upon defts., who accepted the bills & duly paid the same. The whole so paid exceeded the sum realised by sale of all the cargos consigned, including that which produced the £8,960 10*s.* 7*d.* Defts. having claimed a lien on this latter sum:—*Held:* there was no contract, express or implied, giving them any further lien, &, therefore, when all demands on the three firms jointly had been satisfied, those firms had a right to the proceeds, notwithstanding any separate debt due from any one of the consigning firms.

C. as managing partner, had a full right to deal with the partnership property in the ordinary course of trade. They had, therefore, a full right to consign it to defts., & thereby to give them a general lien on it against the consignee, that is to say, for all demands they might have jointly against the three consigning firms, but certainly not for a demand which they might have against any one of those firms separately. Any contract by C. to make the joint property a security for their separate debt, would have been a palpable fraud on their partners. C. as agents of the three firms, consigned the joint cargos for sale. Defts. effected the sales, & received the proceeds. Out of these proceeds they had a right to retain the amount of everything due to them from the consignors—that is to say, from the three firms.—but they had no further right (*per* CUR.).—DENNISTOUN *v.* YOUNG (1850), 15 L. T. O. S. 346.

713. Money borrowed on bond—Whether mortgagor of share of partnership.]—A., B., C. & D. joined in a partnership to work a fulling mill. Money was subscribed by all the partners, with part of which, freehold land was bought, which was conveyed to A. & B. in fee; with other part a mill was built on the land, & machinery for the mill was purchased. By a partnership deed executed by A. & B., C. & D., the trusts of the land, mill, etc., were declared to be (among other things), that A. & B. should stand seised & possessed of all the estates, property goods, etc., upon trust for the benefit of themselves & their partners as part of their partnership joint stock-in-trade, there was a provision in the deed that A. & B. might borrow money upon mtge. of the stock, property estates, etc., belonging to the co-partnership; & it was declared that the land, mill, etc., should be deemed & considered as or in nature of personal estate & not real estate, & be held in trust for the partners as part of their partnership stock-in-trade. A. & B. under the powers of the deed, borrowed money for the purpose of the partnership, for which they gave bonds & notes in their own names, but did not mortgage any part of the property:—*Held:* (1) each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership; (2) the money so borrowed had not the effect of mtges. on the shares of the partners.—BAXTER *v.* BROWN (1845), 7 Man. & G. 198; 135 E. R. 86; *sub nom.* BAXTER *v.* NEWMAN, Bar. & Arn. 493; Cox. & Atk. 86; 1 Lut. Reg. Cas. 287; Pig. & R. 182; 8 Scott N. R. 1019; 14 L. J. C. P. 193; 5 L. T. O. S. 129; 9 J. P. 744; 9 Jur. 829.

Annotations:—As to (1) **Consd.** Bulmer *v.* Norris (1860), 9 C. B. N. S. 19. **Refd.** Ashmore *v.* Lees (1845), 1 Lut. Reg. Cas. 337; Myers *v.* Perigal (1852), 2 De G. M. & G. 599; Watson *v.* Spratley (1854), 10 Exch. 222; Hayter *v.* Tucker (1858), 4 K. & J. 243; Bennett *v.* Blain (1863), 15 C. B. N. S. 518; Freeman *v.* Gainsford (1865), 18 C. B. N. S. 185. *Generally*, **Refd.** Watson *v.* Black (1885), 16 Q. B. D. 270. **Mentd.** Robinson *v.* Ainge (1869), 1 Hop. & Colt. 193; Spencer *v.* Harrison (1879), 5 C. P. D. 97; Mercier *v.* Mercier (1903), 72 L. J. Ch. 511.

714. Power to pledge after dissolution—Partner appointed receiver—Action against pledgee—Parties to action.]—H., a partner in a firm of solrs., received money from R., a client, for the purpose of investment; but the money was not invested. On the death of another partner his exors. brought a partnership action, & H. was appointed one of the receivers. H., without the knowledge of his co-receiver, gave R. a memorandum, stating that he held the title deeds of certain property, on which the firm had an equitable mtge., on behalf of R. as security for her money, & he subsequently placed the deeds in a box marked with R.'s name. R. afterwards got possession of the box & deeds & claimed to retain them. H. was subsequently removed from the receivership & L. appointed in his place. The action was originally brought by the receivers against R. alone, but was amended by adding H. & the exors. of deceased partner as defts.:—*Held:* (1) all the partnership assets passed to the receivers by the order for their appointments to which H. was a party, &, therefore, he held the deeds as receiver & not as partner, & had no power to part with them, & consequently R. must deliver them up to the receivers; (2) the action was properly constituted by making the new receivers pltfs. & H. a deft.—HILLS *v.* REEVES (1882), 31 W. R. 209, C. A.

Annotation:—Generally, **Mentd.** *Re* Sacker, *Ex p.* Sacker (1888), 22 Q. B. D. 179.

715. Bill of sale by one partner—"True owner."]—The words "true owner" in Bills of Sale Act, 1882 (c. 43), s. 5, are used in their natural & not in an artificial sense; & a man does not cease to be the true owner of personal chattels within the meaning of that sect. merely because they may be subject to some lien or equitable right. In 1885 the bkpts. commenced to carry on business in partnership, & in 1888 a bill of sale was executed by the elder partner, with the consent of the younger, of partnership property, as security for an advance for partnership purposes. This bill of sale was set aside by the county ct. judge on the ground that the grantor was not the "true owner" of either the whole of a moiety of the goods specified in the schedule, within Bills of Sale Act, 1882 (c. 43), s. 58, & an order was made directing the bill of sale holder to repay the value of the goods to the trustee in bkpcy.:—*Held:* the county ct. judge was wrong in ordering the bill of sale holder to pay back the whole of the money: the grantor was, to the extent of his share in the partnership goods assigned by the bill of sale, "true owner" within the meaning

implies power to pledge assets.—WESTERN COMMERCIAL CO. *v.* MURR & MUTZ (Alta.) (1914), 29 W. L. R. 945.—**CAN.**

r. *Partner having sole management.*]—Where one of several partners has, under arrangement with the other partners, the sole management of the business, he has the power of borrowing as incidental to the power of trade, & the power to pledge partnership assets as incidental to the power of borrowing.—ASAN KANI RAVUTTAR *v.* SAMASUNDARAM CHETTIAR (1908), I. L. R. 31 Mad. 206.—**IND.**

of sect. 5; & the bill of sale holder was entitled to retain one-half of the money realised.—*Re* TAMPLIN & SON, *Ex p.* BARNETT (1890), 59 L. J. Q. B. 194; 62 L. T. 264; 38 W. R. 351; 6 T. L. R. 206; 7 Morr. 70, D. C.

Annotation:—**Mentd.** Lewis *v.* Thomas (1918), 88 L. J. K. B. 275.

SECT. 6.—LEGAL PROCEEDINGS.

SUB-SECT. 1.—ACTIONS BY PARTNERS.

A. In General.

See, now, R. S. C., Ord. 48A.

716. Right to sue jointly—Bill drawn by one.]—Where one of several partners in a banking house drew a bill in his own name, upon a third party, & accepted the same, upon condition that the drawer should provide for the same when due:—*Held:* all the partners in the banking firm could not recover on the bill.—SPARROW *v.* CHISMAN (1829), 9 B. & C. 241; 4 Man. & Ry. K. B. 206; 7 L. J. O. S. K. B. 173; 109 E. R. 90.

Annotation:—**Refd.** Gordon *v.* Ellis (1844), 7 Man. & G. 607.

717. —— Contract by one — Existence of partnership undisclosed.]—The joint owners of a vessel engaged in the whale fishery may sue a purchaser for the price of whale oil, although the contract of sale were made by one of the part-owners, & the purchaser did not know that other persons had any interest in the transaction.—SKINNER *v.* STOCKS (1821), 4 B. & Ald. 437; 106 E. R. 997.

Annotations:—**Refd.** Steel *v.* Western (1822), 7 Moore, C. P. 29. **Mentd.** Humble *v.* Hunter (1848), 3 New Pract. Cas. 175.

BANKERS, Vol. III., p. 263, No. 802.

718. —— For professional services of one.]—A. employs B. & C., who are attorneys, & partners, to prosecute an action in the Palace Ct., B. alone being an attorney of that ct.

The amount of B. & C.'s bill costs is recoverable from A. in a joint action by B. & C.—ARDEN *v.* TUCKER (1833), 4 B. & Ad. 815; 1 Nev. & M. K. B. 759; 2 L. J. K. B. 137; 110 E. R. 663.

—— Guarantee given to one.]—*See* GUARANTEE, Vol. XXVI., p. 100, Nos. 685, 686.

719. Action by some partners—On contract in their own names.]—Pltfs., who were members of a joint stock co. which dealt in salt, & deft. entered into a written agreement, to the effect that the co. were to supply deft. with brine at a certain sum; that the co.'s make of salt & the price were to be fixed according to a certain standard; & that either the co. or deft. were to be at liberty to cease to supply or to take the salt, upon giving a notice to that effect. This agreement was signed thus: "For Clay & Newman (pltfs.) J. W. Lea." "J. S." (deft.) It appeared that the salt was supplied from the premises of the co.:—*Held:* pltfs. had themselves entered into this contract with deft., & they were entitled to sue him for a breach of it in their own names.—CLAY & NEWMAN *v.* SOUTHERN (1852), 7 Exch. 717; 21 L. J. Ex. 202; 19 L. T. O. S. 67; 16 Jur. 1074; 155 E. R. 1137.

720. —— Joinder of others impracticable.]—ANON. (1722), 2 Eq. Cas. Abr. 168; 22 E. R. 143; *sub nom.* CHANCEY *v.* MAY, Prec. Ch. 591.

Annotations:—**Apld.** Cockburn *v.* Thompson (1809), 16 Ves. 321. **Consd.** Meux *v.* Maltby (1818), 2 Swan. 277. **Refd.** Good *v.* Blewitt (1807), 13 Ves. 397; Long *v.* Yonge (1830), 2 Sim. 369; Wallworth *v.* Holt (1841), 4 My. & Cr. 619.

721. Action by active partners—Profits shared by dormant partner.]—Where a partner has withdrawn his name from the firm, though he may continue to receive part of the profits as a dormant partner, it is not a ground of nonsuit that his name is not joined in the action.—LEVECK *v.* SHAFTOE (1796), 2 Esp. 468; 170 E. R. 422, N. P.

Annotation:—**Refd.** Bawden *v.* Howell (1841), 3 Man. & G. 638.

722. —— ——.]—It is no ground of nonsuit in an action on a contract, that a dormant partner, who is not privy to the contract, & is not party to the suit, partakes the benefit of the contract, & therefore ought to be joined as pltf. For such a dormant partner could not maintain the action.—LLOYD *v.* ARCHBOWLE (1810), 2 Taunt. 324; 127 E. R. 1102.

Annotations:—**Refd.** Beckham *v.* Knight (1838), 5 Scott, 619. **Mentd.** Laird *v.* Dixon (1827), 6 L. J. O. S. K. B. 109; Bawden *v.* Howell (1841), 6 Jur. 37.

Action by solvent partner—& assignee of bankrupt partner.]—*See* BANKRUPTCY, Vol. IV., p. 458, No. 4133.

723. Action by continuing partners—On promise to pay—Goods furnished to another.]—A promise in writing directed to A., B., & C., a house in trade, to pay for goods to be furnished to another cannot be enforced in an action by B. & C. to recover the value of goods furnished after A. had withdrawn from the partnership.—MYERS *v.* EDGE (1797), 7 Term Rep. 254; 101 E. R. 960.

724. Action by surviving partners.]—*Semble:* where one of several partners, pltfs., dies, the suit survives to the others.—ANDERSON *v.* WALLIS (1841), 4 Y. & C. Ex. 336; 10 L. J. Ex. Eq. 9; 5 Jur. 458; 160 E. R. 1035.

725. Action by personal representative of partner—Fraudulent transfer of partnership property—By co-partner.]—Though a right to an action at law & a right to sue in equity spring from the same transaction, & though the personal representative of the person having these rights may, by special circumstances, be prevented from maintaining an action at law, his right to sue in equity will not thereby be lost.

T. & B. were partners. Stock was standing in the books of a railway co. in their joint names. B. sold out the stock by a deed which he executed & to which he forged the name of T., but he continued to account to T. for the dividends, & T. died in ignorance of the forgery. T.'s personal representative afterwards filed a bill against the co. for a retransfer of the stock:—*Held:* though by the death of T. the right to an action at law was gone, the right to a suit in equity still remained, & a decree directing the co. to retransfer the stock was sustained.—MIDLAND RY. CO. *v.*

PART IV. SECT. 6, SUB-SECT. 1.—A.

t. *Right to sue jointly—Conversion.*]—In an action by A. & B. for seizing & selling the joint property of A. & B. under a *fi. fa.* against A. only:—*Held:* the action was rightly brought in the joint names of A. & B.—SMITH & MATTHEWS *v.* OGG (1864), 3 N. S. W. S. C. R. (L.) 6.—**AUS.**

a. —— ——.]—A joint action will lie by partners whose goods have been sold & removed under an execution against one of them.—LANE *v.* TAYLOR (1866), 5 N. S. W. S. C. R. (L.) 84.—**AUS.**

b. ——.]—B. assigned to his partner & to himself a debt due from deft. to himself for goods sold, etc.:—*Held:* under 29 Vict. c. 28, & 35 Vict. c. 12 (O.), B. & his partner could sue for this debt in their joint names.—BLAIR *v.* ELLIS (1874), 34 U. C. R. 466.—**CAN.**

724 i. *Action by surviving partners.*]—One of several joint contractors having died during the progress of the work contracted for, & a bill being afterwards filed by the survivors to enforce a claim under the contract:—*Held:* the personal representatives of the deceased partner should have been made parties; the rules respecting the rights of surviving partners to sue alone not applying to suits in equity.—SYKES *v.* BROCKVILLE & OTTAWA RY. CO. (1862), 9 Gr. 9.—**CAN.**

Sect. 6.—Legal proceedings: Sub-sect. 1, A. & B.]

TAYLOR (1862), 8 H. L. Cas. 751 ; 31 L. J. Ch. 336 ; 6 L. T. 73 ; 8 Jur. N. S. 419 ; 10 W. R. 382 ; 11 E. R. 624, H. L. ; *affg.* S. C. *sub nom.* TAYLOR *v.* MIDLAND RY. CO. (1860), 28 Beav. 287.

Annotations :—**Mentd.** Swan *v.* North British Australian Co. (1862), 10 W. R. 841 ; Sutton *v.* Wilders (1871), L. R. 12 Eq. 373 ; Barton *v.* L. & N. W. Ry. (1888), 38 Ch. D. 144 ; Barton *v.* North Staffordshire Ry. (1888), 38 Ch. D. 458.

726. Joinder of partners.]—Pltfs. together with A. & B. being owners of one ship, & deft. of another, a prize was taken, condemned, & shared by agreement between them ; afterwards the sentence of condemnation was reversed, & restitution awarded, with costs, which was paid solely by pltfs., A. & B. having in the meantime become bkpts. An action cannot be brought by pltfs. alone for a moiety of the restitution money & of the costs, because it was either a partnership transaction, when A. & B. ought to be joined ; or not, when separate actions should be brought by each of the persons paying.—GRAHAM *v.* ROBERTSON (1788), 2 Term Rep. 282 ; 100 E. R. 154.

Annotations :—**Reld.** Osborne *v.* Harpur (1804), 1 Smith, K. B. 411 ; Place *v.* Delegal (1838), 4 Bing. N. C. 426 ; Mills *v.* Alderbury Union Grdns. (1849), 18 L. J. Ex. 252.

727. ——.]—Although in an action on an agreement in writing, made by or with one or more members of a firm on behalf of the rest, all the members may be joined, it is otherwise when the agreement is *inter partes*, & there is no partnership between the person who is party to it on the one side or the other & the third person whom it is sought to join ; & it is questionable whether in the case of an agreement *inter partes* parol evidence is ever admissible for the purpose of showing other persons to be parties to it.—ROBINSON *v.* RUDKINS (1856), 26 L. J. Ex. 56.

728. —— **New partner not to be joined.**]—In an action by several partners for goods sold, if one of them joins in the action, who at the time of the contract was not a partner, but who afterwards becomes such, & by agreement among the partners was to have a share in the profits, from a time preceding the contract, pltfs. shall be non-suited ; for the contract must relate to the time of making it, at which time he was not a partner.—WILSFORD *v.* WOOD (1794), 1 Esp. 181 ; 170 E. R. 321, N. P.

729. —— **Nominal partner joined.**]—A merchant carrying on trade on his own separate account, introduces into his firm the name of a clerk who has no participation in profits or loss, but continues to receive a fixed salary :—*Held :* in an action on a bill of exchange payable to the order of this firm, the clerk must be joined as a pltf.—GUIDON *v.* ROBSON (1809), 2 Camp. 302 ; 170 E. R. 1163, N. P.

Annotation :—**Reld.** Spurr *v.* Cass, Cass *v.* Spurr (1870), L. R. 5 Q. B. 656.

730. —— **Non-joinder amendable at trial.**]—The non-joinder of a partner as pltf. in debt amendable at the trial, deft. not appearing to be prejudiced.—WILLIAMS *v.* GROVES (1858), 1 F. & F. 341.

731. —— **Dissentient partners not joined.**]—RICHARDSON *v.* LARPENT (1843), 2 Y. & C. Ch. Cas. 507 ; 1 L. T. O. S. 431 ; 7 Jur. 691 ; 63 E. R. 227.

Annotations :—**Reld.** Wilson *v.* Stanhope (1846), 2 Coll. 629 ; *Re* London & Birmingham Extension & Northampton, Daventry, Leamington & Warwick Ry., *Ex p.* Morrison (1847), 9 L. T. O. S. 314 ; Carlisle *v.* S. E. Ry. (1850), 2 H. & Tw. 366 ; Fawcett *v.* Laurie (1860), 1 Drew. & Sm. 192. **Mentd.** Sharp *v.* Day (1846), 4 Ry. & Can. Cas. 261 ; Clark *v.* Webb (1848), 12 Jur. 615 ; Turnbull *v.* Woolfe (1861), 4 L. T. 236.

Action by banking co-partnership.] — *See* BANKERS, Vol. III., pp. 139, 140–142, Nos. 123, 131–140, 144, 145.

732. Action by foreign traders—Partnership according to English law.] — Persons trading abroad in such mode as to constitute a partnership here, may sue here as partners for consignments sent to this country, though they cannot sue at the place of trading by reason of the particular law of that country.—SHAW *v.* HARVEY (1830), Mood. & M. 526.

733. —— **Right to counterclaim—Leave to serve out of jurisdiction previously refused.**]—Defts. had been refused leave to serve pltfs., a Dutch firm, out of the jurisdiction in an action for damages for breach of contract. Subsequently pltfs. instituted the present action against defts. in respect of the same matters, & defts. counterclaimed for the damages they sought to recover in the first-named action :—*Held :* the Dutch firm having brought themselves within the jurisdiction by suing here, defts. were entitled to counterclaim.—GRIENDTOVEEN *v.* HAMLYN & CO. (1892), 8 T. L. R. 231, D. C. ; *previous proceedings, sub nom.* HAMLYN & CO. *v.* GRIENDISVEEN CO. (1890), 6 T. L. R. 274, C. A.

Annotation :—**Apld.** The Cheapside, [1904] P. 339.

734. Action for defamation.]—If a partner in a firm be slandered in the way of his trade, the action must be brought by the firm, for they are the parties injured, & he cannot sue alone, as the law does not sanction multiplicity of actions.—ROBINSON *v.* MARTIN (1844), 3 L. T. O. S. 125 ; *subsequent proceedings, sub nom.* ROBINSON *v.* MARCHANT (1845), 7 Q. B. 918.

——.]—*See, also,* LIBEL & SLANDER, Vol. XXXII., pp. 12, 13, Nos. 30–38.

735. Common partner in plaintiff & defendant firms—Right of surviving partners to sue—After decease.]—The partners in one house of trade cannot maintain an action against the partners in another house of trade, of which one of the partners in pltfs.' house is also a member, for transactions which took place while he was partner

726 i. *Joinder of partners.*]—Where three or four partners declared on a bill as indorsees, & averred an indorsement to themselves "trading under" the partnership name, & the bill was indorsed in blank :—*Held :* the non-joinder of the other partner was not a ground of non-suit.—ANDERSON *v.* MACAULAY (1843), 6 O. S. 537.—**CAN.**

726 ii. ——.]—BLACK HILL THRESHING SYNDICATE *v.* COLE (Sask.) (1918), 42 D. L. R. 790.—**CAN.**

c. *Action by foreign traders.*]—Pltfs., a foreign firm, issued the writ of summons in their firm name :—*Held :* there was only an irregularity which was waived by defts. appearing & obtaining an order for security for costs.—KASINDORF *v.* HUDSON BAY INSURANCE CO. (1909), 11 W. L. R. 143.—**CAN.**

d. ——.]—A foreign partnership has no right to proceed as such in the Exchequer Ct. of Canada, but must sue or petition in the names of the individual partners.—NORTH ATLANTIC TRADING CO. *v.* R. (1912), 15 Exch. C. R. 14.—**CAN.**

734 i. *Action for defamation.*]—A party suing a joint stock co., having in his summons made statements with respect to the co., which were alleged to be calumnious :—*Held :* an action was competently laid at the instance of a person who was one of the partners & managers of the co., & who had been mentioned by name in the statements, for slander.—HUSTLER *v.* WATSON (1841), 3 Dunl. (Ct. of Sess.) 366 ; 37 Fac. Coll. 333.—**SCOT.**

734 ii. ——.]—WILLIAMS *v.* ALLAN (1841), 3 Dunl. (Ct. of Sess.) 600 ; 37 Fac. Coll. 617.—**SCOT.**

e. *Proof of partnership.*]—In an action by partners, brought after the Act allowing parties in a cause to be witnesses, it is not necessary to call pltfs. to prove the partnership : it may be proved by other evidence, in the usual way by parties having dealings with them as such, or by persons having means of knowing who composed the firm.—RANKIN *v.* HARLEY (1858), 12 N. B. R. (1 Han.) 271.—**CAN.**

f. *Action for rescission.*]—Although a person, who has been induced to enter into a contract of purchase as one of a partnership or syndicate proves such fraud or misrepresentation on the part of the vendor that he would, if alone concerned, have been entitled to rescind the contract, yet he is not

in both houses, & that, whether the action be brought in the lifetime of the common partner, or after his decease. But after his decease the surviving partners of the one house may sue the surviving partners of the other house, upon transactions subsequent to the decease of the common partner.—BOSANQUET *v.* WRAY (1815), 6 Taunt. 597 ; 2 Marsh. 319 ; 128 E. R. 1167.

Annotations :—**Distd.** Bosanquet *v.* Woodford (1843), 5 Q. B. 310. **Mentd.** Chitty *v.* Naish (1834), 2 Dowl. 511 ; Mills *v.* Fowkes (1839), 2 Arn. 62 ; Beecham *v.* Smith (1858), E. B. & E. 442.

See, now, R. S. C., Ord. 48A, r. 10.

736. Effect of disability of one partner—Partner also director of company—Unregistered security.]—A firm, one of whose members was a director of a co., made a loan to the co. The co. accepted bills drawn by the firm, which when renewed were drawn in the name of the partner who was a director, & certain warrants for pig iron were transferred by the co. to such partner as security. No entry was made of the transaction in the co.'s register of mtges. :—*Held :* as the loan was made by the firm & not by the director partner alone it was not within the principle of the cases decided on Cos. Act, 1862 (c. 89), s. 43, & the security could be enforced against the co.—*Re* SOUTH DURHAM IRON CO., SMITH'S CASE (1879), 11 Ch. D. 579 ; 48 L. J. Ch. 480 ; 40 L. T. 572 ; 27 W. R. 845, C. A.

Annotations :—**Distd.** Freeman *v.* Laing, [1899] 2 Ch. 355. **Refd.** *Re* Underbank Mills Cotton Spinning & Manufacturing Co. (1885), 31 Ch. D. 226 ; Wright *v.* Horton (1887), 12 App. Cas. 371. **Mentd.** *Re* Kingston Cotton Mill Co., *Ex p.* Pickering & Peasegood (1895), 73 L. T. 482 ; Dublin City Distillery *v.* Doherty, [1914] A. C. 823.

Action barred—Acknowledgment of a debt.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 355, No. 385.

Action against surety—Fidelity guarantee for servant afterwards admitted partner.] — *See* GUARANTEE, Vol. XXVI., p. 172, Nos. 1294, 1295.

Action on bill of exchange.] — *See* BILLS OF EXCHANGE, Vol. VI., p. 466, Nos. 2969–2971.

B. By One Partner.

See R. S. C., Ord. 48A.

737. For debt due to firm.]—An action, by one of several partners, for a debt due to the firm, cannot be maintained for the debt, even though deft. suffer judgment by default, & the amount of the debt be clearly proved before the sheriff upon a writ of inquiry.—BLENCOWE *v.* —— (1825), 4 L. J. O. S. K. B. 78.

738. ——.]—It is a general rule of law that one partner may, without the consent of his co-partner, institute legal proceedings against a debtor to the firm.—COLLETT *v.* HUBBARD (1846), 2 Coop. *temp.* Cott. 94 ; 47 E. R. 1069, L. C.

739. To set aside purchase.] — *Semble :* a bill to set aside a purchase may be maintained by some partners of a co., including the actual purchasers, without making all the partners parties, against a vendor who is not a partner, *et vice versâ*.—ATTWOOD *v.* SMALL (1838), 6 Cl. & Fin. 232 ; 7 E. R. 684 ; *sub nom.* SMALL *v.* ATTWOOD, 2 Jur. 226, 246, H. L. ; *varying* S. C. *sub nom.* SMALL *v.* ATTWOOD (1832), You. 407.

Annotations :—**Refd.** Walburn *v.* Ingilby (1833), 1 My. & K. 61 ; Lovell *v.* Hicks (1836), 2 Y. & C. Ex. 46. **Mentd.** Brown *v.* Sawer (1841), 3 Beav. 598 ; Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542 ; Nelthorpe *v.* Holgate (1844), 8 Jur. 551 ; Archbold *v.* Comrs. of Charitable Bequests for Ireland (1849), 2 H. L. Cas. 440 ; Marshall *v.* Sladden (1849), 7 Hare, 428 ; Reynell *v.* Spryc, Sprye *v.* Reynell (1849), 8 Hare, 222 ; Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903 ; Cockell *v.* Taylor (1852), 15 Beav. 103 ; Morrell *v.* Wootten (1852), 16 Beav. 197 ; A.-G. *v.* Chesterfield (1854), 18 Beav. 596 ; Jorden *v.* Money (1854), 5 H. L. Cas. 185 ; Smith *v.* Kay (1859), 7 H. L. Cas. 751 ; Beavan *v.* Mornington (1860), 8 H. L. Cas. 528 ; Ernest *v.* Croysdill (1860), 2 De G. F. & J. 175 ; Higgins *v.* Samels (1862), 2 John. & H. 460 ; Central Ry. of Venezuela *v.* Kisch (1867), L. R. 2 H. L. 99 ; Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485 ; Other *v.* Smurthwaite (1868), L. R. 5 Eq. 437 ; Rankin's Estate (1868), 19 L. T. 25 ; Shedden & Shedden *v.* A.-G., Shedden & Patrick (1869), 22 L. T. 631 ; Torrance *v.* Bolton (1872), 41 L. J. Ch. 643 ; Weise *v.* Wardle (1874), L. R. 19 Eq. 171 ; Panama & South Pacific Telegraph Co. *v.* Indiarubber, Gutta Percha & Telegraph Works Co. (1875), 32 L. T. 238 ; Arkwright *v.* Newbold (1880), 28 W. R. 828 ; Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161 ; Redgrave *v.* Hurd (1881), 20 Ch. D. 1 ; Roots *v.* Snelling (1883), 48 L. T. 216 ; Burstall *v.* Beyfus (1884), 26 Ch. D. 35.

740. On personal undertaking for firm.]—A., a member of the firm of A. Brothers, of South America, went to Hong Kong to enforce a debt due by B. & co. of that place to his firm. Upon B. & co. being threatened with proceedings, they applied to C. & co. for assistance. C. & co. agreed to advance B. & co. the money to pay their debt by remitting the amount to A. & co., & afterwards, in pursuance of this agreement, & in consideration of A.'s not proceeding to sue B. & co., gave an undertaking in writing, whereby C. & co. promised to remit the amount to A.'s agent in London, at the expiration of six months, whereon A. gave B. & co. a receipt in full for the debt due to the firm of A. & co. C. & co. afterwards repudiated their obligation to remit the amount to A. & co. In these circumstances A. brought an action against C. & co. in the Supreme Ct. at Hong Kong, & that Ct. nonsuited A. on the ground that A.'s firm, being beneficially interested, should have sued, & not A. alone.

Such judgment of nonsuit upon appeal reversed, the Judicial Committee of the Privy Council holding, that the contract being entered into with A. personally, upon his undertaking not to sue B. & co., constituted a personal agreement ; & that A. was entitled to sue C. & co. in his own name, without joining his partners as pltfs. in the action. —AGACIO *v.* FORBES (1861), 14 Moo. P. C. C. 160 ; 4 L. T. 155 ; 9 W. R. 503 ; 15 E. R. 267, P. C.

See CONTRACT, Vol. XII., p. 39, No. 187.

—— **Accommodation instrument.**] — *See* BILLS OF EXCHANGE, Vol. V., p. 129, No. 863.

741. On contract for sale of partnership property—Signature for firm under power of attorney.]—C. & co., merchants in Spain, being possessed of mines in that country, gave J. a power of attorney authorising him to sell them for a sum not less than £40,000, J.'s remuneration being a moiety of any sum he might obtain beyond that price. J. contracted to sell the mines to defts., by an agreement which professed to be made "between J., acting for himself & also under a letter of attorney for & on behalf of A., B., & C., all three of them co-proprietors with him of various mines in Spain, & carrying on business in co-partnership with him under the style of C. & co.," of the one part, & defts. of the other part. In the body of the agreement C. & co. were described as the " vendors " & there was a stipulation that the mines were to be delivered by the vendors to the co. with a good title. The agreement was signed by J., " for self & partners," & was sealed with the seal of the co. :—*Held :* J.

in a position to do so unless all the members of the partnership or syndicate are seeking such rescission.—McLAREN *v.* McMILLAN (1907), 16 Man. L. R. 604.—**CAN.**

PART IV. SECT. 6, SUB-SECT. 1.—B.

737 i. *For debt due to firm.*]—A promise to one member of the firm to pay him for work connected with the partnership business, performed by him for deft., enures to the benefit of the firm ; & the partner to whom the promise was made cannot sue alone.—HARTLEY *v.* FISHER (1850), 6 N. B. R. (1 All.) 694.—**CAN.**

alone could not maintain an action against the co. for breach of this agreement, but A., B., & C., being parties to the contract, must be joined as pltfs.—JUNG *v.* PHOSPHATE OF LIME CO., LTD. (1868), L. R. 3 C. P. 139; 37 L. J. C. P. 73; 17 L. T. 541; 16 W. R. 309.

742. Owner of subject-matter of contract.]—Where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject-matter of the contract was his property alone:—*Held:* his declaration was evidence against all the partners, & therefore they could not sue jointly upon such a contract.—LUCAS *v.* DE LA COUR (1813), 1 M. & S. 249; 105 E. R. 93.

Annotations:—**Distd.** Cooke *v.* Seeley (1848), 2 Exch. 746. **Consd.** Humble *v.* Hunter (1848), 12 Q. B. 310. **Refd.** Rederi Akt. Transatlantic *v.* Drughorn, [1918] 1 K. B. 394.

743. Predominant partner managing & controlling.]—By a bill of lading the vessel was to be unloaded in regular turn:—*Held:* where the master was part-owner, but had the entire control & management of the ship, paying to his co-owner a third of the net profits, it was competent to him to sue in his own name.—CAWTHRON *v.* TRICKETT (1864), 15 C. B. N. S. 754; 3 New Rep. 383; 33 L. J. C. P. 182; 9 L. T. 609; 12 W. R. 311; 1 Mar. L. C. 414; 143 E. R. 981.

744. Signatory of deed of composition — Signature for firm.]—Covenant lies on a deed of composition with creditors, by one of two partners who signs the deed in the name of his firm & sets his seal thereto, for non-payment of an instalment due on a partnership debt; for the other partner, not being a party to the deed, cannot join in covenant.—METCALFE *v.* RYCROFT (1817), 6 M. & S. 75; 105 E. R. 1171.

Annotations:—**Refd.** *Re* Smith & Laxton, *Ex p.* Cockburn (1863), 3 New Rep. 227. **Mentd.** Dewhirst *v.* Jones (1864), 3 H. & C. 60.

745. Representative agreed upon by partners. Where several persons jointly interested agreed to horse a coach, each of them, one stage, on the road from L. to B., & that, in case of default, one of them should sue the defaulter for a penalty which should be divided among the non-defaulters, held, that an action might be maintained on the agreement, against a defaulter, by the party so appointed to sue, & that the others need not join in the action.—RADENHURST *v.* BATES (1826), 3 Bing. 463; 11 Moore, C. P. 421; 4 L. J. O. S. C. P. 169; 130 E. R. 591.

746. Recovery of money paid for firm.]—Where a partnership firm is under a liability, & has a remedy over against another person, & one of the partners alone pays the amount, he may bring the action over against the other person in his own name without joining his partners.—HOPLEY *v.* EICKE (1827), 5 L. J. O. S. K. B. 174.

Recovery of insurance money.] — *See* INSURANCE, Vol. XXIX., pp. 294, 295, Nos. 2402–2404.

747. Breach of duty to individual partners.]—In an action against defts., for a breach of duty, as accountants, in casting up & settling the general balance due to the firm, & also the balance due to pltf. & each of his co-partners respectively, in consequence of which, pltf. was awarded to pay a greater sum to his co-partners than he otherwise would have been:—*Held:* the averment in the declaration, that defts. were retained & employed by pltf. was sustained by proof of a retainer & employment by the partners generally, inasmuch as distinct duties were from the nature of the employment, imposed on defts.; in the one case, that of settling the general balance, their duty being to the firm at large; in the other, that of settling the respective balances due to each, their duty being to the partners individually; &, consequently, a separate right of action belonged to any one of the partners who might be aggrieved by the inaccuracy of defts.—STORY *v.* RICHARDSON (1839), 6 Bing. N. C. 123; 8 Scott, 291; 9 L. J. C. P. 43; 4 Jur. 26; 133 E. R. 49.

748. Non-joinder of reputed partner.]—KELL *v.* NAINBY, No. 189, *ante*.

749. After dissolution of partnership—On contract before dissolution—Firm name retained.]—Where a partnership between two persons in trade had been dissolved, & one of them carried on business afterwards, solely on his own account, but in the names of himself & former partner:—*Held:* he might maintain *assumpsit* alone for goods sold & delivered to deft. during the existence of the partnership.—ATKINSON *v.* LAING (1822), Dow. & Ry. N. P. 16, N. P.

750. —— On contract by retired partner as agent.]—Deft., who had dealings with A. & B. as partners, afterwards made a contract with A. in B.'s presence, & received letters with reference to such contract bearing the signature of the firm. In an action by B., A., who was called as a witness, stated that he had ceased to be a partner prior to the date of the contract, & that he made it as agent for B.:—*Held:* the jury were warranted in finding that the contract was with B. alone, although there was no precise evidence of the dissolution of the partnership between A. & B.—COX *v.* HUBBARD (1847), 4 C. B. 317; 136 E. R. 529.

751. Surviving partner—Personal representative not necessary party.]—The survivor of two joint merchants may sue on the partnership account without the personal representative of deceased partner.—MARTIN *v.* CROMPE (1698), 1 Ld. Raym. 340; Comb. 474; 2 Salk. 444; 91 E. R. 1123, Ex. Ch.

Annotations:—**Refd.** Foley *v.* Addenbrooke (1843), 4 Q. B. 197; Buckley *v.* Barber (1851), 6 Exch. 164. **Mentd.** Thomas *v.* Thomas (1850), 5 Exch. 28.

752. —— ——.]—In a suit for an account by a surviving partner against a debtor to the firm it is not in general necessary to make the personal representative of deceased partner a party.—HAIG *v.* GRAY (1850), 3 De G. & Sm. 741; 64 E. R. 685.

—— Action against bank.]—*See* BANKERS, Vol. III., p. 169, No. 278.

753. Dormant partner — Unlawful transaction.]—An inactive or sleeping partner as it is termed

751 i. *Surviving partner — Personal representative not necessary party.*]—Where a sale of railway stock & bonds was effected by a partnership, a mtge. being taken back to secure part of the purchase money, & one of the partners subsequently died:—*Held:* the right to enforce payment of the unpaid purchase money remained in the surviving partner, whether the subject of sale was to be treated as realty or goods & chattels.—BOLCKOW *v.* FOSTER (1878), 24 Gr. 333.—**CAN.**

751 ii. —— ——.]—The rule of English law that, in trading partnerships, although the right of a deceased partner devolves on his representative, the remedy survives to his co-partner, who alone must enforce the right by action, & is liable on recovery to account to the representative for the deceased's share, should be applied in India, in the absence of statutory authority to the contrary.—GOBIND PRASAD *v.* CHANDER SEKHAR (1887), I. L. R. 9 All. 486.—**IND.**

751 iii. —— ——.]—NICOLL *v.* REID (1877), 5 R. (Ct. of Sess.) 137; 15 Sc. L. R. 89.—**SCOT.**

***g.** After dissolution of partnership—Plaintiff assignee of partnership assets.*]—LEONARD *v.* GRIFFIN (1881), 21 N. B. R. 188.—**CAN.**

h. —— ——.]—On the dissolution of the firm of which pltf. was a member,

cannot receive restitution in a transaction in which he could not lawfully be engaged as a sole trader (SIR W. SCOTT).—THE FRANKLIN (1806), 6 Ch. Rob. 127 ; 1 Eng. Pr. Cas. 539 ; 165 E. R. 874.

754. —— On contract for work — Where no party to contract.]—If the ostensible proprietor of materials enter into a contract for work to be done thereon, it is not necessary that in an action brought on the contract, another, who has secretly purchased a share of him, but is no party to the contract, should be joined as a co-pltf., nor could such dormant partner sustain an action.—MAWMAN *v.* GILLETT (1809), 2 Taunt. 325, n. ; 127 E. R. 1103.

Annotations :—**Folld.** Lloyd *v.* Archbowle (1810), 2 Taunt. 324. **Mentd.** Capon *v.* Dillamore (1824), 8 Moore, C. P. 516.

C. In Firm's Name.

See R. S. C., Ord. 48A., rr. 1, 2.

755. Action for recovery of money—Misapplied at instance of one partner.]—Money, the property of two partners, misapplied by a person at the instance of one of the partners, & with his concurrence, cannot be recovered back in an action in the names of the two. Consequently, it cannot be the subject of set-off in an action against the two ; but the partner who has been damnified by the misapplication may maintain a special action on the case, against the person who misapplied the money, though he did so with the concurrence of the other partner.—JONES *v.* FLEEMING (1827), 7 B. & C. 217 ; 6 L. J. O. S. K. B. 113 ; 108 E. R. 704.

756. —— Loan from funds of firm.]—An agreement for a loan of money with a member of a partnership, may be treated by him, if there be no express stipulation to the contrary, either as a private or partnership transaction ; & if the money be lent from the funds of the firm, a joint action may be maintained by all the partners.

Where a shareholder in a co. applied to the treasurer, who was also a partner in a bank, to advance money for the payment of instalments on his shares, & the money was advanced by crediting the co. in their accounts with the bank, to the amount of such instalments :—*Held :* the action for money lent was properly brought against the borrower, in the names of the partners.—ALEXANDER *v.* BARKER (1831), 2 Cr. & J. 133 ; 2 Tyr. 140 ; 1 L. J. Ex. 40 ; 149 E. R. 56.

Annotations :—**Mentd.** Simpson *v.* Clayton (1836), 2 Bing. N. C. 467 ; Sweet *v.* Lee (1841), 4 Scott, N. R. 77.

757. By new firm—In name of old firm—Note given to old firm.]—Several persons joined in a note payable to a banking house, or order on demand. The object was to open an account for one of them, on the credit of the note. The account went on for several years ; the debtor paying interest in account. A change took place in the members of the banking firm ; some of those composing it, when the note was given, going out, & new members coming in. More than six years elapsed between the coming in of the new members & the bringing of action :—*Held :* the action might be maintained in the name of the members of the old firm for the benefit of the new firm, & the payment of interest to the new firm prevented the Stat. Limitations from barring the remedy by action.—PEASE *v.* HIRST (1829), 10 B. & C. 122 ; L. & Welsb. 81 ; 5 Man. & Ry. K. B. 88 ; 8 L. J. O. S. K. B. 94 ; 109 E. R. 396.

Annotations :—**Distd.** Dry *v.* Davy (1839), 10 Ad. & El. 30. **Mentd.** Henniker *v.* Wigg (1843), Dav. & Mer. 160.

758. By sole member of firm.]—MASON & SON *v.* MOGRIDGE (1892), 8 T. L. R. 805, D. C.

759. ——.]—HIRSCHFELDT *v.* ELTON (1899), cited Yearly Practice of Supreme Court for 1927, at p. 831, C. A.

—— Admiralty action in rem.] —*See* ADMIRALTY, Vol. I., p. 158, No. 669.

Firm containing alien partners—In time of war.] —*See* ALIENS, Vol. II., pp. 150, 154, 160, 161, Nos. 223, 247, 305, 306, 310.

760. Disclosure of partners' names—R. S. C., Ord. 48A, rr. 1, 2.]—Where an action is brought by partners in the name of their firm, & the names of the persons constituting the firm are disclosed under above rules, there is no jurisdiction to direct a cross-examination on an affidavit disclosing the names, or to order a separate issue to determine the question whether a person whose name has been disclosed was a partner at the time of the accruing of the cause of action.—ABRAHAMS & CO. *v.* DUNLOP PNEUMATIC TYRE CO., [1905] 1 K. B. 46 ; 74 L. J. K. B. 14 ; 91 L. T. 11, C. A.

761. After dissolution of partnership—Indemnity for costs to retired partner.]—After the dissolution of a partnership one of the two partners commenced an action in the firm name to recover a debt alleged to be due to the partnership, & gave to the other partner, who did not consent to the action & who disclaimed all right to any sum that might be recovered, an indemnity against the costs to be incurred. An order requiring "pltfs." to make a further & better affidavit of documents was served by deft. upon the partner bringing the action, who made a further affidavit & served a copy of the order on his partner, & on the refusal of the latter to make an affidavit, applied for an order of attachment against him on the ground of his non-compliance with the order for a further & better affidavit of documents :—*Held :* the ct. had jurisdiction to make the order of attachment.—SEAL & EDGELOW *v.* KINGSTON, [1908] 2 K. B. 579 ; 77 L. J. K. B. 965 ; 99 L. T. 504 ; 24 T. L. R. 650 ; 52 Sol. Jo. 532, C. A.

762. Retirement of one partner—After judgment & before execution proceedings.]—Where a firm consisting of several members has recovered in the firm name judgment against a debtor the fact that a member has since retired from the firm does not render it necessary that the firm should obtain leave of the ct. under R. S. C., Ord. 42, r. 23, in order that bkpcy. notice may be issued in the name of the firm & a bkpcy. petition

the retiring partner assigned to pltf. all his interest in the assets & property belonging to the firm. Pltf. brought an action in his own name for a firm debt without having given notice of the assignment :—*Held :* he could not recover.—MCKAY *v.* MCDONALD (1898), 31 N. S. R. 316.—**CAN.**

PART IV. SECT. 6, SUB-SECT. 1.—C.

757 i. *By new firm—In name of old firm—Note given to old firm.*]—LENZ & LEISER *v.* KIRSCHBERG (1899), 6 B. C. R. 533.—**CAN.**

758 i. *By sole member of firm.*]—A person carrying on business alone, in a name denoting a partnership, cannot bring an action in that name.—LANG *v.* THOMPSON (1895), 16 P. R. 516.—**CAN.**

758 ii. ——.]—Summons by pltf. for summary judgment. Objection that S. was really the pltf., & he was suing in a firm name when he was the only member of it, upheld.—BRITISH COLUMBIA FURNITURE CO. *v.* TUGWELL (1900), 20 C. L. T. 144 ; 7 B. C. R. 84.—**CAN.**

758 iii. ——.]—CUMMINGS *v.* RYAN, 22 C. L. T. 150.—**CAN.**

k. *After dissolution of partnership.*]—A partner is entitled, after the dissolution of the partnership, to sue in the name of the firm for moneys due to the partnership.—BARKER & CO. *v.* BLORE, [1908] T. S. 1156.—**S. AF.**

l. *By one partner—Without consent of other partners.*]—One partner may give instructions to begin proceedings in the name of the firm, without having obtained the authority of the other

Sect. 6.—*Legal proceedings: Sub-sect.* 1, *C. & D.; sub-sect.* 2, *A.*]

presented in that name.—*Re* HILL, *Ex p.* HOLT & Co., [1921] 2 K. B. 831; 90 L. J. K. B. 734; 125 L. T. 736; [1921] B. & C. R. 12, D. C.

On bankruptcy of co-partner.] — *See* BANKRUPTCY, Vol. IV., p. 231, No. 2163.

D. Set-Off.

See, generally, SET-OFF.

763. Claim by partnership—Set-off of debt incurred by partner—Ostensibly sole partner.]—STRACEY, ROSS, ETC. *v.* DEEY (1789), 7 Term Rep. 361, n.; 101 E. R. 1021; *sub nom.* STACEY, ROSS, ETC. *v.* DECY, 2 Esp. 468, n., N. P.

Annotations:—**Distd.** Gordon *v.* Ellis (1846), 2 C. B. 821. **Refd.** Coldwell *v.* Gregory (1814), 1 Price, 119; Baker *v.* Gent (1892), 9 T. L. R. 159. **Mentd.** Warner *v.* M'Kay (1836), 2 Gale, 86; Ferrand *v.* Bischoffsheim (1858), 4 C. B. N. S. 710.

764. —— —— ——.]—To *assumpsit* by A., B., & C. against D. for money had & received, D. pleaded that, before the money had been received, etc., pltfs. carried on the trade of founders in partnership; that, while they were such partners, A., with the privity & concurrence of B. & C., employed D., an auctioneer, to sell certain property belonging to the firm; that, at the time A. so employed D. to sell the said property, & at the time of the sale thereof, & at the time when the debt after mentioned became due from A. to D., D. believed that A. was the sole & exclusive owner of the property, & had full power & authority to sell the same, & to receive the proceeds for his own sole use, D. having no notice or knowledge that B. & C. had any right or interest in the property; that, after A. had so employed D., & before D. had any notice that A. was not sole & exclusive owner of the property, or of the proceeds thereof, A. became indebted to D. in a sum exceeding the moneys in the declaration mentioned, out of which D. was ready & willing to set off & allow the sums in the declaration mentioned. Pltfs. replied that, at the time of selling the property, D. had knowledge that A. was not the sole & exclusive owner of the property:—*Held:* the plea was bad, inasmuch as it did not allege that A. appeared as sole owner of the property with the assent or by the default of his partners; & therefore it was a mere attempt to set off a debt due from one partner against a debt due to the firm.—GORDON *v.* ELLIS (1846), 2 C. B. 821; 3 Dow. & L. 803; 15 L. J. C. P. 178; 7 L. T. O. S. 85; 10 Jur. 359; 135 E. R. 1167.

765. —— —— ——.]—S., a jobmaster, was indebted to a firm of corn merchants in the sum of £588 for corn supplied, & M., a partner in the firm, was indebted to S. in the sum of £290, being a private debt for the hire of carriages. S. *bonâ fide* believed, & had reasonable grounds to believe, that M. was the sole partner in the firm; whereas, in fact, B. was a secret partner in the business. In a settlement of the two accounts M. gave S. credit for the £290, & authorised the cashier of the firm to make an entry in the books to that effect:—*Held:* the £290 must be treated as a payment to the firm, & S. could not be called upon to pay it again, inasmuch as he was justified in believing that M. was the only partner in the business & was authorised to give S. credit for the amount of his account.—MUGGERIDGE'S *v.* SMITH & Co. (1884), 1 T. L. R. 166.

766. —— **Set-off of debt by original partnership.**]—When a man is sued by or on behalf of two partners, he cannot set-off an old debt due to him from those two, in conjunction with a third partner, who afterwards retired.—M'GILLIVRAY *v.* SIMSON (1826), 2 C. & P. 320; 9 Dow. & Ry. K. B. 35; 5 L. J. O. S. K. B. 53.

Annotations:—**Mentd.** Buchanan *v.* Findlay (1829), 9 B. & C. 738; Young *v.* Bank of Bengal (1836), 1 Deac. 622.

767. —— **Set-off of money received by partner—Before partnership—On work continued by partnership.**]—A. & B., as partners, sued defts. for work & labour done in the matter of an executorship:—*Held:* defts. could not set off money received by A. before the partnership on account of testator's estate, notwithstanding B. had at that time assisted A. in the matter of the executorship, & A., after the partnership, had admitted the receipt of the money.—FRANCE *v.* WHITE (1839), 6 Bing. N. C. 33; 8 Dowl. 53; 8 Scott, 257; 9 L. J. C. P. 27; 133 E. R. 13.

768. —— **Set-off of gains of individual partners.**]—In order to entitle a deft. in an action against him by partners for a breach of contract causing damage to the partnership, to take into account a benefit accruing to any of pltfs. from such breach, for the purpose of reducing the damages, such benefit must be a joint benefit accruing to the partnership, & it is immaterial for the assessment of damages whether or no individual pltfs. have actually benefited in other ways from the very default of the defts. for which as a partnership they are suing. Where partnerships sue for breach of contract, the damages must be confined to those sustained by the partnership; & part owners of ships are for the purposes of such an action in the same position as partners. Pltfs., as owners of an emigrant ship, were unable to carry their destined passengers through defts.' default. Many of the emigrants so lost to pltfs.' ship went consequently by another ship, of which also some of pltfs. were part owners:—*Held:* the true mode of assessing the damages to which pltfs. were entitled was to estimate the actual loss to them as owners of the ship delayed by defts.' breach of contract, & wholly to disregard any gain which those of them who were part owners of the second ship had in consequence made.—JEBSEN *v.* EAST & WEST INDIA DOCK CO. (1875), L. R. 10 C. P. 300; 44 L. J. C. P. 181; 32 L. T. 321; 23 W. R. 624; 2 Asp. M. L. C. 505.

Annotations:—**Mentd.** The Marpessa, [1891] P. 403; British Westinghouse Electric & Manufacturing Co. *v.* Underground Electric Rys. of London, [1912] A. C. 673; Jamal *v.* Moolla Dawood, [1916] 1 A. C. 175; Hill *v.* Showell (1918), 87 L. J. K. B. 1106; City Tailors *v.* Evans (1921), 91 L. J. K. B. 379.

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members.—PROUDFOOT *v.* BANK OF NEW ZEALAND (1885), 6 N. S. W. L. R. (L.) 170; 2 N. S. W. W. N. 15.—**AUS.**

PART IV. SECT. 6, SUB-SECT. 1.—D.

m. *Claim by partnership—Set-off of debt incurred by partner.*]—Evidence of a debt due by one of a firm, pltfs., in his individual capacity, will not support a plea of set-off to an action by the firm for a partnership claim.—PEGG & BARBER *v.* PLANK (1853), 3 C. P. 396.—**CAN.**

n. —— ——.]—FISHER & Co. *v.* LINTON (ROBERT) & Co. (1913), 28 O. R. 322.—**CAN.**

o. —— ——.]—In an action for a debt due to a partnership, deft. cannot, as a general rule, set-off a debt due to him by one of the partners individually.—BRIDER *v.* WILLS (1886), 4 S. C. 282.—**S. AF.**

p. —— *Set-off of debt incurred by assignor of one partner.*]—T. purchased a quantity of bricks manufactured by pltfs. jointly, against one of whom, G., he held a demand, which he desired to set off against the price of the bricks; one of pltfs. being in fact assignee of a former partner of G.:—*Held:* even if the effect of this was to constitute pltfs. tenants in common, it afforded no ground for setting off a separate against a joint debt.—GRAHAM & CLEMOW *v.* TOMS (1877), 25 Gr. 184.—**CAN.**

q. *Claim by partner.*]—A joint debt due from two partners on an account

769. Claim by partner—On contract authorised by co-partner—Set-off of personal debt.]—S., an attorney, practiced under the firm of "S. & C." C., although an attorney, was not, in fact, a partner of S., but only a clerk. Cass was a client of the nominal firm, & owed a bill of costs; & S. was personally liable to Cass on a bill of exchange of less amount than the bill of costs. S., without joining C., sued Cass for the amount of the bill of costs; & Cass pleaded never indebted, & set off the sum due on the bill of exchange. Cass brought a cross action on the bill of exchange, & S. set off the amount of the bill of costs. The two actions being tried together it was found by the jury that C. had authorised S. to contract on behalf of himself & C. with Cass, & that S. had so contracted:—*Held:* S. being the real principal, might take the benefit of the contract with Cass & sue alone, & set off the bill of costs in the action against him.—SPURR *v.* CASS, CASS *v.* SPURR (1870), L. R. 5 Q. B. 656; 39 L. J. Q. B. 249; 23 L. T. 409.

770. Claim by surviving partner—On personal debt—Set-off of partnership debt.]—A debt due from pltf., as surviving partner to deft., may be set off against a debt due from deft. to pltf. in his own right.—FRENCH *v.* ANDRADE (1796), 6 Term. Rep. 582; 101 E. R. 715.

Annotation:—**Mentd.** Pott *v.* Clegg (1847), 16 L. J. Ex. 210.

Set-off in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 390, 391, 415, Nos. 3569, 3582, 3583, 3748.

SUB-SECT. 2.—ACTIONS AGAINST PARTNERS.

A. In General.

See R. S. C., Ord. 48A.

771. Joinder of all partners—Whether necessary.]—ANON. (1709), 2 Eq. Cas. Abr. 166; 22 E. R. 141.

772. —— ——.]—To an action against a carrier in case on the custom of the realm, for not safely carrying goods, etc., deft. may plead in abatement that his partners ought also to have been sued.—BUDDLE *v.* WILLSON (1795), 6 Term Rep. 369; 101 E. R. 600.

Annotations:—**Distd.** Ansell *v.* Waterhouse (1812), 2 Chit. 1. **Refd.** Powell *v.* Layton (1806), 2 Bos. & P. N. R. 365. **Mentd.** Govett *v.* Radnidge (1802), 3 East, 62; Lloyd *v.* Williams (1814), 2 M. & S. 484; Pozzi *v.* Shipton (1838), 8 Ad. & El. 963; Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213.

773. —— ——.]—In an action against one partner, if pltf. gives in a particular of his demand, & deft. pleads partnership in abatement, if deft. proves any of the items to have been furnished on the partnership account, he shall be entitled to a verdict.—COLSON *v.* SELBY (1796), 1 Esp. 450; 170 E. R. 417, N. P.

Annotation:—**Mentd.** Hill *v.* White (1839), 6 Bing. N. C. 26.

774. —— ——.]—In an action on the case against a common carrier, for not safely carrying a passenger, deft. cannot plead in abatement the non-joinder of a co-proprietor.—ANSELL *v.* WATERHOUSE (1817), 2 Chit. 1; 6 M. & S. 385; 105 E. R. 1286.

Annotations:—**Refd.** Bretherton *v.* Wood (1821), 6 Moore, C. P. 141. **Mentd.** Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Readhead *v.* Mid. Ry. (1867), L. R. 2 Q. B. 412.

775. —— ——.]—PLUMER *v.* GREGORY, No. 530, *ante*.

.]—*See* CONTRACT, Vol. XII., p. 231, No. 1909.

776. —— **After release of one—Partnership debt.**]—A release was given by pltfs. to A., one of two partners, with a provision that it should not prejudice any claims which pltfs. might have against B., the other partner; & that in order to enforce the claims against B., it should be lawful for pltfs. to sue A., either jointly with B. or separately. In an action by pltfs. against A. & B., this release having been pleaded by A. & set out on oyer in the replication, with an averment that the action was prosecuted against A. jointly with B., for the purpose of enabling pltfs. to recover payment of moneys due from B. & A. to pltfs., either out of the joint estate of B. & A., or from B. or his separate estate, the replication was demurred to, & the demurrer overruled.—SOLLY *v.* FORBES (1820), 2 Brod. & Bing. 38; 4 Moore, C. P. 448; 129 E. R. 871.

Annotations:—**Apld.** Upton *v.* Upton (1832), 1 Dowl. 400; Currey *v.* Armitage (1858), 6 W. R. 516. **Mentd.** Twopenny *v.* Young (1824), 3 B. & C. 208; Morley *v.* Frear (1830), 4 Moo. & P. 305; Watters *v.* Smith (1831), 2 B. & Ad. 889; *Re* Barrow & Geddes, *Ex p.* Christy (1832), 2 Deac. & Ch. 155; Cocks *v.* Nash (1832), 9 Bing. 341; Simons *v.* Johnson (1832), 3 B. & Ad. 175; Warwick *v.* Richardson (1844), 14 Sim. 281; Kearsley *v.* Cole (1846), 16 M. & W. 128; Thompson *v.* Lack (1846), 3 C. B. 540; Ford *v.* Beech (1848), 11 Q. B. 852; Ansell *v.* Baker (1850), 15 Q. B. 20; Owen *v.* Homan (1851), 3 Mac. & G. 378; Squire *v.* Ford (1851), 9 Hare, 47; Pomfret *v.* Perring (1854), 18 Beav. 618; Price *v.* Barker (1855), 4 E. & B. 760; Willis, Merry & Smith *v.* De Castro (1858), 4 C. B. N. S. 216; Green *v.* Wynn (1868), L. R. 7 Eq. 28; Hooper *v.* Marshall (1869), 39 L. J. C. P. 14; Bateson *v.* Gosling (1871), L. R. 7 C. P. 9; *Re* E. W. A. (a Debtor) (1901), 85 L. T. 31.

777. Joinder of dormant partner—Action on contract with visible partners.]—If several persons act as partners, & contract debts, & an action is brought against several persons, as those composing the whole firm, the ct. will not grant them a new trial on a suggestion that all the concerned were not named, or that some were named who were not concerned.

They, who are the visible apparent partners are the persons to be charged & one partner alone might be charged, if he made the contract alone, as a separate person, & in his own name (CHAPPLE, J.).—SMITH *v.* HUGGINS (1740), 7 Mod. Rep. 407; 87 E. R. 1323.

778. —— ——.]—Upon an action brought against one partner only he must plead the same in abatement, & cannot give it in evidence on the trial, that others are not joined.

In actions upon contract, every partner must be made a deft. All contracts with partners are

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may be set off against a debt due to one of the partners on another account, wher from the conduct of the parties it may be inferred that they intended the account to be amalgamated.—ELL *v.* HARPER (1886), 4 N. Z. L. R. 307 (S. C.).—**N.Z.**

r. *Claim against partnership.*]—Deft. pleaded a set-off to pltf.'s claim for goods sold & delivered, & under that plea gave evidence of a sale of goods to pltf. by deft. & his co-partner, & an agreement made between pltf., deft. & deft.'s co-partner, that pltf.'s claim should be paid in goods from the partnership store.—CROUCHER *v.* GUNN (1851), 14 N. S. R. (2 R. & G.) 370.—**CAN.**

PART IV. SECT. 6, SUB-SECT. 2.—A.

771 i. *Joinder of all partners—Whether necessary.*]—ALBION LUMBER CO. *v.* BROWNELL (N. S.) (1907), 3 E. L. R. 224.—**CAN.**

771 ii. —— ——.]—In an action for the price of goods sold by a partnership it is not necessary to join as a pltf., with the continuing partner who sues in his own name, a retiring partner against whom deft. has no claim, & who has no beneficial interest in what is sought to be recovered.—LEESON *v.* MOSES (1915), 31 W. L. R. 817; 24 D. L. R. 158; 8 Sask. L. R. 222.—**CAN.**

771 iii. —— ——.]—Where a promissory note had been made by a partnership & one of the partners was not resident in the Cape Colony:—*Held:* pltf. was entitled to sue the partner within the jurisdiction.—PIENAAR *v.* RATTRAY (1893), 12 S. C. 35.—**S. AF.**

t. *Joinder of dormant partner.*]—In an action for goods sold & delivered the non-joinder of a dormant partner

Sect. 6.—*Legal proceedings: Sub-sect.* 2, *A., B. & C.*]

joint & several; every partner is liable to pay the whole. In what proportion the others should contribute is a matter merely among themselves. A creditor knows with whom he dealt; but he does not know the secret partner. He may be nonsuited twenty times before he learns them all; or driven to a suit in equity, for a discovery who they are. It is cruel to turn a creditor round, & make him pay the whole costs of a nonsuit, in favour of a deft. who is certainly liable to pay his whole demand; & who is not injured by another partner's not being made deft., because, what he pays, he must have credit for, in his account with the partnership (LORD MANSFIELD).—RICE *v.* SHUTE (1770), 5 Burr. 2611; 2 Wm. Bl. 695; 96 E. R. 409.

Annotations:—**Distd.** Schack *v.* Anthony (1813), 1 M. & S. 573. **Apld.** Richards *v.* Heather (1817), 1 B. & Ald. 29. **Consd.** Kendall *v.* Hamilton (1879), 4 App. Cas. 504. **Refd.** Abbot *v.* Smith (1774), 2 Wm. Bl. 947; Powell *v.* Layton (1806), 2 Bos. & P. N. R. 365; Max *v.* Roberts (1807), 2 Bos. & P. N. R. 454; Hammond *v.* Schofield, [1891] 1 Q. B. 453. **Mentd.** Evans *v.* Lewis (1794), cited in 1 Saund. 291 d; R. *v.* Young & Glennie (1794), 2 Anst. 448; Scott *v.* Godwin (1797), 1 Bos. & P. 67; Govett *v.* Radnidge (1802), 3 East, 62; Godson *v.* Good (1816), 6 Taunt. 587; Jones *v.* Smith (1848), 1 Exch. 831; Townes *v.* Mead (1853), 3 C. L. R. 381.

779. —— ——.]—If a pltf. sues a deft., with whom alone he believes he has contracted, but who in truth has a dormant partner, deft. may plead in abatement that his partner ought to be joined in order to compel a new action against the two, in which they may set off a debt contracted by pltf. as pltf. believed, to the other partner alone, but in which both parties are, in truth, equally interested.—DUBOIS *v.* LUDERT (1814), 5 Taunt. 609; 1 March. 246; 128 E. R. 828.

Annotations:—**Dbtd.** Baldney *v.* Ritchie (1816), 1 Stark. 338; Mullett *v.* Hook (1827), Mood. & M. 88; De Mautort *v.* Saunders (1830), 1 B. & Ad. 398.

780. —— ——.]—The non-joinder of a secret partner cannot be pleaded in abatement.

I directed the jury to find for pltf., if they thought the sale was intended to be made to deft. alone; for deft., if they thought the sale was intended to be made to the two (LORD TENTERDEN, C.J.).—MULLETT *v.* HOOK (1827), Mood. & M. 88, N. P.

Annotation:—**Apld.** De Mautort *v.* Saunders (1830), 1 B. & Ad. 398.

781. —— ——.]—Where, in an action of *assumpsit*, deft. pleads in abatement the non-joinder of other persons, who, he contends, were his partners, & pltf. takes issue upon the plea, it is sufficient for deft. to show a partnership in fact between him & those other persons. He must show that the pltf. knew, or from the circumstances must have believed, that deft. had partners.—DE MAUTORT *v.* SAUNDERS (1830), 1 B. & Ad. 398; 9 L. J. O. S. K. B. 51; 109 E. R. 836.

Annotations:—**Distd.** Bonfield *v.* Smith (1844), 12 M. & W. 405. **Refd.** *Re* Starkies & Whiteside, *Ex p.* Chuck (1832), 8 Bing. 469.

—— **Right to elect in bankruptcy.**]—*See* BANKRUPTCY, Vol. IV., p. 444, No. 4014.

782. Joinder of partner — Not party to agreement sued on.]—A. agreed in writing with B. & C., on behalf of themselves & D., as partners in trade, to serve them, B. & C., & the survivor of them, for seven years, as their foreman, & not to engage in trade on his own account during that period without their consent; & B. & C. agreed to pay him wages after the rate of £3 3*s.* per week, so long as he should serve them faithfully:—*Held:* the action was maintainable against B., C., & D. jointly, though B. & C. only were parties to the written agreement.—DRAKE *v.* BECKHAM (1843), 11 M. & W. 315; 12 L. J. Ex. 486; 7 Jur. 204; 152 E. R. 823, Ex. Ch.; *on appeal, sub nom.* BECKHAM *v.* DRAKE (1849), 2 H. L. Cas. 579, H. L.

Annotations:—**Distd.** Robinson *v.* Rudkins (1856), 26 L. J. Ex. 56; Spurr *v.* Cass, Cass *v.* Spurr (1870), L. R. 5 Q. B. 656. **Mentd.** Hill *v.* Smith (1844), 13 L. J. Ex. 243; Williams *v.* Chambers (1847), 10 Q. B. 337; Bell *v.* Carey (1849), 8 C. B. 887; Bill *v.* Corey (1849), 14 L. T. O. S. 254; Wetherell *v.* Julius (1850), 10 C. B. 267; Elliot *v.* Clayton (1851), 16 Q. B. 581; Boddington *v.* Castelli (1853), 1 E. & B. 879; Emmens *v.* Elderton (1853), 13 C. B. 495; Stanton *v.* Collier (1854), 3 E. & B. 274; Northampton Gas Light Co. *v.* Parnell (1855), 24 L. T. O. S. 239; Betts *v.* Burch (1859), 4 H. & N. 506; Bristowe *v.* Whitmore (1861), 4 L. T. 622; Richbell *v.* Alexander (1861), 30 L. J. C. P. 268; Calder *v.* Dobell (1871), L. R. 6 C. P. 486; Wadling *v.* Oliphant (1875), 1 Q. B. D. 145; Emden *v.* Carte (1881), 17 Ch. D. 169; Kellaway *v.* Bury (1892), 66 L. T. 599; *Re* Beyts & Craig, *Ex p.* Trustee (1894), 70 L. T. 561; Rose *v.* Buckett, [1901] 2 K. B. 449; Bailey *v.* Thurston, [1903] 1 K. B. 137; Formby *v.* Barker, [1903] 2 Ch. 539; Wilson *v.* United Counties Bank, [1920] A. C. 102.

783. Joinder of representative of deceased partner.]—C. made a shipment of goods to the East Indies on account of B., & advanced money to B. upon those goods. C. & his partner afterwards made three other shipments of goods to the East Indies, on account of B. & his partner, & made three advances on those goods; the proceeds of the four shipments were remitted to a firm in London. The surviving partners in the London firm afterwards filed a bill of interpleader against the assignees of C. & his partner, & the assignees of B., & his partner, & paid the amount of the four remittances into ct. The assignees of C. & his partner, filed a bill against the surviving partners in the London firm, the partner of B., & B.'s assignees, praying for an account of what was due to C., & also of what was due to C. & his partner, on account of their advances. A demurrer to this bill, on the ground that the representatives of deceased partner in the London firm were necessary parties, & also for multifariousness, was allowed.—MILLER *v.* CRAWFORD (1840), 9 L. J. Ch. 195.

784. Joinder of retired partner — Interest assigned prior to action—Liability for costs.]—A party having an interest in the subject-matter of a suit by virtue of a partnership had parted with his interest prior to the date of filing the bill. Pltf. nevertheless made him a deft., & he by his answer disclaimed. Pltf. was ordered to pay such deft.'s costs without being entitled to them, over, the ct. being of opinion that pltf. might have easily ascertained the fact of the assignment & it not appearing that he had attempted to do so.—TEED *v.* CARRUTHERS (1842), 2 Y. & C. Ch. Cas. 31; 6 Jur. 987; 63 E. R. 14.

Annotation:—**Refd.** Frail *v.* Ellis (1852), 22 L. J. Ch. 467.

785. Joinder of absconding partner.]—ATKINSON *v.* MACKRETH, No. 487, *ante*.

786. Action against individual partners—For

is not fatal.—BRIGGS *v.* BOWER (1832), 5 O. S. 672.—**CAN.**

782 i. *Joinder of partner—Not party to agreement sued on.*]—An agreement was entered into under seal between A., B. & C., for the advance of certain moneys from A. to B. & C., who were partners in a mill business, & who, from the assets arising from the business, were to repay such advances. D. afterwards became a partner with B. & C.:—*Held:* A. could not maintain an action of *assumpsit* against B., C., & D. jointly, for the recovery of the balance of such advances.—MITTLEBERGER *v.* MERRITT (1845), 1 U. C. R. 330.—**CAN.**

a. *Proof of partnership.*]—JAMIESON MEAT CO. *v.* STEPHENSON (1912), 22 O. W. R. 6; 3 O. W. N. 1196; 2 D. L. R. 911.—**CAN.**

b. *Liability of partner for costs incurred by co-partners.*]—BANQUE D'HOCHELAGA *v.* MARITIME RAILWAY NEWS CO. (1898), 31 N. S. R. 9.—**CAN.**

c. *Form of claim.*]—Where an action is brought against A. & B., carrying on business under the name, style, & firm

same debt.]—Several actions will not lie against the different members of a partnership firm, for the same identical debt. Therefore, where pltf. brought two actions against two joint contractors for the same debt, the ct. set aside the proceedings without costs in one action, the debt & costs in the other having been paid.—CARNE *v.* LEGH (1826), 6 B. & C. 124; 9 Dow. & Ry. K. B. 126; 108 E. R. 398.

Annotations:—**Refd.** Newton *v.* Liddiard (1847), 11 Jur. 471; Bailey *v.* Haines (1850), 15 Q. B. 533.

787. Proof of partnership—Strict proof necessary.]—MAGG *v.* STONEHOUSE (1843), 1 L. T. O. S. 508.

788. Attachment order—All partners must be served.]—An attachment for disobedience of a judge's order cannot issue against two partners, unless each has been served with the order.—*Ex p.* WILLAND (1851), 11 C. B. 544; 138 E. R. 585.

789. —— Against sole partner.] — Where an order has been obtained by a local authority giving them a charge in priority to other incumbrances on property adjoining a road for their costs of paving such road, & directing an inquiry as to incumbrances, & the sole partner of deft. co. neglects to obey an order that he should answer such inquiry on affidavit, & a subsequent order that he should attend for examination. On a motion to attach him:—*Held:* an order for attachment must be made, & the costs of, & incidental to, the motion were directed to be added to the charge.—TOTTENHAM URBAN COUNCIL *v.* NIELSEN & Co. (1915), 85 L. J. Ch. 272; 114 L. T. 159; 79 J. P. 504; 59 Sol. Jo. 667; 14 L. G. R. 333.

B. In Firm's Name.

See R. S. C., Ord. 48A, r. 1.

790. Bill drawn by firm.]—In a declaration by the indorsee against the acceptor of a bill of exchange drawn by a firm & by them indorsed to pltf., it is sufficient to describe the bill as drawn & indorsed by certain persons under the name & style of the firm, without setting forth the name of the individuals composing it.—TIGAR *v.* GORDON (1842), 9 M. & W. 347; 11 L. J. Ex. 279; 6 Jur. 629; 152 E. R. 148.

Annotation:—**Refd.** Smith *v.* Ball (1846), 9 Q. B. 361.

791. Death of partner after action commenced—Defence by survivor in personal capacity.]—An action was brought against a firm in the firm name. There were two partners, one of whom died after writ & appearance. The surviving partner put in a defence not purporting to be the defence of the firm, but as his personal defence to the action:—*Held:* the form of the defence was wrong, as deft., not being sued in his personal capacity, was not entitled to put in a personal defence, but only a statement of defence for & in the name of the firm.

In case, say, one partner alone chooses to appear, he would be entitled & would be bound to put in a statement of defence of the partnership. He might if he chose add, "by" so & so, "one of the partners served & appearing"; but his defence would be the defence of the firm, & the action would go to trial upon that defence, & in that case judgment could be obtained against the partnership. Of course, if the partner chose to put in an improper defence &, so rendered the partnership liable in a case where it ought not to be made liable, he might thereby, as between himself & his co-partners, be committing a breach of duty for which he would be liable to them, but, so far as pltf. is concerned, pltf. would be able to obtain judgment. Now, if judgment is obtained against the partnership, it can be enforced as against all the partners, & against the partnership assets; but there is this provision made, that suppose one of the partners has not been served & is ignorant of the existence of the action, then execution cannot be levied against him without giving him an opportunity of appearing, & pltf. must then satisfy the ct. that he is liable as a partner (ROMER, L.J.).

I have so far dealt with the case of the death of a partner before action. Now what happens if a partner dies between service of writ & the trial of the action & judgment? In that case equally the dead man's estate is not bound. Judgment can only be obtained against the surviving partners & enforced against them & against the partnership assets. . . . This is clear—that the partner who dies between writ & judgment is not before the ct., & therefore judgment could not be obtained against deceased partner, or execution enforced against him or his assets. Supposing there were two partners, both living at the date of writ, & both were served, & both died before the action came on for trial, no judgment could be obtained (ROMER, L.J.).—ELLIS *v.* WADESON, [1899] 1 Q. B. 714; 68 L. J. Q. B. 604; 80 L. T. 508; 47 W. R. 420; 15 T. L. R. 274; 43 Sol. Jo. 330, C. A.

Action against proprietary club.]—*See* CLUBS, Vol. VIII., p. 520, No. 103.

See, also, Sub-sect. 2, E., *post.*

C. After Dissolution.

792. Action in firm name.]—(1) A firm, consisting of A., B., & C., incurred a debt. The firm was dissolved as to C., but continued to trade in the old firm's name. The creditor after the dissolution sued the firm in the firm's name, & served the writ personally on A., & on default of appearance signed judgment. C. had no notice of the action. The creditor, on discovering C., served him with particulars of demand of the judgment debt, & on his neglect to pay, issued a debtor's summons against him founded on the judgment debt. C. denied the debt & applied to dismiss the summons. The registrar refused:—*Held:* the debtor's summons must be dismissed, but without costs.

of A. & B., they are to be considered as sued individually & not "in the firm name."—RANSOM *v.* POTTER & MCDOUGALL (1907), 1 Alta. L. R. 247. —**CAN.**

d. ——.]—If defts. are sued as "A., B. & C., carrying on business under the firm name & style of A. & Co.," the action is against the partners individually, & a judgment therein "against the said defts." is against the said individuals.—SUFFIELD *v.* KENNEDY (Man.), [1920] 3 W. W. R. 594.—**CAN.**

PART IV. SECT. 6, SUB-SECT. 2.—B.

e. *General rule.*]—The right form of action, when suing a partnership, is to cite the partnership. It is not necessary to name in the summons the individual members of the partnership. —NATIONAL BANK, LTD. *v.* MAKANJEE & PATEL (GUJERAT TRADING CO.) (1919), 40 N. L. R. 33.—**S. AF.**

f. *Foreign firm.*]—The members of a foreign firm cannot be sued in our cts. in the firm name.—KNAUTH NACHOD *v.* STERNE (1897), 30 N. S. R. 251.—**CAN.**

g. *Action for fraud.*]—It is incompetent to sue a firm for damages on the ground of fraud, unless the names of the partners alleged to have committed the fraud are specified, fraud being personal to an individual.—THOMSON & Co. *v.* PATTISON ELDER & Co. (1895), 22 R. (Ct. of Sess.) 432; 32 Sc. L. R. 339; 2 S. L. T. 530.—**SCOT.**

PART IV. SECT. 6, SUB-SECT. 2.—C.

792 i. *Action in firm name.*]—The cause of action arose before, & the writ of summons was issued after, the dissolution of defts.' firm:—*Held:* defts. were properly sued in their firm name.—WILSON *v.* MCLAY (ROGER) & Co. (1884), 10 P. R. 355.—**CAN.**

792 ii. ——.]—MILLS *v.* MCGRATH (1907), 7 W. L. R. 74; 1 Alta. L. R. 32.—**CAN.**

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(2) *Semble:* R. S. C., Ord. 16, r. 10, does not apply to the case of a partner in a firm dissolved before the issue of the writ in an action in respect of a debt incurred before such dissolution; but that, having regard to R. S. C., Ord. 42, r. 8, a judgment obtained against a firm in the firm's name is not *per se* binding on a person who is not a partner at the issue of the writ, & who has not admitted on the pleadings that he is, nor been adjudged to be, a partner in the firm sued, nor been served as partner with the writ so as to constitute a debt on which he can, without any further proceedings against him, be made a bkpt.

(3) The orders apply only to persons who are at the time of action commenced partners in an existing firm, & not to persons who have been partners in a firm then dissolved.—*Re* YOUNG, *Ex p.* YOUNG (1881), 19 Ch. D. 124; 51 L. J. Ch. 141; 45 L. T. 493; 30 W. R. 330, C. A.

Annotations:—*As to* (1) **Distd.** Jackson *v.* Litchfield (1882), 8 Q. B. D. 474. **Refd.** Ellis *v.* Wadeson, [1899] 1 Q. B. 714. *As to* (2) **Dbtd.** Davis *v.* Morris (1883), 10 Q. B. D. 436. **Consd.** Munster *v.* Railton (1883), 11 Q. B. D. 435. **Distd.** *Re* Wenham, *Ex p.* Battams, [1900] 2 Q. B. 698. *As to* (3) **Consd.** Davis *v.* Morris (1883), 10 Q. B. D. 436. *Generally*, **Refd.** Worcester Banking Co. *v.* Trotter Thomas (1887), 3 T. L. R. 708; Shepherd *v.* Hirsch, Pritchard (1890), 45 Ch. D. 231.

793. ——.]—Pltfs. having brought an action & obtained judgment against the firm of "H. & D.," applied to a judge under R. S. C., Ord. 42, r. 8, for leave to issue execution against M. as being a member of the firm. It appeared that the action was upon a bill of exchange drawn by D. at a time when M. H. & D. were partners in the firm of H. & D., but that M. had retired from the partnership prior to the issuing of the writ, & that the firm of H. & D. then continued, but consisted of H. & D. only. The bill was drawn without the knowledge or consent of M., & for a purpose unconnected with the partnership:—*Held:* (1) under R. S. C., Ord. 16, r. 10, which enables two or more persons being liable as co-partners to be sued in the name of their firm, the right to sue partners in the name of a firm is not limited to the case of partners carrying on business at the date of the writ; (2) it was a question of fact, having regard to the circumstances & the proceedings subsequent to the writ, whether pltf. intended to sue under the firm name those partners only who were members of the firm at the commencement of the action, or the same persons together with any former partner.—DAVIS *v.* MORRIS (1883), 10 Q. B. D. 436; 52 L. J. Q. B. 401; 31 W. R. 749.

794. ——.]—Judgment was recovered, in default of appearance, against a late partnership firm of "W. Brothers," in an action brought against it after its dissolution, for a debt incurred during the partnership. The writ had been served on each of the late partners, J. & T. A bkpcy. notice in the usual form, & following the judgment, was then addressed to "W. Brothers" & served personally on each of the late partners. The notice not having been complied with, the judgment creditor presented a petition against J. alone:—*Held:* under R. S. C., Ord. 48A, the action had been properly constituted against "W. Brothers" as a firm, notwithstanding its dissolution, since the cause of action had accrued before the dissolution, Partnership Act, 1890 (c. 39), s. 38; &, under the same order, the judgment was enforceable against each of the late partners.—*Re* WENHAM, *Ex p.* BATTAMS, [1900] 2 Q. B. 698; 69 L. J. Q. B. 803; 83 L. T. 94; 48 W. R. 627; 44 Sol. Jo. 609; 7 Mans. 309, C. A.

795. One partner abroad.]—A suit for the specific performance of a contract made with a partnership, was instituted against the members of the firm after the partnership had been dissolved:—*Held:* the fact of one of defts. being out of the jurisdiction was no reason why a decree should not be made against those defts., who were within the jurisdiction.—SOUTHERN *v.* HARRIMAN (1864), 10 L. T. 263; 12 W. R. 704; *on appeal* (1866), 14 W. R. 487, C. A.

796. Power of one partner to consent to judgment—Without assent of co-partner.]—After a partnership has been dissolved, one of two partners has no power to bind the other in an action brought against both jointly, by giving a *cognovit* to pay the debt & costs as between attorney & client, & the *cognovit* having been given without the knowledge or assent of the co-deft. the ct. set aside a judgment & execution which had been entered up & sued out thereon.—RATHBONE *v.* DRAKEFORD (1830), 6 Bing. 375; 4 Moo. & P. 57; 8 L. J. O. S. C. P. 117; 130 E. R. 1325.

Service of writ.]—*See* Sub-sect. 2, E. (*a*), *post.*

D. Deceased Partners.

797. Right of partnership creditor—Against representatives & surviving partner.]—A joint creditor of a partnership is entitled to sustain a bill for the administration in one suit of the real & personal estates of several deceased partners, against their representatives & the surviving partners.—BROWN *v.* WEATHERBY (1841), 12 Sim. 6; 10 L. J. Ch. 190; 59 E. R. 1032.

Annotation:—**Mentd.** Bridges *v.* Hinxman (1847), 16 Sim. 71.

798. —— —— **Remedies concurrent.**]—*Re* HODGSON, BECKETT *v.* RAMSDALE, No. 593, *ante.*

799. Action against surviving partner.]—A demand against a surviving partner as survivor, may be joined with a demand due from him, as if he were solely liable.—GOLDING *v.* VAUGHAN (1782), 2 Chit. 436.

800. Action against representatives—Of last surviving partner.]—Where A., partner with B., signed an agreement on behalf of the house of A. & B., & B. survived A.:—*Held:* an action on the agreement lay against the exors. of the survivor only.—CALDER *v.* RUTHERFORD (1822), 3 Brod. & Bing. 302; 7 Moore, C. P. 158; 129 E. R. 1301.

801. —— **Whether surviving partners necessary parties—Action by joint creditor.**]—WILKINSON *v.* HENDERSON, No. 623, *ante.*

802. —— —— ——.]—THORPE *v.* JACKSON, No. 624, *ante.*

803. —— ——.]—KIRWAN *v.* KIRWAN (1836), Donnelly, 71; 47 E. R. 233.

804. —— —— **Claim for payment of partnership debt.**]—The surviving partner of a firm is a necessary party to a claim by a creditor for payment out of the estate of deceased partner of a

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795 i. *One partner abroad.*]—*Re* SINCLAIR *v.* BELL (1897), 28 O. R. 483.—**CAN.**

h. *Joinder of all partners—Whether necessary.*]—*Held:* an action for payment of a partnership debt against one of several partners of a dissolved firm is incompetent.—M'NAUGHT *v.* MILLIGAN (1885), 13 R. (Ct. of Sess.) 366; 23 Sc. L. R. 236.—**SCOT.**

k. —— ——.]—In an action against a partnership which has been dissolved, all partners who were such at the date the alleged cause of action accrued should be joined as defts.—KING *v.* PORTER, HODGSON & Co. (1879), Buch. 117.—**S. AF.**

PART IV. SECT. 6, SUB-SECT. 2.—D.

799 i. *Action against surviving partner.*]—Where the mtge. debt is taken in the name of one partner to secure a partnership debt, & a bill is filed to enforce the security, the representatives real or personal of a deceased partner are not necessary parties.—

partnership debt.—HILLS *v.* M'RAE (1851), 9 Hare, 297; 20 L. J. Ch. 533; 17 L. T. O. S. 242; 15 Jur. 766; 68 E. R. 516.

Annotations:—**Consd.** *Re* Hodgson, Beckett *v.* Ramsdale (1885), 31 Ch. D. 177. **Refd.** *Re* Barnard, Edwards *v.* Barnard (1886), 32 Ch. D. 447; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337; Moore *v.* Knight, [1891] 1 Ch. 547.

805. —— —— Taking accounts of deceased partner's estate.] — *Re* HODGSON, BECKETT *v.* RAMSDALE, No. 593, *ante*.

——.]—*See* EXECUTORS, Vols. XXIII. & XXIV., pp. 362, 646, Nos. 4289, 6727.

E. Service of Proceedings.

(a) In General.

806. Service on one partner—Whether valid for all.]—By suffering judgment to go by default defts. acknowledge a joint cause of action &, therefore, *quoad hoc* they are partners. Service, therefore, on one is good for all (BAYLEY, B.).—FIGGINS *v.* WARD (1834), 2 Cr. & M. 424; 2 Dowl. 364; 4 Tyr. 282; 3 L. J. Ex. 135; 149 E. R. 826.

Annotations:—**Apld.** Amlot *v.* Evans (1841), 7 M. & W. 462; Ettison *v.* Wood (1852), 21 L. J. Q. B. 317.

807. —— —— Co-partners not available.]—Service of subpœna on some partners defts., ordered to be deemed good service upon other partners defts. who could not be found.—SNOW *v.* HOLE (1841), 10 L. J. Ch. 178.

808. —— —— Copy left at place of business.]—An order on two solrs., as partners, is not duly served by serving it on one of them & leaving a copy at the place where the partnership business is carried on.—YOUNG *v.* GOODSON (1826), 2 Russ. 255; 38 E. R. 331.

809. —— After service on firm—Appearance within eight days.]—The writ of summons in an action against a firm was duly served upon the firm, & five days afterwards was served upon an alleged partner. Judgment by default was signed against the firm; subsequently to the signing of the judgment, but within eight days from the service of the writ upon him, an appearance was entered by the partner:—*Held:* the partner was entitled to have the judgment against the firm set aside.—ALDEN *v.* BECKLEY (1890), 25 Q. B. D. 543; 63 L. T. 282; 39 W. R. 8; *sub nom.* ALLDEN *v.* BECKLEY, 60 L. J. Q. B. 87, D. C.

810. Service on presumed partner—Presumption wrong.]—A writ, having been issued against a firm & others, was served on deft. F., in his individual capacity as deft. & also as representing both a co-deft. G., & the firm, of which he F. was supposed to be a member. F. was not in fact, however, a partner in the firm, nor did he in any way represent either it or G. for the purposes of service. The firm entered a conditional appearance in their firm name, & moved to discharge the service as a against them. G., who was out of the jurisdiction, also entered a conditional appearance & moved to discharge the service as against him:—*Held:* (1) the defect, under R. S. C., Ord. 12, r. 15, in the firm's conditional appearance could be cured by an undertaking by the partners to amend the appearance by appearing individually in their own names; (2) upon this being done the service must be discharged as against them, & it must also be discharged as against G., he being accessible without difficulty, & there being no need for prompt service; (3) pltf. must pay the costs of both motions, the objection as to the firm's defective appearance not having been taken until nearly the close of the argument.—NELSON *v.* PASTORINO & Co. (1883), 49 L. T. 564.

811. Service after dissolution—Plaintiff ignorant of dissolution.]—SHEPHERD *v.* HIRSCH, PRITCHARD & Co., No. 815, *post*.

812. —— On all partners—Service on firm insufficient.]—Where an action is brought & judgment is recovered against co-partners in the firm name, if one of the members has left the firm to the knowledge of pltf. before the commencement of the action, & does not appear to the writ in his own name or admit that he is, or has not been adjudged to be, a partner, pltf., in order to be entitled to obtain leave to issue execution against such member, or to have the question of his liability tried, under R. S. C., Ord. 48A, r. 8, must have served him with the writ in accordance with the proviso to r. 3.—WIGRAM *v.* COX, SONS, BUCKLEY & Co., [1894] 1 Q. B. 792; 63 L. J. Q. B. 751; 10 R. 186; *sub nom.* WIGGAN *v.* COX, SONS, BUCKLEY & Co., 70 L. T. 656, D. C.

Annotation:—**Distd.** Davis *v.* Hyman (1903), 72 L. J. K. B. 426.

813. —— Motion to discharge charging order.]—By a judgment in an action in the Ch. Div. the partnership carried on under the name of S. & co., was dissolved, & a receiver & manager was appointed. Subsequently, D., a creditor, without the knowledge of these proceedings sued the firm in the K. B. Div. on certain bills of exchange accepted by the firm for partnership purposes, & served one partner only, who entered an appearance, & obtained judgment for the sum due & costs. D. then having become aware of this action applied in it for leave to issue execution, notwithstanding the possession of the receiver, which leave was accordingly granted, & a charging order obtained. On a motion on behalf of the partner not served with the writ in the action in the K. B. Div. to discharge the charging order for irregularity:—*Held:* the motion was, in effect, to obtain a declaration that the judgment of the K. B. Div. was void, & there was no jurisdiction to so hold; R. S. C., Ord. 48A, rr. 1 & 3, were intended for the protection of the individual partner, & not of the assets of the firm, therefore the order previously made in chambers following the terms of the order in *Kewney* v. *Attrill*, No. 1540, *post*, would stand, & the motion be refused with costs.—BRAND *v.* SANDGROUND (1901), 85 L. T. 517; 18 T. L. R. 96.

In action of bill of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 469, No. 2988.

Service of bankruptcy notice.] — *See* BANKRUPTCY, Vol. IV., pp. 136, 137, Nos. 1260, 1261.

(b) On Foreign Firm.

i. Carrying on Business within Jurisdiction.

See, now, R. S. C., Ord. 48A, rr. 1, 3.

814. General rule.]—(1) R. S. C., Ord. 48A, r. 1, applies to all partnerships carrying on business within the jurisdiction. Therefore a firm which carries on business within the jurisdiction may be sued in the firm name under that rule without leave, although it be a foreign or colonial firm, the members of which are resident out of the jurisdiction.

For the present purpose I think that a colonial

STEPHENS *v.* SIMPSON (1866), 12 Gr. 493.—**CAN.**

PART IV. SECT. 6, SUB-SECT. 2.—E. (a).

1. *Service on one partner—After assignment of share—Plaintiff ignorant of assignment.*]—A., B., & O. carried on business in partnership, under the name of A. & Co. A. absconded & the business continued. O. assigned his interest to B., & after such assignment, but before it had been made public, pltf. served his writ of summons against the firm on O.:—*Held:* the service was good.—BANK OF HAMILTON *v.* BLAKESLEE (1881), 9 P. R. 130.—**CAN.**

Sect. 6.—*Legal proceedings: Sub-sect.* 2, *E.* (*b*) *i. & ii.*]

firm is in the same position as a foreign firm, *i.e.* a firm in a foreign country composed of persons not subjects of the Queen; for it appears to me that for this purpose nothing turns on whether defts. owed allegiance to the Queen; but the question is whether they are subject to the jurisdiction of this ct. . . . If the firm carries on business within the jurisdiction, then whether it is an English or a foreign firm, & whether it also carries on business in a colony or abroad or not, a writ may be issued against the partners in the firm name without leave under R. S. C., Ord. 48A, r. 1 (LORD ESHER, M.R.).

(2) Pltfs. issued a writ against defts. in the name of their firm, without leave. Defts. were a Natal firm carrying on business within the jurisdiction. The partners being out of jurisdiction, pltfs. obtained an order for substituted service upon one of the partners by serving it upon his brother in London:—*Held:* the order for substituted service & service thereunder must be set aside because the writ could not be served personally upon a partner out of the jurisdiction & therefore could not be served upon him by substitution.—WORCESTER CITY & COUNTY BANKING CO. *v.* FIRBANK, PAULING & CO., [1894] 1 Q. B. 784; 63 L. J. Q. B. 542; 70 L. T. 443; 42 W. R. 402; 10 T. L. R. 345; 38 Sol. Jo. 324; 9 R. 367, C. A.

Annotations:—*As to* (1) **Refd.** Taylor *v.* Johnson, [1917] W. N. 341. *As to* (2) **Refd.** Porter *v.* Freudenberg Kreglinger *v.* Samuel & Rosenfeld, *Re* Merten's Patents, [1915] 1 K. B. 857.

815. Service on resident partner.]—(1) Service on one partner within the jurisdiction is good service on all the partners, although the partnership is a foreign partnership & all the partners reside & are domiciled out of the jurisdiction.

(2) A writ was issued against a partnership firm of H. P. & co., & was served in London under R. S. C., Ord. 9, r. 6, on the manager, at the place where the business of H., P. & co. purported to be carried on. H. was a foreigner domiciled in France, & P. a British subject resident here. H. moved to discharge the service of the writ on the ground that the partnership of H., P. & co. had been dissolved to the knowledge of pltf. some time before the issue of the writ, & moreover that he, H., was a foreigner domiciled in France. Upon the evidence, the ct. arrived at the conclusion that the dissolution of the partnership had not come to the knowledge of pltf. prior to the commencement of the action:—*Held:* under R. S. C., Ord. 9, r. 6, coupled with R. S. C., Ord. 16, r. 14, service on the manager at the place of business was good service on H. & P. notwithstanding the fact of H. being a foreigner domiciled abroad.—SHEPHERD *v.* HIRSCH, PRITCHARD & CO. (1890), 45 Ch. D. 231; 59 L. J. Ch. 819; 63 L. T. 335; 38 W. R. 745; 6 T. L. R. 438.

As to (2) **Refd.** Western National Bank of City of New York *v.* Perez, Triana, [1891] 1 Q. B. 304; St. Gobain, Chauny & Cirey Co. *v.* Hoyermann's Agency, [1893] 2 Q. B. 96.

816. ——.]—Two persons, subjects of a foreign state, carried on business as co-partners in England. One of them resided in England, the other resided & was domiciled abroad. A writ having been issued against them in the name of their firm, the partner resident in England was served with such writ under R. S. C., Ord. 9, r. 6, & appeared. There being no defence to the action, judgment was entered against the firm under R. S. C., Ord. 14:—*Held:* the service on the partner was a good service on the firm, & judgment was rightly entered against the firm.

The appearance of one partner is the appearance of the firm; & one partner here having appeared, judgment was rightly entered against the firm (CAVE, J.).—LYSAGHT *v.* CLARK & CO., [1891] 1 Q. B. 552; 64 L. T. 776; 7 T. L. R. 376, D. C.

Annotation:—**Refd.** Harris *v.* Beauchamp, [1893] 2 Q. B. 534.

817. Service on manager—Controlling business within jurisdiction.]—A foreign partnership, the members of which are foreigners resident out of the jurisdiction, but carrying on business in this, country, cannot be served under R. S. C., Ord. 9, r. 6, by service on the manager at their principal place of business within the jurisdiction.—RUSSELL *v.* CAMBEFORT (1889), 23 Q. B. D. 526; 58 L. J. Q. B. 498; 61 L. T. 751; 37 W. R. 701, C. A.

Annotations:—**Apld.** Shepherd *v.* Hirsch, Pritchard (1890), 45 Ch. D. 231; Heinemann *v.* Hale, [1891] 2 Q. B. 83. **Consd.** Dobson *v.* Festi, Rasini, [1891] 2 Q. B. 92. **Distd.** Lysaght *v.* Clark, [1891] 1 Q. B. 552. **Folld.** Western National Bank of City of New York *v.* Perez, Triana, [1891] 1 Q. B. 304. **Consd.** Grant *v.* Anderson, [1892] 1 Q. B. 108. **Apld.** Turnbull *v.* Walker (1892), 9 T. L. R. 99. **Consd.** St. Gobain, Chauny & Cirey Co. *v.* Hoyermann's Agency, [1893] 2 Q. B. 96. **Apld.** Worcester City & County Banking Co. *v.* Firbank, Pauling (1894), 9 R. 367. **Consd.** MacIver *v.* Burns, [1895] 2 Ch. 630. **Refd.** De Bernales *v.* New York Herald (1893), 62 L. J. Q. B. 385; Singleton *v.* Roberts, Stocks (1894), 70 L. T. 687.

818. —— ——.]—SHEPHERD *v.* HIRSCH, PRITCHARD & CO., No. 815, *ante*.

819. Service on agent—Agent transmitting orders only.]—R. S. C., Ord. 48A, r. 1, provides that persons liable as co-partners & carrying on business within the jurisdiction may be sued in their firm name, & r. 3 of the same Ord. provides for service of the writ in such cases at the principal place within the jurisdiction of the business of the partnership upon any person having the management of the business there.

Defts. were a firm of manufacturers carrying on business in Glasgow, all the members of which were domiciled & resident in Scotland. They employed an agent in London to procure orders for them on commission. For that purpose he occupied an office in London, the rent of which he paid himself, & at which he kept samples of defts.' goods. His duty was to receive & transmit orders to defts. at Glasgow, & he had no authority to conclude contracts for defts., except upon express instructions. A writ was issued against defts. in the name of their firm, & served upon the agent at the above-mentioned office:—*Held:* defts. did not carry on business, & had no place of business, within the jurisdiction, & therefore the writ & service must be set aside.—GRANT *v.* ANDERSON & CO., [1892] 1 Q. B. 108; 61 L. J. Q. B. 107; 66 L. T. 79; 8 T. L. R. 111, C. A.

Annotations:—**Consd.** Grainger *v.* Gough, [1895] 1 Q. B. 71; Okura *v.* Forsbacka Jernverks Akt., [1914] 1 K. B. 715. **Refd.** De Bernales *v.* New York Herald (1893), 62 L. J. Q. B. 385; St. Gobain, Chauny & Cirey Co. *v.* Hoyermann's Agency, [1893] 2 Q. B. 96; Singleton *v.* Roberts, Stocks (1894), 70 L. T. 687; Worcester City & County Banking Co. *v.* Firbank, Pauling, [1894] 1 Q. B. 784; MacIver *v.* Burns (1895), 73 L. T. 39.

——.]—*See* AGENCY, Vol. I., p. 271, No. 32; CORPORATIONS, Vol. XIII., pp. 430, 432, Nos. 1531, 1535, 1547.

Service on branch.]—*See* CORPORATIONS, Vol. XIII., p. 432, No. 1548.

ii. *Carrying on Business outside Jurisdiction.*

See, now, R. S. C., Ord. 48A, r. 1.

820. Service in firm name—On partner resident in England.]—Defts., who were a foreign partnership carrying on business out of the jurisdiction, were sued in the name of their firm. One member

of the firm happening to be within the jurisdiction was served with the writ, which was the ordinary eight day writ :—*Held :* such service was good under R. S. C., Ord. 9, r. 6, which provides that, where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there.—POLLEXFEN *v.* SIBSON (1886), 16 Q. B. D. 792 ; 55 L. J. Q. B. 294 ; 54 L. T. 297 ; 34 W. R. 534, D. C.

Annotations :—**Distd.** Russell *v.* Cambefort (1889), 23 Q. B. D. 526. **Folld.** Shephord *v.* Hirsch Pritchard (1890), 45 Ch. D. 231. **Consd.** Western National Bank of City of New York *v.* Perez, Triana, [1891] 1 Q. B. 304. **Refd.** St. Gobain, Channy & Cirey Co. *v.* Hoyermann's Agency (1893), 41 W. R. 563.

821. —— ——.] —A writ was issued against a foreign firm in respect of the breach of a contract made & to be performed in England. The writ was issued in the firm name, & was served on one of the three partners who was resident in England, the other two residing out of the jurisdiction. On an application, before appearance, by the partner who was served to set aside the writ & service :—*Held :* the partners resident abroad could only be brought in by leave under R. S. C., Ord. 11 ; a writ in the firm name was not available against them, &, consequently the writ must be set aside.—HEINEMANN & Co. *v.* HALE & Co., [1891] 2 Q. B. 83 ; 60 L. J. Q. B. 650 ; 64 L. T. 548 ; 39 W. R. 485 ; 7 T. L. R. 497, C. A.

Annotation :—**Consd.** Worcester City & County Banking Co. *v.* Firbank, Pauling, [1894] 1 Q. B. 784.

822. —— ——.] —Pltfs., an English firm, entered into contracts in India with G. & co., an Indian firm, for the manufacture of indigo. O. & co. were the English correspondents of G. & co. & there were some partners common to both firms, & some of the partners of each firm were resident in India. G. & co. consigned indigo to O. & co., & pltfs. brought an action against the firm of O. & co. claiming the indigo, to which all the members of O. & co. both in England & India appeared. Pltfs. then obtained an order *ex p.* to amend their writ by adding G. & co. as defts. & making consequential alterations in the writ, & also obtained leave to serve the amended writ on defts. out of the jurisdiction. In making the amendments, pltfs. made the firm of G. & co. deft., & added a claim in respect of fresh causes of action arising out of breaches of contract by G. & co. in India, which were not included in the original writ. The members of the firm of G. & co. appeared to the amended writ, & moved to discharge the order to amend as irregular :—*Held :* the original writ was wrongly issued against the firm of O. & co., some of the partners being out of the jurisdiction & the order to amend it was also bad. The ct. accordingly set aside the amended writ, & gave liberty to pltfs. to amend the original writ by substituting for the name of the firm of O. & co. the names of the individual members of that firm & of the firm of G. & co. who were in this country, & by adding a claim in respect of breaches of the contracts ; the members of the two firms who were out of the jurisdiction being at liberty to set aside their appearances, without prejudice to any application by pltfs. to add such members as parties, & to serve them with the amended writ.—INDIGO Co. *v.* OGILVY, [1891] 2 Ch. 31 ; 64 L. T. 846 ; 39 W. R. 646, C. A.

Annotations :—**Refd.** Grant *v.* Anderson, [1892] 1 Q. B. 108 ; Croft *v.* King (1893), 62 L. J. Q. B. 242 ; Firth *v.* De La Rivas & Palmer (No. 2) (1893), 69 L. T. 666 ; Worcester City & County Banking Co. *v.* Firbank, Pauling, [1894] 1 Q. B. 784. **Mentd.** *Re* Crighton & Law Car & General Insco. Corpn., [1910] 2 K. B. 738.

823. —— ——.] —A writ was issued, under R. S. C., Ord. 48A, r. 1, against a firm in the firm name. The firm was a foreign firm carrying on business abroad, but the members of the firm were British subjects. They employed pltf. to purchase goods in England for shipment to them abroad, & one of the partners was generally in England & chose the goods to be purchased. Pltf. ordered & paid for these goods in his own name & forwarded the same to deft. firm abroad, & he received from defts. sums of money on account from time to time, leaving a balance for which the writ was issued. The writ having been served personally on one of the partners while in England :—*Held :* upon the facts, deft. firm did not carry on a business within the jurisdiction & consequently there was no authority for issuing the writ against the firm in the firm name, & the issue & service of the writ ought to be set aside.—SINGLETON *v.* ROBERTS, STOCKS & Co. (1894), 70 L. T. 687 ; 38 Sol. Jo. 478 ; 10 R. 223, D. C.

824. —— **On partner visiting England.** A writ was issued against a partnership firm, sued by the firm name, which carried on business abroad & had no place of business in England, & all the partners in which were domiciled & resident abroad. The writ was served in England upon a person who was temporarily there, & whom pltfs. alleged to be a partner in the firm, he being served expressly "as partner." He entered a conditional appearance, which was, on the application of pltfs., struck out as irregular, & he then entered an unconditional appearance, &, in his own name, moved to set aside the service, on the ground that he was not a partner in deft. firm. A Div. Ct. refused to set aside the service :—*Held :* R. S. C., Ord. 9, r. 6, did not apply to the case of a foreign firm, & the service was not good service on the firm ; but the service on deft. as an individual would have been good, if he had been named in the writ, & he had by appearing waived the irregularity.

Ordered therefore, that, if pltfs. would elect to amend the writ, by stating that applt. was sued together with the other alleged members of the firm, who were to be named separately, the service should stand as against applt. ; but, if pltfs. would not so elect, the writ must be set aside with costs.—WESTERN NATIONAL BANK OF CITY OF NEW YORK *v.* PEREZ, TRIANA & Co., [1891] 1 Q. B. 304 ; 60 L. J. Q. B. 272 ; 64 L. T. 543 ; 39 W. R. 245 ; 7 T. L. R. 177, C. A.

Annotations :—**Apld.** Dobson *v.* Festi, Rasini, [1891] 2 Q. B. 92 ; Heinemann *v.* Hale, [1891] 2 Q. B. 83. **Folld.** Indigo Co. *v.* Ogilvy, [1891] 2 Ch. 31. **Consd.** Lysaght *v.* Clark, [1891] 1 Q. B. 552. **Refd.** Frith *v.* De La Rivas & Palmer (1893), 69 L. T. 383 ; St. Gobain, Channy & Cirey Co. *v.* Hoyermann's Agency, [1893] 2 Q. B. 96 ; Worcester City & County Banking Co. *v.* Firbank, Pauling, [1894] 1 Q. B. 784.

825. —— ——.] —AGAR *v.* KAUFMAN BROTHERS (1894), 39 Sol. Jo. 181, D. C.

826. —— **On one partner abroad.**] —Pltfs. brought an action for a breach within the jurisdiction of a contract which was to be performed within the jurisdiction against foreign partners in the name of their firm. The partnership had neither place of business nor property within the jurisdiction, & all the partners resided out of the jurisdiction. Leave having been obtained to serve notice of the writ out of the jurisdiction, the notice was served abroad on one of the partners. Defts. did not appear, & pltfs. applied for leave to sign judgment for want of appearance :—*Held :* pltfs. were not entitled to judgment, for R. S. C.,

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Ord. 9, r. 6, did not apply to a foreign partnership, & the service of the notice on one partner was not good service on the firm.—DOBSON *v.* FESTI, RASINI & Co., [1891] 2 Q. B. 92; 60 L. J. Q. B. 481; 64 L. T. 551; 39 W. R. 481; 7 T. L. R. 538, C. A.

Annotations:—**Consd.** Von Hellfeld *v.* Rechnitzer & Mayer, [1914] 1 Ch. 748. **Refd.** De Bernales *v.* New York Herald (1893), 68 L. T. 658.

827. ——.]—A writ was issued by pltf., who was a foreigner carrying on business in England, against R., a foreigner carrying on business in England, & Mayer Frères & co., a French firm carrying on business in Paris, consisting of three partners all domiciled in Paris, & having no place of business in England, who were sued in the firm name. The writ asked for cancellation of an agreement, & was served upon R. in England. Liberty to issue a concurrent writ & serve notice of it out of the jurisdiction on Mayer Frères & co. was granted, & they were duly served in Paris at the principal place of business of the firm:—*Held:* the proceedings must be set aside, so far as they affected Mayer Frères & co., on the ground that there was no power to sue a foreign partnership, not carrying on business in England, under its firm name, in the absence of evidence that by French law a partnership was a different legal entity from the individual partners.—VON HELLFELD *v.* RECHNITZER & MAYER FRÈRES & CO., [1914] 1 Ch. 748; 83 L. J. Ch. 521; 110 L. T. 877; 58 Sol. Jo. 414, C. A.

828. Service outside jurisdiction—Agreement to be so served.]—An agreement by a person domiciled or ordinarily resident in Scotland that a writ for breach of contract arising within the jurisdiction may be served on him in Scotland does not authorise the ct. to direct service of such a writ in Scotland, as to do so would be in direct contravention of R. S. C., Ord. 11, r. 1 (*e*).—BRITISH WAGON CO. *v.* GRAY, [1896] 1 Q. B. 35; 65 L. J. Q. B. 75; 73 L. T. 498; 44 W. R. 113; 12 T. L. R. 64; 40 Sol. Jo. 83, C. A.

Annotations:—**Distd.** Montgomery *v.* Liebenthal, [1898] 1 Q. B. 487. **Refd.** Duff Development Co. *v.* Kelantan Government, [1924] A. C. 797.

See, now, R. S. C., Ord. 11, r. 2A.

829. —— **Leave of court.**]—APPLETON & CO. *v.* DONOVAN & Co. (1891), 7 T. L. R. 554, D. C.

830. —— ——.]—(1) R. S. C., Ord. 11, r. 1 (*g*), applies to a foreigner resident out of the jurisdiction. Pltfs., an English co., entered into a contract in Spain with defts., who carried on business in partnership in Spain, to manufacture & deliver certain goods in Spain. The payment was to be made abroad. One of defts. was an English subject, & the other was a Spanish subject, resident in Spain. Pltfs. brought an action to recover the price of the goods so delivered, & the writ was served on the English partner in England:—*Held:* the foreign partner was a "proper party," to the action within R. S. C., Ord. 11, r. 1 (*g*), & leave to issue a concurrent writ & serve notice thereof on him out of the jurisdiction might be allowed.

(2) The Div. Ct. having made it a condition of the order that judgment should not be signed nor execution issued against foreign deft. except by leave of the ct. or a judge:—*Held:* this condition could not be imposed as a general rule in all such cases, nor were there any special circumstances in this case which called for it.—FIRTH & SONS *v.* DE LA RIVAS & PALMER (No. 2) (1893), 69 L. T. 666; 42 W. R. 100; 10 T. L. R. 38; 38 Sol. Jo. 24; 9 R. 51, C. A.

831. Service within jurisdiction—Agreement to be so served.]—An agreement by a person domiciled or ordinarily resident in Scotland, that a writ for breach of contract may be served by leaving it with an agent in England, appointed by him to accept service, is valid, & service upon the agent is good service on deft.—MONTGOMERY *v.* LIEBENTHAL, [1898] 1 Q. B. 487; 67 L. J. Q. B. 313; 78 L. T. 211; 46 W. R. 292; 14 T. L. R. 201; 42 Sol. Jo. 232, C. A.

Annotations:—**Refd.** Duff Development Co. *v.* Kelantan Government, [1924] A. C. 797. **Mentd.** Czarnikow *v.* Roth, Schmidt (1922), 127 L. T. 824.

(*c*) *Single Individual Trading under Firm Name.*

See R. S. C., Ord. 48A, r. 11.

832. Resident outside jurisdiction.]—R. S. C., Ord. 48A, r. 2, provides that "any person carrying on business within the jurisdiction in a name or style other than his own name, may be sued in such name or style as if it were a firm name; &, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply":—*Held:* the rule did not apply to a foreign subject resident out of the jurisdiction who carried on business within the jurisdiction in a name or style other than his own name.—ST. GOBAIN, CHAUNY & CIREY CO. *v.* HOYERMANN'S AGENCY, [1893] 2 Q. B. 96; 62 L. J. Q. B. 485; 69 L. T. 329; 41 W. R. 503; 9 T. L. R. 481; 4 R. 441, C. A.

Annotations:—**Consd.** MacIver *v.* Burns, [1895] 2 Ch. 631, n. **Apld.** Taylor *v.* Johnson, [1917] W. N. 341.

833. ——.]—B., a domiciled Scotsman, resident in Scotland, carried on business in Liverpool in the name of G. & J. Burns:—*Held:* R. S. C., Ord. 48A, r. 11, did not apply so as to enable pltf. to effect service of a writ upon B. by serving it on the person having the management & control of the business at Liverpool.—MACIVER *v.* BURNS, [1895] 2 Ch. 630; 64 L. J. Ch. 681; 73 L. T. 39; 44 W. R. 40; 11 T. L. R. 506; 39 Sol. Jo. 638; 12 R. 467, C. A.

Annotation:—**Refd.** Taylor *v.* Johnson, [1917] W. N. 341.

834. ——.]—Pltf. claimed damages for breach of the contract in not delivering the pig iron, & on Mar. 27, 1917, the writ of summons, which was in form for service within the jurisdiction, was served on a person at an office in the City of London, as the person having at the time of such service the control or management of the partnership business of deft. firm. A conditional appearance was entered on behalf of deft. firm, & a summons was taken out to set aside the writ & the service thereof.

The ct. dismissed the appeal upon the ground that the case was covered by the decision in *St. Gobain, Chauny & Cirey Co.* v. *Hoyermann's Agency,* No. 832, *ante,* which was binding on ct.—TAYLOR BROTHERS & CO., LTD. *v.* JOHNSON (A.) & Co., [1917] W. N. 341, C. A.

Service of bankruptcy petition.]—*See* BANKRUPTCY, Vol. IV., p. 137, No. 1262.

(*d*) *Substituted Service.*

See R. S. C., Ord. 9, r. 2.

835. General rule.]—CROYDON & NORWOOD TRAMWAYS CO. *v.* JACKSON & Co. (1887), 3 T. L. R. 650, C. A.

PART IV. SECT. 6, SUB-SECT. 2.—E. (d).

m. *Partner abroad—Service on co-partner in England—After dissolution.*]—Where an order had been made to substitute service on a partner in a firm, which had been dissolved, who resides out of the jurisdiction, by serving a former partner residing within the jurisdiction, such an order is incorrect.—— *v.* SCOTT BROTHERS (1852), 19 L. T. O. S. 149.—IR.

836. Service on co-partner — With request for delivery.]—In an action against A. & B., who are partners, service of notice of declaration by delivering a notice to A. at the place of business, & putting into his hands a similar notice, with a request that he will deliver it to B., is not a good service as against B. Interlocutory judgment have been signed against both, it was set aside as against B., the costs of the application to be costs in the cause.—MOREDON *v.* WYER (1843), 6 Man. & G. 278; 134 E. R. 899; *sub nom.* MOSEDON *v.* WYER, 6 Scott, N. R. 945; *sub nom.* MORTON *v.* WIRE, 1 L. T. O. S. 315.

837. Partner abroad—Service on co-partner in England.] — CARRINGTON (LADY) *v.* CANTILLON (1722), Bunb. 107; 145 E. R. 612.

Annotations:—**Folld.** Coles *v.* Gurney (1815), 1 Madd. 187. **Refd.** Hobhouse *v.* Courtney (1841), 12 Sim. 140; Hope *v.* Hope (1854), 19 Beav. 237.

838. —— ——.] — Bill filed against two partners, & one being abroad, the subpœna against him, on motion, permitted to be served on the partner here.—COLES *v.* GURNEY (1815), 1 Madd. 187; 56 E. R. 70.

839. —— ——.]—A bill was filed, impeaching the validity of a mtge. which had been made to A., who was in partnership with three other gentlemen, practising as solrs. in London. A. left England before the bill was filed, & was in Italy. Three yearly sums, which were payable to A., by virtue of the mtge., had been generally paid to his partners on his account, & they had a general power to act for him. An order that service of the subpœna to appear should be made upon A.'s partners, was held regular, & a motion to discharge it was refused, with costs.—KINDER *v.* FORBES (1840), 2 Beav. 503; 9 L. J. Ch. 288; 4 Jur. 430; 48 E. R. 1277.

Annotation:—**Mentd.** Pinnock *v.* Rigby (1842), 11 L. J. Ch. 408.

840. —— ——.]—The old practice as to substituting service on a partner may still be resorted to, notwithstanding the partner to be served by substitution be abroad, & by the recent decisions could not have been there served.—HENDERSON *v.* CAMPBELL (1865), 34 L. J. Ch. 666; 13 W. R. 704, L. JJ.

841. —— ——.] — In a suit against five partners, three of whom had entered appearance & the other two were out of the jurisdiction & had not, substituted service of a notice of motion for an injunction, & for the appointment of a receiver on any of the three partners for the two was allowed.—LEESE *v.* MARTIN (1871), L. R. 13 Eq. 77.

842. —— **Service on relative in England.**] — WORCESTER CITY & COUNTY BANKING CO. *v.* FIRBANK, PAULING & CO., No. 814, *ante*.

843. —— **Service on servant in England.**]— If a copy of *subpœna ad respondendum* be left with a servant of deft.'s brother, who was also his partner & a co-deft. in the suit, at whose house such servant acknowledged that he resided at will be good service, although the party be out of the kingdom at the time.—BIRDWOOD *v.* HART (1816), 3 Price, 176; 146 E. R. 228.

844. No person in control.] — SHILLITO *v.* CHILD & CO., [1883] W. N. 208; Bitt. Rep. in Ch. 219.

On lunatic partner.] — *See* LUNATICS, Vol. XXXIII., p. 235, No. 1509.

F. Appearance.

See R. S. C., Ord. 48A, rr. 5, 7.

845. Appearance by one partner—Appearance for firm.]—An action was brought to which a firm & one of the partners in the firm were made defts., & separate defences were put in by that partner for himself & for the firm. No appearance was put in by the firm separately or by the other partner:—*Held:* the defence of the firm could not be struck out for default of appearance, for R. S. C., Ord. 12, r. 12, gives no power to a firm to enter an appearance.—TAYLOR *v.* COLLIER (1882), 51 L. J. Ch. 853; 30 W. R. 701.

846. —— ——.] — LYSAGHT *v.* CLARK & CO., No. 816, *ante*.

847. —— ——.]—A writ was issued against a trading partnership, unincorporated & served upon a member of the firm, who entered an appearance, "W. N., a partner of the firm of W. T. & co." There was no service upon or appearance by the other members of the firm:—*Held:* leave to sign judgment against the firm for default of appearance could not be granted.—ADAM *v.* TOWNEND (1884), 14 Q. B. D. 103, D. C.

848. —— ——.] — ELLIS *v.* WADESON, No. 791, *ante*.

849. Appearance by solicitor — By order of managing partner.]—TOMLINSON *v.* BROADSMITH, No. 430, *ante*.

850. Appearance conditional or under protest.] —NELSON *v.* PASTORINO & CO., No. 810, *ante*.

851. ——.]—There is no power under R. S. C., in an action against a firm, to allow the entry of a conditional appearance, *i.e.* an appearance by a person which denies that such person is a partner in the firm.—DAVIES & CO. *v.* ANDRÉ & CO. (1890), 24 Q. B. D. 598; 59 L. J. Q. B. 233; 63 L. T. 151; 38 W. R. 437, C. A.

Annotations:—**Apld.** Weir *v.* McVicar, [1925] 2 K. B. 127. **Refd.** Alden *v.* Beckley (1890), 25 Q. B. D. 543; Western National Bank of City of New York *v.* Perez, Triana, [1891] 1 Q. B. 304. **Mentd.** Firth *v.* De Las Rivas, [1893] 1 Q. B. 768.

852. —— **Partner after cause of action accrued.**] —ROBINSON *v.* WARD & SON (1892), 36 Sol. Jo. 415, D. C.

853. —— **Partnership disputed.**]—In an action against a firm a person who, being served as a partner, enters an appearance under protest denying that he is a partner in accordance with the provisions of R. S. C., Ord. 48A, r. 7, is not entitled to dispute the liability of the firm, & consequently cannot obtain an order for an issue to try the question of his partnership before the other issues in the action. *Qu.:* whether, a person served as a partner who appears unconditionally is entitled to dispute the fact of his partnership as well as the liability of the firm?—WEIR & CO. *v.* MCVICAR & CO., [1925] 2 K. B. 127; 94 L. J. K. B. 786; 133 L. T. 428, C. A.

PART IV. SECT. 6, SUB-SECT. 2.—F.

845 i. *Appearance by one partner—Appearance for firm.*]—LANGMAN *v.* HUDSON & RAMSEY (1891), 14 P. R. 215.—**CAN.**

n. *Appearance by solicitor—By authority of one partner.*]—After service of the writ of summons upon one of the partners in an action against a partnership in the firm name, an appearance was entered by a solr. in the names of both partners individually, but upon the instructions of one partner only & without the authority of the other:—*Held:* the appearance & pltfs.' judgment founded thereon were irregular.—MASON *v.* COOPER & SMITH (1893), 15 P. R. 418.—**CAN.**

850 i. *Appearance conditional or under protest.*]—An appearance by A., "having been served as a partner, but who denies that he is a partner," etc., will be deemed an unconditional appearance.—RANSOM *v.* POTTER & MCDOUGALL (1907), 1 Alta L. R. 247.—**CAN.**

o. —— *Multiplicity of actions.*]—OPPENHEIMER *v.* SPERLING (1902), 22 C. L. T. 376; 9 B. C. R. 166.—**CAN.**

p. *Appearance by both partners—Subsequent proceedings by one.*]—Where two attorneys in partnership appear in a suit, a subsequent notice of a proceeding in the suit signed in the name of one of them is sufficient; the act of one partner in such a matter being the act of both.—DOE d. ODELL *v.* TAYLOR (1857), 8 N. B. R. (3 All.) 437.—**CAN.**

Sect. 6.—*Legal proceedings: Sub-sect.* 2, *F., G., H. J.* (*a*).]

854. Setting aside appearance—Partner resident abroad.]—INDIGO CO. *v.* OGILVY, No. 822, *ante*.

G. Discovery—Documents and Names of Partners.

See R. S. C., Ord. 48A, r. 2.

855. Production of partnership deed — Action against surviving partner.]—TAYLOR *v.* OSBORNE (*circa* 1811), cited in 4 Taunt. at p. 159; 128 E. R. 289.

Annotations:—**Consd.** Bateman *v.* Phillips (1811), 4 Taunt. 157; Ratcliffe *v.* Bleasby (1825), 3 Bing. 148.

856. Discovery of names of partners—By proceedings pointed out in rules.]—MUNSTER *v.* COX, No. 862, *post*.

857. Costs of discovery — Partners entitled to one set only.]—A. & B., two surveyors in partnership, who were employed as a firm, with respect to the matters in question in the suit, were made defts. for the purpose of discovery only. The bill also prayed that "defts. might pay the costs of the suit." A. & B. put in separate answers & appeared by separate counsel at the hearing. Prior to the hearing they had dissolved partnership.

At the hearing a decree was taken by consent, as between pltfs. & principal defts., as to the matters in question in the suit & it was admitted that A. & B. were entitled to their costs:—*Held*: A. & B. were only entitled to one set of costs between them, as they were not justified in severing in their defence.—BULL *v.* WEST LONDON SCHOOL BOARD (1876), 34 L. T. 674; 3 Char. Pr. Cas. 43.

See DISCOVERY, Vol. XVIII., pp. 57, 78, 79, 98, 112, 119, 120, 175, 202, 214, 227, 248, 249, Nos. 140, 332, 342, 489, 636, 694, 695, 1289, 1497, 1614, 1743, 1913, 1924.

H. Judgment.

858. Judgment against one partner—Bar to action against another—Though judgment unsatisfied.]—A judgment, without satisfaction, recovered against one of two joint debtors is a bar to an action against the other. *Secus*: where the debt is joint & several.—KING *v.* HOARE (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L. J. Ex. 29; 4 L. T. O. S. 174; 8 Jur. 1127; 153 E. R. 206.

Annotations:—**Apld.** Newton *v.* Blunt (1846), 3 C. B. 675. **Distd.** *Re* Morrison, *Ex p.* Jones (1851), 20 L. J. Bcy. 5. **Consd.** Buckland *v.* Johnson (1854), 15 C. B. 145; Owen *v.* Wilkinson (1858), 5 C. B. N. S. 526; Brinsmead *v.* Harrison (1872), L. R. 7 C. P. 547. **Apprvd.** Kendall *v.* Hamilton (1879), 4 App. Cas. 504. **Apld.** *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50. **Consd.** *Re* Hodgson, Beckett *v.* Ramsdale (1885), 31 Ch. D. 177; Munster *v.* Cox (1885), 10 App. Cas. 680. **Apld.** Cambefort *v.* Chapman (1887), 19 Q. B. D. 229. **Consd.** Philley *v.* Robinson (1887), 20 Q. B. D. 155; Hammond *v.* Schofield, [1891] 1 Q. B. 453; Wegg Prosser *v.* Evans, [1894] 2 Q. B. 101. **Apld.** McLeod *v.* Power, [1898] 2 Ch. 295; Isaacs *v.* Salbstein, [1916] 2 K. B. 139; Parr *v.* Snell, [1923] 1 K. B. 1. **Refd.** Roddam *v.* Morley (1857), 1 De G. & J. 1; Phillips *v.* Ward (1863), 3 New Rep. 92; Baker *v.* Sayers & Foster (1868), 17 L. T. 579; Bermondsey Vestry *v.* Ramsey (1871), L. R. 6 C. P. 247; Odell *v.* Cormack (1887), 19 Q. B. D. 223; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337; Midgley *v.* Midgley, [1893] 3 Ch. 282; Goldrei, Foucard *v.* Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180; Moore *v.* Flanagan, [1920] 1 K. B. 919; The Koursk, [1924] P. 140; Pirie *v.* Richardson (1926), 70 Sol. Jo. 1023; R. M. K. R. M. *v.* M. R. M. V. L., R. M. K. R. M. Somasundaram Chetty *v.* M. R. M. V. L. Supramanian Chetty (1926), 95 L. J. P. C. 197. **Mentd.** Henry *v.* Goldney (1846), 15 M. & W. 494; *Re* Wheal Ludcott & Wrey Consols Mines Co., *Ex p.* Jackson (1869), 21 L. T. 67; Wemyss *v.* Hopkins (1875), 44 L. J. M. C. 101; Beck *v.* Pierce (1889), 23 Q. B. D. 316; *Re* Crook, *Ex p.* Collins (1891), 66 L. T. 29; Westmorland Green & Blue Slate Co. *v.* Feilden, [1891] 3 Ch. 15; Chamberlyn *v.* Allen (1892), 36 Sol. Jo. 348; British South Africa Co. *v.* Companhia de Mocambique, [1893] A. C. 602; *Re* King & Beesley, *Ex p.* Horner [illegible] Mans. 505; Penny *v.* Wimbledon U. C. (1899), 68 L. J. Q. B. 704; Morel *v.* Westmorland (1902), 87 L. T. 635; London Assocn. for Protection of Trade *v.* Greenlands, [1916] 2 A. C. 15.

859. —— ——.]—Pltfs., a firm of printers, sued deft. for the cost of printing for him a certain newspaper of which they supposed him to be the sole proprietor. There being no defence to the action, deft. consented to final judgment being signed against him. After judgment had been so signed, pltfs. received information that at the time the work was done, T. was a partner of deft., & joint proprietor with him of the newspaper. They accordingly, with the consent of deft., applied for an order that the judgment should be set aside, & that the writ should be amended by adding T. as deft. in the action:—*Held*: the consent of deft. to the setting aside of the judgment could not enable pltf. to evade the rule that judgment recovered against one of two joint contractors is a bar to an action against the other, & there was consequently no jurisdiction to make the order.—HAMMOND *v.* SCHOFIELD, [1891] 1 Q. B. 453; 60 L. J. Q. B. 539; 7 T. L. R. 300, D. C.

Annotations:—**Apld.** Parr *v.* Snell, [1923] 1 K. B. 1. **Refd.** Hoare *v.* Niblett, [1891] 1 Q. B. 781; Cross *v.* Matthews & Wallace (1904), 91 L. T. 500. **Mentd.** Moore *v.* Flanagan, [1920] 1 K. B. 919.

860. —— ——.]—PIRIE *v.* RICHARDSON, No. 523, *ante*.

—*See* BILLS OF EXCHANGE, Vol. VI., pp. 387, 388, Nos. 2543, 2546.

861. Leave to defend granted to another.]—In an action by a firm of solrs. against E. & J., two partners, for a bill of costs incurred by the firm, on application under R. S. C., Ord. 14, r. 1, E. consented that judgment should be entered against him, J. obtained leave to defend. "All matters in difference in the action" were afterwards referred to a master. J. raised a counterclaim. The master found in favour of J. in the original action, & awarded him £230 on the counter-claim:—*Held*: the judgment against E. did not prevent J. from recovering a balance due to the partnership.—WEALL *v.* JAMES (1893), 68 L. T. 54; 37 Sol. Jo. 194; 5 R. 157, D. C.

Annotations:—**Consd.** M'Leod *v.* Power (1898), 67 L. J. Ch. 551. **Mentd.** Morel *v.* Westmorland (1902), 87 L. T. 635.

862. —— **Amendment of judgment—To judgment against firm.**]—To a writ issued against R. & co., & claiming damages for libel, an appearance was entered for "R. trading as R. & co. deft. in this action." The statement of claim was delivered against "R. sued as R. & co." & the proceedings continued in that form down to judgment. At the trial by consent a verdict was found for pltf. for 40*s*. & judgment entered accordingly. After issuing execution against R. pltf., under the rules in force before 1883, took out a summons for liberty to amend the judgment, & the pleadings

PART IV. SECT. 6, SUB-SECT. 2.—G.

q. *Production of partnership books.*]—DOUGLAS *v.* MANN (1897), 11 Man. L. R. 546.—**CAN.**

PART IV. SECT. 6, SUB-SECT. 2.—H.

r. *Judgment against one partner—Bar to action against firm.*]—A judgment in Penang against a deft., described in the writ by the group of letters under which a moneylending firm there carries on business followed by the name of the firm's local representative, is a judgment against the local representative personally, whether he is a partner in, or merely an agent for, the firm. A subsequent suit for the same debt against the firm itself is barred.—R. M. K. R. M. (FIRM OF) *v.* M. R. M. V. L. (FIRM OF), [1926] A. C. 761, P. C.—**STRAITS SETTLEMENTS.**

t. *Judgment against firm—Judgment summons against partner.*]—A member

if necessary, by striking the words "R. sued as" from the title of the action; to enter judgment against R. & co. so as to correspond with the writ, & to issue execution against C., on the ground that C. had been since discovered to be a partner in the firm:—*Held:* the proceedings having been conducted against R. only, & judgment having been signed by consent against him alone, the judgment could not be converted into a judgment against the firm.

Pltf., if he wished to know who the partners in the firm were, might by easy proceedings, pointed out in the rules, ascertain who they were (LORD SELBORNE, C.).—MUNSTER *v.* COX (1885), 10 App. Cas. 680; 55 L. J. Q. B. 108; 53 L. T. 474; 34 W. R. 461; 1 T. L. R. 542, H. L.; *affg.* S. C. *sub nom.* MUNSTER *v.* RAILTON (1883), 11 Q. B. D. 435, C. A.

Annotation:—**Mentd.** The Duke of Buccleuch, [1892] P. 201.

—— **Proof in bankruptcy against joint estate.**]—*See* BANKRUPTCY, Vol. IV., p. 433, Nos. 3906, 3907.

863. Judgment against firm—Operates as judgment against members.]—LOVELL & CHRISTMAS *v.* BEAUCHAMP, No. 218, *ante.*

864. —— Where writ in firm name.]—Where the writ in an action is issued against a partnership firm in the name of the firm the judgment must be against the firm, & it cannot be separately entered against an individual member of the firm who has made default in appearing to the action.—JACKSON *v.* LITCHFIELD (1882), 8 Q. B. D. 474; 51 L. J. Q. B. 327; 46 L. T. 518; 30 W. R. 531, C. A.

Annotations:—**Distd.** Clark *v.* Cullen (1882), 9 Q. B. D. 355. **Consd.** Davis *v.* Morris (1883), 10 Q. B. D. 436; Munster *v.* Railton (1883), 52 L. J. Q. B. 409.

865. —— Judgment summons against partner—Affidavit for leave to issue.]—By C. C. R., Ord. 25, r. 14 (*b*), it is provided that where a judgment is recovered against a firm & pltf. seeks to enforce it by judgment summons against a person whom he alleges to be a partner in the firm, he shall file an affidavit in Form 52 (*c*) & thereupon a judgment summons shall issue:—*Held:* the statement of pltf.'s sources of information & grounds of belief that the person against whom the judgment summons is sought was a partner is a material part of the form, & its omission from the affidavit will render irregular the issue of the summons & all subsequent proceedings thereon.—LUMLEY *v.* OSBORNE, [1901] 1 K. B. 532; 70 L. J. K. B. 416; 84 L. T. 461; 49 W. R. 374; 45 Sol. Jo. 277, D. C.

866. —— Infant member.]—The fact that one of the members of a partnership, which is sued in the firm name, is an infant, does not prevent judgment being obtained against the firm & execution from issuing thereon against the property of the partnership.—HARRIS *v.* BEAUCHAMP BROTHERS, [1893] 2 Q. B. 534; 63 L. J. Q. B. 99; 69 L. T. 373; 42 W. R. 37; 9 T. L. R. 651; 37 Sol. Jo. 715; 4 R. 550, C. A.

Annotation:—**Refd.** Lovell & Christmas *v.* Beauchamp (1894), 63 L. J. Q. B. 802.

867. —— —— Infant member excluded.]—LOVELL & CHRISTMAS *v.* BEAUCHAMP, No. 218, *ante.*

868. —— In default of appearance—Appearance of one partner.]—ADAM *v.* TOWNEND, No. 847, *ante.*

—— **Action on judgment—Against individual partners.**]—*See* JUDGMENTS, Vol. XXX., pp. 166, 167, No. 353.

869. —— Proof in bankruptcy against separate estates of partners.]—Where a firm is adjudicated bkpt. on a judgment debt recovered against the firm jointly, if the partners are also severally liable in respect of the same matter by reason, for instance, of its arising out of breach of trust, the several liability of the partners is not, solely by reason of the creditor having sued for & obtained a joint judgment, merged in such judgment, so as to preclude a proof by the judgment creditor against their respective separate estates.—*Re* DAVISON, *Ex p.* CHANDLER (1884), 13 Q. B. D. 50; *sub nom. Re* DAVISON, *Ex p.* BLENKIRON'S EXECUTORS, 50 L. T. 635.

Annotation:—**Mentd.** *Re* King & Beesley, *Ex p.* Horner (1894), 64 L. J. Q. B. 126.

870. Judgment against estate of deceased partner—Not bar to action against estate of surviving partner.]—*Re* HODGSON, BECKETT *v.* RAMSDALE, No. 593, *ante.*

871. Foreign partner—Leave to sign judgment against—Jurisdiction of court to impose condition.]—FIRTH & SONS *v.* DE LA RIVAS & PALMER (No. 2), No. 830, *ante.*

872. Death of partner — After action commenced — Judgment against survivor.] — ELLIS *v.* WADESON, No. 791, *ante.*

873. Costs of setting aside judgment — At instance of one partner—Payment to other partner.]—Interlocutory judgment for want of a plea having been set aside with costs at the instance of one of two defts., who appeared separately, in an action against both for use & occupation; payment of the costs to the other deft., who gave a receipt in the action for himself & partner:—*Held:* insufficient, although there was nothing apparent on the face of the order to show that it was made at the instance of one only of defts.—SHOWLER *v.* STOAKES (1844), 2 Dow. & L. 2; 13 L. J. Q. B. 230; 3 L. T. O. S. 107; 8 Jur. 449.

J. Execution.

(*a*) *Judgment against Firm.*

See Partnership Act, 1890 (c. 39), s. 23.

874. Liability of assets of firm — Belonging chiefly to one partner.]—If three partners, two of whom reside abroad & one in England, be sued for a partnership debt, & the partner resident in England appear to the action, but refuse to appear for the partners resident abroad, the sheriff, under a *distringas* against the two partners, may take partnership effects, though paid for by the partner resident in England alone, to whom the partner was largely indebted: & the ct. will not relieve him against such distress.—MORLEY *v.* STROMBOM (1802), 3 Bos. & P. 254; 127 E. R. 141.

Annotation:—**Refd.** Tomlinson *v.* Broadsmith & Stead (1896), 65 L. J. Q. B. 308.

875. Dispute as to partnership — Leave to try issue — Before execution issued.]—WORCESTER

of a partnership against which a judgment has been recovered in a division ct. in the firm name, who has not been personally served with the summons, & has not admitted himself to be or been adjudged a partner, cannot be proceeded against by an order for committal for non-attendance on a judgment summons.—*Re* REID *v.* GRAHAM BROTHERS (1894), 26 O. R. 126.—**CAN.**

PART IV. SECT. 6, SUB-SECT. 2.—J. (a).

a. *Liability of assets of firm.*]—GIBSON *v.* TEMPS PUBLISHING CO. (1903), 24 C. L. T. 21; 6 O. L. R. 690; 2 O. W. R. 1122.—**CAN.**

b. *One partner bankrupt.*]—O'NEIL *v.* HAMILTON (1847), 4 U. C. R. 294.—**CAN.**

c. *Liability of assets of individual partner.*]—BANK OF TORONTO *v.* HALL (1884), 6 O. R. 653.—**CAN.**

d. ——.]—ROSS BROTHERS, LTD. *v.* HANKIN (Alta.) (1908), 9 W. L. R. 222.—**CAN.**

e. *No partnership in fact existing.*]—STANDARD BANK OF CANADA *v.* FRIND (1893), 15 P. R. 438.—**CAN.**

Sect. 6.—*Legal proceedings: Sub-sect.* 2, *J.* (*a*) & (*b*); *sub-sect.* 3. *Part V. Sect.* 1.]

BANKING CO. *v.* TROTTER, THOMAS & CO. (1887), 3 T. L. R. 708, D. C.

876. —— —— ——.] — DAVIS *v.* HYMAN & CO., No. 206, *ante.*

Garnishee order.]—*See* EXECUTION, Vol. XXI., p. 620, No. 2076.

Married woman trading as firm—Enforcement of judgment.]—*See* BANKRUPTCY, Vol. IV., p. 32, No. 265.

Effect of receiving order against one partner.]—*See* BANKRUPTCY, Vol. V., p. 820, No. 6963.

(*b*) *Judgment against Individual Partner.*

See Partnership Act, 1890 (c. 39), s. 23; R. S. C., Ord. 46, rr. 1A, 1B.

877. Liability of partnership assets—Rights of other creditors of partnership.]—If a *fi. fa.* issue against one of several partners, the ct. will not at the request of the partnership creditors give the sheriff time to return the writ until an account can be taken of the several claims upon the partnership property.—PARKER *v.* PISTOR (1802), 3 Bos. & P. 288; 127 E. R. 159.

878. —— **Death of partner before writ of execution delivered.**] — Injunction granted to restrain the goods of a partnership from being taken in execution for a debt due from one of the partners who died before the writ was delivered to the sheriff.—NEWELL *v.* TOWNSEND (1834), 6 Sim. 419; 58 E. R. 651.

879. —— **Whether seizure & sale a conversion.**]—One of two tenants in common of a chattel is not liable in trover at the suit of his co-tenant, for the mere sale of the chattel; though he may be, for such a disposition as amounts to a destruction of it.

Deft., an officer of the Palace Ct., seized, under a *fi. fa.* against A., partnership effects of A. & B., & sold them to various purchasers, who carried them away. In trover at the suit of the assignees of B., who had become bkpt.:—*Held:* the seizure & sale, under the circumstances, did not amount to a conversion; but, in the absence of any evidence to show in what proportions the partners were interested in the partnership property, the assignees of B. were entitled to a moiety of the proceeds of the sale.—MAYHEW *v.* HERRICK (1849), 7 C. B. 229; 18 L. J. C. P. 179; 13 Jur. 1078; 137 E. R. 92.

Annotations:—**Consd.** Fraser *v.* Kershaw (1856), 2 K. & J. 496. **Mentd.** Tancred *v.* Allgood (1859), 28 L. J. Ex. 362; Jacob *v.* Seward (1872), L. R. 5 H. L. 464.

880. ——.] — Since the Partnership Act, 1890 (c. 39), partnership property cannot be seized to satisfy the debt of one partner; all that can be done is to make an order charging the partner's interest in the partnership property with payment of the amount of the judgment debt, & the share can only be ascertained after satisfying all the partnership liens & other claims (PICKFORD, L.J.). —PEAKE *v.* CARTER, [1916] 1 K. B. 652; 85 L. J. K. B. 761; 114 L. T. 273, C. A.

881. Liability of share of partner — Sale.] — Under an execution against one of several partners, the share only of him against whom the execution issued can be sold.—JACKY *v.* BUTLER (1703), 2 Ld. Raym. 871; 92 E. R. 82, L. C.

Annotations:—**Refd.** West *v.* Skip (1749), 1 Ves. Sen. 239; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Johnson *v.* Evans (1844), 7 Man. & G. 240; Ekins *v.* Brown (1854), 1 Ecc. & Ad. 400.

882. —— **Charging order—Right of creditor—No greater than where charge made by partner.**]—As a general rule the remedies of a separate judgment creditor of a partner, in whose favour an order has been made charging the judgment debt on that partner's interest in the partnership under Partnership Act, 1890 (c. 39), s. 23 (2), are only such as he would have had if the charge had been made by the partner; &, therefore, in the absence of special circumstances, he cannot during the continuance of the partnership obtain an order under that sub-sect. directing the other partners to render to him accounts of the partnership transactions.—BROWN, JANSON & CO. *v.* HUTCHINSON & CO., [1895] 2 Q. B. 126; 64 L. J. Q. B. 619; 73 L. T. 8; 43 W. R. 545; 11 T. L. R. 437; 14 R. 485, C. A.

883. —— —— —— **Account against other partners.**]—BROWN, JANSON & CO. *v.* HUTCHINSON & CO., No. 882, *ante.*

884. —— —— —— **Against trustee in bankruptcy.**]—A charging order under Partnership Act, 1890 (c. 39), s. 23, upon a judgment debtor's interest in a partnership, being a proceeding *in invitum*, is not a "transaction" protected by Bankruptcy Act, 1883 (c. 52), s. 49.

When in such a case the partners by direction of the ct. pay into ct. a sum of money in redemption or purchase of the interest charged, the transaction is not a "completed execution" within the Bkpcy. Act, 1883 (c. 52), s. 45. *Semble:* if the money had been paid out to the execution creditor or the partners had paid him the money direct, he would have got a good title.—WILD *v.* SOUTHWOOD, [1897] 1 Q. B. 317; 66 L. J. Q. B. 166; 75 L. T. 388; 45 W. R. 224; 41 Sol. Jo.

885. —— —— —— **Against other claims on partnership.**]—PEAKE *v.* CARTER, No. 880, *ante.*

886. —— —— **Application to county courts.**]—EDMONDSON *v.* HARRISON (1896), 41 Sol. Jo. 128.

887. —— —— **Partner suffering from mental**

PART IV. SECT. 6, SUB-SECT. 2.—J. (b).

880 i. *Liability of partnership assets.*]—A pltf. suing a partner alone upon a note made in the name of the firm, & for a partnership debt, cannot under his judgment & execution against such partner sell the goods of the firm, except in cases of dormant partnership.—TAYLOR *v.* JARVIS (1856), 14 U. C. R. 128.—**CAN.**

880 ii. ——.] — Where a partner, desiring to retire from the business, agrees to sell out his interest in the joint property subject to the payment of all claims against the partnership; & a sale is effected by the remaining partner to a third party subject to such payment; the title which remains in the retiring partner until the payment of the debts of the firm is a legal, not a merely equitable right, & such as an execution against the remaining partner, for a private debt, will not affect.—STEVENSON *v.* SEXSMITH (1874), 21 Gr. 355.—**CAN.**

880 iii. ——.]—Partnership property cannot be seized under a *fi. fa.* against one partner, so as to interfere with the property or possession of a co-partner.—OVENS *v.* BULL (1876), 1 A. R. 62.—**CAN.**

880 iv. ——.]—YOUNG *v.* HUBER (1881), 29 Gr. 49.—**CAN.**

880 v. ——.] — *Re* MCDONAGH *v.* JEPHSON (1889), 16 A. R. 107.—**CAN.**

880 vi. ——.]—Under an execution against an individual partner the sheriff can seize the partnership goods & sell the execution debtor's share, whatever may be the difficulties which arise thereafter.—HARRISON *v.* HARRISON (1892), 14 P. R. 436.—**CAN.**

880 vii. ——.] — *Held:* a certain agreement constituted a partnership agreement, & consequently certain goods were partnership property & were not properly seized under an execution against one of the partners individually.—RIDDELL *v.* BOTFIELD, [1923] 2 D. L. R. 1056; 33 Man. L. R. 54; [1923] 1 W. W. R. 1109.—**CAN.**

880 viii. ——.]—Property belonging to a partnership cannot be seized in execution of a decree against one partner only. Accordingly, where a suit was brought against one partner only & the decree made him alone liable:—*Held:* only his property could be attached in execution of that decree.—HARIBHAI *v.* ARDESIR UKADJI (1875), I. L. R. 4 Bom. 229, n.—**IND.**

l. Liability of share of partner.]—Where a sale is made under execution is sued against one partner, the assignee is only entitled to such partner's

infirmity.]—*Re* SEAGER HUNT, [1900] 2 Ch. 54, n.; 69 L. J. Ch. 450, n.; 82 L. T. 741, n.

Annotation:—**Refd.** Didisheim *v.* London & Westminster Bank, [1900] 2 Ch. 15.

—— —— **Redemption or purchase of interest charged by continuing partners.**]—*See* Nos. 884, 886, *ante.*

888. —— **Redemption or purchase of share by continuing partner—Must be bonâ fide.**]—The purchase by solvent partners of the share of a partner on an execution issued against him, in order to be valid, must be made under circumstances beyond suspicion; therefore, where the solvent partners in a coal mine before the sale by the sheriff removed the gear & prevented access to the coal mine through the shaft, & removed ironstone which had been newly raised, so as to prevent its being known that the seam of coal was almost reached, & then bid for & became the purchasers, & a few days afterwards, & on one day's working, they discovered the seam of coal:—*Held:* the purchase must be set aside, & on repayment of the purchase-money they were declared to be trustees of the share for the partner, although he had, without notice of the conduct of the purchasers, received the balance of the purchase-money from the sheriff.—PERENS *v.* JOHNSON, JOHNSON *v.* PERENS (1857), 3 Sm. & G. 419; 29 L. T. O. S. 383; 3 Jur. N. S. 975; 65 E. R. 720.

889. —— —— ——.]—During the temporary unsoundness of mind of pltf., who was a partner with deft., the sheriff levied execution against his "chattel interest" in the partnership upon three judgments which had been obtained against him. At a sale by auction by the sheriff, deft himself bought the interest for a sum very much below its actual value, & an assignment of the interest was executed by the sheriff to deft. The purchase-money was paid to the sheriff by a cheque drawn by deft. on the partnership banking account, & the amount was debited to pltf. in the partnership books. Pltf. on recovering his health brought an action to set aside the sale on the ground of undervalue & undue advantage, for a declaration that the partnership was still subsisting, for a dissolution, & for the usual accounts:—*Held:* (1) the purchase was void & must be set aside; (2) under the circumstances of the present case there was no dissolution of the partnership by the seizure & sale. *Qu.:* whether a sale by a sheriff of a partner's interest to his co-partner causes a dissolution, if the co-partner purchases with his own money.

(3) A sheriff cannot sell a partner's interest in the goodwill or book debts, or anything else which he cannot seize.—HELMORE *v.* SMITH (1) (1887), 35 Ch. D. 436; 56 L. T. 535; 36 W. R. 3, C. A.

890. —— —— **Whether operating as dissolution.**]—HELMORE *v.* SMITH (1), No. 889, *ante.*

891. —— —— **Charging order on share.**]—EDMONDSON *v.* HARRISON (1896), 41 Sol. Jo. 128.

892. —— —— ——.]—WILD *v.* SOUTHWOOD, No. 884, *ante.*

893. —— **Extent of sheriff's power of sale.**]—HELMORE *v.* SMITH (1), No. 889, *ante.*

Interpleader—Duty of sheriff where partnership disputed.]—*See* INTERPLEADER, Vol. XXIX., p. 470, Nos. 184–186.

SUB-SECT. 3.—ADMISSIBILITY OF HEARSAY EVIDENCE AND ADMISSIONS.

Hearsay.]—*See* EVIDENCE, Vol. XXII., pp. 89, 90, Nos. 583–591.

Admissions.]—*See* EVIDENCE, Vol. XXII., p. 139, Nos. 1142–1147.

Part V.—Relations of Partners inter se.

SECT. 1.—IN GENERAL.

894. Whether bound by partnership articles—Implied duties & obligations.]—SMITH *v.* JEYES, No. 249, *ante.*

895. Agreement as to share of deceased partner—Mode of payment—Nature of liability unaltered—Liability joint & several.]—An agreement between four partners recited that they had considerable sums employed in the business, which it might be impracticable or highly detrimental to repay from the business immediately after the retirement or decease of either of them, & provided that in case of the retirement or death of either, the balance due to such retiring or deceased partner should be repaid out of the business by the continuing or surviving partners, by annual instalments of £2,000. One partner died, & his share in the business was ascertained in suits instituted for that purpose & for the administration of his estate, to be £64,000, & the instalments were directed to be paid by the surviving partners, & the survivors & survivor of them, until further order. After some years two of the surviving partners died, & then the third became insolvent:—*Held:* the estates of the two were liable for the unpaid balance of the £64,000.—BERESFORD *v.* BROWNING (1875), 1 Ch. D. 30; 33 L. T. 524; *sub nom.* BERESFORD *v.* BROWNING, BROWNING *v.* BERESFORD, 45 L. J. Ch. 36; 24 W. R. 120, C. A.

Annotation:—**Consd.** Kendall *v.* Hamilton (1879), 41 L. T. 418.

interest or share in the assets after payment of the partnership debts.—PARTRIDGE *v.* MCINTOSH (1849), 1 Gr. 50.—**CAN.**

g. ——.]—BANK OF ROCHESTER *v.* STONEHOUSE (1880), 27 Gr. 327.—**CAN.**

h. ——.]—A decree-holder in execution attached & seized certain property which belonged to the judgment debtor in partnership with another person, who alone, at the time of attachment was in actual possession:—*Held:* such property was the subject of attachment in execution of the decree against the one partner, but such attachment must be limited to his share.—THAMA SING *v.* KALIDAS ROY (1870), 5 B. L. R. 386.—**IND.**

PART V. SECT. 1.

k. *Payment to partner at place of business—Presumed applied to partnership uses.*]—BECKWITH *v.* LORDLY (1867), 7 N. S. R. (1 G. & O.) 72.—**CAN.**

l. *Liabilities of partners inter se—How determined.*]—The liabilities of the parties *inter se* should be determined by their relationship as co-partners.—BENSON *v.* MCKONE (Man.), [1919] 1 W. W. R. 349; 45 D. L. R. 83.—**CAN.**

SECT. 2.—NECESSITY FOR GOOD FAITH.

SUB-SECT. 1.—IN GENERAL.

See Partnership Act, 1890 (c. 39), ss. 19–31.

896. Partner must not place himself in position antagonistic to firm.]—If an indenture of partnership for a term of years contains a proviso, that either party may, if he be desirous of quitting the trade, determine the partnership by giving six months' notice, he cannot dissolve the partnership & then set up a trade elsewhere; but must either continue the partnership, or entirely give up such trade.—COOPER *v.* WATLINGTON (1784), 2 Chit. 451; *sub nom.* COOPER *v.* WATSON, 3 Doug. K. B. 413; 99 E. R. 724.

897. ——.]—No partner who owes a duty towards another can place himself in a situation which gives him a bias against the discharge of that duty.—BURTON *v.* WOOKEY (1822), 6 Madd. 367; 56 E. R. 1131.

Annotations:—**Refd.** Dean *v.* MacDowell, Dean *v.* MacDowell (1878), 8 Ch. D. 345; Kuhlirz *v.* Lambert (1913), 108 L. T. 565.

898. —— **Mere temptation to abuse partnership property—Not sufficient for interference by court.**]—A temptation to the abuse of partnership property is not sufficient to induce the ct. to interfere by injunction.

All the partners in a publication, except one, being also partners in a rival publication, an injunction to restrain the using of the effects of the former partnership, to assist the latter, in consideration of an annual sum, was refused, where there had been an agreement, permitting the use on those terms, which had been acted on for many years. But the injunction was granted to restrain the use of partnership effects, not included in the agreement.—GLASSINGTON *v.* THWAITES (1823), 1 Sim. & St. 124; 1 L. J. O. S. Ch. 113; 57 E. R. 50.

899. Relationship between partners fiduciary.]—CASSELS *v.* STEWART, No. 1070, *post*.

900. ——.]—GORDON *v.* HOLLAND, HOLLAND *v.* GORDON, No. 907, *post*.

901. Partner drawing out partnership moneys—Concealing or disguising fact—Fraud.]—If managing partner draws out moneys, & conceals the fact, or disguises it in the partnership books, this is fraud, & proof may be made against the separate estate. Otherwise, if the transaction is duly entered in books.—*Re* HARDING, *Ex p.* SMITH (1821), 1 Gl. & J. 74; *sub nom. Re* HAY, *Ex p.* SMITH, 6 Madd. 2; 56 E. R. 988.

Annotations:—**Consd.** *Re* Mackenzie & Abbott, *Ex p.* Turner (1833), 4 Deac. & Ch. 169. **Apld.** *Re* Higginson & Deane, *Ex p.* Hinds (1849), 14 L. T. O. S. 449; Read *v.* Bailey (1877), 3 App. Cas. 94.

902. Partner in two firms—Cannot transfer accounts without consent.]—A partner in two firms cannot transfer an account of one of them to the other without the consent of his partners.—CLARKE *v.* COLE (1844), 3 L. T. O. S. 183.

903. Cessation of duty—One partner failing to carry out his obligation.]—A. & B. entered into a joint adventure for the purchase of goods to be shipped to China, to be there sold, & the proceeds of the sale invested in a homeward cargo. A. was to render himself liable for the payment of the goods purchased, & B. was to supply A. with a share of the money by a fixed time, so as to enable A. to meet this liability. At the time fixed A. applied to B. for the money, but B. failed to supply it. In consequence of this, & after some negotiation on the subject, A. offered to allow B. to withdraw from the adventure altogether, & this offer was ultimately accepted. Down to the time when A. applied to B. for the money, A. had communicated to B. all the information which he possessed relative to the adventure & to its chances of success, which then appeared very doubtful, but while the negotiation was going on A. received two letters from his correspondents in China, through whom the business was managed, the contents of which he did not communicate to B.:—*Held*: considering the relative situation of the parties, there was no obligation on the part of A. to communicate to B. the letters in question; & that, there being no proof of misrepresentation by A., the arrangement could not be set aside merely on the ground of the noncommunication of the letters.—M'LURE *v.* RIPLEY (1850), 2 Mac. & G. 274; 42 E. R. 105, L. C.; *sub nom.* M'CLURE [illegible]EY, 15 L. T. O. S. 41.

SUB-SECT. 2.—DUTY TO ACCOUNT FOR PROFIT RECEIVED.

A. In General.

See Partnership Act, 1890 (c. 39), ss. 28, 29.

904. Partner must account—Profits of offices obtained—In breach of covenant to procure for firm.]—A. & B. & the son of B. entered into partnership as solrs., & by arts. agreed, clause 2, that the partners were diligently & faithfully to employ themselves in carrying on & managing all the professional business in which they or either of them might be employed or concerned; clause 5, that B. should use his best endeavours to obtain the appointment of the partnership firm to three offices or clerkships, which were then held by B., & such offices should be partnership appointments; clause 6, that all other compatible offices should be obtained, if possible, in the name of the firm, & the emoluments treated as part of the profits of the partnership; clause 15, that, if B. or his son should retire, or A. or B. or his son should die, the share of deceased partner should accrue to the surviving partners: that if B. or his son retired they were to use their best endeavours to secure the practice to the continuing partners, & such retiring partner should not practise within 30 miles; clause 16, that, if either partner should not diligently & faithfully employ himself in carrying on the partnership practice, & should, on receiving moneys, bills, notes, etc., knowingly or wilfully omit immediately to make entries thereof, or if A. or the son of B. should absent himself more than two months in one year, the others or other of the partners, if they or he should think fit, should be at liberty to dissolve the partnership, by giving to the offending partner a notice to that effect, & the partnership should from that time, or the time specified in the notice, be dissolved in the same manner & with the same consequences as if it had determined by the voluntary retirement of the offending partner. B. & his son subsequently procured their own appointment, or the appointment of one of them, to the offices or clerkships, & did not endeavour to procure the appointment of A. It was afterwards discovered that B. was greatly involved in debt, & he absconded in Jan. 1849, & did not return to the business. In May, 1849, A. served a notice, in the manner pointed out by the articles, on B. & his son to dissolve the partnership from that date; & he then filed his

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PART V. SECT. 2, SUB-SECT. 1.

m. *Fraud on partner—In effecting dissolution.*]—O'CONNOR *v.* NAUGHTON (1867), 13 Gr. 428.—**CAN.**

n. *Partner using position to secure private advantage.*]—MATABELE SYNDICATE *v.* LIPPERT (1897), 4 O. R. 372.—**S. AF.**

o. ——.]—DOUCETT *v.* PRAGGIO, [1905] T. H. 267.—**S. AF.**

bill against B. & his son to have the dissolution declared by the ct., an injunction to restrain them from practising within 30 miles, & a decree that they should resign the several offices or clerkships: —*Held:* (1) pltf. was entitled to dissolve the partnership as to B., but not as against the other partner, the son of B., & he was not entitled to dissolve it by notice under clause 16 without the concurrence of his co-partner, the son; (2) B., not having procured or endeavoured to procure for the partnership firm the appointments to the several offices or clerkships, so as to give pltf. at the dissolution either a share of the profits of the offices or the chance of competing for them, but such appointments having been procured for B. & his son to the exclusion of pltf., B. & his son were not to be allowed to retain the offices for their exclusive benefit.

(3) Inasmuch as, from the nature of the offices, they could not be sold, nor could any manager or receiver be appointed to carry them on, defts. ought to be charged with the value of the offices in the partnership accounts.

(4) Pltf. having given a notice of dissolution, acting under the clause 16, & his co-partner having adopted it, the partnership should be treated as dissolved from the time of the notice, although not with the consequences attaching to a dissolution under clause 15.

(5) An agreement that, if any of several partners should not diligently & faithfully employ himself in carrying on the partnership practice, the others might give notice of dissolution—construed to refer to the diligent & faithful discharge by each partner of the portion of business carried on by him.—SMITH *v.* MULES (1852), 9 Hare, 556; 21 L. J. Ch. 803; 19 L. T. O. S. 26; 16 Jur. 261; 68 E. R. 633; *varied*, 9 Hare, at p. 573, L. JJ.

905. —— Profit from employment of partnership property.]—If profits have been made in any other business by a partner in violation of a covenant not to engage in any other business, the profits will not be decreed to belong to the partnership unless they have arisen (*a*) from employment of the partnership property, or (*b*) from transactions in rivalry with the firm, or (*c*) from some advantage obtained by the partner by virtue of his being a member of the firm.—DEAN *v.* MACDOWELL, DEAN *v.* MACDOWELL (1878), 8 Ch. D. 345; 47 L. J. Ch. 537; 38 L. T. 862; 42 J. P. 580; 26 W. R. 486, C. A.

Annotations:—**Expld.** Aas *v.* Benham, [1891] 2 Ch. 244. **Refd.** Fuller *v.* Duncan (1891), 7 T. L. R. 305; Trego *v.* Hunt (1895), 72 L. T. 269; Trimble *v.* Goldberg, [1906] A. C. 494. **Mentd.** Tarkwa Main Reef *v.* Merton (1903), 19 T. L. R. 367.

906. —— Profit by virtue of membership of firm.]—DEAN *v.* MACDOWELL, DEAN *v.* MACDOWELL, No. 905, *ante*.

907. —— Sale & repurchase of partnership property.]—A partner who has improperly, & without the knowledge of his partner, sold partnership property to a *bonâ fide* purchaser for value without notice, & has afterwards repurchased it from him, stands in a fiduciary relation to his partner, & cannot take advantage of the rule which protects a purchaser with notice taking from a purchaser without notice, but is liable to account for profits made by subsequent dealings with the property.—GORDON *v.* HOLLAND, HOLLAND *v.* GORDON (1913), 82 L. J. P. C. 81; 108 L. T. 385, P. C.

Partner in position of agent.]—*See* AGENCY, Vol. I., pp. 469, 473, 476, 479, 480, Nos. 1536, 1557, 1579, 1599, 1601.

908. Liability of person inducing breach of duty.]—A. usually employed B. as his agent to buy hops of the several planters in & about Canterbury, but having in a particular season omitted to give him any orders at the usual time, B. enters into a partnership with three others, for purchasing hops of that year, for their mutual benefit. The hops are accordingly purchased, but A. having intelligence of this transaction before they were delivered, prevails upon B. to declare to the planters, that he bought them as A.'s agent, & by that means A. got the hops delivered to him:—*Held:* this was a fraud upon the partners of B. & A. should account for the value of the hops, according to the highest price for which he sold them.—HUNTER *v.* SHEPPARD (1769), 4 Bro. Parl. Cas. 210; 2 E. R. 143, H. L.

B. Profits in Competing Business.

See Partnership Act, 1890 (c. 39), ss. 28–30.

909. Partner must account—For profits on private trading.]—The effect of the answer is this. Deft. discovers that he did carry on a separate trade; that he derived considerable profit from it; & has books relating to it; but insists that he is not liable to be called on to state what books he has. . . . Upon the whole as he has put his defence upon the record he cannot refuse a production of the books, contained in the schedule (LORD ELDON, C.).—SOMERVILLE *v.* MACKAY (1810), 16 Ves. 382; 33 E. R. 1029, L. C.

Annotations:—**Distd.** Dean *v.* MacDowell, Dean *v.* MacDowell (1878), 8 Ch. D. 345. **Mentd.** Mazarredo *v.* Maitland (1818), 3 Madd. 66; Lancaster *v.* Evors (1844), 1 Ph. 349; Molesworth *v.* Howard (1845), 2 Coll. 145; Swinborne *v.* Nelson (1853), 16 Beav. 416.

PART V. SECT. 2, SUB-SECT. 2.—A.

905 i. *Partners must account—Profit from employment of partnership property.*]—TUPPER *v.* ANNAND (1889), 16 S. C. R. 718.—**CAN.**

905 ii. —— ——.]—The parties herein, solrs., were partners. Deft. bought certain land, & without pltf.'s knowledge, gave a cheque on the firm's account for the purchase money. He then sold at a profit:—*Held:* deft. must account for the profits.—MORICE *v.* HUBBARD (1909), 10 W. L. R. 703.—**CAN.**

905 iii. —— ——.]—FORD *v.* ABERCROMBIE, [1904] T. S. 878.—**S. AF.**

906 i. —— *Profit by virtue of membership of firm.*]—Where articles of partnership bound the parties to be just & true to each other, & to devote their time diligently to the concerns of the firm, & not to engage in any other business; & it appeared that after notice of dissolution had been , one of the partners had taken orders on his own account to be filled by him after the termination of the partnership:—*Held:* his co-partner had no equity to compel him to account for the profits of the business thus done by him. The remedies in such a case are by injunction, or by action for damages.—MITCHELL *v.* LISTER (1891), 21 O. R. 318.—**CAN.**

p. —— *Sale of partnership property.*]—LOUGHNAN *v.* DALGETY & CO., LTD. (1897), 16 N. Z. L. R. 299.—**N.Z.**

q. —— *Profit derived as agent for negotiating partnership.*]—Where three persons are engaged in negotiating a partnership & the negotiation is conducted by one as agent of the other two, he should not be allowed to make a private advantage for himself.—POWELL *v.* MADDOCK & DART (1915), 32 W. L. R. 619; 9 W. W. R. 353; 25 D. L. R. 748; 25 Man. L. R. 730.—**CAN.**

r. —— *Lease renewed before expiry of partnership lease—By partner in own name.*]—M'NEVIN *v.* PEFFERS (1868), 7 Macph. (Ct. of Sess.) 181; 41 Sc. Jur. 104.—**SCOT.**

t. *Partner engaging in private speculations—With partnership funds—With implied consent of partners.*]—KELLY *v.* KELLY (1911), 20 Man. L. R. 579.—**CAN.**

a. *Secret transaction by one partner.*]—PENDER, ETC. *v.* HENDERSON & CO. (1864), 2 Macph. (Ct. of Sess.) 1428; 36 Sc. Jur. 663.—**SCOT.**

b. —— *Outside scope of partnership.*]—TRIMBLE *v.* GOLDBERG, [1906] T. S. 1002.—**S. AF.**

PART V. SECT. 2, SUB-SECT. 2.—B.

909 i. *Partner must account—For profits on private trading.*]—LOCK *v.* LYNAM (1854), 4 I. Ch. R. 188.—**IR.**

909 ii. —— ——.]—GIBSON *v.* TYREE (No. 2) (1901), 20 N. Z. L. R. 562.—**N.Z.**

909 iii. —— ——.]—STEWART *v.* NORTH (1893), 20 R. (Ct. of Sess.) 260.—**SCOT.**

Sect. 2.—*Necessity for good faith: Sub-sect.* 2, *B.; sub-sect.* 3. *Sect.* 3: *Sub-sects.* 1 *&* 2.]

910. —— ——.]—RUSSELL *v.* AUSTWICK, No. 68, *ante.*

911. —— ——.]—The master of a ship is bound to employ his whole time & attention in the service of his employer. *Semble:* a custom allowing such master to trade on his private account during the voyage, cannot be maintained. The master & part owner of a ship purchased goods during the voyage, which his answer stated were purchased out of private property, & the profits of private trade during the voyage, but the ct. considering there were strong grounds for thinking that the goods were purchased with partnership property, or with money for which deft. was accountable to the partnership, & that they belonged to the partnership, restrained him from receiving the goods. — GARDNER *v.* M'CUTCHEON (1842), 4 Beav. 534; 49 E. R. 446.

Annotation:—**Distd.** Dean *v.* MacDowell, Dean *v.* MacDowell (1878), 8 Ch. D. 345.

912. —— ——.]—DEAN *v.* MACDOWELL, DEAN *v.* MACDOWELL, No. 905, *ante.*

913. —— ——.]—(1) If a member of a partnership firm avails himself of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may obtain from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, & not competing with it, the firm is not entitled to an account of such benefit.

A member of a firm of shipbrokers styled "H. C. & co.," assisted in the formation of a joint-stock co. for building ships, & in so doing availed himself of information obtained as a member of the firm, & occasionally used the name & office paper of the firm in his correspondence on that subject. He received remuneration for his services in the formation of the co., & was made a director of the co., when formed, at a salary. He also threatened to engage in the separate business of a shipowner under the style of "H. C. & co., shipowning." The other partners brought an action to restrain him from using the name of the firm in a separate business, & claiming an account of his profits & salary in connection with the new co.:—*Held:* (2) deft. must be restrained from using the name of H. C. & co.; (3) the business of the new co. was beyond the scope of, & did not compete with, the partnership business, deft. was not bound to account for the benefit obtained by him in connection with the new co.

(4) The use by deft. of the name & paper of H. C. & co. in promoting the ship-building co. was held not to be sufficient to show that as between deft. & his partners ship-building was within the scope of the partnership business.—AAS *v.* BENHAM, [1891] 2 Ch. 244; 65 L. T. 25, C. A.

Annotations:—*As to* (1) **Consd.** Trego *v.* Hunt, [1895] 1 Ch. 462. **Refd.** Tarkwa Main Reef *v.* Morton (1903), 19 T. L. R. 367.

914. Business outside scope of partnership—Partner not liable to account.]—Arts. of partnership of a firm of auctioneers, land agents, & surveyors contained a stipulation that neither partner should exercise or carry on for his own profit or advantage any trade, business, or profession whatever. One of the partners, F., having on his own account formed & brought out a co. for purchasing land in the Transvaal:—*Held:* the profits resulting from this transaction were not partnership profits, but belonged to F. alone.—FULLER *v.* DUNCAN (1891), 7 T. L. R. 305.

915. —— ——.]—AAS *v.* BENHAM, No. 913, *ante.*

916. —— ——.]—Resp. & two applts. under a partnership arrangement in 1902, bought with a review to resale the properties of H., consisting of stands or plots of land laid off for building, & of shares in a co. entitled to other stands in the same locality. Applts., apart from resp., purchased some other of the co.'s stands & made profits.

In a suit by resp. for an account thereof the ct. below held that, though the stands so purchased were not within the scope of the partnership of 1902, they were connected with it indirectly; that the purchase thereof by applts. was secret & injurious to the common interest, & that resp. was entitled to share in the benefit thereof:—*Held:* it could not be supported on authority or on any recognised equity.

The purchase, not being within the scope of the partnership, was not shown to have been in rivalry or any other connection therewith, nor in any way injurious thereto.—TRIMBLE *v.* GOLDBERG, [1906] A. C. 494; 75 L. J. P. C. 92; 95 L. T. 163; 22 T. L. R. 717, P. C.

Annotation:—**Refd.** Rodriguez *v.* Speyer, [1919] A. C. 59.

SUB-SECT. 3.—LEASEHOLD INTERESTS AND REVERSIONS ACQUIRED BY PARTNER.

917. Renewal of lease—Enures for benefit of partnership.]—(1) A partnership, without arts., & for an indefinite period, may be dissolved by any partner at any time, without previous notice; subject to the engagements of the partnership: but the existence of engagements with third persons cannot prevent the right of dissolution as among themselves.

(2) The consequence of the dissolution of partnership, where there are no arts., prescribing the terms, is a general sale & account of the joint property: one or more partners therefore cannot insist on taking the share of another at a valuation; or, that he shall remove his proportion from the premises; thereby securing the goodwill.

(3) Partner, after dissolution of the partnership continuing to trade with the joint property, must account for the profits.

(4) Lease of premises, where a partnership trade was carried on, renewed by one partner in his own name clandestinely, a trust for the partnership; to be accounted for as joint property.

(5) No partner therefore can derive a particular advantage by choosing an unseasonable moment for dissolution. . . . The same inquiry should be directed as in *Crawshay* v. *Collins*, No. 1010, *post*, to ascertain, what that stock was at the period of dissolution . . . what use was afterwards made of it; & what profits were produced by the trade (GRANT, M.R.).—FEATHERSTONHAUGH *v.* FENWICK (1810), 17 Ves. 298; 34 E. R. 115.

Annotations:—*As to* (1) **Refd.** Heath *v.* Sansom (1832), 4 B. & Ad. 172; Neilson *v.* Mossend Iron Co. (1886), 11 App. Cas. 298. *As to* (2) **Apld.** Rigden *v.* Pierce (1822), 6 Madd. 353. **Apprvd.** Cook *v.* Collingridge (1823), Jac. 607. **Consd.** Darby *v.* Darby (1856), 3 Drew. 495; Stevenson *v.* Akt. für Cartonnagen-Industrie, [1918] A. C. 239. *As to* (3) **Refd.** Wedderburn *v.* Wedderburn

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917 i. *Renewal of lease—Enures for benefit of partnership.*]—WEGNER *v.* SURGESON, [1910] T. P. D. 571.—S. AF.

(1839), 4 My. & Cr. 41 ; Stevenson *v.* Akt. für Cartonnagen-Industrie, [1918] A. C. 239. *As to* (4) **Consd.** *Re* Biss, Biss *v.* Biss, [1903] 2 Ch. 40. **Refd.** Portlock *v.* Gardner (1842), 11 L. J. Ch. 313. *As to* (5) **Consd.** Willett *v.* Blanford (1842), 1 Hare, 253. **Apld.** Blisset *v.* Daniel (1853), 10 Hare, 493. **Refd.** Wedderburn *v.* Wedderburn (1856), 22 Beav. 84. *Generally*, **Consd.** Cassels *v.* Stewart (1881), 6 App. Cas. 64.

.]—There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested : as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mtgee. of a mortgaged lease. In all such cases the new lease is treated as engrafted on or as forming part of the original lease.—*Re* BISS, BISS *v.* BISS, [1903] 2 Ch. 40 ; 72 L. J. Ch. 473 ; 88 L. T. 403 ; 51 W. R. 504 ; 47 Sol. Jo. 383, C. A.

Annotation :—**Refd.** Griffith *v.* Owen, [1907] 1 Ch. 195.

919. —— —— Person renewing constructive trustee—If lease renewable.]—W. W. was possessed in 1854 of certain leasehold premises, partly under two leases of 1839 & 1840, & partly under a yearly tenancy. On these premises he was carrying on certain businesses, one of which he made over to a partnership. No lease of the premises was ever granted to the partnership. W. W. purchased by auction in 1881 one moiety of the reversion expectant on the two leases & the yearly tenancy. He died in 1883, leaving J. R. & T. A. W. his exors., who purchased the other moiety of the reversion in 1893.

This was an action by partners entitled to one-fourth share of the partnership claiming a declaration that the reversion formed part of the partnership assets :—*Held :* (1) the purchase of the reversion did not enure for the benefit of the partnership assets, the leaseholds not being renewable by custom or contract ; (2) the firm having no interest in fact in the leasehold premises, there was nothing even if the reversion could be treated as a graft or an addition, to which it could be grafted, & pltfs.' claim failed on this ground also.

If a trustee, or a person in the position of a trustee, holding a lease as part of his trust property takes a renewal of that lease, that renewed lease is treated as a graft or addition to the trust property, & itself forms part of the trust property (WARRINGTON, J.).—BEVAN *v.* WEBB, [1905] 1 Ch. 620 ; 74 L. J. Ch. 300 ; 93 L. T. 298 ; 53 W. R. 651.

Annotation :—*Generally*, **Mentd.** Griffith *v.* Owen, [1907] 1 Ch. 195.

920. —— Right of one partner to renew -- Business to be carried on in agreed place.]—C. & N. entered into partnership for twenty-one years as ironmongers under articles which provided that the business should be carried on for twenty-one years at the G. R. premises, or in such other place or places as the partners may agree upon. Afterwards the partners agreed to add to their business that of ironfounders, & took for that purpose the G. Q. works. The lease of these works expired during the partnership, & C. declined to concur in a renewed lease. N. thereupon took a renewed lease of them in his own name, & insisted on his right to continue to carry on the ironfounding business there on account of the partnership :—*Held :* (1) as the partnership business could only be carried on in such place as the partners agreed upon, if they did not agree upon a place it could not be carried on at all, & one partner, in the absence of express powers for that purpose, could not without the consent of the other, although the partnership was to continue for a definite term, renew on account of the partnership a lease of the property on which the business had been carried on.

(2) C. was entitled to an injunction to restrain N. from employing the assets or pledging the credit of the partnership in carrying on business at the G. Q. works.—CLEMENTS *v.* NORRIS (1878), 8 Ch. D. 129 ; 47 L. J. Ch. 546 ; 38 L. T. 591, C. A.

.]—*See* MINES, Vol. XXXIV., pp. 625, 626, Nos. 222–224.

SECT. 3.—MANAGEMENT OF PARTNERSHIP AFFAIRS.

SUB-SECT. 1.—IN GENERAL.

See Partnership Act, 1890 (c. 39), s. 24 (5).

921. Power of individual partners co-extensive.]—One of two partners, joint tenants of a house where their joint business is carried on has a right to authorise a joint weekly servant to remain in the house, though the other partner has regularly given him a week's notice to leave the service.—DONALDSON *v.* WILLIAMS (1833), 1 Cr. & M. 345 ; 3 Tyr. 371 ; 2 L. J. Ex. 173 ; 149 E. R. 432.

922. Limitation of diligence required — To particular department of business.]—SMITH *v.* MULES, No. 904, *ante*.

SUB-SECT. 2.—POWER OF MAJORITY.

See Partnership Act, 1890 (c. 39), s. 24 (8).

923. Decision of majority binding — Majority must act bonâ fide—Views of minority considered.]—CONST *v.* HARRIS, No. 1502, *post*.

924. —— —— ——.]—Certain of the directors of a railway co. acting on the nomination of another railway co. which was interested in certain shares in it, & which nominated those directors by virtue of the Act constituting the co., were excluded, by a resolution of the board of directors, from the meetings of the directors, & the majority delegated all the powers of the board to a managing committee :—*Held :* although in such a body the majority binds the minority, yet,

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PART V. SECT. 3, SUB-SECT. 1.

c. *Right of partner to act alone—Co-partner's attorney guilty of misconduct.*]—Partners agreed that one of them might absent himself from the business, & act by attorney. The attorney of the absent partner improperly withdrew bills of the firm deposited for collection & placed the proceeds of their discount to the credit of his principal, in payment of a debt alleged to be due to the principal by the firm. Demurrer allowed to a bill by the other partner claiming to act alone, & to restrain the attorney from obstructing him in so acting.—TERRY *v.* STRACHAN (1870), I. V. R. 180.—**AUS.**

d. *One member of firm petitioning for adjudication of firm—In absence of co-partner.*]—One of two partners may, during the absence of the other partner, present a petition for the adjudication of the partnership firm.—*Re* SMART, DONKIN & Co. (1870), 2 Q. S. C. R. 66.—**AUS.**

e. *Right of partner to sell partnership property—Whether implied.*]—BOWEN *v.* MORRISON (1875), 14 N. S. W. S. C. R. (L.) 199.—**AUS.**

f. *Right of partners to forfeit co-partner's share—By proxy—Construction of articles.*]—SHELDON *v.* PHILLIPS (1894), 15 N. S. W. L. R. (Eq.) 98.—**AUS.**

g. *Each partner agent of partnership.*]—For the purpose of carrying on the business of the partnership each partner is the agent of the others in all matters falling within the scope of the partnership.—*Re* PAARL BANK (IN LIQUIDATION) (1891), 8 S. C. 131.—**S. AF.**

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that it is essential to the validity of their acts that the voice of the minority should have been heard; & such exclusion of directors was restrained.

Upon every principle governing not only bodies of this kind but governing private partnerships where there is a body of persons in which the majority is to bind the minority it is essential to the validity of all their acts that the voice of the minority should be heard, & that the minority should have an opportunity of stating their views; and it is not till they have had that opportunity that the acts of the majority become binding on the minority: & I think Lord Eldon's opinion may be referred to as showing that even if the minority had a voice given to them, still, if there existed a combination among the majority, before that voice was heard to overbear it he would consider the acts of such a body illegal (SIR JAMES PARKER, V.-C.).—GREAT WESTERN RY. CO. *v.* RUSHOUT (1852), 5 De G. & Sm. 290; 7 Ry. & Can. Cas. 991; 19 L. T. O. S. 281; 16 Jur. 238; 64 E. R. 1121.

Annotations:—**Mentd.** G. W. Ry. *v.* Oxford, Worcester & Wolverhampton Ry. (1853), 3 De G. M. & G. 341; Green *v.* Nixon (1857), 23 Beav. 530.

925. Limitation on power—Sale of partnership business.]—Partnership amongst a number of persons, to be managed by a committee of five, & by general meetings, at which the vote of the majority was to be binding; with a provision, that any one wishing to retire should first offer his share to the committee at a certain price, & if they declined to buy, might sell it to any other person: —*Held:* the majority were not able to sell the whole concern without the consent of all; but where all but two were desirous of retiring, they might sell their own shares without making an offer of them to the committee.—CHAPPLE *v.* CADELL (1822), Jac. 537; 37 E. R. 953, L. C.

926. —— Commencement of different business.] —If six persons join in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, can engage that partnership in marine insurances, unless the contract of partnership, expressly, or impliedly, gives that power.

Qu.: if a part of the six openly & publicly profess their intention to engage the partnership in another concern, & clearly & distinctly bring this to the knowledge of one or more of the other partners, & such one or more of the other partners can be clearly shown to have acquiesced in such intention, & to have permitted the other partners to enter upon & engage themselves & the body in such new projects.

The principles, which a ct. would act upon, in the case of a partnership of six, must, as far as the nature of things will admit, be applied to a partnership of 600. They, who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly, or tacitly, acquiesce.—NATUSCH *v.* IRVING (1824), 2 Coop. *temp.* Cott. 358; 47 E. R. 1196, L. C.

Annotations:—**Refd.** Ware *v.* Grand Junction Water Co. (1831), 2 Russ. & M. 470; Simpson *v.* Westminster Palace Hotel Co. (1860), 8 H. L. Cas. 712. **Mentd.** Mozley *v.* Alston (1847), 16 L. J. Ch. 217; Parker *v.* River Dun Navigation Co. (1847), 9 L. T. O. S. 292; Shrewsbury & Birmingham Ry. *v.* L. & N. W. Ry. (1853), 4 De G. M. & G. 1050; Featherstonhaugh *v.* Lee Moor Porcelain Clay Co. (1865), L. R. 1 Eq. 318; Irrigation Co. of France (1870), 39 L. J. Ch. 663; Pickering *v.* Stephenson (1872), L. R. 14 Eq. 322.

927. —— Authorising manager to sign cheques.] —The manager of a firm is not entitled, as such, to sign the firm or name of the partnership:—*Held:* the authority of trustees representing three-fourths of the property of the concern was insufficient to empower a manager, as such, to sign the co.'s firm, especially when the proceeding was opposed by the representative of the remaining fourth.—BEVERIDGE *v.* BEVERIDGE (1872), L. R. 2 Sc. & Div. 183, H. L.

928. What power includes — Admission of new partners.]—In a partnership consisting of three members, two of the partners resolved to introduce into the partnership works a son of one of these partners, with a view to his learning the business. The third partner objected to this being done:—*Held:* the difference between the partners was as to an ordinary matter connected with the partnership business, within Partnership Act, 1890 (c. 39), s. 24 (8), on which, therefore, the decision of the majority was binding.—HIGHLEY *v.* WALKER (1910), 26 T. L. R. 685.

SUB-SECT. 3.—REMUNERATION.

A. For Management.

See Partnership Act, 1890 (c. 39), s. 24 (6).

929. Whether surviving partner entitled to remuneration—Carrying on business as executor.]—(1) Surviving partner, being exor., not entitled without express stipulation to any allowance for carrying on the trade after the testator's death.

(2) Allowed expenses actually incurred under an erroneous conception, that he was sole proprietor by purchase from his co-exors., set aside as a breach of trust, though *bonâ fide.*—BURDEN *v.* BURDEN (1813), 1 Ves. & B. 170; 35 E. R. 67, L. C.

Annotations:—*As to* (1) **Apld.** Stocken *v.* Dawson (1843), 6 Beav. 371. **Refd.** Stocken *v.* Dawson (1848), 17 L. J. Ch. 282: Wedderburn *v.* Wedderburn (1856), 22 Beav. 84; Wightwick *v.* Lord (1857), 6 H. L. Cas. 217. *Generally,* **Refd.** Heathcote *v.* Hulme (1819), 1 Jac. & W. 122.

930. —— Business carried on at profit.]—On the death of one partner, the survivor retaining his capital & employing it in the trade, decreed to account for the profits derived from it, making him proper allowances for the management of the business.

A., B., & C. being partners together, A. agrees with D. to give him a moiety of his share in the concern; an account may be decreed between A. & D. without making B. & C. parties.—BROWN *v.* DE TASTET (1819), Jac. 284; 37 E. R. 858, L. C.

Annotations:—**Consd.** Stocken *v.* Dawson (1848), 17 L. J. Ch. 282; Lord Provost of Edinburgh *v.* Lord Advocate (1879), 4 App. Cas. 823. **Refd.** Cook *v.* Collingridge (1823), Jac. 607; Wedderburn *v.* Wedderburn (1838), 4 My. & Cr. 41; Portlock *v.* Gardner (1842), 6 Jur. 795; Willett *v.* Blanford (1842), 1 Hare, 253; Clegg *v.* Fishwick (1849), 1 H. & Tw. 390; Wedderburn *v.* Wedderburn (1856), 22 Beav. 84; Vyse *v.* Foster (1874), L. R. 7 H. L. 318; Wilkes *v.* Saunion (1877), 7 Ch. D. 188; *Re* Norrington, Brindley *v.* Partridge (1879), 13 Ch. D. 654; Cassels *v.* Stewart (1881), 6 App. Cas. 64; *Re* Aldridge, Aldridge *v.* Aldridge (1894), 63 L. J. Ch. 465. **Mentd.** Lovegrove *v.* Nelson (1834), 3 My. & K. 1; Crosley *v.* Derby Gas Light Co. (1838), 3 My. & Cr. 428; Lodge *v.* Prichard (1853), 3 De G. M. & G. 906.

931. —— ——.]—When after the death of a partner the business is, with the concurrence of

PART V. SECT. 3, SUB-SECT. 3.—A.

h. *Whether managing partner entitled to remuneration—In absence of special agreement—Or custom.*]—The managing partner of a concern is not entitled to an allowance for carrying on the partnership trade, when there is neither contract between the partners nor a custom of the trade to authorise such allowance.—HUTCHESON *v.* SMITH (1842), 5 I. Eq. R. 117.—**IR.**

k. —— ——.]—BELL *v.* DOUGLASS' ESTATE, 17 C. T. R. 810.—**S.**

his exors., carried on by the surviving partner with a view to the benefit of himself & the estate of deceased, he is not entitled to remuneration for his services if no profits are derived from the carrying on of the business.—*Re* ALDRIDGE, ALDRIDGE *v.* ALDRIDGE, [1894] 2 Ch. 97 ; 63 L. J. Ch. 465 ; 70 L. T. 724 ; 42 W. R. 409 ; 8 R. 189.

932. Provision in articles for remuneration—Effect of dissolution.]—Arts. made between three partners directed that the real & leasehold estate of the partnership should be treated as partnership stock, & that, before any division of profits, the rates, repairs, etc., should be paid, & £5 per cent. interest set apart on the capital, & be paid to the partners in the proportions in which they had advanced it. They afterwards purchased other estates, the purchase-money of which was by the conveyances, expressed to be paid by the three partners in equal proportions. The partners subsequently executed a deed, reciting the fact that the purchase-money had been wholly paid by two of the partners, & declaring that, until the third partner should pay into the partnership capital a sum equal to that paid by each of the other partners, he should stand possessed of the undivided third part of the estates in trust for them, the other two partners. Upon the dissolution of the partnership, the third partner not having paid any portion of his capital :—*Held :* (1) the real & leasehold estate was nevertheless part of the partnership capital, & that the effect of the declaratory deed was to charge the legal interest of the third partner by way of mtge. with the proportionate share of the capital which he ought to have advanced.

(2) In the interim, after a dissolution, & whilst the affairs of the partnership were being wound up, the third partner had ceased to be entitled to the benefit of a provision in the articles allowing him a salary, & the occupation of a house belonging to the partnership as managing partner, & that a receiver must be appointed.

In a suit to wind up a partnership, the ct. will appoint a manager, though the management has been given up to one partner under the provisions of the partnership deed, & no case of mismanagement is made against him.—TIBBITS *v.* PHILLIPS (1853), 10 Hare, 355 ; 68 E. R. 963 ; *sub nom.* TIPPETTS *v.* PHILLIPS, 1 W. R. 163.

933. Provision in articles for whole time services—Discontinuance of service by one partner—Allowance to active partner.]—(1) A partnership for fourteen years was dissolved before the end of two years. The ct., under the circumstances, refused to direct the repayment of any portion of the premium paid for a share in the business.

(2) Partners having stipulated to devote their whole time to the business, & one having discontinued his services, an inquiry was, upon a dissolution, directed, as to what was proper to be allowed to the other partner in respect of the business having been exclusively conducted by him.—AIREY *v.* BORHAM (1861), 29 Beav. 620 ; 4 L. T. 391 ; 54 E. R. 768.

Annotation :—As to (1) **Refd.** Belfield *v.* Bourne (1893), 69 L. T. 786.

934. Trustee of deed of arrangement not entitled.]—Where A. & B., partners, assigned all their stock in trade, etc., to C., in trust to secure a sum of money advanced by C. & upon further trusts that C. might manage the business until he & other creditors were repaid sums due to them : —*Held :* C. was not entitled to credit himself with any sums as bonuses, notwithstanding that his management of the concern had been such as to pay all creditors & largely to diminish his own debt, & the partners had repeatedly acquiesced in such charges.—BARRETT *v.* HARTLEY (1866), L. R. 2 Eq. 789 ; 14 L. T. 474 ; 12 Jur. N. S. 426 ; 14 W. R. 684.

Annotations :—**Refd.** Barnes *v.* Richards (1902), 71 L. J. K. B. 341. **Mentd.** James *v.* Kerr (1889), 40 Ch. D. 449 ; Mainland *v.* Upjohn (1889), 41 Ch. D. 126 ; Wheeler *v.* Sargeant (1893), 3 R. 663.

B. For Work Done.

935. Whether partner entitled as against firm—Work as surveyor.]—A number of persons associating together, & subscribing sums of money for the purpose of obtaining a bill in Parliament to make a railway, are partners in the undertaking ; & therefore a subscriber who acted as their surveyor, cannot maintain an action for work done by him in that character on account of the partnership, against all or any one of the other subscribers.—HOLMES *v.* HIGGINS (1822), 1 B. & C. 74 ; 2 Dow. & Ry. K. B. 196 ; 1 L. J. O. S. K. B. 47 ; 107 E. R. 28.

Annotations :—**Apld.** Lucas *v.* Beach (1840), 1 Man. & G. 417. **Distd.** Day *v.* Sharp (1846), 7 L. T. O. S. 62. **Folld.** Wilson *v.* Curzon (1847), 15 M. & W. 532. **Refd.** Money-penny *v.* Hartland (1824), 1 C. & P. 352 ; Chadwick *v.* Clarke (1845), 1 C. B. 700 ; Reynell *v.* Lewis, Wyld *v.* Hopkins (1846), 4 Ry. & Can. Cas. 351 ; Walstab *v.* Spottiswoode (1846), 10 Jur. 498 ; Smith *v.* Archibald (1849), 14 L. T. O. S. 174 ; Boulter *v.* Peplow (1850), 9 C. B. 493. **Mentd.** Wilson *v.* King (1834), 2 Cr. & M. 689.

936. —— Work as solicitor.] — A joint stock co., in which A. B. & C. are shareholders, is dissolved ; A. & B. being sued by a creditor of the concern, employ C. who is an attorney, to defend them. C. cannot sue A. & B. for his bill of costs.

The actions which pltf. defended, were actions brought against defts. as members of a partnership of which pltf. was also a member. When an action was commenced, it was the duty of all the partners in the late co., either to pay the money or to resist the demand ; & in the case of resistance, the expense ought to be paid by all, pltf. among the rest ; . . . he & all the others derived benefit from their defending, & therefore he cannot maintain this action (LORD TENTERDEN, C.J.).—MILBURN *v.* CODD (1827), 7 B. & C. 419 ; 1 Man. & Ry. K. B. 238 ; 6 L. J. O. S. K. B. 52 ; 108 E. R. 779.

Annotation :—**Refd.** Lucas *v.* Beach (1840), 4 Jur. 631.

937. —— Commission for collecting debts—Due to preceding partnership.] — In taking the accounts between three partnerships, the first, of A. & B. ; the second, of A. B. & C. ; & the third, of B. & C. : the partnership of B. & C. cannot charge commission for collecting the debts due to the two preceding partnerships.—WHITTLE *v.* M'FARLANE (1830), 1 Knapp, 311 ; 12 E. R. 338.

938. —— Partner with ship owners—Working for ship's husband.]—Pltf. & deft. were partners. They were joint owners with B. of some ships, as to which B. acted as ship's husband but the duties were principally performed for him by deft. There being no agreement on the subject between the parties :—*Held :* B. was entitled to the

PART V. SECT. 3, SUB-SECT. 3.—B.

l. *Special remuneration beyond co-partnership profit.*]—A partner is not entitled to special remuneration beyond that received by his co-partners for extra services, unless by express agreement. — BENNETT *v.* MCKAY (1879), 6 Nfld. L. R. 178.—**NFLD.**

m. *Claim for services under inchoate agreement for partnership—Agreement unenforceable.*]—Pltf., relying upon an agreement with deft. that he would be taken into partnership in a farm, left his employment & came & worked upon the farm. The agreement for partnership was found to be substantially proved, but was too vague to be enforced :—*Held :* pltf. was entitled

Sect. 3.—*Management of partnership affairs: Sub-sect.* 3, *B.; sub-sects.* 4 *&* 5. *Sects.* 4 *&* 5: *Sub-sects.* 1 *&* 2.]

profits derived as ship's husband & pltf. was not, as partner entitled to participate in any share of them received by deft., by arrangement with B.—MILLER *v.* MACKAY (No. 2) (1865), 34 Beav. 295; 55 E. R. 649.

Annotation:—**Distd.** Hancock *v.* Heaton (1874), 30 L. T. 592.

939. —— Receiver & manager of partnership—Services outside scope of duties.]—By a judgment for dissolution of a partnership between two agricultural implement makers, deft., one of the partners was appointed receiver & manager & undertook to act without salary. He carried on the business very successfully for more than eighteen months & then purchased it with the sanction of the ct. He was a skilled mechanic, & during his receivership worked in the business as a common workman. In his accounts he claimed to be allowed two premiums of £25 each paid to a guarantee society which had become surety for his duly accounting, & the sum of £2 per week for the manual work done by him as a workman:—*Held:* the £2 per week ought also to be allowed for that, although the receiver had acted irregularly & run great risk in not asking for wages at the time of his appointment he was entitled to be paid for services which had proved beneficial to the estate & which it was no part of his duty as receiver & manager to perform.—HARRIS *v.* SLEEP, [1897] 2 Ch. 80; 66 L. J. Ch. 596; 76 L. T. 670; 45 W. R. 680, C. A.

SUB-SECT. 4.—RIGHT TO PARTNERSHIP BOOKS.

See Part V., Sect. 12, sub-sect. 3, *post.*

SUB-SECT. 5.—SHARING OF PROFITS AND EXPENSES.

940. Expenses—To what entitled.]—BURDEN *v.* BURDEN, No. 929, *ante.*

941. —— Cost of entertaining customers—Allowance not provided for in articles—Necessity for agreement.]—At the commencement of a partnership, the partners both living in the same house, entertained their customers jointly; one removing, the whole expense of entertainments, which were necessary in the trade, fell upon the other. They ought to have agreed for an allowance; the ct. can make none. The accounts having been annually balanced without such allowance, is conclusive.—THORNTON *v.* PROCTOR (1792), 1 Anst. 94; 145 E. R. 810.

Sharing profits.]—*See* Part V., Sect. 11, sub-sect. 1, B., *post.*

Incidence of losses.]—*See* Part V., Sect. 11, sub-sect. 2, *post.*

SECT. 4.—**TRANSACTIONS BETWEEN PARTNERS.**

942. Loan by one partner to another—Liability for interest.]—If one co-partner borrows money of the other on his note, he shall pay interest for it, though he had more money in the stock than what he borrowed; for the stock is only to be employed in augmentation of the trade, for their mutual benefit, but neither of them can make use of it, for their own private advantage.—BEECHER *v.* GUILBURN (1726), Mos. 3; 25 E. R. 236, L. C.

943. Sale by one partner to another—Interest in partnership business—Valid if no fraud—Though insolvency known.]—One partner may agree with retiring partner to give him a sum for the concern though they know the partnership to be insolvent, provided no fraud was intended.—*Re* LIGHTOLLER, *Ex p.* PEAKE (1816), 1 Madd. 346; 2 Rose, 455; 56 E. R. 128.

944. —— —— Valid as against third partner—Notwithstanding restriction on assignment.]—CASSELS *v.* STEWART, No. 1070, *post.*

945. Set-off in separate transaction—Of balance due on partnership accounts.]—FROMONT *v.* COUPLAND, No. 67, *ante.*

946. Sale of partnership asset—Right of partners to bid—Effect of non-attendance of partners.]—Specific performance of an agreement for an intended sale of a partnership asset, by which it was clearly intended that the three partners were to attend & bid for the same; & at which one of them did not attend, & subsequently died, without having confirmed what passed at such sale, will not be decreed.—HUDSON *v.* HUDSON (1860), 1 L. T. 433.

Debt due from deceased partner to firm—Right of executor partner to retain.]—*See* EXECUTORS, Vol. XXIII., p. 378, Nos. 4477–4479.

SECT. 5.—**ADMISSION OF OTHER PARTNERS.**

SUB-SECT. 1.—IN GENERAL.

See Partnership Act, 1890 (c. 39), s. 24 (7).

947. Necessity for consent of all partners.]—If testator directs that A. shall carry on testator's trade, with a capital taken from testator's personal estate, & shall educate & support D. & bind him apprentice to himself, & that upon the expiration of the apprenticeship, or so soon as A. shall think D. capable A. shall take D. into the business as a partner:—*Held:* D. was not entitled to claim a share of the profits from the death of testator, & he had no right to be admitted a partner at any time, unless his conduct was such as to render him not unfit for the situation.—GORDON *v.* RUTHERFORD (1823), Turn. & R. 373; 2 L. J. O. S. Ch. 50; 37 E. R. 1144.

948. ——.]—No partner can be named for another; . . . no one can be put upon another as a partner without his consent. . . .

To make a person a partner with two others, their consent must clearly be had, but there is no particular mode or time required of giving that consent; & if three enter into partnership by a contract which provides that, on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract which the ct. & collect the debts.—BURGESS *v.* FANNING (1835), 4 O. S. 188.—**CAN.**

to remuneration for his services upon the farm, rendered under the belief that he was a partner.—PERROTT *v.* PERROTT (1911), 31 N. Z. L. R. 6.—**N.Z.**

PART V. SECT. 4.

n. *Loan by one partner from another—Prior to partnership.*]—One partner may recover from another money lent before the formation of the partnership, but with the knowledge that the intending partner proposed to apply that, or a similar amount, to payment of the capital to be contributed by him.—LEE *v.* ROBERTS (1899), 5 V. L. R. (L.) 26.—**AUS.**

o. *Offer by partner on arrangement for dissolution—Of conditional payment to co-partner.*]—An action cannot be maintained by one partner against another, on an offer made on arranging for a dissolution to pay a certain sum if he were allowed to keep the books

PART V. SECT. 5, SUB-SECT. 1.

p. *Liabilities of assumed partner.*]—An incoming partner, who as between himself & co-partners enters into a joint liability (with notice to the creditor), as well for prior as subsequent debts, is liable for debts contracted before he became a member

must perform, & that the new partner would come in as entirely by the consent of the other two, as if they had adopted him by name (LORD BROUGHAM, C.).—LOVEGROVE *v.* NELSON (1834), 3 My. & K. 1; 3 L. J. Ch. 108; 40 E. R. 1, L. C.

Annotations:—**Apld.** Byrne *v.* Reid, [1902] 2 Ch. 735. **Refd.** Moffatt *v.* Farquhar (1878), 7 Ch. D. 591.

949. Assignment of share in partnership—Does not make assignee partner.]—A partner may give to a third person interest in his share, but cannot make him a partner.—BRAY *v.* FROMONT (1821), 6 Madd. 5; 56 E. R. 990.

Annotation:—**Consd.** Cassels *v.* Stewart (1881), 6 App. Cas. 64.

950. Direction by testator to admit son to partnership—On completion of apprenticeship—Right to share of profits before admittance.]—GORDON *v.* RUTHERFORD, No. 947, *ante*.

951. Entry subject to terms of partnership—No special term without notice.]—If two partners take in a third partner, without specifying the terms on which he becomes such partner, he has the same rights & is subject to the same liabilities as the two original partners; the terms & conditions of the partnership which bind them bind him, unless a new contract be made between them. & so also, if the conditions of his becoming partner are partially set forth, then to the extent that they are not specified & involved by necessary inference therein, he will be bound by the terms of the partnership contract affecting the two original partners with whom he associates himself.

In 1839 a retiring partner stipulated with the continuing partners that they should, at a future period, take his grandson T. into the business. In 1846 the continuing partners entered into arts. for seven years, & by one clause, which formed no part of the partnership contract prior to that time, it was stipulated that any partner might retire, & the continuing partners should then pay him the value of his share in the "goodwill." Afterwards, in 1849, T. was admitted, but the memorandum arranging his admission specified little more than the share he was to take, & it was agreed that it should not annul the arts. of 1846 as between the former partners. T. had no notice of the stipulation as to retirement:—*Held:* T. was not bound by it, though the former partners were; & assuming that under it, the value of the goodwill was to be calculated as a perpetuity, still the arrangements of 1849 had cut it down & limited it to so much of the seven years as were unexpired at the time of the notice to retire.—AUSTEN *v.* BOYS (1857), 24 Beav. 598; 27 L. J. Ch. 243; 30 L. T. O. S. 216; 3 Jur. N. S. 1285; 53 E. R. 488; *affd.* (1858), 2 De G. & J. 626, L. C.

Annotations:—**Refd.** Clark *v.* Leach (1863), 1 De G. J. & Sm. 409; Reynolds *v.* Bullock (1878), 47 L. J. Ch. 773; Corbin *v.* Stewart (1911), 28 T. L. R. 99.

952. Refusal by other partners to admit—Remedy of nominee.]—Damages may be recovered upon an agreement by one of several partners to introduce a stranger into the firm, although the agreement be entered into without the knowledge of the firm.—M'NEILL *v.* REID (1832), 9 Bing. 68; 2 Moo. & S. 89; 1 L. J. C. P. 162; 131 E. R. 540.

SUB-SECT. 2.—STIPULATION EMPOWERING PARTNER TO NOMINATE.

953. Exercise of power entrusted to executors—Power to exclude nominee—Executors must be unanimous.]—Testator, after giving life interests in stock to each of his daughters, afterwards the principal among his grandchildren, in pursuance of a power in arts. of partnership appointed his exors. to carry on the trade in his room with power to dissolve, or nominate any other person; & gave them his share of the capital & all freehold & leasehold on trust to carry on the trade as long as they should think fit; & after expiration of partnership to sell the estates, & with the produce & profits of trade & all the rest of his estate from a fund to accumulate twelve years, then among the grandchildren living: By codicil he substituted his partner, who was his son in law, in the room of one exor. removed; & desired, that, if his exors. should continue trade, & his grandsons T. & J. should attain twenty-one, his exors. would nominate each a partner for a quarter, when exors. should think fit, with legacies at the same time, to sink into the estate if they should decline the partnership, or die before twenty-one; exors. to advance any farther sum they might want to carry on trade; the rest of his property among all the grandchildren except T. & J. By another codicil he left it entirely in discretion of the exors. to appoint J. or not; if they should not think proper, his legacy to be void: T. & J. both entitled to be partners & to their legacies at twenty-one; one exor., their father, being for admitting them, the two other against it: but if all had without fraud united in declaring J. unfit, they might have excluded him; in which case he could have taken nothing under this devise.—WAINWRIGHT *v.* WATERMAN (1791), 1 Ves. 311: 30 E. R. 300.

954. Obligation on other partners to admit.]—LOVEGROVE *v.* NELSON, No. 948, *ante*.

955. —— Nominee performing conditions of admission.]—Where, in partnership arts., it has been agreed between the partners that any one of them shall be at liberty to nominate & introduce any other person into the partnership, & a valid nomination is made by one partner accordingly, followed by acceptance of the nomination by the nominee, the other partners are bound to give effect to the nomination, &, in case of their refusal to admit the nominee as partner or to do & execute the acts & deeds necessary for conferring upon him the rights of a partner, he is entitled, as against them, to such relief as cts. of equity are in the habit of granting to persons standing in the relation of partners, subject to his fulfilling, on his part, such conditions of his admission as may be contained in the arts., such as executing a proper deed, or otherwise.—BYRNE *v.* REID, [1902] 2 Ch. 735; 71 L. J. Ch. 830; 87 L. T. 507; 51 W. R. 52, C. A.

956. Extent of power.]—By arts. of partnership it was agreed that, except as thereinafter provided, none of the partners should hire any clerk or servant in the business, but T., one of the partners, might introduce two of his sons as pupils or clerks, at a salary, such sons to have an option of becoming partners. T. introduced two sons, the second of whom died without becoming a partner:—*Held:* (1) T. could not introduce or employ a third son as pupil or clerk; (2) an action to restrain breach of a partnership covenant would lie, though pltf. did not pray for a dissolution.—WATNEY *v.* TRIST (1876), 45 L. J. Ch. 412.

of the firm, contrary to the general principle of law.—HINE *v.* BEDDOME (1859), 8 C. P. 381.—**CAN.**

q. —— *Debts incurred prior to assumption.*]—STEPHEN'S TRUSTEE *v.* JENKINS (MACDOUGALL & CO.'S TRUSTEE) (1889), 16 R. (Ct. of Sess.) 779.—**SCOT.**

r. *Rights of assumed partner—Benefit of new lease acquired by partnership.*]—VAN DER BYL *v.* VAN DER BYL & (1899), 16 S. C. 338.—**S. AF.**

Sect. 5.—*Admission of other partners: Sub-sect.* 3, *A., B. & C. Sects.* 6 & 7: *Sub-sect.* 1.]

SUB-SECT. 3.—OPTION TO ENTER PARTNERSHIP.

A. In General.

957. Whether creating trust of share—In favour of nominee.]—A tradesman bequeathed his residuary estate, including his stock-in-trade, to trustees, with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds; & to invest the same & pay the annual income to S., his wife; & after her decease to M., his wife's sister; & after the decease of the survivor of S. & M. he gave his residuary estate to another person absolutely. After the date of the will M. married, & her husband & testator entered into partnership, under arts. which contained a proviso that if testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, & should be entitled to testator's share in the profits & excess of capital; & if testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business & property, accounting & paying for the same as therein directed. Testator died, leaving his widow, who, under this provision, claimed his interest in the partnership: —*Held:* the provision in the arts. took testator's share of the business wholly out of the provisions of the will, & the widow became entitled, under the partnership arts., to such share.

A trust may well be created in the absence of any expression importing confidence; & the obligation on the surviving partner created by the partnership arts., with reference to the legal interest in the partnership, did not in substance differ from a trust, & therefore the arts of partnership created a trust in favour of the wife, to arise on the death of testator leaving a widow surviving, which would attach on the property as it should then exist.—PAGE *v.* COX (1852), 10 Hare, 163; 68 E. R. 882.

Annotations:—**Apld.** *Re* Flavell, Murray *v.* Flavell (1883), 25 Ch. D. 89. **Expld.** Ehrmann *v.* Ehrmann (1894), 72 L. T. 17. **Consd.** Byrne *v.* Reid, [1902] 2 Ch 735.

958. —— ——.]—EHRMANN *v.* EHRMANN, No. 969, *post.*

B. Nature of Option.

959. Not compulsory on nominee.]—By partnership arts., it was stipulated, that the partnership should continue for nineteen years, & that if either of the partners should die, during the term, the widow, or other legal personal representative of the partner so dying, should be let into the partnership, & become a partner therein, in the same manner, & upon the same terms & conditions: *Held:* (1) this was not an absolute, or imperative obligation on the widow or personal representative to become a partner, but only an option so to do, with a stipulation by the surviving partner to admit them. (2) The widow, or personal representative, was entitled to a reasonable time to inspect & examine the partnership accounts, but not to have the accounts taken, before they elected whether they would become partners.—PIGOTT *v.* BAGLEY (1825), M'Cle & Yo. 569; 148 E. R. 539, Ex. Ch.

960. ——.]—(1) Difficulties in appointing a receiver of a partnership upon motion.

Surviving partners insisted on continuing the partnership with the assets of a deceased partner. The ct. thought the representatives of the latter entitled to a receiver.

(2) Partnership stipulation, that a son of one partner, or in case of his minority, the exor. should, on the death of such partner, succeed to his share. The ct., on the terms of the partnership deed, considered it an option, & not an obligation.—MADGWICK *v.* WIMBLE (1843), 6 Beav. 495; 14 L. J. Ch. 387; 7 Jur. 661; 49 E. R. 917.

Annotation:—*As to* (2) **Refd.** Downs *v.* Collins (1848), 12 L. T. O. S. 102.

961. —— **Nominee refusing to become partner—Partnership treated as dissolved.**]—Where a partner has a right to appoint a person to succeed, upon his death, to his share of the business, & the person so appointed refuses to accept that share, or to comply with the stipulations of the arts., the partnership is dissolved; but the dissolution is not a dissolution which is wrought by the exclusion of the appointee by the surviving partners.—KERSHAW *v.* MATTHEWS (1826), 2 Russ. 62; 38 E. R. 259, L. C.

Annotations:—**Folld.** Lancaster *v.* Allsup (1887), 57 L. T. 53. **Refd.** Downs *v.* Collins (1848), 12 L. T. O. S. 102.

962. —— —— —— **Remedy against deceased partner's estate.**]—(1) The arts. of partnership under which a partnership in a brewery had been carried on, provided for the introduction of a son or sons, brother or brothers, nephew or nephews of either partner, & power was given for one partner to introduce such relations by his last will, but they were silent as to any power of bequeathing his share of the business, but stipulated that the same, on the death of a partner, should be carried on by the survivor & the exors. or administrators of the partner dying, in the way therein expressed. One partner died; his representatives declined to join in carrying on the business, & other parties claiming under deceased partner's will joined in the general allegation that to carry on the business would not be beneficial for any party:—*Held:* the partnership was dissolved on the death of the deceased partner.

(2) A man may do certain acts, & he may covenant that his son, after his death shall also do certain acts; or if it be his wife, that she may levy a fine, for instance; but those parties cannot afterwards be compelled to do it, but the covenantee looks to the assets of the covenantor. If the person who is required to do the act declines to do it, the effect of that latter clause about the death afterwards is material in this point of view, that it gives the exors. who filed a fiduciary character power, if they think fit, to carry on the business, which of course would be an indemnity to them for their so doing (WIGRAM, V.-C.).—DOWNS *v.* COLLINS (1848), 6 Hare, 418; 12 L. T. O. S. 102; 67 E. R. 1228.

Annotations:—*As to* (1) **Folld.** Lancaster *v.* Allsup (1887), 57 L. T. 53. **Refd.** Johnston *v.* Moore (1858), 6 W. R. 490. *As to* (2) **Consd.** Lancaster *v.* Allsup (1887), 57 L. T. 53.

963. —— —— —— ——.]—Partnership arts. provided that the partnership should last for a term of fifteen years, & that in case any of the partners should die during the continuance of the partnership, his exors. or administrators should succeed to his share, & be & become partners in his place, & in respect of his share:—*Held:* the ct. would not, on the death of a partner force the exors. to become partners against their will; &, if they declined to come in, the partnership must be treated as dissolved as from the death of the deceased partner, & wound up on that footing; but the judgment must contain a provision, as in *Downs* v. *Collins*, No. 962, *ante*, reserving to

the surviving partners the right to prosecute against the estate of the deceased any remedy which they might have in respect of any alleged breach of the covenant contained in the arts.—LANCASTER *v.* ALLSUP (1887), 57 L. T. 53.

C. Time for Exercise of Option.

964. Within reasonable time—Time for inspection of books.]—PIGOTT *v.* BAGLEY, No. 959, *ante*.

965. —— Effect of delay.]—A partner destined his two sons to be taken into the partnership business, but one of them only availed himself of the intention, & entered into the partnership. There was an understanding that on the death of a partner the interest should be continued in his family. The son who had entered the concern having died leaving several sons, & leaving his brother exor. & trustee under his will, the brother nominated his own son to the business to the exclusion of his nephews. On bill filed by the widow of deceased partner praying that the brother might be ordered to account for the benefit accrued to his son, which ought to have been enjoyed by the son of deceased partner:—*Held:* the widow not having claimed the benefit of the nomination, & having acquiesced in the appointment made, could have no claim in equity.—VANSITTART *v.* OSBORNE (1871), 20 W. R. 195.

966. Within time fixed.]—By indentures of partnership between A., B., & C., it was provided that, in case of the death of either of the parties during the continuance of the partnership, then the exor. or administrator of deceased partner should have the option of succeeding to the share of such deceased partner in the partnership business & effects, if he, she, or they should think proper, & should give notice of such his, her, or their intention, within three calendar months after the decease of the partner so dying, to the surviving partner or partners. C. died on Feb. 20, 1844, intestate; on May 15 his widow gave the surviving partners notice of her intention to avail herself of the option of succeeding to her deceased husband's share of the business: & on Dec. 10 she took out letters of administration, & thereby became his sole legal representative:—*Held:* this was not an effectual notice, within the meaning of the indenture.—HOLLAND *v.* KING (1848), 6 C. B. 727; 136 E. R. 1433.

Annotation:—**Apld.** Dibbins *v.* Dibbins, [1896] 2 Ch. 348.

967. —— Partners restrained from depreciating business pending election.]—E. & H. were partners under arts. One of the terms was, that on the decease of either partner, his personal representative should have the power, within three months, of electing to continue the share of the deceased partner; & if he declined, then the business, stock-in-trade, etc., were to be valued, & the surviving partner was to take the whole, giving security for the moiety late belonging to the deceased partner. E. died:—*Held:* during the three months, or until E.'s personal representative should elect, the survivor, H. was to be prevented by injunction from carrying on the business in any other firm than what had been used in the life of E.—EVANS *v.* HUGHES (1854), 18 Jur. 691.

968. On attaining certain age—Right of other partners to dissolve before time reached.]—A. assigned his business to three of his clerks, reserving a share of the profits for the benefit of a son to be nominated by him, & who on attaining twenty-one was to have the option of being admitted a partner. The arts. of partnership, to which A. was a party, gave power to the partners to dissolve with mutual consent, & also a power to any partner to withdraw, so long as stated intervals were left between the retirement of partners. Defts., the two existing partners, one of whom had come in under a subsequent deed, just before the son came of age, announced a dissolution of the partnership, & recommenced the same description of business under another name:—*Held:* without the consent of A. the attempted dissolution was not effectual, as it was contrary to the intention of the original arts., & subversive of the rights of A.—ALLHUSEN *v.* BORRIES (1867), 15 W. R. 739.

969. —— ——.]—Several persons carried on business in partnership under arts. which provided for the nomination of a son to succeed to the partner's share in the business, but such son was to succeed only on attaining twenty one, & signing such deed as therein mentioned. Several of the partners appointed a son, but no son had yet attained twenty-one. All the partners save one brought an action against the remaining partner for dissolution:—*Held:* no immediate trust in favour of the son was created by the arts., & the sons need not be made parties to the action.—EHRMANN *v.* EHRMANN (1894), 72 L. T. 17; 43 W. R. 125.

Annotation:—**Distd.** Byrne *v.* Reid, [1902] 2 Ch. 735.

SECT. 6.—COVENANTS IN RESTRAINT OF TRADE.

See TRADE & TRADE UNIONS.

SECT. 7.—PARTNERSHIP PROPERTY AND PROPERTY OF SEPARATE PARTNERS.

SUB-SECT. 1.—IN GENERAL.

970. Partnership property must only be used for partnership business.]—BEECHER *v.* GUILBURN, No. 942, *ante*.

971. Partner succeeding to trusteeship—Deceased partner in default—Promise by surviving partner to make good deficiency.]—One of two partners was appointed trustee under a liquidation, &, before the affairs were wound up, died. At the time of his death he was indebted to the estate in a sum of £201. The surviving partner was then appointed trustee on his giving an undertaking in writing to make good any deficiency. The latter never received anything on behalf of the estate. An order of ct. was made for payment

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PART V. SECT. 7, SUB-SECT. 1.

t. *Conversion by partner of partnership property—Rights of co-partner.*]—One partner cannot maintain trover against another for converting the partnership property.—SMITH *v.* BOOK (1837), 5 O. S. 556.—**CAN.**

a. *Building on one partner's land—Built by partnership funds—Rights of co-partner as to.*]—One partner cannot enter on his partner's land & remove a building, though that building be merely on blocks & has been built by partnership funds & intended for a store to carry on the partnership business.—MCKENZIE *v.* MCKENZIE (1848), 1 Thom. 2nd ed. 198.—**CAN.**

b. *Division of assets—Valuation of plant supplied—Payment with partnership moneys.*]—WORTHINGTON *v.* MACDONALD (1884), 9 S. C. R. 327.—**CAN.**

c. *Partnership property—Insured as partner's property—Title not in question.*]—STILLMAN *v.* AGRICULTURAL INSURANCE CO. (1888), 16 O. R. 145.—**CAN.**

d. —— *Registered as property of individual partner.*]—M'ARTHURS *v.* M'PRAIR & JOHNSTONE'S TRUSTEE (1844), 6 Dunl. (Ct. of Sess.) 1174; 16 Sc. Jur. 513.—**SCOT.**

e. —— —— *Whether real ownership may be established.*]—Where certain shares in a ship were registered in the name of a party individually:—*Held:*

Sect. 7.—Partnership property and property of separate partners: Sub-sects. 1 & 2, A., B. & C.]

of the £201, & on its being disobeyed an application was made to commit the surviving partner :—*Held :* no order to commit could be made because it was not shown that debtor had ever had the money in his possession.—*Re* HINCKS, *Ex p.* CUDDEFORD (1876), 45 L. J. Bcy. 127 ; 24 W. R. 931 ; *sub nom. Re* HINCKS, *Ex p.* INSPECTION COMMITTEE, 34 L. T. 666.

Disclosure of partnership accounts in claim for alimony.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 417, No. 4226.

Voluntary settlement on partner's wife impeachable by other partners.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., p. 244, No. 716.

Levy of execution.]—*See* Part IV., Sect. 6, subsect. 2, J., *ante*.

-SECT. 2.—WHAT PARTNERSHIP PROPERTY INCLUDES.

A. In General.

See Partnership Act, 1890 (c. 39), s. 20 (1).

972. Sum awarded as compensation for war loss—Alien enemy partner excluded from share.]—Two American citizens residing at Baltimore, & a French subject residing at St. Domingo being in partnership, & owners of certain ships captured by British cruisers, & the comrs. appointed under the 7th art. of the Treaty of Commerce concluded in 1794, between this country and America, for awarding compensations to American subjects who had suffered losses by capture for which they could obtain no redress in the ordinary tribunals, having awarded in compensation of the ships of the partnership captured, certain sums to the two Americans, with express exclusion of the French citizen, as an alien enemy ; the sums so awarded are not partnership property, & the creditors of the partnership have no claim on them, as against the separate creditors of the Americans.—CAMPBELL *v.* MULLETT, WILLIAMSON *v.* LONGMEAD (1819), 2 Swan. 551 ; 36 E. R. 727.

Annotation :—**Refd.** Johnson *v.* Evans (1844), 8 Jur. 341.

973. Property acquired for purposes of partnership.]—BURDON *v.* BARKUS, No. 268, *ante*.

974. Articles providing for sole ownership—Disregard of articles evidencing new agreement—Property treated as partnership property.]—PILLING *v.* PILLING (1865), 3 De G. J. & Sm. 162 ; 46 E. R. 599, L. JJ.

Annotations :—**Mentd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1 ; Bruner *v.* Moore, [1904] 1 Ch. 305 ; Morrell *v.* Studd & Millington, [1913] 2 Ch. 648.

B. Property Purchased with Partnership Money.

See Partnership Act, 1890 (c. 39), s. 21.

975. Whether partnership property — Depends on circumstances of case.]—There is no rule that where lands are bought by partners in trade, & are paid for out of the partnership assets, they of necessity become part of the joint estate ; nor, on the other hand, that if they are not bought for the purposes of the partnership business they are not joint estate ; nor does the form of the conveyance settle the question, which must be determined with reference to all the circumstances of the case.

One of two partners carrying on the business of leather factor bought lands for the purpose of erecting a residence on part of it & selling the remainder to a railway co. He offered a share to his partner who was also desirous of building a house out of town for his residence. The offer was accepted & the purchase-money paid out of the partnership assets ; but the conveyance was to the partners in separate moieties, each of which was conveyed to the usual uses to bar dower. The partners at their individual expense built houses upon portions of the land set apart for the purpose, but the other expenses relating to the land were paid out of the partnership assets :—*Held :* the whole of the land constituted joint estate.—*Re* LAURENCE, *Ex p.* M'KENNA, BANK OF ENGLAND CASE (1861), 3 De G. F. & J. 645 ; 45 E. R. 1029 ; *sub nom. Re* STREATFEILD, LAURENCE & CO., *Ex p.* M'KENNA, *Re* SAME, *Ex p.* BANK OF ENGLAND, 30 L. J. Bcy. 25 ; 4 L. T. 601 ; 7 Jur. N. S. 715 ; 9 W. R. 892, L. JJ.

976. Purchase of patent—Taken out in name of one partner.]—By arts. of partnership, whereby pltf. & two other parties agreed to become partners as machine manufacturers, it was provided that pltf. should not, without the consent of the other two, use or exercise the business of a machine maker, otherwise than in co-partnership with them. During the partnership a patent was taken out for a carding machine, &, in order to save expense, it was taken out in pltf.'s name, but paid for out of the partnership funds, to which he had contributed nothing. Upon the dissolution of the partnership, pltf. assigned all his estate & interest in the partnership effects to his partners, who continued to make the carding machines as before :—*Held :* as there was evidence of pltf. having taken out
which removed it from him he could maintain the action, & the patent did not pass under the deed of assignment.—BIRCH *v.* WOOD (1843), 2 L. T. O. S. 2.

977. Purchase by two partners—Third partner holding under declaration of trust.]—TIBBITS *v.* PHILLIPS, No. 932, *ante*.

978. Discharge of mortgage by three partners—Fourth partner having paid consideration for admission—On basis of property being freehold.]—G. bought a share in a co-partnership business established by S., D., & L., in Sydney, New South Wales. No regular deed of co-partnership was executed, but by an agreement between them it

incompetent to establish by proof, that they were the property of a co. of which he was a partner.—ORD *v.* BARTON (1846), 8 Dunl. (Ct. of Sess.) 1011 ; 18 Sc. Jur. 505.—**SCOT.**

PART V. SECT. 7, SUB-SECT. 2.—A.

f. *Picture painted by partner—At co-partner's expense—From data furnished by co-partner.*]—MITCHELL *v.* BROWN (1881), 7 V. L. R. 55.—**AUS.**

g. *Land purchased by partners—Conveyed to one only.*]—If partners buy land for the purpose of a partnership concern it forms part of the partnership propecty, & if partnership propetry is invested in the purchase of real estate, such estate will be partnership property, though the conveyance of it may have been made to one partner only.—*Re* ELLIOTT'S INSOLVENCY, *Ex p.* BANKS (1823), 1 Nfld. L. R. 349.—**NFLD.**

h. *Land bought for partnership purposes—Proof of partnership—*
.]—Pltf. alleged that deft., being his partner, bought land for the use of the partnership. On the evidence :—*Held :* there was not sufficient proof of such partnership to enable the ct. to declare deft. a trustee for the partnership.—BROWN *v.* GRADY (1898), 6 B. C. R. 190.—**CAN.**

k. *Money in bank to credit of partnership.*]—CARSCALLEN *v.* CARMICHAEL [1924] 2 D. L. R. 113.—**CAN.**

l. *Bequest to representatives of partnership—In satisfaction of debt due to firm.*]—A bequest to the representatives of the late mercantile house of A. & K., or to such person or persons as should be entitled at testator's decease to their personal property, in satisfaction of a debt due by the testator's father :—*Held :* claimable by the legal representative of the surviving partner, as representing the firm of A. & K., & not by the persons beneficially entitled to the properties of A. & K.—KERRISON *v.* REI (1847), 11 I. Eq. R. 451.—**IR.**

was stipulated that some interest, the nature & extent of which was not defined, in a piece of land, wharf, & premises, upon which the partnership business was carried on, should form part of the partnership property. This property was then held by S., D., & L., under a lease, & was also subject to a mtge. During the negotiation for the partnership, S., D., & L., paid off the mtge., & acquired by purchase the fee of the property, & upon failure of the partnership concern sold the same, receiving the consideration money, which they refused to account for to G., or to treat as partnership assets, on the ground, that the property had been acquired by them on their separate account, & not purchased with the partnership assets:—*Held:* S. D., & L., having purchased the fee in the property during the negotiation for the partnership, & the consideration money paid by G. for his share in such partnership being based upon the fact of the property being freehold, the purchase must be treated as being for the benefit of the partnership concern; & G. was entitled to participate & share with S., D., & L. in the freehold interest so acquired, G. contributing in the sum paid by S., D., & L., for the purchase thereof to the extent of his share in the partnership.—GORDON *v.* SCOTT (1858), 12 Moo. P. C. C. 1; 14 E. R. 812.

979. Purchase by one partner for himself.]—A ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bkpt.:—*Held:* the firm had no interest in the ship, or any lien on it for the amount of the purchase-money.—WALTON *v.* BUTLER (1861), 29 Beav. 428; 54 E. R. 693.

Annotation:—**Distd.** Hancock *v.* Heaton (1874), 30 L. T. 592.

980. Purchase of land employed in business.]—A testator, a nurseryman, devised his real estate, on part of which he had carried on his business, & his residuary estate, to his three sons, F., M., & J., as tenants in common. After his death they carried on the business in partnership, & out of moneys belonging to the estate completed a contract for the purchase of more land which was inchoate at the death, & employed such land in the business. Subsequently, F. & J. purchased M.'s third share in the land & business, & paid for it partly out of the estate & partly out of moneys borrowed on the land. F. & J. then continued the business on the land. F. subsequently died intestate:—*Held:* both the devised & the purchased land employed in the business was converted.

The land used in the trade is part of the partnership property & therefore personal estate (JAMES, L.J.).—WATERER *v.* WATERER (1873), L. R. 15 Eq. 402; 21 W. R. 508.

Annotations:—**Apld.** Davies *v.* Games (1879), 12 Ch. D. 813; A.-G. *v.* Hubbuck (1883), 10 Q. B. D. 488. **Refd.** *Re* Cooper, Cooper *v.* Cooper (1878), 26 W. R. 785; Davis *v.* Davis, [1894] 1 Ch. 393.

981. Conveyance to one partner.]—William Wray carried on business under his own name at Laurel House, North Hill, Highgate, in partnership with his sons, & another person. He died in 1885, & his widow was admitted as a partner in his place. The business was carried on as before & under the same name. In 1890 the partners bought a house & paid for it out of the partnership assets. The conveyance was made between the vendor of the one part & William Wray of Laurel House, Highgate, of the other part, & the property was conveyed to William Wray in fee simple:—*Held:* the legal estate passed by the conveyance to the four partners as joint tenants.—WRAY *v.* WRAY, [1905] 2 Ch. 349; 74 L. J. Ch. 687; 93 L. T. 304; 54 W. R. 136.

Annotation:—**Mentd.** *Re* Smith, Johnson *v.* Bright-Smith, [1914] 1 Ch. 937.

See, also, No. 993, *post.*

C. Property of One Partner Brought into Partnership.

982. Lease acquired before partnership—Admission of partner to use of part of property.]—BURDON *v.* BARKUS, No. 268, *ante.*

983. —— Partnership to continue during lease.]—P. having a lease of salt works & entering into partnership with H., brought it into the partnership capital, in consideration of H.'s brother advancing money to the firm & taking an under lease by way of mtge. for the same, H. being allowed a larger share of profits for ten years. A dispute having arisen at the sale of the lease, whether this lease did not continue the separate property of P., subject to the use of the firm while the partnership lasted:—*Held:* it was a partnership asset, & this appeared from the following circumstances: viz., that the lease had been at a rack rent; the firm was to have the benefit of it, & the firm was to last during the currency of the lease; there was a provision as to what was to be done with the lease in the contingency of a dissolution; on the mtge. being paid off, the equity of redemption was to be conveyed to the firm; & on a sale of the lease at the dissolution, the surplus was to be paid over to P., & he was to repurchase H.'s interest.—HILLS *v.* PARKER (1861), 4 L. T. 746; 7 Jur. N. S. 833, H. L.; *revsg.* S. C. *sub nom.* PARKER *v.* HILLS (1859), 33 L. T. O. S. 46, L. JJ.

984. —— Firm paying rent.]—Where the premises upon which a partnership business is carried on are, & are declared by the partnership deed to be, the property of one partner, & the partnership deed contains no provision as to the tenancy of the partnership, but only a general direction that all rent is to be paid out of profits, the ct. will infer that the partnership was intended to hold the premises on a tenancy during the continuance of the partnership & not on a tenancy from year to year or at will.—POCOCK *v.* CARTER, [1912] 1 Ch. 663; 81 L. J. Ch. 391; 106 L. T. 423; 56 Sol. Jo. 362.

985. Trade mark.]—Upon the formation of a partnership with a person entitled to a trade mark, such mark will, in the absence of express provisions in relation to it, become an asset of the partnership, for the whole trade is carried into the partnership, & the trade mark is but one element in it. Such a trade mark is, therefore, capable of being assigned by the partnership & the ct. will after an assignment to a purchaser restrain the firm, or any partner in it, from himself using the mark & from assigning it to any other person.—BURY *v.* BEDFORD (1864), 4 De G. J. & Sm. 352; 4 New Rep. 180; 33 L. J. Ch. 465; 10 L. T. 470; 10 Jur. N. S. 503; 12 W. R. 726; 46 E. R. 954, L. JJ.

986. Patent.]—When a partnership at will is formed, for the purpose of working an invention for which a patent has previously been taken out by & registered in the name of one of the partners alone, the patent becomes an asset of the partnership, & each partner acquires a right to practise the invention; & this right is not taken away by the registered owners, assigning the patent to third parties who have notice of the existence of the partnership.—KENNY'S PATENT BUTTON-HOLEING CO., LTD. *v.* SOMERVELL & LUTWYCHE (1878), 38 L. T. 878; 26 W. R. 786.

Sect. 7.—*Partnership property and property of separate partners: Sub-sect.* 2, *C.; sub-sects.* 3, 4 & 5. *Sect.* 8: *Sub-sect.* 1, *A*

987. Mill & plant.] — On the formation of a partnership it was agreed that the business should be carried on at a mill belonging to R., one of the partners; & R. was credited in the books of the partnership with the value of the mill. From time to time sums were expended in making additions to & improvements in the mill; & in the yearly balance sheets the mill was entered at the original value increased by the amount so expended, but less a certain amount for depreciation; & the partners were allowed interest on the sums from time to time standing to their capital accounts: —*Held:* in the absence of any special agreement, the mill was an asset of the partnership, & on a sale of the business, under which the purchase-money of the mill was largely in excess of its value in the books, the difference was profit divisible in the proportions in which the profits of the business were divisible at the time of the sale.

In the absence of special agreement the rise or fall in value of fixed plant or real estate belonging to a partnership was as much profit or loss of the partnership as anything else (JESSEL, M.R.). —ROBINSON *v.* ASHTON, ASHTON *v.* ROBINSON (1875), L. R. 20 Eq. 25; 44 L. J. Ch. 542; 33 L. T. 88; 23 W. R. 674.

Annotation:—**Mentd.** *Re* Bridgewater Navigation Co. (1888), 39 Ch. D. 1.

SUB-SECT. 3.—ASSIGNMENTS BY PARTNERS TO ONE OF THEMSELVES.

988. Whether converting joint into separate estate.]—A., B., C. & D. were partners in a banking house at Liverpool, & C. & D. also carried on a separate mercantile concern in London; F. S. having accepted bills payable at the house of C. & D. employed A., B., C. & D. to get them paid accordingly, & agreed to deposit with them good bills indorsed by him, for the purpose of enabling them so to do; A., B., C. & D. debited F. S. in account for his acceptances, & credited him for all the bills which he deposited; some of the bills so deposited by F. S. were remitted by A., B., C. & D. to C. & D. upon the general account between the two houses, & before any of the acceptances of F. S. became due both houses failed, & F. S. was obliged to pay his own acceptances:—*Held:* the assignees of C. & D. were entitled to retain against F. S. the bills remitted to them by A., B., C. & D.

There can be no doubt that as between themselves a partnership may have transactions with an individual partner or with two or more of the partners having their separate estate engaged in some joint concern in which the general partnership is not interested: & that they may by their acts convert the joint property of the general partnership into the separate property of an individual partner or into the joint property of two or more partners or *e converso* (EYRE, C.J.). —BOLTON *v.* PULLER (1796), 1 Bos. & P. 539; 126 E. R. 1053.

Annotations:—**Distd.** Pedder *v.* Watt (1795), Peake, Add. Cas. 41; Sparrow *v.* Chisman (1829), 7 L. J. O. S. K. B. 173. **Apld.** Johnson *v.* Robarts (1875), 44 L. J. Ch. 465 **Refd.** Jacaud *v.* French (1810), 12 East, 317; Thompson *v.* Giles (1824), 2 B. & C. 422. **Mentd.** *Re* Boldero, *Ex p.* Pease, etc. (1812), 19 Ves. 25.

989. —— Agreement must be executed not executory.]—K., a partner in the firm of K. & co., being entitled by the arts. of partnership, & desiring to withdraw £4,000 from the capital of the firm, which was in a state of insolvency, bills of exchange to that amount in three sets were bought by & made payable to the order of the firm, & the first set of bills were indorsed by K. & co. & delivered to K. K. died without receiving payment of the bills, & the first set were lost. The surviving partners executed a creditors' deed, & the second set of bills not having been indorsed, were claimed by the trustees of the deed as partnership assets, & by K.'s exors. as his separate estate. By arrangement the bills were indorsed to stakeholders, & the money was paid into ct.:—*Held:* K. was not entitled to withdraw the £4,000 when the firm was insolvent, & as the money had not actually reached his hands it belonged to the joint creditors.—*Re* KEMPTNER (1869), L. R. 8 Eq. 286; 21 L. T. 223; 17 W. R. 818.

990. —— ——.]—An agreement for the dissolution of a partnership between two traders provided that the balance due to the retiring partner should be paid partly by an immediate cash payment, & partly by weekly instalments, & the continuing partner agreed to enter into a personal bond conditioned for carrying out the terms of the agreement:—*Held:* the agreement was an executory one, &, at any rate till the cash payment had been made & the bond had been given, the assets of the business remained joint assets, & the retiring partner was, subject to the payment of the debts due to the joint creditors, entitled to a lien upon the assets in respect of what remained due to him under the agreement.—*Re* WRIGHT, *Ex p.* WOOD (1879), 10 Ch. D. 554; 39 L. T. 646; 27 W. R. 401, C. A.

Annotations:—**Refd.** *Re* Head, *Ex p.* Kemp (1893), 10 Morr. 76; *Re* Daniel (1896), 3 Mans. 312.

991. —— ——.]—The statement in Lindley on Partnership, 8th ed. pp. 400–401, that in order that an agreement may have the effect of converting joint into separate estate, or *vice versâ*, the agreement must be executed, & not be executory merely, does not, in my opinion, mean that what has to be done under the agreement must be entirely completed, but that nothing remains to be done to make the agreement operative (NEVILLE, J.).—PEARCE *v.* BULTEEL, [1916] 2 Ch. 544; 85 L. J. Ch. 677; 115 L. T. 291; 32 T. L. R. 723; [1916] H. B. R. 147.

SUB-SECT. 4.—CO-OWNERS OF LAND IN PARTNERSHIP.

992. Joint tenancy under will—Severance implied from dealings—As to profits & capital.]—Though by the residuary disposition to testator's two sons, & the survivor, their or his heirs, exors., etc., they took as joint tenants the leasehold & personal estate embarked in trade, upon all the circumstances, the transactions for twelve years, as between themselves a severance was to be implied, both as to the profits & the capital.—JACKSON *v.* JACKSON (1804), 9 Ves. 591; 32 E. R. 732, L. C.

Annotations:—**Distd.** Burdon *v.* Barkus (1862), 4 De G. F. & J. 42. **Refd.** Dale *v.* Hamilton (1846), 5 Hare, 369; Waterer *v.* Waterer (1873), 21 W. R. 508. **Mentd.** Brown *v.* Oakshott (1857), 24 Beav. 254; Harrison *v.* Barton (1860), 1 John. & H. 287; Williams *v.* Hensman (1861), 1 John. & H. 546.

993. —— Additional land purchased with partnership funds—Tenancy in common of after-purchased estate.]—Where the residue of real & personal estates were devised by testator to his two sons as joint tenants, & the two sons, after the father's decease, & during the period of

twenty years, carried on the business of farmers with such estates, & kept the moneys arising therefrom in one common stock, & with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other :—*Held :* they continued, at the death of one of them, joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estate.—MORRIS *v.* BARRETT (1829), 3 Y. & J. 384 ; 148 E. R. 1228.

Annotations :—**Apld.** Davies *v.* Games (1879), 12 Ch. D. 813. **Consd.** Davis *v.* Davis, [1894] 1 Ch. 393.

994. Tenancy in common — Effect of dealing with estate as joint.]—The interest of partners as tenants in common, where the estate was purchased out of the joint property, & mortgaged by the firm for a joint debt, is a joint security.—*Re* BURGESS, *Ex p.* FREEN (1827), 2 Gl. & J. 250.

995. —— Tenants cannot sue each other in trover.]—JONES *v.* BROWN (1856), 25 L. J. Ex. 345 ; 27 L. T. O. S. 203 ; 4 W. R. 680.

Annotation :—**Mentd.** Nyburg *v.* Handelaar (1892), 8 T. L. R. 395.

996. —— Under will — Acquisition of another share by one — Conversion into personalty.] — WATERER *v.* WATERER, No. 980, *ante.*

997. —— —— Mortgage by one tenant— Mortgagee postponed to other's claim.]—CAVANDER *v.* BULTEEL, No. 670, *ante.*

Purchase by married woman co-owner out of profits.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 94, No. 725.

Co-ownership as consideration affecting question of partnership.]—*See* Part II., Sect. 3, *ante.*

SUB-SECT. 5.—EFFECT OF BANKRUPTCY.

See BANKRUPTCY, Vol. IV., pp. 420–469, 585, Nos. 3788–4229, 5357–5359, Vol. V., pp. 630, 762, 763, 784–786, 801, 802, Nos. 5680, 6558–6565, 6726–6737, 6845–6854.

SECT. 8.—**SHARES IN PARTNERSHIP.**

SUB-SECT. 1.—NATURE OF SHARE.

A. In General.

See Partnership Act, 1890 (c. 39), s. 23.

998. Share of surplus after payment of partnership debts.]—A partner's interest in the partnership, property, is his share upon the division of the surplus after payment of the partnership debts.

Where the sheriff seized the partnership goods under a *fi fa.*, upon a judgment for a separate debt against one of the partners, & a fiat in bkpcy. issued against both partners the day after the seizure, under which the messenger entered, & by arrangement held the goods for both parties, which were subsequently sold, & the proceeds of the sale received by the assignees :—*Held :* an action for money had & received would not lie at the instance of the execution creditor against the assignees, no settlement of the partnership debts & accounts having been made, & there being therefore no ascertained surplus applicable to pltf.'s execution.—GARBETT *v.* VEALE (1843), 5 Q. B. 408 ; Dav. & Mer. 458 ; 13 L. J. Q. B. 98 ; 8 Jur. 335 ; 114 E. R. 1303.

999. ——.]—Testator, who was a partner in a mercantile firm, gave the proceeds of the sale of his share of certain real estate which was held as partnership property to charitable uses :—*Held :* the interest of testator in the partnership property, so far as it comprised moneys arising from the sale of the real estate, was an interest in land under Charitable Uses Act, 1736 (c. 36), & the bequest of it was void.

The share of each of the other partners no doubt is not a share in any specific asset or any specific part of the assets real or personal, but is his share of what will ultimately come to him when the accounts are ascertained, & when the partners who are to contribute have contributed, & when the assets are got in, the debts paid, & the amounts realised (JAMES, L.J.).—ASHWORTH *v.* MUNN (1880), 15 Ch. D. 363 ; 50 L. J. Ch. 107 ; 43 L. T. 553 : 28 W. R. 965, C. A.

Annotations :—**Refd.** *Re* Hollon, Forbes *v.* Hardcastle (1893), 68 L. T. 160 ; *Re* Dawson, Pattisson *v.* Bathurst, [1915] 1 Ch. 626. **Mentd.** *Re* Hill's Trusts (1880), 16 Ch. D. 173 ; *Re* Watts, Cornford *v.* Elliott (1885), 29 Ch. D. 947 ; *Re* Pickard, Elmsley *v.* Mitchell, [1894] 3 Ch. 704 ; *Re* Hume, Forbes *v.* Hume, [1895] 1 Ch. 422 ; *Re* Berchtold, Berchtold *v.* Capron, [1923] 1 Ch. 192.

1000. Indefinite & fluctuating sum.]—Case in which it was held, that according to the true construction, having regard to all the circumstances of the case, of a memorandum of mutual agreement between M., pltfs., & three other firms. whereby M. agreed to surrender to pltfs. "his share" in a certain mtge. held by him as trustee, the share of M.'s firm therein passed, & not merely his own individual share as between himself & his partner.

The expression "share" is more suitable to that definite share in the mtge. which M. [deft.] held on behalf of his firm, than to the indefinite & fluctuating interest which was all that he personally could have in a partnership asset (SIR ROBERT COLLIER).—MARSHALL *v.* MACLURE (1885), 10 App. Cas. 325, P. C.

1001. Priority of partnership debts—Over claim of creditor of partner.]—A. & B. are partners in trade. A. gives a bond to leave his wife £1,000. A. dies, the other partner administers. If the wife would be paid out of the separate estate of A. on there being effects, she shall have a preference before other creditors ; but if there is no separate estate, & the wife would have satisfaction out of the partnership effects, then all the partnership debts must be first paid.—CROFT *v.* PYKE (1733), 3 P. Wms. 180 ; 24 E. R. 1020, L. C.

Annotations :—**Refd.** Ryall *v.* Rolle (1749), 1 Atk. 165. **Mentd.** Hall *v.* Laver (1838), 3 Y. & C. Ex. 191.

1002. —— Over claim of partner.] — The partnership effects must be applied to pay the partnership debts before any other partner can claim anything out of either for his share or debt (LORD HARDWICKE, C.).—WEST *v.* SKIP (1750), 1 Ves. Sen. 456 ; 27 E. R. 1140, L. C.

Annotations :—**Consd.** Fox *v.* Hanbury (1776), 2 Cowp. 445. **Refd.** Smith *v.* De Silva (1776), 2 Cowp. 469 ; Taylor *v.* Fields (1799), 4 Ves. 396 ; *Ex p.* Ruffin (1801), 6 Ves. 119 ; Aspinall *v.* L. & N. W. Ry. (1853), 11 Hare, 325 ; Ekins *v.* Brown (1854), 1 Ecc. & Ad. 400. **Mentd.** Imray *v.* Magnay (1843), 11 M. & W. 267; Bartlett *v.* Bartlett (1857), 1 De G. & J. 127 ; *Re* Rawbone's Trust (1857), 3 K. & J. 476.

1003. —— ——.]—A part owner of a ship is not entitled to his share of the ship's earnings until he has paid his proportion of the outfit & expenditure for the voyage ; & a part delivery of his share does not defeat the lien which the other part owners have upon the remainder.

PART V. SECT. 8, SUB-SECT. 1.—A.

m. *Experience as logger contributed by one partner—Advance of money by another.*]—STANFORD *v.* CLAYTON (B. C.) (1922), 70 D. L. R. 864.—CAN.

Sect. 8.—*Shares in partnership: Sub-sect.* 1, *A., B. & C.* (*a*).]

If one partner becomes bkpt., his assignees cannot claim his share of profits, unless they pay the sums due upon the outfit & other charges (LORD TENTERDEN, C.J.).—HOLDERNESS *v.* SHACKELS (1828), 8 B. & C. 612; Dan. & Ll. 203; 3 Man. & Ry. K. B. 25; 7 L. J. O. S. K. B. 80; 108 E. R. 1170.

Annotation:—**Apld.** Green *v.* Briggs (1848), 6 Hare, 395.

1004. —— ——.]—LOVELL & CHRISTMAS *v.* BEAUCHAMP, No. 218, *ante.*

1005. —— **Over claim of assignees of bankrupt partner.**]—HOLDERNESS *v.* SHACKELS, No. 1003, *ante.*

1006. —— **Over claim of judgment creditor of partner.**]—GARBETT *v.* VEALE, No. 998, *ante.*

1007. Partnership debts payable primarily out of partnership assets—Notwithstanding existence of charge on real estate.]—Real Estate Charges Act, 1854 (c. 113), does not apply to the case of a charge created by one partner on his separate real estate to secure a debt of the partnership, when at the time of his death the partnership assets are sufficient to answer all the debts of the partnership.—*Re* RITSON, RITSON *v.* RITSON, [1899] 1 Ch. 128; 68 L. J. Ch. 77; 79 L. T. 455; 47 W. R. 213; 15 T. L. R. 76; 43 Sol. Jo. 95, C. A.

1008. Conversion of joint property into separate property—Transfer of property in bills—By firms with partners in common.]—BOLTON *v.* PULLER, No. 988, *ante.*

1009. Partnership capital used by continuing partner—Right of representatives of deceased partner.]—HILL *v.* BURNHAM (1805), cited in 15 Ves. at pp. 220 *et seq.*; 33 E. R. 738, L. C.

Annotation:—**Refd.** Crawshay *v.* Collins (1826), 2 Russ. 325.

1010. —— **Right of assignees of bankrupt partner.**]—A partnership being dissolved by the bkpcy. of one partner, the assignees are entitled, beyond an account & distribution of the stock, etc., to a participation of subsequent profits, made by the other partners, carrying on the trade with the capital, as constituted at the time of the bkpcy. *Qu.:* as far as the profits may have been produced by a joint application of that & other funds.

There may be a partnership where, whether the parties have agreed for the determination of it at a particular period, or not, engagements must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership; & the consequence is, that for the purpose of making good those engagements with third persons it must continue; & then, instead of being, as it was, a general partnership, it is a general partnership, determined, except as it still subsists for the purpose only of winding up the concerns (LORD ELDON, C.).

Another mode of determination [of partnership] is, not by effluxion of time, but by the death of one partner (LORD ELDON, C.).

I cannot go the length of holding that there may not have been profits in which these assignees are not entitled to participate. I will not say that they have a right to participate in all the profits that have been made. I shall therefore direct an inquiry to ascertain whether the profits that have been made were made by any & what application of the funds which the report states constituted the capital in Oct. 1803, or by the application of any other & what funds (LORD ELDON, C.).—CRAWSHAY *v.* COLLINS (1808), 15 Ves. 218; 33 E. R. 736, L. C.

Annotations:—**Consd.** Brown *v.* De Tastet (1821), Jac. 284; Cook *v.* Collingridge (1823), Jac. 607; Willett *v.* Blanford (1842), 1 Hare, 253; Blyth *v.* Blyth (1861), 4 L. T. 536. **Refd.** Featherstonhaugh *v.* Fenwick (1810), 17 Ves. 298; Heathcote *v.* Hulme (1819), 1 Jac. & W. 122; Lewis *v.* Langdon (1835), 7 Sim. 421; Wedderburn *v.* Wedderburn (1838), 4 My. & Cr. 41; Portlock *v.* Gardner (1842), 11 L. J. Ch. 313; Buckley *v.* Barber (1851), 20 L. J. Ex. 114; Simpson *v.* Chapman (1853), 4 De G. M. & G. 154; Darby *v.* Darby (1856), 3 Drew. 495; Wedderburn *v.* Wedderburn (1856), 25 L. J. Ch. 710; Vyse *v.* Foster (1874), L. R. 7 H. L. 318; Stevenson *v.* Akt. Für Cartonnagen-Industrie, [1918] A. C. 239. **Mentd.** Davies *v.* Hodgson (1858), 25 Beav. 177.

1011. Acquisition of right to work patent—Notwithstanding assignment to another.]—KENNY'S PATENT BUTTON-HOLEING CO., LTD. *v.* SOMERVELL & LUTWYCHE, No. 986, *ante.*

1012. Legacy of proceeds of sale of share of partnership land—Application of Charitable Uses Act, 1736 (c. 36).]—ASHWORTH *v.* MUNN, No. 999, *ante.*

B. Right of Survivorship.

1013. General rule—No right of survivorship.]—ANON. (1612), cited 2 Brownl. at p. [illegible]

Annotation:—**Refd.** Buckley *v.* Barber (1851), 6 Exch. 164.

1014. —— ——.]—ANON. (1595), Noy, 55; 74 E. R. 1024.

1015. —— ——.]—Not necessary in arts. of co-partnership to provide against survivorship. Where two are jointly interested by way of gift, survivorship takes place, otherwise in a joint undertaking in the way of trade.—JEFFEREYS *v.* SMALL (1683), 1 Vern. 217; 1 Eq. Cas. Abr. 290; 23 E. R. 424.

Annotations:—**Consd.** Jackson *v.* Jackson (1804), 9 Ves. 591; Dale *v.* Hamilton (1846), 5 Hare, 369; Buckley *v.* Barber (1851), 6 Exch. 164.

.]—ANON. (1709), 11 Mod. Rep. 223; 88 E. R. 1003.

1017. —— ——.]—Five persons purchased W. T. level from the comrs. of sewers, & the purchase was to them as joint tenants in fee; but they contributed ratably to the purchase, which was with an intent to drain the level: after which several of them died; they were held to be tenants in common in equity & though one of these five undertakers deserted the partnership for thirty years yet he was let in afterwards, & on what terms.—LAKE *v.* CRADDOCK (1733), 3 P. Wms. 158; 24 E. R. 1011, L. C.; *affg.* S. C. *sub nom.* LAKE *v.* GIBSON (1729), 1 Eq. Cas. Abr. 290.

Annotations:—**Consd.** Buckley *v.* Barber (1851), 6 Exch. 164. **Refd.** Jackson *v.* Jackson (1804), 9 Ves. 591; Aveling *v.* Knipe (1815), 19 Ves. 441; Dale *v.* Hamilton (1846), 5 Hare, 369; *Re* Rowe, Jacobs *v.* Hind (1889), 60 L. T. 596; Steeds *v.* Steeds (1889), 22 Q. B. D. 537.

1018. —— ——.]—ELLIOT *v.* BROWN (1791), 3 Swan. 489, n.; 1 Vern. 217, n.; 36 E. R. 948, L. C.

Annotations:—**Consd.** Dale *v.* Hamilton (1846), 5 Hare, 369. **Refd.** Jackson *v.* Jackson (1804), 9 Ves. 591.

PART V. SECT. 8, SUB-SECT. 1.—B.

n. *General rule.*]—The legal maxim "*Jus accrescendi inter mercatores locum non habet*" does not apply to prevent the right of survivorship in partnership assets but upon the dissolution of a partnership by death the whole of the joint assets pass to the surviving partners by right of survivorship.—REES *v.* DUNCAN (1900), 25 V. L. R. 520.—**AUS.**

o. ——.]—A., of whom pltf. was administratrix, & deft. having worked & stocked a farm in partnership:—*Held:* on the death of one, the survivor did not take the whole of the chattels, but that the maxim "*Jus accrescendi inter mercatores locum non habet,*" applied.—RATHWELL *v.* RATHWELL (1866), 26 U. C. R. 179.—**CAN.**

p. ——.]—REILLY *v.* WALSH (1848), 11 I. Eq. R. 22.—**IR.**

q. ——.]—The right of a surviving partner to the partnership assets is absolute.—BROWNING *v.* BROWNING (1887), 7 Nfld. L. R. 161.—**NFLD.**

r. *Agreement to be considered as a whole.*]—If the intention that a surviving partner should have a right to take over the interest of a deceased partner clearly appears from the terms of the partnership agreement, though it is not formally expressed

1019. —— ——.]—On the death of one partner in trade, a portion belongs to the surviving partner & a portion to the exors. of deceased.—EKINS *v.* BROWN (1854), 1 Ecc. & Ad. 400; 24 L. T. O. S. 63; 1 Jur. N. S. 21; 164 E. R. 231.

1020. —— —— **Powers of surviving partners.**]—BUCKLEY *v.* BARBER, No. 676, *ante*.

C. Conversion—Realty and Personalty.

(a) In General.

See, now, Partnership Act, 1890 (c. 39), s. 22.

1021. Whether realty converted into personalty—Property used for purposes of trade.]—THORNTON *v.* DIXON (1791), 3 Bro. C. C. 199; 29 E. R. 488, L. C.

Annotations:—**Folld.** Balmain *v.* Shore (1804), 9 Ves. 500. **Consd.** Randall *v.* Randall (1835), 7 Sim. 271. **Dbtd.** Darby *v.* Darby (1856), 3 Drew. 495; Holroyd *v.* Holroyd (1859), 28 L. J. Ch. 902. **Refd.** *Re* Hulton, Hulton *v.* Lister (1889), 61 L. T. 467.

1022. —— ——.]—Partnership property of different natures, partly real, partly personal.

The difficulty of disentangling & arranging it is no objection against the heir.

In cases where persons, engaged in partnership. have bought freehold houses, the difficulty of distinguishing & arranging property of different natures, partly personal, partly real, has never except by the effect of the contract or the will been held sufficient against the heir (LORD ELDON, C.).—STUART *v.* BUTE (MARQUIS) (1806), 11 Ves. 657; 32 E. R. 1243, L. C.; *on appeal* (1813), 1 Dow, 73, H. L.

Annotations:—**Consd.** Darby *v.* Darby (1856), 3 Drew. 495. **Mentd.** Wilce *v.* Wilce (1831), 7 Bing. 664; Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; Waite *v.* Morland (1865), 13 W. R. 963; *Re* Prater, Desinge *v.* Beare (1888), 37 Ch. D. 481; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365; *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390.

1023. —— ——.]—TOWNSHEND *v.* DEVAYNES (1808), 1 Montagu on Partnership, 2nd ed., note 2 A., p. 96, L. C.

Annotations:—**Folld.** Phillips *v.* Phillips (1832), 1 My. & K. 649. **Expld.** Randall *v.* Randall (1835), 7 Sim. 271. **Consd.** Darby *v.* Darby (1856), 3 Drew. 495.

1024. —— ——.] — CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY, No. 51, *ante*.

1025. —— ——.]—A. & B., tenants in common of an estate, agreed to carry on the farming business in co-partnership, & afterwards entered into co-partnership as maltsters & biscuit bakers. From time to time they made purchases of land with the partnership moneys. Some of the lands so purchased were not conveyed to them, but others were conveyed as to one moiety to A., who was a bachelor, in fee, &, as to the other moiety to B. who was married, & a trustee, to bar dower. The lands were used solely for farming & agricultural purposes, but all the receipts & payments in respect of them were entered in the partnership books & carried to the account of the partnership. The farming business was continued until A.'s death, but the malting & biscuit baking had ceased several years before:—*Held:* the lands were not converted into personalty.—RANDALL *v.* RANDALL (1835), 7 Sim. 271; 4 L. J. Ch. 187; 58 E. R. 841.

Annotation:—**Consd.** Darby *v.* Darby (1856), 3 Drew. 495.

1026. —— ——.] — Declaration, that real estate, held for partnership purposes, is in the nature of personal estate.—MORRIS *v.* KEARSLEY (1836), 2 Y. & C. Ex. 139; 160 E. R. 344.

Annotation:—**Mentd.** Poppleton *v.* Buchanan (1858), 4 C. B. N. S. 20.

1027. —— ——.]—Real property, held for the purposes of a trading co., is, in equity, to be deemed in the nature of personal estate, although the co. is a corpn., & the shares are assignable, & one shareholder is not answerable for the acts of another in relation to the partnership concern.—BLIGH *v.* BRENT (1837), 2 Y. & C. Ex. 268; 6 L. J. Ex. Eq. 58; 160 E. R. 397.

Annotations:—**Refd.** Baxter *v.* Brown (1845), 7 Man. & G. 198; Watson *v.* Spratley (1854), 10 Exch. 222; Hayter *v.* Tucker (1858), 4 K. & J. 243; Bulmer *v.* Norris (1860), 9 C. B. N. S. 19. **Mentd.** Bradley *v.* Holdsworth (1838), 3 M. & W. 422; Newry & Enniskillen Ry. *v.* Coombe (1849), 3 Exch. 565; Birkenhead, Lancashire & Cheshire Junction Ry. *v.* Pilcher (1851), 6 Ry. & Can. Cas. 622; L. & N. W. Ry. *v.* McMichael (1851), 6 Ry. & Can. Cas. 618; *Re* Langham's Will (1853), 1 Eq. Rep. 118; Thornton *v.* Kempson (1854), Kay. 592; Bennett *v.* Blain (1863), 15 C. B. N. S. 518; Adair *v.* New River Co. & Metropolitan Water Board (1908), 25 T. L. R. 193.

1028. —— ——.]—COOKSON *v.* COOKSON, No. 280, *ante*.

1029. —— ——.]—Two brothers, A. & B., entered into co-partnership without arts., & purchased land for the purposes of their trade with money borrowed from C., & had the land conveyed to themselves in moieties, to uses to bar dower. Shortly afterwards they mortgaged the land to C. in fee, to secure the money borrowed. A. died intestate, leaving B. his heir: B. then took D. into partnership. Each of the firms erected trade buildings on the land, & paid for them & for the insurance on them, and also paid the interest on the mtge. money out of their partnership funds. Ultimately, B. & D. paid off the mtge. out of their partnership property, & took a reconveyance of the land to themselves as joint tenants in fee. B. died, & his heir, who was also the heir of A., claimed the land; but the ct. held that it was converted into personalty, & dismissed the bill.—HOUGHTON *v.* HOUGHTON (1841), 11 Sim. 491; 10 L. J. Ch. 310; 5 Jur. 528; 59 E. R. 963.

Annotations:—**Consd.** Darby *v.* Darby (1856), 3 Drew. 495; Davies *v.* Games (1879), 12 Ch. D. 813. **Refd.** Holroyd *v.* Holroyd (1859), 28 L. J. Ch. 902.

1030. —— ——.]—A., B., C. & D. joined in a partnership to work a fulling mill. Money was subscribed by all the partners; with part of which, freehold land was bought, which was conveyed to A. & B. in fee; with other part a mill was built on the land, & machinery for the mill was purchased. By a partnership deed executed by A. & B., C. & D., the trusts of the land, mill, etc., were declared to be, among other things, that

that right exists.—WOOD *v.* GOULD (1915), 53 S. C. R. 51.—**CAN.**

PART V. SECT. 8, SUB-SECT. 1.—C. (a).

1021 i. *Whether realty converted into personalty—Property used for purposes of trade.*]—Two merchants entered into partnership, *inter alia*, in the buying & selling of lands; & accordingly bought lands with partnership moneys, some of which were conveyed to each partner, & some to both jointly:—*Held:* as between the real & personal representative of one partner who died, the lands so bought were personal estate.—WYLIE *v.* WYLIE (1853), 4 Gr. 278.—**CAN.**

1021 ii. —— ——.]—Persons engaged in the "oil business" purchased land, on parts of which they sank wells, & leased or sold other portions thereof to various persons desirous of extracting oil from them:—*Held:* such lands were part of the partnership assets & to be treated as personal property.—SANBORN *v.* SANBORN (1865), 11 Gr. 359.—**CAN.**

1021 iii. —— ——.]—When a partnership is entered into for the purpose of buying & selling lands, the lands acquired in the business of such partnership are, in equity, considered as personalty.—MANITOBA MORTGAGE Co. *v.* BANK OF MONTREAL (1889), 9 C. L. T., Occ. N. 125; 17 S. C. R. 692.—**CAN.**

1021 iv. —— ——.]—Realty purchased by partners with partnership funds must be regarded as personal estate in the absence of an agreement between them to the contrary.—*Re* CUSHING'S ESTATE (1895), 1 N. B. Eq. Rep. 102.—**CAN.**

1021 v. —— ——.]—*Re* KEATING & OLSEN (Y. T.) (1907), 7 W. L. R. 316.—**CAN.**

1021 vi. —— ——.]—MURTAGH *v.* COSTELLO (1881), 7 L. R. Ir. 428.—**IR.**

Sect. 8.—*Shares in partnership: Sub-sect.* 1, *C.* (*a*) *& (b); sub-sect.* 2.]

A. & B. should stand seised & possessed of all the estates, property, goods, etc., upon trust for the benefit of themselves & their partners as part of their partnership joint stock-in-trade, there was a provision in the deed that A. & B. might borrow money upon mtge. of the stock, property estates, etc., belonging to the co-partnership; & it was declared that the land, mill, etc., should be deemed & considered as or in nature of personal estate & not real estate, & be held in trust for the partners as part of their partnership stock-in-trade. A. & B. under the powers of the deed, borrowed money for the purposes of the partnership, for which they gave bonds & notes in their own names, but did not mortgage any part of the property:—*Held:* (1) each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership; (2) the money so borrowed had not the effect of mtges. on the shares of the partners.—BAXTER *v.* BROWN (1845), 7 Man. & G. 198; 135 E. R. 86; *sub nom.* BAXTER *v.* NEWMAN, Bar. & Arn. 493; Cox & Atk. 86; 1 Lut. Reg. Cas. 287; Pig. & R. 182; 8 Scott, N. R. 1019; 14 L. J. C. P. 193; 5 L. T. O. S. 129; 9 J. P. 744; 9 Jur. 829.

Annotations:—Generally, **Mentd.** Ashmore *v.* Lees (1845), 1 Lut. Reg. Cas. 337; Myers *v.* Perigal (1852), 2 De G. M. & G. 599; Watson *v.* Spratley (1854), 10 Exch. 222; Hayter *v.* Tucker (1858), 4 K. & J. 243; Bulmer *v.* Norris (1860), 9 C. B. N. S. 19; Bennett *v.* Blain (1863), 15 C. B. N. S. 518; Freeman *v.* Gainsford (1865), 18 C. B. N. S. 185; Robinson *v.* Ainge (1869), 1 Hop. & Colt. 193; Spencer *v.* Harrison (1879), 5 C. P. D. 97; Watson *v.* Black (1885), 16 Q. B. D. 270; Mercier *v.* Mercier (1903), 72 L. J. Ch. 511.

1031. —— ——.]—ESSEX *v.* ESSEX, No. 240, *ante.*

1032. —— ——.]—Testator, a stuff manufacturer, innkeeper, butcher, & farmer, devised his real estate, which he had employed in his several occupations, & his personal estate, to his wife for life, & then to his three sons as tenants in common. After his death the widow & sons carried on the several businesses in partnership down to the death of the widow, when the sons continued only the business of stuff manufacturers, & employed the moneys arising from the sale of one part, & the mtge. of another part of the real estate in that business. On the death of one son intestate:—*Held:* his one-third of the devised lands had been converted.—*Re* COOPER, COOPER *v.* COOPER (1878), 26 W. R. 785.

1033. —— —— **Land purchased with partnership assets.**]—BELL *v.* PHYN (1802), 7 Ves. 453; 32 E. R. 183.

Annotations:—**Consd.** Randall *v.* Randall (1835), 7 Sim. 271. **Apld.** Cookson *v.* Cookson (1837), 8 Sim. 529. **Consd.** Holroyd *v.* Holroyd (1859), 28 L. J. Ch. 902. **Refd.** Darby *v.* Darby (1856), 3 Drew. 495. **Mentd.** Dunbar *v.* Boldero (1825), 4 L. J. O. S. Ch. 76; Dillon *v.* Harris (1830), 4 Bli. N. S. 321; Norman's Trust (1853), 17 Jur. 154; Grey *v.* Pearson (1857), 6 H. L. Cas. 61; Maynard *v.* Wright (1858), 26 Beav. 285; Day *v.* Barnard (1860), 1 Drew. & Sm. 351; Seccombe *v.* Edwards (1860), 28 Beav. 440; Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514.

1034. —— —— ——.]—Real estate purchased with partnership capital for the purposes of the joint trade is personal estate, &, in respect of the share of deceased partner, retains that character as between his real & personal representatives.—PHILLIPS *v.* PHILLIPS (1832), 1 My. & K. 649; 1 L. J. Ch. 214; 39 E. R. 826.

Annotations:—**Apld.** Broom *v.* Broom (1834), 3 My. & K. 443. **Consd.** Randall *v.* Randall (1835), 7 Sim. 271; Houghton *v.* Houghton (1841), 11 Sim. 491. **Expld.** Custance *v.* Bradshaw (1845), 4 Hare, 315. **Consd.** Darby *v.* Darby (1856), 3 Drew. 495; Holroyd *v.* Holroyd (1859), 28 L. J. Ch. 902. **Refd.** Fitch *v.* Weber (1848), 6 Hare, 145; Taylor *v.* Taylor (1853), 3 De G. M. & G. 190. **Mentd.** Cogan *v.* Stephens (1835), 5 L. J. Ch 17; Williams *v.* Williams, Williams *v.* Kershaw (1835), 5 L. J. Ch. 84; Seaman *v.* Woods (1857), 24 Beav. 372.

1035. —— —— ——.]—The interest of deceased partner in real estate, purchased with partnership moneys & used for partnership purposes, though distributable as personal estate, is not liable to probate duty.—CUSTANCE *v.* BRADSHAW (1845), 4 Hare, 315; 14 L. J. Ch. 358; 9 Jur. 486; 67 E. R. 669.

Annotations:—**Consd.** A.-G. *v.* Brunning (1860), 8 H. L. Cas. 244; Forbes *v.* Steven, Mackenzie *v.* Forbes (1870), L. R. 10 Eq. 178. **Dbtd.** A.-G. *v.* Hubbuck (1884), 13 Q. B. D. 275. **Refd.** Myers *v.* Perigal (1852), 2 De G. M. & G. 599; *Re* De Lancey (1870), L. R. 5 Exch. 102; A.-G. *v.* Lomas (1873), L. R. 9 Exch. 29.

1036. —— —— ——.]—Two brothers entered into a joint speculation to purchase land, with a view to reselling it in small parcels at a profit. Two freehold estates, were bought & conveyed to the brothers as tenants in common. A copyhold estate was surrended to them as joint tenants, & two other estates remained still in contract when one brother died intestate. The purchase-money for these estates was paid by means of a joint credit with a banking co. Some of the land had been resold by the brothers:—*Held:* the share of deceased brother in these estates was, as between his real & personal representatives, to be regarded as personalty.—DARBY *v.* DARBY (1856), 3 Drew. 495; 25 L. J. Ch. 371; 27 L. T. O. S. 39; 2 Jur. N. S. 271; 4 W. R. 413; 61 E. R. 992.

Annotations:—**Consd.** Holroyd *v.* Holroyd (1859), 28 L. J. Ch. 902. **Distd.** Steward *v.* Blakeway (1869), 4 Ch. App. 603. **Consd.** Forbes *v.* Steven, Mackenzie *v.* Forbes (1870), L. R. 10 Eq. 178; A.-G. *v.* Hubbuck (1884), 13 Q. B. D. 275. **Apprvd.** *Re* Hulton, Hulton *v.* Lister (1890), 62 L. T. 200. **Consd.** Davis *v.* Davis, [1894] 1 Ch. 393. **Refd.** Christie *v.* I. R. Comrs. (1866), 4 H. & C. 664; Stevenson *v.* Akt. Für Cartonnagen-Industrie, [1918] A. C. 239. **Mentd.** A.-G. *v.* Allesbury (1885), 16 Q. B. D. 408.

1037. —— —— ——.]—Where land is purchased by partners out of the partnership assets, & used for the purposes of the business, it is to be considered as personalty, both as between the partners themselves & as between the heir personal representatives of deceased partner.—HOLROYD *v.* HOLROYD (1859), 28 L. J. Ch. 902; 7 W. R. 426.

1038. —— —— **Upon construction of partnership deed.**]—Upon the construction of a deed for the purpose of a partnership real estate held to be converted out & out, into personal.—RIPLEY *v.* WATERWORTH (1802), 7 Ves. 425; 32 E. R. 172, L. C.

Annotations:—**Consd.** Randall *v.* Randall (1835), 7 Sim. 271; Davies *v.* Games (1879), 12 Ch. D. 813. **Refd.** Darby *v.* Darby (1856), 3 Drew. 495; Davis *v.* Davis, [1894] 1 Ch. 393. **Mentd.** Zouch d. Forse *v.* Forse (1806), 3 Smith, K. B. 191; Franklin *v.* Bank of England (1826), 1 Russ. 575; Fitzroy *v.* Howard (1827), 3 Russ. 225; Wellman *v.* Bowring (1830), 3 Sim. 328; Palin *v.* Hille (1834), 1 My. & K. 470; Holloway *v.* Clarkson (1843), 2 Hare, 521; Hardey *v.* Hawkshaw (1850), 12 Beav. 552; Stead *v.* Platt (1853), 18 Beav. 50; Clarke *v.* Franklin (1858), 4 K. & J. 257; Head *v.* Godlee, Reynolds *v.* Godlee (1859), John. 536; Northen *v.* Carnegie (1859), 28 L. J. Ch. 930; *Re* Seymour's Trusts (1859), John. 472; Chatfield *v.* Berchtoldt (1872), 7 Ch. App. 192; Edwards *v.* West (1878), 47 L. J. Ch. 463; *Re* Isaacs, Isaacs *v.* Reginald, [1894] 3 Ch. 506; *Re* Grimthorpe, Beckett *v.* Grimthorpe, [1908] 1 Ch. 666; *Re* Hopkinson, Dyson *v.* Hopkinson, [1922] 1 Ch. 65.

1039. —— —— —— **Contrary intention expressed in deed.**]—Interests in a partnership trad under arts. to the widows of the partners for thei respective lives, & after the decease of the widow to & to be equally divided among their respectiv children: not vested in children, who died in th life of the mother; on account of the nature o the subject: the primary object being to const tute a partnership, & ascertain the successior & a provision for the family only a secondary obje

through that medium. Purchase by partners of real estate to them & their respective heirs, equally, as tenants in common, etc., to be used in trade during the partnership; with covenants against alienation & partition. The nature of the property is not varied.—BALMAIN *v.* SHORE (1804), 9 Ves. 500; 32 E. R. 696.

Annotations:—**Consd.** Randall *v.* Randall (1835), 7 Sim. 271; Holroyd *v.* Holroyd (1859), 28 L. J. Ch. 902. **Refd.** Darby *v.* Darby (1856), 3 Drew. 495.

1040. —— —— —— ——.]—The shares of partners in realty forming part of the partnership property must be regarded as personal estate in the absence of any binding agreement between the partners to the contrary; & probate duty is payable on deceased partner's share in such realty, irrespective of the question whether or not there is in the event any actual conversion into personalty.—A.-G. *v.* HUBBUCK (1884), 13 Q. B. D. 275; 53 L. J. Q. B. 146; 50 L. T. 374, C. A.

Annotations:—**Refd.** A.-G. *v.* Ailesbury (1887), 12 App. Cas. 672. **Mentd.** *Re* Glassington, Glassington *v.* Follett, [1906] 2 Ch. 305; *Re* Grimthorpe, Beckett *v.* Grimthorpe, [1908] 2 Ch. 675; Talbot *v.* Jevers, [1917] 2 Ch. 363.

1041. —— —— —— ——.]—S. having purchased an estate agreed to sell to W. one undivided moiety of the estate for one half the purchase-money. The purchase-money was to be paid within three months, & W. to be entitled to half profits & to bear half expenses from the date of S.'s purchase. On payment of the purchase-money S. was to convey the undivided moiety to W. If the purchase-money was not paid within the time agreed S. was to have a right to put an end to the contract. It was further agreed that W. should give all his services as a surveyor in the management and disposal of the estate, & use his best endeavours to make the most profit for the same; that S. should not be obliged to give any attention to the management or disposal of the estate; & that W. should not, except by will, dispose of any part of his undivided moiety of the estate without the consent of S. & no part of the entirety should be sold without the concurrence of both parties. W. had paid the purchase-money & died:—*Held:* though real estate acquired by persons in partnership was *primâ facie* converted, they might agree by their contract of partnership to hold it as real estate, & on the true construction of the agreement in this case S. & W. had intended to do so, & W.'s undivided moiety of the estate was not converted into personalty by the agreement.—*Re* WILSON, WILSON *v.* HOLLOWAY, [1893] 2 Ch. 340; 62 L. J. Ch. 781; 68 L. T. 785; 41 W. R. 684; 37 Sol. Jo. 386; 3 R. 525.

(*b*) *Reconversion.*

1042. How reconversion may be effected—By agreement for payment of rent.]—A. & B. purchased realty out of their partnership assets, which was used for their partnership purposes, & was, in equity, to be considered as personalty. A new partnership was formed between A., B., & C. The realty was continued to be used for the partnership purposes, but A. & B. stipulated for a rent to be paid them by the new partnership, composed of A., B. & C. A. died:—*Held:* the property was, in equity, to be considered as part of his real estate.—ROWLEY *v.* ADAMS (1844), 7 Beav. 548; 8 Jur. 994; 49 E. R. 1178.

1043. —— **By abandonment of partnership business.**]—In 1873 A. & B., being tenants in common in equal shares of certain freehold & leasehold properties, entered into co-partnership under the style of M. & Sons, as builders & contractors, for a period of ten years, those properties & certain plant being by the arts. of partnership made partnership assets. In 1877 the plant was sold & the proceeds divided, but the freehold & leasehold properties, with the exception of an office, were let to tenants, & no new contracts were entered into. The business connected with the receipts & payments in respect of the properties was transacted at the office, & a banking account kept in the name of the partnership firm of M. & Sons. In 1888 A. died intestate, & the question arose whether his share in the freehold property comprised in the partnership arts. was realty or personalty:—*Held:* the partnership terminated in 1877, & from that time the property was simply held by the former partners as tenants in common, the right of either party to call for a sale being taken away when they ceased to carry on the partnership business; therefore, the property must be considered as realty.—MYERS *v.* MYERS (1889), 61 L. T. 757; *revsd.* (1890), cited in 60 L. J. Ch. 311, C. A.; *subsequent proceedings* (1891), 60 L. J. Ch. 311.

SUB-SECT. 2.—AMOUNT OF SHARES.

1044. General rule—Presumption of equality.]—PEACOCK *v.* PEACOCK, No. 154, *ante.*

1045. —— ——.]—Where two persons are in partnership, the presumption is that they are interested in the partnership stock in equal moieties.—FARRAR *v.* BESWICK (1836), 1 Mood. & R. 527, N. P.

1046. —— ——.]—Until the contrary is shown the presumption in the case of partners is that each is interested in the partnership goods to the extent of one half (COLTMAN, J.).—MAYHEW *v.* HERRICK (1849), 7 C. B. 229; 18 L. J. C. P. 179; 13 Jur. 1078; 137 E. R. 92.

Annotations:—**Refd.** Fraser *v.* Kershaw (1856), 2 K. & J. 496. **Mentd.** Tancred *v.* Allgood (1859), 28 L. J. Ex. 362; Jacob *v.* Seward (1872), L. R. 5 H. L. 464.

1047. —— ——.]—*Semble:* the master of a vessel chartered has a right to settle a claim arising at a foreign port, for demurrage by detention beyond the period for which the rate of demurrage is stipulated, such a claim being in the nature of an unliquidated demand, which it is for the owner's benefit to have promptly settled abroad, without leaving it for dispute or litigation at home. But if the master become part owner of the ship after the charter & during the voyage, that will raise a presumption of law that he was interested in the charter & would confer an authority *primâ facie* to make a settlement of such a claim. As the presumption of law is that where parties are partners they are partners in equal moieties, & that where they are part owners they are owners with equal rights, the presumption where they are part owners of a ship is, that they are both interested in any charter upon it made before they became such owners of it. Therefore, where it appeared that B. had purchased the ship during the voyage, & that the master had also become a part owner, although there was no evidence, that

PART V. SECT. 8, SUB-SECT. 2.

1044 i. *General rule—Presumption of equality.*]—JADOBRAM DEY *v.* BULLORAM DEY (1899), I. L. R. 26 Calc. 281.—**IND.**

1044 ii. —— ——.]—The extent of the interest of a partner in a co. where this was not fixed by contract, was not to be regulated by the amount of his input stock, as compared with that of the other partners, but that he was to be held as having an equal share.—STRUTHERS *v.* BARR (1826), 2 Wils. & S. 153.—**SCOT.**

Sect. 8.—*Shares in partnership: Sub-sects.* 2 & 3, *A. & B.*]

either of them had purchased directly from the former owner with whom the charter was entered into, & who was the nominal pltf. :—*Held:* evidence of an authority in the master to settle for the demurrage claimed, & make an accord, *which was pleaded to* have been made with pltf., who sued for the benefit of the owners at the time the claim arose.—ALEXANDER *v.* DOWIE (1856), 1 H. & N. 152; 25 L. J. Ex. 281; 27 L. T. O. S. 159; 156 E. R. 1156.

...e Partnership Act, 1890 (c. 39), s. 24 (1).

1048. Application of presumption — Solicitors acting for same clients jointly interested in profits.]—ROBINSON *v.* ANDERSON, No. 1142, *post.*

1049. —— Value of goodwill on dissolution.]—Under Bank Charter Act, 1844 (c. 32), the right of a country bank to issue notes belongs beneficially, on the death of a partner, to the surviving partner.

The goodwill in a partnership business does not, on the death of one partner, survive beneficially to the others; when it has any value, a due proportion belongs to the estate of deceased partner, but the surviving partner has still the right to carry on the same business & at the same place.

After the decease of one of two partners in a sold the business for £10,

Held: the estate of deceased was entitled to a share of so much of the £10,000 as was attributable to the goodwill, & special inquiries were directed to ascertain the value, having regard to the fact that the partnership premises belonged to the survivor, that he had still the right to carry on the same business in the same locality, & that the sole right of issuing notes, under Bank Charter

EVERETT (1859), 27 Beav. 446; 29 L. J. Ch. 236; 34 L. T. O. S. 58; 5 Jur. N. S. 1332; 7 W. R. 605; 54 E. R. 175.

Annotations:—**Consd.** Mellersh *v.* Keen (No. 2) (1860), 28 Beav. 453; Robertson *v.* Quiddington (1860), 28 Beav. 529.

1050. —— Firm in partnership with individual.]—The adventure in question was for the supply of small arms to a foreign govt.; & the arrangement to tender for the supply was verbally come to without any distinct agreement respecting the division of the profits. In the contracts for supply subsequently entered into with the representative of the foreign government, A. signed separately, & B. & C. were made parties by the name of their firm, & signed in that character:—*Held:* the proper inference from the form & mode of execution of the contracts was that the adventure was undertaken by B. & C. as a firm, *i.e.* as one person, conjointly with A. as another person, & consequently the profits ought to be divided in moieties, one to A. & the other to B. & C., & they decreed accordingly.—WARNER *v.* SMITH (1863), 1 De G. J. & Sm. 337; 1 New Rep. 458; 32 L. J. Ch. 573; 8 L. T. 221; 11 W. R. 392; 46 E. R. 135, L. JJ.

1051. Rebuttal of presumption — Evidence to contrary.]—PEACOCK *v.* PEACOCK, No. 154, *ante.*

1052. —— ——.]—WARNER *v.* SMITH, No. 1050, *ante.*

1053. —— —— Books entries—Or course of dealing.]—An equal partnership implies not only an equal participation *de facto* in profit & loss, but a right in each partner to claim & insist on such participation. Thus, although in a case where parties had participated equally in profit & loss, the law would, in the absence of any contract, or any dealing from which a contract might be inferred, presume an equal partnership; yet this presumption would not arise if the books of the concern & the dealings of the parties showed that such could not have been the terms on which the business was carried on.—STEWART *v.* FORBES (1849), 1 Mac. & G. 137; 1 H. & Tw. 461; 19 L. J. Ch. 133; 13 Jur. 523; 41 E. R. 1215, L. C.

Annotations:—**Mentd.** Dudgeon *v.* Thomson (1854), 24 L. T. O. S. 39; Pisani *v.* A.-G. for Gibraltar (1874), L. R. 5 P. C. 516.

Proportions ... of partnership—Applicable to subsequent transactions.]—ROBLEY *v.* BROOKE (1833), 7 Bli. N. S 90; 5 E. R. 705, H. L.

1055. —— Burden of proof.]—ROBINSON *v* ANDERSON, No. 1142, *post.*

SUB-SECT. 3.—ASSIGNMENT OF SHARE.

A. Right of Pre-Emption.

1056. Notice of intention to assign—Form of —Effect of usage in particular firm.]—A deed of partnership, in the *Morning Herald* newspaper, contained a clause that no proprietor should dispose of his share without first offering the same for sale, by notice in writing under his hand, to the other proprietors at a certain monthly meeting. It had been usual to enter at such meeting a notice of this offer in a book open to the inspection of all the proprietors both present & absent, but not to serve any notice personally:—*Held:* whether regard were had to the words of the deed, or to the mode of acting, such entry was a sufficient notice.—GLASSINGTON *v.* THWAITES (1833), Coop. *temp.* Brough. 115; 47 E. R. 41, L. C.

1057. To whom right of pre-emption accrues-with right of pre-emption—Assignment of partnership share—Deed of assignment of shares silent as to right.]—A. purchases from B. a share in a concern, & gives for it a price which he understands to be four times the amount of the yearly profits, but which, in consequence of a mistake made by B. in the estimate of the profits, turns out to be more than that; the deed of assignment purports to be for an absolute sum; there is evidence that B. never intended to sell for less than that absolute sum, & no evidence to the contrary:—*Held:* a ct. of equity will not decree the sum, which A. alleges he has overpaid, to be refunded to him.

B. & C., being the sole proprietors of a newspaper, by indenture divide the concern into a certain number of shares, & confer certain rights of pre-emption, according to fixed rates of price & in a certain order, on each other mutually, & on all future holders of shares. Having all along continued to be, & still being, the sole proprietors, they afterwards assign certain shares, with their appurtenances, & all their right, title, & interest in these shares to A.; & various new conditions, with respect to A.'s interest, are introduced into the deeds of assignment, but nothing is said as to the right of pre-emption:—*Held:* A. is entitled to the rights of pre-emption annexed by the first-mentioned indenture to his shares.—STEWART *v.* STUART, STUART & STREET *v.* STEWART (1823), as reported in 1 L. J. O. S. Ch. 61.

1058. Enforcement of right—As against trustees of bankrupt partner.]—Arts. of provided, that on dissolution by death, notice, or misconduct, of a partner, the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years; & that on the bkpcy. or insolvency of a partner, the partnership should

be immediately void as to him; by a deed, four years subsequent, the partners declared, after a recital that such was their intention in the arts., that in the event of bkpcy. or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct: one of the partners having become bkpt. within a few months after the execution of the latter deed, his assignees are not bound by it. *Qu.:* whether a provision in arts. of partnership, that on the bkpcy. of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation, & payable by instalments in a course of years, is not void by the statutes concerning bkpts.—WILSON *v.* GREENWOOD (1818), 1 Swan. 471; 1 Wils. Ch. 223; 36 E. R. 469, L. C.

Annotations:—**Consd.** Hall *v.* Hall (1850), 3 Mac. & G. 79; Whitmore *v.* Mason (1861), 2 John. & H. 204; Collins *v.* Barker, [1893] 1 Ch. 578. **Refd.** Francis *v.* Spittle (1840), 9 L. J. Ch. 230; Tibbits *v.* Phillips (1853), 10 Hare, 355. **Mentd.** *Ex p.* Hope (1844), 3 Mont. D. & De G. 720; Knight *v.* Browne (1861), 30 L. J. Ch. 649; Mackintosh *v.* Pogose, [1895] 1 Ch. 505; *Re* Johnson Johnson, *Ex p.* Matthews & Wilkinson, [1904] 1 K. B. 134; *Re* Wombwell (1921), 37 T. L. R. 625.

1059. —— By party sought to be excluded—Declaration of right to pre-emption.]—STEWART *v.* STUART, STUART & STREET *v.* STEWART, No. 1057, *ante*.

1060. —— Specific performance—Jurisdiction of court to order.]—Partnership arts. provided that no partner should sell his shares except as follows:—That the partner desirous of selling should offer the shares to his co-partners collectively; if they should decline, then to the partners desirous of collectively purchasing; & if none such, then to the partners individually; after which he might sell to a stranger. One of four partners offered his shares to the other three collectively, one of whom to his knowledge would not purchase. The remaining two declared their willingness to accept, & were told that no offer was made to them:—*Held:* the offer to the three enured for the benefit of the two, & specific performance decreed accordingly.—HOMFRAY *v.* FOTHERGILL (1866), L. R. 1 Eq. 567; 14 L. T. 49.

1061. Loss of right—Impossibility of compliance with pre-emption conditions.]—CHAPPLE *v.* CADELL, No. 925, *ante*.

1062. —— Non-compliance for some time—Subsequent lunacy of offeree.]—Several persons, having obtained a mining lease for sixty years, entered into partnership in "the business of iron ore workers" for that period. The business consisted of winning & selling hematite iron in an unmanufactured state. One of them having become lunatic, the ct. dissolved the partnership & directed the whole concern to be sold by an indifferent person, with liberty to the parties to bid.

(2) By partnership arts. between A., B. & C., it was agreed that upon the sale by a partner of his share in a mining concern, his co-partners should have a right of pre-emption. A. gave to B. notice of his intention to sell, after which B. became a lunatic, & the option not having been exercised for some time, A. sold to C.:—*Held:* B.'s right of pre-emption was lost.—ROWLANDS *v.* EVANS, WILLIAMS *v.* ROWLANDS (1861), 30 Beav. 302; 31 L. J. Ch. 265; 5 L. T. 658; 8 Jur. N. S. 88; 10 W. R. 186; 54 E. R. 905.

Annotation:—*As to* (1) **Refd.** Pawsey *v.* Armstrong (1881), 50 L. J. Ch. 683.

1063. —— Failure to exercise option within time limited.]—Arts. of partnership provided that, on the death of either partner, the survivor should have the option of purchasing deceased partner's share, upon giving notice in writing of his intention so to do within three months from the death, & that in ascertaining the value of deceased partner's share after such notice nothing should be allowed for the goodwill of the business. The surviving partner was of unsound mind, but notice of his intention to purchase was given on his behalf by his solr. within three months from the death. An order was subsequently made under the Lunacy Acts authorising a notice being given on his behalf, & a second notice was given accordingly, but after the three months had expired:—*Held:* as the option to purchase had not been exercised within the time limited, there was no contract which could be confirmed by the second notice, &, consequently, the committee of the surviving partner was not entitled to the benefit of the provision in the arts.—DIBBINS *v.* DIBBINS, [1896] 2 Ch. 348; 65 L. J. Ch. 724; 75 L. T. 137; 44 W. R. 595; 40 Sol. Jo. 599.

Annotation:—**Refd.** Reynolds *v.* Atherton (1921), 125 L. T. 690.

B. Assignment to Partner.

1064. Right of partner to assign.]—*Re* LIGHTOLLER, *Ex p.* PEAKE, No. 943, *ante*.

1065. Form of assignment—Necessity for writing.]—GRAY *v.* SMITH, No. 237, *ante*.

1066. Effect of assignment—Dissolution—Sale by one of two partners.]—HEATH *v.* SANSOM, No. 648, *ante*.

1067. —— —— One of several partners assigning to another.]—*Qu.:* whether in a partnership at will in which there are more than two members an assignment by one of the partners of his share in the partnership to another partner effects a dissolution of partnership.—EMANUEL *v.* SYMON, [1907] 1 K. B. 235; 76 L. J. K. B. 147; 96 L. T. 231; 23 T. L. R. 94; *revsd.* on other grounds, [1908] 1 K. B. 302, C. A.

Annotations:—**Mentd.** Gavin Gibson *v.* Gibson, [1913] 3 K. B. 379; Phillips *v.* Batho, [1913] 3 K. B. 25; Harris *v.* Taylor (1914), 111 L. T. 564; Employers' Liability Assce. Corpn. *v.* Sedgwick, Collins, [1927] A. C. 95.

1068. —— —— —— Share assigned in breach of terms of agreement.]—STURGEON BROTHERS *v.* SALMON, No. 1071, *post*.

1069. —— Bequest of share—Whether legatee relieved from liability for partnership debts.]—F. & L. were partners entitled in equal shares. Part of the assets consisted of leasehold premises vested in them as joint tenants, in which the business was carried on. F. by his will bequeathed to L. "all my share of the leasehold premises in which my business is carried on." After F.'s death the assets of the partnership proved insufficient to pay the partnership debts, though L. & the estate of F. were amply solvent. L. bought the share of F. in the leasehold premises, without prejudice to his rights under the bequest; & a certificate having been made in a suit for the administration of F.'s estate, showing that it was solvent, L. presented a petition to have it declared that the effect of the bequest was to give him a moiety of the leasehold exonerated out of F.'s estate from the partnership debts, & for the return of the purchase-money which he had paid:—*Held:* the bequest only gave such interest in the leasehold as F. had, namely, a right to a moiety

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t. *Breach of agreement by purchaser of share.*]—TURNER *v.* DAVISON, [1921] 2 W. W. R. 337; 31 Man. L. R. 270.—**CAN.**

a. *Right of administrator of deceased partner to assign.*]—The administrator of a partner has a right to sell deceased's interest in the firm to the partner, provided he does so fairly.—*Re* HEAD ESTATE (Man.), [1925] 1 W. W. R. 730.—**CAN.**

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subject to payment of the partnership debts; & as the partnership debts exhausted the assets the bequest failed.—FARQUHAR *v.* HADDEN (1871), . J. Ch. 260; 25 L. T. 717; 20 W. R. 46, L. JJ.

Annotation:—**Distd.** *Re* Holland, Brettell *v.* Holland, [1907] 2 Ch. 88.

1070. Right of one of several partners to purchase another's share for own benefit—Clauses not worded so as to prevent sale.]—A prosperous co. came to consist of three partners, A., B., & C., having equal shares. The contract of co-partnership contained (*inter alia*) a clause that it should not be in the power of any of the partners to assign all or any part of their shares or interest in the capital, stock, or profits of the concern to any person or persons, or give them a right to inspect the co.'s books, or to interfere in any way with the business; & should any such assignation be granted the same was declared of no effect as far as regards the co. There was also a clause that on the retirement of a partner the remaining partners should have power to buy his interest at the amount standing to his credit at the last balance. A. entered into an agreement by which he sold to B. his whole interest. A.'s name remained on the books, & he signed all deeds relating to the business till his death seven years after. C. was not till then informed of the agreement. He then claimed to participate on the grounds of (*a*) an alleged mandate to B. to purchase for the co. A.'s interest; (*b*) that the agreement could only be legally made under the contract of co-partnership with his consent; & (*c*) that B. had secretly acquired a benefit for himself within the scope of the partnership business:—*Held:* in point of fact no agreement had been made between B. & C. to the effect that B. was to buy A.'s interest for the partnership. In respect to the arts. of co-partnership they did not prevent the agreement being made, & otherwise it was perfectly legal. Therefore C. was not entitled to any benefit under it.

Those cases proceed upon the ground that a partner being an agent, for I think it is because he is an agent that the fiduciary character arises, if he, as agent, makes a profit out of the concerns of his principal, & as acting for him, he must communicate it to his principal; he cannot make a profit out of his principal's business for himself (LORD BLACKBURN).—CASSELS *v.* STEWART (1881), 6 App. Cas. 64; 29 W. R. 636, H. L.

2 Ch. 40; [1906] A. C. 494. **Refd.** Stevenson ren-Industrie, [1918] A. C. 239; 919] A. C. 59.

1071. —— Stipulation as to notice not complied with.]—An agreement between three persons for a partnership at will contained a clause that "in the event of any partner . . . desiring to retire, he shall give one calendar month's notice to allow his shares to be purchased by the remaining partners. . . ." Deft., who was one of ... partners, without giving notice as provided by the above clause, sold his share to one of the the knowledge of the other, who A creditor, who for the firm after the sale, sued deft. as :—*Held:* as deft. had not complied with the above clause in the partnership agreement, he remained a partner, the mere assignment of his share to one of his co-partners not operating as a dissolution of the partnership.—STURGEON BROTHERS *v.* SALMON (1906), 22 T. L. R. 584, D. C.

Annotation:—**Consd.** Emanuel *v.* Symon, [1907] 1 K. B. 235.

Duty of full disclosure on sale of share.]—*See* Sect. 13, sub-sect. 4, B., *post.*

C. Assignment to Third Party.

(*a*) *In General.*

See Partnership Act, 1890 (c. 39), s. 31.

1072. Right of partner to assign—Whether assignee constituted a partner.]—BRAY *v.* FROMONT, No. 949, *ante*

1073. —— —— Assignment by way of security.]—BENTLEY *v.* BATES, No. 1326, *post.*

1074. Covenant of survivorship between partners—Effect on assignment.]—HAYES *v.* KINGDOME (1681), 1 Vern. 33; 23 E. R. 288.

1075. Assignment in fraud of creditors.]—If partners by deed assign all their partnership effects, etc., to trustees for the benefit of their creditors, & some of the separate creditors of one partner do not assent to it, the assignment is fraudulent & void.—ECKHARDT *v.* WILSON (1799), 8 Term Rep. 140; 101 E. R. 1311.

Annotations:—**Refd.** R. *v.* Watson (1816), 3 Price, 6; Siebert *v.* Spooner (1836), 2 Gale, 135.

1075a. Agreement in articles—Bequest of estate & effects.]—PONTON *v.* DUNN (1830), 1 Russ. & M. 402; 39 E. R. 155.

Annotation:—**Consd.** *Re* Flavell, Murray *v.* Flavell (1883), 25 Ch. D. 89.

1076. Bequest of share—Devise of freeholds forming part of assets—Liability of devisees for partnership debts.]—One of two partners in a solvent business died & by his will, after bequeathing his share in the partnership to his exors. upon certain trusts, made a specific devise of his share in certain freeholds which formed part of the partnership assets. The other partnership assets were more than sufficient to pay the partnership debts:—*Held:* as between the beneficiaries claiming under the will, the specific devise of the share in partnership freeholds was valid, & the devisees took it free from liability to contribute to the partnership debts.—*Re* HOLLAND, BRETTELL *v.* HOLLAND, [1907] 2 Ch. 88; 76 L. J. Ch. 449; 97 L. T. 49.

Assignability as chose in action.]—*See* CHOSES IN ACTION, Vol. VIII., p. 441, Nos. 178, 179.

(*b*) *Liability of Assignor.*

1077. Ceases on assignment—Assignment with notice to other partners—Assignee insolvent.]—JEFFERYS *v.* SMITH, No. 1082, *post.*

1078. Implied covenant not to derogate from deed—Failure to assign bill of exchange.]—The first count alleged that deft. & L. carried on business in co-partnership, & that, by indenture between deft. & L. of the first part, pltfs. of the second part, etc., it was witnessed that deft. & L., & each of them, granted, assigned, & transferred to pltfs. all the co-partnership stock, debts, sums of money, & all other the personal estate & effects & property of them deft. & L. as such co-partners. It then averred, that, at the time of the making of the indenture, deft. was indebted to the co-partnership in £240. being part of the debts, sums of money, & personal estate & effects & property of deft., & L., as such co-partners; & it assigned for a first breach, non-payment of the £240. There was a second breach, alleging that, at the time of the

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b. *Right of one partner to assign whole of partnership property.*]—GANDER *v.* MURRAY, ZOBEL *v.* MURRAY (1907), 5 C. L. R. 575.—**AUS.**

c. *Mode of assignment—Whether equitable assignment allowed.*]—COLLINS & FRASER *v.* COLLINS, [1911] S. R. Q. 241.—**AUS.**

making of the indenture, a bill of exchange for £120, payable to the order of deft., & then being in the possession of deft., was part of the personal estate & effects & property of deft. & L. as such co-partners, & that deft. made default in transferring the bill of exchange, & the right to the money therein specified, to pltfs., &, after the making of the indenture, incapacitated himself from so doing, & from conferring on pltfs. any right or title to receive the money specified in the bill, by then parting with the possession of the bill in such manner & on such terms as so to incapacitate himself, & thereby deft. prevented pltfs. from acquiring or having any right or title as aforesaid to the money, contrary to the indenture :—*Held :* (1) there was no implied covenant on the part of deft. to pay to pltfs. the sum due from him to the co-partnership, & therefore deft. was entitled to judgment on the first breach ; (2) there was an implied covenant on his part not to do anything in derogation of his deed, & therefore pltfs. were entitled to judgment as to the second breach.—AULTON *v.* ATKINS (1856), 18 C. B. 249 ; 25 L. J. C. P. 229 ; 27 L. T. O. S. 135 ; 4 W. R. 592 ; 139 E. R. 1364 ; *sub nom.* OULTON *v.* ATKINS, 2 Jur. N. S. 812.

Annotations :—**Refd.** Parnell *v.* Hingston (1856), 3 Sm. & G. 337. **Mentd.** *Re* Patrick, Bills *v.* Tatham, [1891] 1 Ch. 82.

1079. Debt due from one partner to firm—No covenant to pay assignee implied.]—AULTON *v.* ATKINS, No. 1078, *ante.*

(c) Rights and Liabilities of Assignee.

1080. Right to account—Assignee of share of profits—Arising from working patent.]—(1) When an assignment is made of a share of profits, arising, *e.g.*, from the working of a patent by licencees, the assignee is entitled to an account from the licencee, but the account must be taken once for all in the presence of all the parties interested. The licencee is not bound to account to the assignor & to each assignee of a share separately. & the assignee who asks for an account must place himself in the position of the assignor by offering to pay to the accounting party anything which may be due to him by the assignor.

(2) An account of profits will not be directed if it is clear that no profits have been made.—BERGMANN *v.* MACMILLAN (1881), 17 Ch. D. 423 ; 44 L. T. 794 ; 29 W. R. 890.

Annotation :—**Consd.** Public Trustee *v.* Elder, [1926] Ch. 776.

1081. —— Account of profits—Where clear that no profits made.]—BERGMANN *v.* MACMILLAN, No. 1080, *ante.*

1082. Liability—As between assignee & co-partners—Assignee not acknowledged or allowed to interfere in management.]—A., being, as a partner, entitled to a share of extensive ironworks, & of the lands & premises on which they were carried on, agreed for valuable consideration, to assign to B. his interest in the property & business : B. interfered & acted as a partner ; but afterwards he assigned his share, & gave notice to the other partners, that he had withdrawn from the business ; &, when called on to complete his purchase, resisted the performance of the contract successfully, on the ground that a good title could not be shown :—*Held :* (1) B., as between him & the other partners, was to be treated as a partner, & was to contribute to the partnership losses, until the time when he gave notice of his withdrawal from the concern & assigned his share ; (2) his liability ceased upon his assigning his share, & giving notice to the other partners of his withdrawal from the concern ; (3) the assignment of his share, though made to an insolvent person, was not for that reason the less effectual in putting an end to his liability ; (4) the assignee, not having been acknowledged a partner, or permitted to act as such, did not, by his acceptance of the assignment, incur any liability as between himself & the co-partners.—JEFFERYS *v.* SMITH (1827), 3 Russ. 158 ; 38 E. R. 535.

1083. —— —— Assignee acting as partner.]—JEFFERYS *v.* SMITH, No. 1082, *ante.*

—— Assignee takes subject to equities.]—*See* CHOSES IN ACTION, Vol. VIII., pp. 488–495, Nos. 565–612.

1084. —— For subsequent losses of partnership.]—G. L., a retiring partner of the firm of B. & co., applied to G. & co., bankers, for a loan of £20,000 on the security of his share in the partnership, & informed them by letter that the amount of his share might be taken at about £25,000 ; & that he was informed by W. B., his former partner, that part of the balance at credit with C. L. & co., of which G. L. was a member, on account of B. & co., would be appropriated towards payment thereof, & that he would authorise W. B. to pay the amount to G. & co., & he thereby bound himself to give G. & co. a full & perfect lien therein. Afterwards, W. B. wrote to G. & co., through G. L., stating that they had instructed C. & co. to transfer to them £5,000, the surplus partnership assets of B. & co., in their hands, & engaging to pay the remaining balance of G. L.'s capital. G. L. sent to G. & co. a promissory note payable to the order of C. L. & co., with the letter of W. B., as a collateral security, & the £20,000 was accordingly advanced. The firm of C. L. & co. became insolvent & the promissory note when due was presented & dishonoured. G. & co. filed a bill against the surviving members of the firm of B. & co., & the representatives of deceased partner, who claimed to be allowed to deduct the £5,000 in the hands of C. L. & co., referred to in the letter :—*Held :* pltfs. were equitable assignees of G. L.'s share, & were entitled to recover the whole amount without deducting the £5,000 alleged to be in the hands of C. L. & co.—GLYN *v.* HOOD (1859), 1 Giff. 328 ; 1 L. T. 1 ; 5 Jur. N. S. 1117 ; 8 W. R. 37 ; 65 E. R. 941 ; *affd.* (1860), 1 De G. F. & J. 334, L. JJ.

1085. —— To indemnify vendor against partnership losses—Implied contract.]—A contract to purchase a share in a partnership implies a contract by the purchaser to indemnify the vendor against the liabilities of the partnership although the contract is silent on the point & although the purchaser is, under Partnership Act, 1890 (c. 39), s. 31, not entitled to become a partner.—DODSON *v.* DOWNEY, [1901] 2 Ch. 620 ; 70 L. J. Ch. 854 ; 85 L. T. 273 ; 50 W. R. 57 ; 45 Sol. Jo. 739.

Annotation :—**Mentd.** Mills *v.* United Counties Bank, [1912] 1 Ch. 231.

1086. —— For management expenses—Payment of salaries.]—*Re* GARWOOD'S TRUSTS, GARWOOD *v.* PAYNTER, No. 698, *ante.*

Mortgage of share of partnership.]—*See* Part IV., Sect. 4, sub-sect. 4, *ante.*

D. Recovery of Payment.

1087. Sale of deceased partner's share—Right of proof for purchase-money—On bankruptcy of continuing partners.]—Upon the death of one of three

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partners, his exors. carried on the business with the two surviving ones for a twelve month longer, & then dissolved the partnership; upon which occasion the two continuing partners gave the exors. a bond to secure the balance due to them; & more than six years afterwards the two become bkpt.:—*Held:* the exors. had a right to prove the amount of the bond against the joint estate of the two continuing partners.—*Re* BOOTHBY, *Ex p.* HALL (1838), 3 Deac. 125, Ct. of R.

1088. —— —— ——.]—Arts. of partnership between three partners provided that on the death of the senior partner a specified amount of his share in the capital should be continued in & be considered part of the partnership effects, & that the surviving partners should pay that amount, with interest, by yearly instalments, with liberty for his exors. to inspect the accounts of the surviving partners' business, & that the said capital should be secured by the bond of the surviving partners. After the senior partner's death the surviving partners executed a bond to his exors., according to the arts., to secure the balance due to their testator, & by a contemporaneous deed the exors. assigned to the surviving partners all the testator's share of the business, & the surviving partners covenanted to pay all the joint debts. After payment of all the joint debts the surviving partners became bkpts.:—*Held:* the exors. were entitled to prove & receive dividends on the unpaid balance *pari passu* with bkpts.' other creditors.—*Re* BEATER, *Ex p.* EDMONDS (1862), 4 De G. F. & J. 488; 45 E. R. 1273; *sub nom. Re* BEATER, DENNANT & RUSS, *Ex p.* CREDITORS OF BANKRUPTS OTHER THAN BROOKING, ETC. (EXECUTORS OF COSTER), 31 L. J. Bcy. 15; 8 Jur. N. S. 629; *sub nom. Re* COSTER, BEATER & Co., *Ex p.* COSTER, 6 L. T. 199; 10 W. R. 372, L. JJ.

Annotations:—**Reld.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 161, n. **Mentd.** *Re* Lovell, *Ex p.* Lovell (1865), 13 L. T. 451; *Re* Johnson, Shearman *v.* Robinson (1880), 15 Ch. D. 548; Strickland *v.* Symons (1883), 22 Ch. D. 666.

1089. —— **Lien of trade creditors of continuing partners.**]—A trader, by his will, appointed his partner & other parties exors., & authorised his partner to purchase his share of the trade, premises & stock; & if he declined to do so, the trade was to be carried on for the benefit of the testator's wife & family. A valuation was made, & the surviving partner took possession of the whole partnership property under circumstances which induced the ct. to set aside the sale as invalid. The surviving partner, & subsequently his son & legatee, carried on the business for several years, & the son ultimately became bkpt. The partnership property was then sold, & the proceeds paid into ct.:—*Held:* the representatives of deceased partner were entitled to one moiety of the fund in ct., & also to a lien on the other moiety for sums which were found by the master to be due to them from the estate of W.; & their claim ought to be satisfied in preference to the debts of the creditors of the bkpt., the case not being affected by the question, whether any of the partnership stock was or was not in the order or disposition of the bkpt.—STOCKEN *v.* DAWSON (1848), 17 L. J. Ch. 282, L. C.

1090. —— **Payment by instalments with interest—Calculation of interest.**]—A deed of partnership provided that in the event of the death of any of the partners, & in the event of the surviving partners electing to continue the business, the amount at the credit of deceased partner as at the last balance "shall be paid out to his representative by instalments of equal amount at six, twelve, etc., up to sixty months' date," "from the date of the surviving partners declaring their election," "with interest thereon from the date of the balance." The chief partner, whose interest was about £394,340 in the concern, died. The surviving partners having elected to continue the business, sought to pay his representative by ten equal instalments, with interest on the amount of each instalment from substantially the date of the death to the date of payment. In a claim by deceased partner's representative that interest should be added to each instalment on the balance of the capital sum remaining unpaid at the date of the payment of each such instalment; thus reaping an advantage of about £2,365 from the earlier payment of the larger sums of interest:—*Held:* the interest to be paid with each instalment was interest calculated upon the balance of the capital sum unpaid at that date, & not interest upon the amount of each instalment.—EWING *v.* EWING (1882), 8 App. Cas. 822, H. L.

Annotation:—**Mentd.** Portsmouth Corpn. *v.* Smith (1885), 10 App. Cas. 364.

SUB-SECT. 4.—CHARGING ORDERS.

See Part IV., Sect. 6, sub-sect. 2, J. (*b*), *ante*.

SECT. 9.—RIGHT TO INDEMNITY.

SUB-SECT. 1.—IN GENERAL.

1091. Right of contribution.]—A., B. & C. being in partnership borrowed £10,000 from their bankers, to secure the repayment of which with interest, B. executed a mtge. of a freehold estate & C. a mtge. of a copyhold estate. B.'s estate was sold & paid off £8,690 of the mtge. debt. C.'s estate only paid the residue of the debt & interest amounting to £1,628:—*Held:* A.'s estate being wholly insolvent, the estate of B. was entitled to be recouped from the estate of C. the amount of the difference between £1,628 & the half of the mtge. money & interest.—*Re* BISHTON, *Ex p.* PLOWDEN (1837), 2 Deac. 456; 3 Mont. & A. 402, Ct. of R.

1092. ——.]—Pltf. & deft. were partners. They dissolved the partnership, pltf. agreeing to take all the debts of the firm upon himself, & to release deft. from liability, & deft. giving him a bond for a certain sum payable by instalments. Pltf. failed to pay a debt due from the firm whereupon creditors sued deft., & obtained judgment, & issued a *fi. fa.*, under which the sheriffs seized & sold deft.'s goods, & out of the proceeds paid the debt.—RODGERS *v.* MAW (1846), 15 M. & W. 444; 4 Dow. & L. 66; 16 L. J. Ex. 137; 7 L. T. O. S. 260; 153 E. R. 924.

Annotation:—**Mentd.** A.-G. *v.* De Keyser's Royal Hotel, [1920] A. C. 508.

Right to satisfied security.]—*See* GUARANTEE, Vol. XXVI., pp. 116, 117, Nos. 824, 825.

SUB-SECT. 2.—TO WHAT PAYMENTS AND LIABILITIES RIGHT EXTENDS.

A. Expenditure for Partnership Purposes.

See Partnership Act, 1890 (c. 39), s. 24 (2).

1093. Entertainment expenses—No express agreement.]—THORNTON *v.* PROCTOR, No. 941, *ante*.

1094. Expenditure incurred with consent of other partners.]—Directors & shareholders in an incorporated co. made *bonâ fide* advances of money for purpose of carrying on a mine established abroad, & without which advances the property would have been wholly ruined. The money was applied to purposes for which these parties & the other shareholders were jointly personally liable. The co. was ordered to be wound up & master made a call on these directors & shareholders & the other shareholders as contributories & he allowed these parties their several advances as set-off against their calls as contributories :—*Held :* master was correct. A manager of a mine is authorised to incur debts for wages & goods necessary for carrying on the mine.—*Re* GERMAN MINING CO. (1853), 22 L. J. Ch. 926 ; 21 L. T. O. S. 221 ; 17 Jur. 745, L. JJ.

Annotation :—**Refd.** *Re* Wrexham, Mold & Connah's Quay Ry. (1899), 68 L. J. Ch. 270.

1095. Expenses of carrying on business.]—Pltf., as managing owner & ship's husband, expended a certain sum for the outfit of the vessel :—*Held :* he might sue each of the other part owners separately for his share of the expense.—HELME *v.* SMITH (1831), 7 Bing. 709 ; 5 Moo. & P. 744 ; 9 L. J. O. S. C. P. 206 ; 131 E. R. 274.

Annotations :—**Consd.** Sadler *v.* Nixon (1834), 5 B. & Ad. 936 ; Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156 ; Green *v.* Briggs (1848), 6 Hare, 395. **Distd.** Bolter *v.* Peplow (1850), 14 L. T. O. S. 550. **Consd.** Brodie *v.* Howard (1855), 17 C. B. 109.

—— **As representative of deceased.**]—*See* EXECUTORS, Vol. XXIV., p. 601, Nos. 6321, 6322.

1096. Expenses incurred in breach of partnership articles—Acquiescence by co-partners.]—CRAGG *v.* FORD, No. 327, *ante*.

1097. Unprofitable expenditure—Shares in company taken by partner—On faith of misrepresentation by secretary.]—A. & B. were partners, & A., on the faith of representations made to him by the secretary of a co., informed B. that the liabilities were limited, & thereupon B. consented to shares being taken in the co. A. executed the co.'s deed alone, in the name of the firm. Two calls were paid by the firm, & dividends were received by the firm, as part of the partnership assets. The firm then dissolved partnership, & all the assets & liabilities, the above shares being particularly specified, were transferred from A. to B. The co. failed, & was wound up under the Act. It then appeared that the liabilities of the co. were not limited, & B. alleged that A. alone was liable as a contributory :—*Held :* the misrepresentation as to the limited liabilities not being wilful, & the co. assenting, B. was primarily liable, & A. secondarily liable, as contributories.—*Re* PROTESTANT ASSURANCE ASSOCN., *Ex p.* LETTS & STEER (1857), 26 L. J. Ch. 455 ; 5 W. R. 399.

1098. —— Partner taking onerous lease as trustee for firm—Lease assigned to company with covenant to indemnify partnership.]—In 1879 two partners in a firm took an onerous lease on behalf of & as trustees for the partnership & entered into joint covenants with the lessors. On Nov. 15, 1886, all the original partners, including the two trustees, entered into an agreement to transfer the assets & liabilities to a limited co. The co. agreed to indemnify them against the partnership liabilities & to take all reasonable steps in their power to bring about a novation to the co. of all liabilities of the partnership & a release therefrom of the partnership & the several partners. On Nov. 27, 1886, one trustee died. On Nov. 4, 1887, the surviving trustee in pursuance of the agreement assigned the lease to the co. on the usual covenant for indemnity. About the same time he also conveyed other freehold & leasehold partnership property to the co. in pursuance of the agreement, without reserving any part to cover the indemnity. On Feb. 18, 1891, the surviving trustee died. In 1909, the co. having made default, the surviving trustee's exors. were compelled to pay £5,874 for arrears of rent, breach of covenants of the lease, & costs :—*Held :* neither the agreement, nor the assignment & conveyances in pursuance thereof, nor the change of the trust relationship thereby effected, amounted to any novation of the surviving trustee's original right to indemnity & contribution against the partners, & his exors. were therefore entitled to enforce this right against the partners or their estates.—MATTHEWS *v.* RUGGLES-BRISE, [1911] 1 Ch. 194 ; 80 L. J. Ch. 42 ; 103 L. T. 491.

1099. Expenditure on property belonging exclusively to one partner.]—BURDON *v.* BARKUS, No. 268, *ante*.

B. Joint Expenditure Where No Partnership Exists.

1100. Expenses of projected joint stock company —Failure of project.]—Where a number of persons, some acting on behalf of the others, endeavour to establish a joint-stock co., purchase property, provisionally register, but eventually fail in carrying it out, that is not a partnership, but an ordinary inchoate assocn. ; & a bill filed for general contribution against a party not sanctioning expenses, but furnishing by his acts a colour to a right to have an account, dismissed without costs ; but with respect to a party not so acting with costs.—HAMILTON *v.* SMITH (1859), 28 L. J. Ch. 404 ; 32 L. T. O. S. 330 ; 5 Jur. N. S. 32 ; 7 W. R. 173.

C. Losses due to Partner's Fraud or Negligence.

1101. General rule.]—A. & B. being joint prize agents, A. is imposed on by persons falsely pretending to be sailors, to whom he pays a sum of money, which he is subsequently compelled to pay again to the persons really entitled. B. is not bound to contribute to the sum so paid.

Deft. has been guilty of negligence, & as between him & pltf. the latter is not liable. It is of great consequence to the public that the rule should be strictly preserved. With regard to third persons, pltf. & deft. are both liable (LORD MANSFIELD, C.J.).—M'ILREATH *v.* MARGETSON (1785), 4 Doug. K. B. 278 ; 99 E. R. 880.

1102. ——.]—A., B., C., & D., in partnership as carriers, agreed with S. & co. of Frome, to carry goods from London to Frome, where they were to be deposited in a warehouse belonging to the partnership at Frome, where A. resided, without any charge for warehouse room, till it should be convenient to S. & co. to take the goods home. Goods of S. & co. carried by the partners from London to Frome under this agreement, were

PART V. SECT. 9, SUB-SECT. 2.—A.

1095 i. *Expenses of carrying on business.*]—HAGARTY *v.* GOETZ (Sask.), [1921] 3 W. W. R. 517.—**CAN.**

e. *Right to recover against one partner—Other partners insolvent.*]—LAMB *v.* NORTH (1912), 21 W. L. R. 422 ; 22 Man. L. R. 360 ; 1 W. W. R. 463.—**CAN.**

f. Right of executor of deceased partner—To be indemnified against payment—Of future rents.]—The representative of a deceased partner of a co. not entitled to demand from the remaining partners, who were in good credit, security to relieve him of the obligation for future rents under certain leases held for behoof of the co., but in which the individual partners, with their respective heirs & successors, had been taken bound to the landlord.—MURRAY *v.* HOGARTH & Co. (1835), 13 Sh. (Ct. of Sess.) 453 ; 10 Fac. Coll. 263.—**SCOT.**

Sect. 9.—Right to indemnity: Sub-sect. 2, C., D. & E.; sub-sects. 3 & 4.]

deposited in the warehouse at the latter place, & destroyed by fire:—*Held:* the partners were not liable to S. & co. for the value of the goods burnt; & A., having paid the amount of the loss to S. & co., had paid it in his own wrong, & was not entitled to contribution from his partners.—*Re* WEBB (1818), 8 Taunt. 443; 2 Moore, C. P. 500; 129 E. R. 455.

Annotations:—**Apld.** Chapman *v.* G. W. Ry. (1880), 5 Q. B. D. 278. **Mentd.** Manchester & Northern Counties Federation of Coal Traders' Assocns. *v.* L. & Y. Ry. (1897), 10 Ry. & Can. Tr. Cas. 127.

1103. ——.]—BURY *v.* ALLEN, No. 1775, *post.*

1104. ——.]—A joint fiat in bkpcy. was issued against two partners, pending a suit by one of them against the other & a third person who had previously retired from the business, to set aside the partnership agreement on the ground of fraud & misrepresentation on the part of both defts., & for repayment of the moneys which pltf. had brought into the concern under that agreement. The assignees obtained leave from the ct. of Review to prosecute the suit against the retired partner, & they proceeded by supplemental bill, in which the creditors' assignees were pltfs. & the official assignee & the retired partner were defts.:—*Held:* the creditors' assignees, who represented not only the original pltf. on whose behalf relief was sought, but also the bkpt. partner who was an original deft. against whom relief was sought, could not sustain the suit against the retired partner.—ROBERTSON *v.* SOUTHGATE (1848), 6 Hare, 536; 67 E. R. 1276.

1105. ——.]—The managing partner of a colliery worked beyond the boundaries of the colliery without proper inquiry as to such boundaries, &, after notice from the adjoining owner that he was committing a trespass, recklessly continued such workings without consulting his co-partners under the *bonâ fide* belief that the adjoining owner had no title to the disputed area. An action against him for trespass & damages by the adjoining owner was referred to arbn. The co-partners had no knowledge of the action until after the reference had been agreed to. They attended the reference, however, & did not object to it. The arbitrator found that a trespass had been committed, & assessed the damages at £6,000. The co-partners refusing to contribute, the managing partner brought an action against them claiming a declaration that the £6,000 damages was a partnership debt, & that defts. were bound to contribute ratably to it:—*Held:* (1) the co-partners had acquiesced in the arbn. & were bound by the award, which was equivalent to a verdict by a jury & the judgment of the ct. thereon; but (2) inasmuch as the managing partner had acted with culpable negligence in continuing to work in the disputed area after notice from the adjoining proprietor, & without consulting his co-partners, he alone was liable for the damages.—THOMAS *v.* ATHERTON (1878), 10 Ch. D. 185; 48 L. J. Ch. 370; 40 L. T. 77, C. A.

D. Loans from Partner to Partner.

1106. No right to indemnity.]—Mtgees. of goods, etc., permitting bkpts. to continue in possession, order & disposition, have no specific lien against general assignees under the commission.

The partnership stock is no further subject to debts from one partner to another, than as the money has been applied to the partnership trade (LEE, C.J.).—RYALL *v.* ROWLES (1749), 9 Bli. N. S. 377; 1 Ves. Sen. 348; 1 Atk. 165; 1 Wils. 260; 27 E. R. 1074.

Annotations:—**Refd.** West *v.* Skip (1749), 1 Ves. Sen. 239; Doddington *v.* Hallet (1750), 1 Ves. Sen. 497; Hartley *v.* Smith (1819), Buck. 368; *Re* Bainbridge, *Ex p.* Fletcher (1878), 8 Ch. D. 218. **Mentd.** Row *v.* Dawson (1749), 1 Ves. Sen. 331; Ward *v.* Turner (1752), 2 Ves. Sen. 431; *Ex p.* Dumas (1754), 2 Ves. Sen. 582; *Ex p.* Shank (1754), 1 Atk. 234; Worseley *v.* Demattos & Slader (1758), 1 Burr. 467; Wilson *v.* Day (1759), 2 Burr. 827; Mason *v.* Vere (1779), 2 Wm. Bl. 1309; Falkener *v.* Case (1781), 1 Bro. C. C. 125; Atkinson *v.* Maling (1788), 2 Term Rep. 462; Plumb *v.* Fluitt (1791), 2 Anst. 432; Gordon *v.* East India Co. (1797), 7 Term Rep. 228; Lingham *v.* Biggs (1797), 1 Bos. & P. 82; Evans *v.* Bicknell (1801), 6 Ves. 174; Jones *v.* Gibbons (1804), 9 Ves. 407; Horn *v.* Baker (1808), 9 East, 215; Taylor *v.* Plumer (1815), 3 M. & S. 562; *Re* Frazer, *Ex p.* Monro (1819), Buck. 300; Storer *v.* Hunter (1824), 3 B. & C. 368; Dearle *v.* Hall, Loveridge *v.* Cooper (1828), 3 Russ. 1; Hubbard *v.* Bagshaw (1831), 4 Sim. 326; *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67; Buck *v.* Lee (1834), 1 Ad. & El. 804; *Re* Ogden, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765; Gardner *v.* Lachlan (1838), 4 My. & Cr. 129; Reeves *v.* Capper (1838), 1 Arn. 427; *Re* Gye & Hughes, *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443; Belcher *v.* Capper (1842), 4 Man. & G. 502; Etty *v.* Bridges (1843), 2 Y. & C. Ch. Cas. 486; Belcher *v.* Bellamy (1848), 2 Exch. 303; Beckham *v.* Drake (1849), 2 H. L. Cas. 579; Bartlett *v.* Bartlett (1857), 1 De G. & J. 127; North *v.* Gurney (1861), 1 John. & H. 509; Grainge *v.* Warren, *Re* Grainge (1865), 6 New Rep. 219; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334; *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426; *Re* Patrick, Bills *v.* Tatham (1890), 63 L. T. 752; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; Thomas *v.* Searles, [1891] 2 Q. B. 408; English & Scottish Mercantile Investment Trust *v.* Brunton, [1892] 2 Q. B. 1; *Re* Wyatt, White *v.* Ellis, [1892] 1 Ch. 188; Ward *v.* Duncombe, [1893] A. C. 369; Sharman *v.* Mason, [1899] 2 Q. B. 679; Rose *v.* Buckett, [1901] 2 K. B. 449; Clegg *v.* Bromley (1911), 81 L. J. K. B. 334.

E. Debt paid by One Partner.

1107. Judgment debt.]—A. on behalf of himself & his partners, enters into contract with B. for the purchase of a certain commodity, but the name of A. only was made use of in the contract. This contract not being performed by A. an action was brought, & a verdict recovered against him. On a bill filed by A. against his partners, to contribute their shares of the damages & costs:—*Held:* they were liable so to do, having paid a proportion of the deposit, & being entitled to an equal share of the profit if any had been made.—BROWNE *v.* GIBBINS (1725), 5 Bro. Parl. Cas. 491; 2 E. R. 817, H. L.

1108. ——.]—EVANS *v.* YEATHERD (1824), 2 Bing. 133; 1 C. & P. 336; 9 Moore, C. P. 272; 2 L. J. O. S. C. P. 149; 130 E. R. 256.

Annotations:—**Mentd.** Blackett *v.* Weir (1826), 4 L. J. O. S. K. B. 205; Slegg *v.* Phillips (1836), 2 Har. & W. 51.

1109. ——.]—One of several partners in trade who pays money on account of his co-partners cannot maintain an action against them for contribution on the ground that he made such payment not voluntarily but by compulsion of law.—SADLER *v.* NIXON (1834), 5 B. & Ad. 936; *sub nom.*

PART V. SECT. 9, SUB-SECT. 2.—D.

g. *Right to indemnity.*]—SUBBARAYUDU *v.* ADINARAYUDU (1894), I. L. R. 18 Mad. 134.—**IND.**

h. ——.]—VALLAMKONDU SUBRIA *v.* MALUPEDDI VENKATARAMIAH (1908), I. L. R. 31 Mad. 343.—**IND.**

PART V. SECT. 9, SUB-SECT. 2.—E.

k. *General rule.*]—GRAY *v.* MCMILLAN (1863), 22 U. C. R. 456.—**CAN.**

l. ——.]—After dissolution the position of members of a partnership with reference to a firm debt is that of ordinary joint-debtors, & accordingly where one of two partners has paid a portion of such debt he may recover from the other half of the instalment so paid.—WREN *v.* NELSON, [1910] T. P. D. 562.—**S. AF.**

1107 i. *Judgment debt.*]—SADHU NARAYANA AIYANGAR *v.* RAMASWAMI AIYANGAR (1908), I. L. R. 32 Mad. 203.—**IND.**

SADLER *v.* HICKSON, 3 Nev. & M. K. B. 258; 3 L. J. K. B. 101; 110 E. R. 1038.

Annotations:—**Refd.** Bolter *v.* Poploe (1847), 14 L. T. O. S. 550; Bevan *v.* Whitmore (1863), 15 C. B. N. S. 433.

1110. Payment of bill of exchange.]—AFLALO *v.* FOURDRINIER (1829), 6 Bing. 306; L. & Welsb. 68; 3 Moo. & P. 743; Mood. & M. 334, n.; 8 L. J. O. S. C. P. 33; 130 E. R. 1298.

Annotations:—**Refd.** Bassett *v.* Dodgin (1833), 9 Bing. 653; Wallis *v.* Swinburne (1847), 1 Exch. 203. **Mentd.** *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468.

1111. ——.]—The right to enforce contribution between joint makers of a promissory note by an action at law is not affected by the fact that the makers were co-partners together with others, & that the note was given to secure money raised for the purposes of the partnership. Therefore, where A., B., & C., being shareholders with other adventurers in a Cornish mine, conducted on the cost book principle, for the purpose of raising money for carrying on the mine, joined in a joint & several promissory note for £500, & which being discounted the proceeds were applied to the working of the mine, A. having subsequently paid the amount to the holder of the note:—*Held:* an action for money paid was maintainable by him against the other makers of the note, this not being a partnership transaction.—SEDGWICK *v.* DANIELL (1857), 2 H. & N. 319; 27 L. J. Ex. 116; 157 E. R. 132.

1112. ——.]—EDWARDS *v.* WEAR (1849), 13 L. T. O. S. 120.

Contract of guarantee.]—*See* GUARANTEE, Vol. XXVI., p. 132, No. 959.

SUB-SECT. 3.—LIMITATION OF LIABILITY.

1113. By course of dealing.]—GEDDES *v.* WALLACE, No. 248, *ante.*

1114. Expressly.]—By the terms of the resolutions on the formation of a co., the object of which was to purchase land & found a colony, certain trustees had the control of an expedition to explore the district & it was resolved that the expense of the expedition should not exceed a certain sum, & that the subscribers were not to be liable beyond a fixed amount. On the arrival in the country of the persons proceeding on the expedition they were seized & thrown into prison, and owing to this the project failed, & the loss greatly exceeded the limit fixed by the resolutions:—*Held:* the trustees could not call on the subscribers for contribution beyond the fixed amount.—GILLAN *v.* MORRISON (1847), 1 De G. & Sm. 421; 9 L. T. O. S. 352; 11 Jur. 861; 63 E. R. 1131.

Annotation:—**Refd.** *Re* Norwich Yarn Co., *Ex p.* Bignold (1856), 22 Beav. 143.

1115. —— **Inconsistent stipulations.**] — One clause of a joint stock co.'s partnership deed declared that no member should in any case, as between himself & the partnership, be liable for any debts, calls, or demands upon the said co. after he should have ceased to be a member, "save only & except for & in respect of any sum or sums which he shall or may be liable to pay by reason of any forfeiture, penalty, or misconduct." A subsequent clause declared, that after transfer "the former or last proprietor thereof shall thenceforth be for ever acquitted & discharged of & from all covenants, agreements, regulations, obligations, & liabilities whatsoever" in respect of the shares transferred, "save only in respect of any penalty, forfeiture, or liability which shall have been previously incurred by him, her, or them in regard thereto":—*Held:* (1) the saving as to liability in the first clause meant, in respect of any personal liability of the member to the co.; (2) the saving in the latter clause must be construed to mean the same personal liability, for that to give it a larger construction would be to annul the discharge from liability previously given.—*Re* OUNDLE UNION BREWERY CO., CROXTON'S CASE (1852), 1 De G. M. & G. 600; 19 L. T. O. S. 209; 16 Jur. 507; 42 E. R. 685, L. C.

Annotations:—*Generally,* **Refd.** *Re* Pennant & Craigwen Consolidated Lead Mining Co., Fenn's Case (1854), 4 De G. M. & G. 285. **Mentd.** *Re* Monmouthshire & Glamorganshire Banking Co., Cape's Exors.' Case (1852), 2 De G. M. & G. 562.

1116. On demand for payment of debt—No demand made—Action by representatives of deceased partner.]—Under a written instrument of partnership entered into in Feb. 1920, between five co-partners for the development & ultimate resale of a freehold estate which they had purchased it was provided that, upon the death of any of the partners before the estate had been completely sold, the share or interest of the one so dying should be purchased by the others in equal shares at a price to be fixed by arbn. in case of difference, & the legal personal representatives of the deceased partner were to be "indemnified" by the surviving partners from all future claims, liabilities, & demands, in respect of the said estate. One of the partners died on Oct. 4, 1921, & the greater part of the freehold estate was still unsold. At the date of the partner's death the partnership account at a bank was largely overdrawn. The overdraft was secured by the guarantee of each partner. The exact amount of the overdraft was subsequently ascertained by the bank to be £17,126 16*s.* 2*d.*, & the manager informed the exor. of deceased partner of this, & of the liability of the partnership syndicate & testator's estate, but no demand for payment was ever made. In an action by pltf. as legal personal representative of deceased partner against his four co-partners as defts. claiming specific performance of the partnership agreement & requiring a proper discharge & release from all the liabilities of the partnership, particularly in respect of the overdraft at the bank:—*Held:* the ordinary covenant contained in the agreement to indemnify the estate of deceased partner did not entitle pltf. to insist upon the immediate payment of debts for which no demand had been made. The obligation to make good the indemnity by payment & the right to enforce the covenant arose when the demand for payment was made & not before, therefore, pltf. was not entitled to what would be in substance an order on defts. to repay all that was owing to the bank, & the action failed.—BRADFORD *v.* GAMMON, [1925] Ch. 132; 94 L. J. Ch. 193; 132 L. T. 342; 69 Sol. Jo. 160.

SUB-SECT. 4.—LOSS OF INDEMNITY.

Laches.]—*See* No. 1122, *post.*

1117. By agreement between partners—Whereby partnership effects to be divided into separate

1110 i. *Payment of bill of exchange.*] *v.* LOVE (1888), 16 O. R. 170.—**CAN.**

1110 ii. ——.]—STROYAN *v.* MILROY, [1909] 2 S. L. T. 543.—**SCO.**

m. *Right of subrogation.*]—Under the principles of the common law as it obtains in England & in Ontario a partner who pays a partnership debt cannot be subrogated to the rights of the creditor against his co-partner.—R. *v.* CONNOR (1906), 10 Exch. C. R. 183; 26 C. L. T. 527.—**CAN.**

n. *Payment by partner—Custodian of funds.*]—COUCHMAN *v.* CAMPBELL, [1925] 3 D. L. R. 749.—**CAN.**

PART V. SECT. 9, SUB-SECT. 4.

o. *By agreement between partners—Improper acting of partner not disclosed.*]

Sect. 9.—*Right to indemnity: Sub-sect.* 4. *Sect.* 10: *Sub-sects.* 1 & 2. *Sect.* 11: *Sub-sect.* 1, *A.*]

property of each.]—H. & D. consign indigo to Messrs. G. for sale, with a letter of instructions, to which H. adds a postscript stating that T. is to share his moiety with him, & directing Messrs. G. to carry the balance, after certain payments thereout, to the separate accounts of the three, H., D., & T. Messrs. G. act on these instructions. T. deals with his share through their means, & H. then revokes his directions to carry to T.'s separate account in consequence of T.'s default in meeting a bill, of which he was joint acceptor with H. H. files a bill for a decree that he has a lien on T.'s share in the hands of Messrs. G., & for an account & lien on the balance. Bill dismissed with costs.—HOLROYD *v.* GRIFFITHS (1856), 3 Drew. 428; 4 W. R. 225; 61 E. R. 966.

·.]—*See, also,* No. 1118, *post.*

SECT. 10.—PARTNER'S LIEN.

SUB-SECT. 1.—NATURE OF RIGHT.

Lien, generally, *see* LIEN, Vol. XXXII., pp. 212 *et seq.*

See Partnership Act, 1898 (c. 39), s. 39.

1118. To what property right attaches—Property appropriated to one partner.]—(1) If, upon a dissolution of partnership, it is agreed that certain arts. of the partnership stock shall become the exclusive property of one of the partners, & that a certain fund shall be appropriated to the payment of the debts, & that fund afterwards proves insufficient for the purpose, the other partner has no lien on those arts. in respect of such deficiency.

(2) A ct. of equity will enforce an agreement made upon a dissolution of partnership, that a particular book, used in the trade should become the exclusive property of one of the partners, & that a copy of it should be delivered to the other.—LINGEN *v.* SIMPSON (1824), 1 Sim. & St. 600; 57 E. R. 236.

1119. —— Substituted assets—By continuing partner.]—A. & B. carried on partnership; A. died, & a considerable sum was due from the partnership to his estate. B. continued the trade, with the assent of the exors., but at the end of six months they insisted on payment, or to have the business wound up, whereupon B. assigned to them his share in all the partnership assets, upon trust to pay the joint creditors, & then the debt due to A.'s estate, & the residue to B.:—*Held:* the exors. had no lien on the stock-in-trade substituted by B., for that sold during the six months.—PAYNE *v.* HORNBY (1858), 25 Beav. 280; 27 L. J. Ch. 689; 31 L. T. O. S. 309; 4 Jur. N. S. 446; 53 E. R. 643.

1120. —— Surplus assets—Not specific property.]—*Re* BOURNE, BOURNE *v.* BOURNE, No. 680, *ante.*

Solicitor's lien.]—*See* SOLICITORS.

SUB-SECT. 2.—AGAINST WHOM AVAILABLE.

1121. Separate creditors of other partner.]—Rights of the separate creditor of one partner, against the partnership property.

The share taken in execution was liable, in the first place, to all such demands as the other partner had against H., on the partnership account, either in law or equity, antecedent to the execution; but not to such demands as he might have on a separate account, or to such as were subsequent to the execution; because as to the goods taken in execution, the partnership ended thereupon, & the creditor became a tenant in common with the other partner (LORD HARDWICKE, C.).—SKIPP *v.* HARWOOD (1747), 2 Swan. 586; 3 Atk. 564; 36 E. R. 739, L. C.

Annotations:—**Consd.** Aspinall *v.* L. & N. W. Ry. (1853), 11 Hare, 325. **Refd.** Fox *v.* Hanbury (1776), 2 Cowp. 445; Taylor *v.* Fields (1799), 4 Ves. 396; Johnson *v.* Evans (1844), 7 Man. & G. 240; Ekins *v.* Brown (1854), 1 Ecc. & Ad. 400. **Mentd.** Pengree *v.* Jonas (1787), 2 Bro. C. C. 141; Russel *v.* Buchanan (1838), 9 Sim. 167; Aitchison *v.* Lee (1856), 3 Drew. 637; *Re* Royal British Bank (1856), 2 Jur. N. S. 1111.

1122. ——.]—WEST *v.* SKIP (1749), 1 Ves. Sen. 239; 27 E. R. 1006, L. C.; *subsequent proceedings* (1750), 1 Ves. Sen. 456, L. C.

Annotations:—**Consd.** Fox *v.* Hanbury (1776), 2 Cowp. 445; Taylor *v.* Fields (1799), 4 Ves. 396. **Refd.** Smith *v.* De Silva (1776), 2 Cowp. 469; *Ex p.* Ruffin (1801), 6 Ves. 119; Aspinall *v.* L. & N. W. Ry. (1853), 11 Hare, 325; Ekins *v.* Brown (1854), 1 Ecc. & Ad. 400. **Mentd.** Imray *v.* Magnay (1843), 11 M. & W. 267; Bartlett *v.* Bartlett (1857), 1 De G. & J. 127; *Re* Rawbone's Trust (1857), 3 K. & J. 476.

1123. Mortgagee—Of partnership assets.]—*Re* LANGMEAD'S TRUSTS, No. 678, *ante.*

1124. —— —— Remedy for interference with partnership assets.]—An inquiry must be directed as to what property is included in the mtges. . . . A retiring partner, or the exor. of a deceased partner, is entitled to be indemnified from partnership liabilities out of the partnership estate, & though he cannot compel payment out of the continuing partners' separate estates, he can prevent interference with the partnership assets until these liabilities have been paid off. That right exists unless forfeited or released, or merged or otherwise lost in any way a vendor's lien might be lost (KEKEWICH, J.).—ABERDARE & PLYMOUTH CO., LTD. *v.* HANKEY (1887), 3 T. L. R. 493.

1125. —— Of undivided moiety of freeholds—Notice of partnership to mortgagee necessary.]—CAVANDER *v.* BULTEEL, No. 670, *ante.*

SECT. 11.—DIVISION OF PROFITS AND INCIDENCE OF LOSSES.

SUB-SECT. 1.—PROFITS.

A. Meaning of.

1126. Definition.]—There is no single definition of the word "profits" which will fit all cases (FARWELL, J.).—BOND *v.* BARROW HÆMATITE

—Where one co-partner acts so improperly in the affairs of the co-partnership as to render it liable to an action for damages, the other members may maintain a suit for the amount thereof against him, even though on the dissolution of the partnership the continuing partner gave to the one so acting a bond of indemnity, & to save him harmless from actions, if it appear that the fact of such improper acting of his partner was withheld from him.—KINTREA *v.* CHARLES (1865), 12 Gr. 123.—**CAN.**

PART V. SECT. 10, SUB-SECT. 1.

p. *To what property right attaches—Partnership property—For money advanced.*]—Mining Act, 1904, s. 281 (4), does not extend the right of partners to contribution or indemnity beyond those already existing, but merely gives a lien of the description indicated in respect of money to which the partner having the claim may have been entitled apart from the statute.—CURATOR OF INTESTATE ESTATES *v.* GRAHAM (1913), 15 W. A. L. R. 93.—**AUS.**

q. —— *Profits & corresponding capital—Securing repayment of loan by retired partner.*]—A retiring partner obtained from one of the continuing partners a letter agreeing to reimburse the amount advanced by him out of the one-fourth of the profits from the business:—*Held:* the retiring partner had a lien on such fourth part of the profits, & a corresponding portion of the capital stock & assets of the partnership.—MCGREGOR *v.* ANDERSON (1857), 6 Gr. 354.—**CAN.**

r. —— *Share assigned to co-partner.*]—MATHERS *v.* SHORT (1868), 14 Gr. 254.—**CAN.**

t. *Power to sell under award of lien.*]—REDICK *v.* SKELTON (1889), 18 O. R. 100.—**CAN.**

PART V. SECT. 11, SUB-SECT. 1.—A.

a. *How estimated—Value after deduction of costs & expenses—Speculation in*

STEEL Co., [1902] 1 Ch. 353; 71 L. J. Ch. 246; 86 L. T. 10; 50 W. R. 295; 18 T. L. R. 249; 46 Sol. Jo. 280; 9 Mans. 69.

Annotations:—**Consd.** *Re* Spanish Prospecting Co., [1911] 1 Ch. 92. **Refd.** Ammonia Soda Co. *v.* Chamberlain, [1918] 1 Ch. 266; Evling *v.* Israel & Oppenheimer, [1918] 1 Ch. 101. **Mentd.** *Re* Accrington Corpn. Steam Tram. Co., [1909] 2 Ch. 40.

1127. ——.]—The word "profits" has in my opinion a well-defined legal meaning & this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. "Profits" implies a comparison between the state of a business at two specific dates. . . . The fundamental meaning is the amount of gain made by the business during the year (FLETCHER MOULTON, L.J.).—*Re* SPANISH PROSPECTING CO., LTD., [1911] 1 Ch. 92; 80 L. J. Ch. 210; 103 L. T. 609; 27 T. L. R. 76; 55 Sol. Jo. 63; 18 Mans. 191, C. A.

Annotations:—**Refd.** Garwood *v.* Garwood (1911), 104 L. T. 341; Pool *v.* Guardian Investment Trust Co., [1922] 1 K. B. 347; I. R. Comrs. *v.* Burrell, [1924] 2 K. B. 52.

1128. Profits accruing to one partner—From office—Not partnership property unless expressly included.]—CLARKE *v.* RICHARDS, No. 207, *ante*.

1129. —— Steward's fees.]—S. & U. were solrs. & partners; S. was steward of a manor & receiver of rents. In the arts. of partnership it was provided that steward's fees & receiver's salaries of either partner should be deemed part of the profits of the partnership, but that the receipts & payments in respect thereof should be made by the partner conducting such business:—*Held:* steward's fees & receiver's salary or commission are not profits on a trade or business in the ordinary sense of the term; & under the circumstances, balances due by S. as steward or receiver were not debts of the partnership.—ALSTON *v.* SIMS (1855), 3 Eq. Rep. 834; 24 L. J. Ch. 553; 25 L. T. O. S. 139; 1 Jur. N. S. 438; 3 W. R. 431.

Annotation:—**Consd.** Collins *v.* Jackson, Jackson *v.* Collins (1862), 31 Beav. 645.

1130. —— Receiver's salary.]—ALSTON *v.* SIMS, No. 1129, *ante*.

1131. —— Gratuity on sale of property—When arising from partnership transaction.]—A. & B. in partnership as valuers were employed by H. & co. to value a property. A. valued the property, & in conjunction with T. sold it to a co., whereupon H. & co. gave A. & T. £5,000. The accounts showed that the firm of A. & B. were employed in getting up the co.:—*Held:* the £2,500 paid to A. belonged to the firm.—HANCOCK *v.* HEATON (1874), 22 W. R. 784, L. JJ.

1132. —— Benefit derived from "office"—Pay of army officers.]—A partnership deed made in 1909 between pltf. & deft., who were solrs., provided that "the salary or other benefit derived by either partner from any office which he may hold during the continuance of the partnership shall be treated as forming part of the profits," & that after five years pltf. should not be obliged to attend to the business any further than he thought proper. In 1914, pltf. joined the army with the rank of major, & in 1918 he was demobilised. The partnership was dissolved in 1921:—*Held:* the word "office" in the deed included the position of an officer in the army, & on taking the accounts the pay received by pltf. as an officer was to be treated as profits of the partnership.—CARLYON-BRITTON *v.* LUMB (1922), 38 T. L. R. 298.

—— —— Partnership between solicitors.]—*See* SOLICITORS.

1133. Increase in value of book debts—Over-estimate in partnership deed.]—A father trading alone took his sons into partnership, & undertook to bring into the business "all his capital then or usually employed therein, without any allowance of interest." In estimating the father's capital, the book debts due to him were, according to the custom of the trade, valued at 20 per cent. below their nominal amount; but they actually realised more. The father withdrew large sums from the capital, to pay trade debts incurred before the substituted capital of his own. In the absence of express contract:—*Held:* (1) the sum realised for book debts, beyond the estimated amount, was capital, & not partnership profits; but the fact that the father had taken the sons into partnership by way of advancement, was at once conclusive on this point; (2) no interest was payable to the sons on account of capital withdrawn by the father to pay trade debts due at the date of the partnership; (3) no interest was payable to the sons on account of additional capital brought in by them.

The withdrawal by a partner of capital, in order to pay his private debts, is so far for the benefit of the other partners, as preventing the mischief that would arise from an execution against the partnership property, that, in the absence of fraud, no interest is payable to the other partners on account of the capital so withdrawn.

Semble: interest may, under some circumstances, be payable between partners on account of capital brought in or withdrawn, independently of express contract.—COOKE *v.* BENBOW (1865), 3 De G. J. & Sm. 1; 6 New Rep. 135; 46 E. R. 538, L. JJ.

1134. Increase in value of fixed plant or real estate.]—ROBINSON *v.* ASHTON, ASHTON *v.* ROBINSON, No. 987, *ante*.

1135. How estimated—Value of partnership property less original capital with interest.]—(1) Where two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one appointed by each partner, & the partnership was carried on for some time under the agreement:—*Held:* though the valuation could not be so made, because no umpire was provided, the ct. would carry the partnership agreement into effect by ascertaining the value of the share.

(2) Where the fixing a value by arbitrators is not of the essence of an agreement, the ct. will carry the agreement into effect, & will itself, if necessary, ascertain the value.

(3) Where profits are left by a partner in a business he will not, in the absence of a special agreement, be allowed interest on them.

(4) In ascertaining the profits of a business, the value of the partnership property is to be found, & the original capital with interest thereon, if necessary, is to be deducted; the residue will represent the profits.—DINHAM *v.* BRADFORD (1869), 5 Ch. App. 519, L. C.

Annotation:—*As to* (1) **Apprvd. & Apld.** Hordern *v.* Hordern, [1910] A. C. 465.

.]—PROUDFOOT *v.* BUSH (1859), 7 Gr. 518.—**CAN.**

b. —— *Deduction of excess of profits duty.*]—In calculating the share of goodwill of a partner who has died "profits" means profits available for division after deduction of excess profits duty.—BISHOP *v.* NICOL'S TRUSTEES, [1921] S. C. 229; 58 Sc. L. R. 109.—**SCOT.**

c. *Profits left in business—Profits or capital.*]—PILSWORTH *v.* MOSSE (1862), 14 I. Ch. R. 163.—**IR.**

Sect. 11.—*Division of profits and incidence of losses: Sub-sect.* 1, *A. & B.* (*a*) *&* (*b*).]

1136. —— Balance of receipts over expenditure in each year.]—In ascertaining the "profits" of a partnership, in the absence of special agreement to the contrary, the net profits of each year must be ascertained upon the footing of the moneys actually received & paid in that year without reference to when the work is done in respect of which the moneys are received.—BADHAM *v.* WILLIAMS (1902), 86 L. T. 191.

Profits of company.]—*See* COMPANIES, Vol. IX., pp. 600, 601, Nos. 4006, 4017.

B. How Divided.

(*a*) *In General.*

See Partnership Act, 1890 (c. 39), s. 24 (1).

1137. Presumption of equal division.]—PEACOCK *v.* PEACOCK, No. 154, *ante.*

1138. ——.]—[As to] the question what proportion the partners in a concern were severally entitled to, I should be disposed to advise the jury, leaving the matter to them, that an equal division would be a convenient doctrine of fact, & form the ground for a convenient inference to be drawn in the absence of other evidence; but that would only be supposing that there was no other evidence in the cause (LORD BROUGHAM, C.).—THOMPSON *v.* WILLIAMSON (1831), 7 Bli. N. S. 432; 5 E. R. 833, H. L.

1139. ——.]—FARRAR *v.* BESWICK, No. 1045, *ante.*

1140. ——.]—M'GREGOR *v.* BAINBRIGGE (1848), 7 Hare, 164, n.; 68 E. R. 67.

Annotation:—**Refd.** Robinson *v.* Anderson (1855), 20 Beav. 98.

1141. ——.]—STEWART *v.* FORBES, No. 1053, *ante.*

1142. ——.]—Where two solrs., who are not then in partnership, are employed in the same matter for a client, as in the defence of an action, the *primâ facie* inference of law is, that they are partners as to that particular matter, & entitled to an equal share of the joint profits, irrespective of the quantity of work performed by each.—ROBINSON *v.* ANDERSON (1855), 20 Beav. 98; 52 E. R. 539; *affd.*, 7 De G. M. & G. 239, L. JJ.

1143. ——.]—In the absence of any evidence, the presumption is, that partners are equally entitled to the profits & equally liable to bear the losses of the business.—COLLINS *v.* JACKSON, JACKSON *v.* COLLINS (1862), 31 Beav. 645; 54 E. R. 1289.

1144. Rebuttal of presumption — Entries in account books.]—STEWART *v.* FORBES, No. 1053, *ante.*

Express agreement.]—*See* Sub-sect. 1, B. (*b*), *post.*

1145. —— Burden of proof—On party setting up rebuttal.]—ROBINSON *v.* ANDERSON, No. 1142, *ante.*

1146. Effect of extra work by one—Extra remuneration may be allowed.]—Two sets of parties having projected a railway, on a similar line, agreed to consolidate the project, & appointed as solrs. of the proposed co. pltf. & deft., whom they had respectively consulted prior to the consolidation. The two solrs. accepted the appointment without making any definite arrangement as to the division of the business, or of the emoluments of the office, & a much larger portion of the work was done by deft. than by pltf. In a conversation between them about six months after the appointment, & before the principal part of the business was transacted, pltf. stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses & personal trouble in such limited partnerships between solrs. was made by each party retaining besides his expenses & disbursements, from 10 to 25 per cent. on the amount of the net charges for the business done, & which principle he considered satisfactory; & deft., in reply, observed that there could be no misunderstanding about it between honourable men. Upon a bill by pltf. claiming an account & division of the profits of the business done by the co. upon the footing of an equal co-partnership, & offering to allow 25 per cent. upon the work done separately to the partner who did it, the ct. in the circumstances, made a decree accordingly.—WEBSTER *v.* BRAY (1849), 7 Hare, 159; 68 E. R. 65.

Annotation:—**Apld.** Robinson *v.* Anderson (1855), 20 Beav. 98.

1147. ——.]—ROBINSON *v.* ANDERSON, No. 1142, *ante.*

(*b*) *Shares Fixed by Agreement.*

1148. When varied—More work performed by one partner.]—Two captains of ships of war enter into an agreement, that all prizes taken by either of them, whether in the ships they then had, or in any other ships which they might thereafter command, should be equally divided between them. One of them changed his ship, which, meeting with an accident, was ordered to be laid up, & it was some time before he got another; the other captain continued cruising all the time, but objected to account for the prizes which he took during the interval of his partner being unemployed:—*Held:* he was accountable for all the prizes taken from the date of the agreement.—OGLE *v.* SANSOM (1715), 1 Bro. Parl. Cas. 149; 1 E. R. 477, H. L.

1149. —— Bankrupt partner—Debt due to partnership.]—A. being entitled, under a parol partnership agreement with B. & C., to three-eighths of the capital & profits of the business, became bkpt., being at the time indebted to the partnership in respect of bills in which the partnership name had been used for his personal accommodation: the assignees claimed a share of profits made subsequently to the bkpcy., while the continuing partners insisted, that bkpt.'s interest in the profits ceased at that time; in consequence of this difference, no settlement of accounts between his estate & the partnership took place, & the assignees filed their bill; but B. & C., & afterwards C. alone, pending the litigation with the assignees, carried on the business for many years with the stock & capital which existed at the time of the bkpcy., & stock & capital substituted in the usual course of trade for such former stock & capital, aided by the expenditure of considerable sums by C.:—*Held:* the assignees of A. were

PART V. SECT. 11, SUB-SECT. 1.—B. (a).

1137 i. *Presumption of equal division.*]—In the absence of anything in a partnership contract to the contrary, the presumption of law is that the partnership shares are equal.—WELLS *v.* PETTY (1897), 5 B. C. R. 353; 1 M. M. Cas. 147.—**CAN.**

1137 ii. ——.]—Where there is no express contract between partners, it is not, according to the law of Scotland, a necessary presumption of law that the profits are to be divided in equal shares.—THOMPSON *v.* WILLIAMSON (1831), 7 Bli. N. S. 432; 5 E. R. 833.—**SCOT.**

PART V. SECT. 11, SUB-SECT. 1.—B. (b).

d. *Advance of half capital for quarter profits—Capital not called for—Division of profits unaffected.*]—GALBRAITH *v.* MCDOUGALL (1913), 24 O. W. R. 234; 4 O. W. N. 919; 11 D. L. R. 133.—**CAN.**

entitled to three-eighths of the profits which had been made or should be made until the concern was finally wound up, & to three-eighths of the money to be produced by the sale of what remained in specie of the capital & stock; A.'s proportion of the profits was not to be lessened, nor the proportion of C. to be increased, in respect of the debt which A. owed to the partnership, or of the money which C. brought into the business, beyond his share of the original capital.—CRAWSHAY *v.* COLLINS (1826), 2 Russ. 325; 38 E. R. 358, L. C.

Annotations:—**Consd.** Richardson *v.* Bank of England (1838), 4 My. & Cr. 165; Wedderburn *v.* Wedderburn (1856), 22 Beav. 84. **Refd.** Portlock *v.* Gardner (1842), 1 Hare, 594; Buckley *v.* Barber (1851), 6 Exch. 164; McDonald *v.* Richardson, Richardson *v.* Marten (1864), 10 L. T. 166; Vyse *v.* Foster (1872), 21 W. R. 207; *Re* Aldridge, Aldridge *v.* Aldridge, [1894] 2 Ch. 97.

1150. —— —— Extra capital brought in by co-partner.]—CRAWSHAY *v.* COLLINS, No. 1149, *ante.*

1151. —— Release by one partner.]—At a meeting held in 1852, between pltf. & deft., two solrs., it was agreed that the professional business connected with the formation of a new line of railway should be apportioned between them; that they should co-operate as solrs. in getting up the co., & obtaining the Act of Parliament at their own risk; that each should provide the cash for his own disbursements, such disbursements to be repaid in the first instance, & then that any profits should be equally divided between them. The co. was formed & the Act obtained; & at a meeting of the co. in Mar. 1855, a proposal in writing was made by pltf. & deft., & confirmed by the co., that pltf. & deft. should be allowed £1,500, in paid-up shares, in addition to their disbursements, such £1,500 to be received in full for all professional business up to the then present time, but to be subject to revision in case the line should be completed. In 1856 part of the line was commenced, but the works were stopped for the want of funds. These funds were afterwards supplied by deft., & others, pltf. not being able to contribute. In 1858 a small part of the line was completed, & pltf., early in 1859, pressed the co. for payment on account of his costs. In May, 1859, the co. paid pltf. £450 in cash & £740 in paid-up shares, & took from him a general release of all claims. From that time pltf. ceased to act as solr. to the co. Deft. said that some time in 1858 he told pltf. when he was pressing the co., that he (deft.) should henceforth decline undertaking any fresh business of the co. in co-operation with him; & alleged that since the date of the release he had had nothing whatever to do with pltf. He admitted pltf.'s right to have the profits attending the obtaining of the Act of Parliament; but insisted that the memorandum of Mar. 1855, & the payments & release of May, 1859, settled all questions between pltf. & himself. He denied that any partnership was ever constituted between pltf. & himself:—*Held:* the release did not put an end to the agreement between the parties, & pltf. was entitled to a decree for an account down to Apr. 1859.—HANSLIP *v.* KITTON (1862), 7 L. T. 291; 8 Jur. N. S. 1113, L. C.

1152. —— Variation of agreement as to number of partners.]—(1) Pltf. B., who was an architect, agreed with defts., A. & K., who were wharf-building speculators & wharfingers, to render his financial & other assistance & supervision in the construction & completion of warehouses on two wharves, of which it was proposed to procure a lease; &, in consideration of such his assistance & supervision, to receive one equal fifth part or share of the profits of the speculation & undertaking. A lease of the X. property was procured, but the negotiations for the Y. property fell through at the time. Pltf., it was originally intended, should be one of five, the other four to consist of two defts. & two capitalist gentlemen, whom it was intended to secure. Eventually defts., in lieu of procuring two capitalists to be admitted into the partnership, borrowed the sum of £18,000 on mtge. of the premises by way of raising capital for the concern. No new agreement was entered into regarding the shares of the three parties to the original agreement:—*Held:* pltf. B. was only entitled to one-fifth share as fixed in the agreement, but such share should not be liable to the mtge. debt of £18,000.

(2) The Y. property became the subject of new negotiations on behalf of the partnership, but these latter negotiations also fell through. Some years after the date of the original agreement relating to the Y. property, deft. A. succeeded in obtaining a lease of the Y. property & claimed to retain it for his own benefit. Deft. A. had not previously declared in express terms that he considered the original agreement at an end:—*Held:* the Y. property still remained subject to the partnership agreement, & pltf. B. was entitled to one-fifth share in that property also.—BELL *v.* BARNETT (1872), 21 W. R. 119.

1153. —— Variation of agreement as to partnership property—Property subsequently acquired.]—BELL *v.* BARNETT, No. 1152, *ante.*

1154. Construction of articles—Guarantee of fixed sum.]—By arts. of partnership between pltf. & two defts. it was agreed that pltf. should reside & manage the business abroad, & that he might draw for his private use to the extent of £500, until the yearly balance sheet was made, & the amount of profit ascertained. After payment of specified expenses, the partners were declared entitled to the gains & profits of the business in the following proportions: deft. K. to four-tenths, deft. H. to two-tenths, & pltf. to four-tenths. In case the gains should be found insufficient to pay the expenses, the deficiency was to be borne in the same proportions; &, in consideration of pltf. devoting his whole time to the business, defts. agreed to guarantee to pltf. "that the four-tenths share in the profits to be received by him during the first two years should not be less than £500 *per annum;* & further, that if the net profits should at any time, upon the division thereof, exceed £1,500 a year, pltf. should receive an additional bonus of £10 *per cent.* upon the gross earnings":—*Held:* the true construction was, that if there should be a profit, & four-tenths of that profit should be less than £500, pltf. was to take £500 but if there should be no profit, then the guarantee was not to emerge.—CROKER *v.* KREEFT, KREEFT *v.* CROKER (1865), 13 L. T. 136, L. C.

1155. —— Provision of annuity for retiring partner—Whether creating a trust.]—Arts. of partnership between two solrs. provided that the partnership should be for the term of ten years from May 1, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner, his exors. or administrators, or the exors. or administrators of deceased partner, should be entitled to receive out of the net profits of the partnership business, during so much, if any, of the term of five years from May 1, 1880, as should remain after the determination of the partnership, the yearly sum of £350, & during so much, if any, of the term of five years from May 1, 1885, as either the retiring partner, or a widow of the retiring or deceased

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partner, should be living, the yearly sum of £250, any sum which might under this provision for the time being become payable to the exors. or administrators of deceased partner, to be applied in such manner as such partner should by deed or will direct for the benefit of his widow & children, & in default of such direction to be paid to such widow, if living, for her own benefit. It was further provided that the annuity should, so far as legally might be, be constituted a charge on the net profits of the business. One of the partners died in 1883, leaving a widow, but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee & sole extrix. He died insolvent, & an action was brought by the creditor to administer his estate:—*Held:* the annuity did not form part of testator's estate, but by the arts. a trust of it was created in favour of the widow, & she was entitled to it free from the claims of testator's creditors.

The fund came to the hands of the exors. impressed with a trust; & not merely subject to a direction given by F. [testator] which he could have altered by a contract for value (COTTON, L.J.).—*Re* FLAVELL, MURRAY *v.* FLAVELL (1883), 25 Ch. D. 89; 53 L. J. Ch. 185; 49 L. T. 690; 32 W. R. 102, L. JJ.

Annotations:—**Refd.** Ehrmann *v.* Ehrmann (1894), 72 L. T. 17. **Refd.** *Re* Davies, Davies *v.* Davies, [1892] 3 Ch. 63.

(*c*) *Profits Made after Dissolution.*

See Part VI., Sect. 5, sub-sect. 2, *post.*

C. Right of Personal Representative of Deceased Partner.

See Partnership Act, 1890 (c. 39), ss. 29 (2), 42.

1156. Profits treated as capital—Expended on improvements.]—Exors. under a power contained in the will continued to carry on the partnership colliery business of their testator for the benefit of his estate. Under the will the widow took a life interest in the profits. A small amount of the profit only was distributed during the lifetime of the widow, in accordance with formal resolutions passed by the partners. Large accumulations were used for business purposes & the undivided balances were carried to a profit & loss account, no resolution being passed to capitalise such accumulations. On the death of the widow her representatives claimed testator's share in those profits as against his estate, & the Vice-Chancellor decided that they were entitled. The other exors. of testator appealed:—*Held:* the question depended upon the terms of the partnership, which was not an ordinary partnership, as the majority of the partners could decide what was to be done. They had treated these profits for many years as capital, & had decided not to divide them, & neither testator nor his exors. could at any time have received them, especially after they had been spent upon the works of the colliery. The order of the Vice-Chancellor must be discharged so far as it affected so much of the profits as had been employed as capital in improving & extending the colliery business; & a declaration made that the tenant for life was not entitled to these profits.—STRAKER *v.* WILSON (1871), 6 Ch. App. 503; 40 L. J. Ch. 630; 24 L. T. 763; 19 W. R. 761, L. C.

Annotation:—**Refd.** *Re* Bouch, Sproule *v.* Bouch (1885), 29 Ch. D. 635.

—— ——.]—J., one of three partners in a colliery, charged his one-third share & the future gains & profits in the partnership with the payment of £10,000 & interest to trustees of a deed for the benefit of his wife & family, & also covenanted to pay to the trustees all the residue remaining of his share in the gains & profits of the business during the preceding year after certain payments thereout, such residue & the interest on the £10,000 to be divided as to two-thirds for his wife & one-third for himself. The partnership was dissolved by the death of J.:—*Held:* (1) as between the trustees & J.'s estate the trustees under the covenant were not entitled to have paid to them out of his share of the partnership assets surplus income which, although appearing in the partnership accounts as excess of receipts over expenditure during a particular year, was, by the settled practice of the partners, treated otherwise than as distributable profits & devoted to colliery equipment & replacing assets that had been worn out; (2) the share of any surplus which became divisible when the partnership was wound up did not come within the covenant.—GARWOOD *v.* GARWOOD (1911), 105 L. T. 231, C. A.

1158. Whether profits capital or income.]—IBBOTSON *v.* ELAM, No. 1201, *post.*

1159. ——.]—Profits in a partnership business partly earned in testator's lifetime, but not ascertained until after his death, are not apportionable, but are income of testator's estate.—LAMBERT *v.* LAMBERT (1874), 29 L. T. 878; 22 W. R. 359.

1160. Accounts made up half-yearly.]—Partnership arts. provided that meetings of the partners should be held, & the profits should be divided annually. The partners when reduced to two, testator being one of them, met & resolved that the accounts should be made up half-yearly, in Mar. & Sept. The meetings of the partners were held very irregularly, but when they took place it was the practice of the partners to examine the accounts, & to pass a resolution disposing of the profits, & until the passing of such resolution the profits were not carried to the separate credits. Testator, who died in Aug. 1869, by will declared that from the day of his decease the annual income arising from his residuary personal estate should belong, in effect, to A. for life, & that for that purpose the clear profits arising from his partnership should be considered as annual income, & be paid to A. for life. In Dec. 1869, at a meeting of the surviving partner & an exor. of testator, they resolved that the profits for the year ending Mar. 1869, should be divided; & testator's share was carried to the credit of his account under date Sept. 30, 1869, & it was, in Dec. 1869, paid to his exors. At a meeting of the same two persons in Mar. 1870, they ordered the profits for the half-year ending Sept. 1869, to be divided, & testator's share was paid to his exors. In taking the account in chambers a question arose whether these shares of testator should be distinguished as capital or as income, & A. presented a petition, under Ct. of Chancery Act, 1852 (c. 80), asking for the opinion of the ct.:—*Held:* the profits for the year ending Mar. 1869, were capital, & belonged to testator's estate; & the profits for the half-year ending Sept. 1869, were income, & belonged to A.—BROWNE *v.* COLLINS (1871), L. R. 12 Eq. 586.

Annotations:—**Mentd.** *Re* Bouch, Sproule *v.* Bouch (1885), 29 Ch. D. 635: Shaw *v.* Brown (1887), 44 L. T. 339.

1161. Payment of interest in lieu of profits—Right of representative to elect—Effect of delay in effecting sale of share.]—R. was the chief partner in a large & prosperous trade. By the arts. of partnership, which were to take effect from June 30, 1853, the cash accounts were to be balanced monthly, the stock & the value of each

partner's share were to be ascertained on June 30, in each year, & be written into as many books as there were partners, & each partner was to sign & to possess one book, & be bound thereby. If any partner should die, the partnership as to him was to cease, & his share was to be divided among his surviving partners in proportion to their existing shares, & the value of his share was to be ascertained as at the last stock taking, & it was to be paid for by promissory notes payable at six, twelve, eighteen, & twenty-four months' date; & the surviving partners were to execute a covenant of indemnity to the estate of deceased partner, whose exors. were to execute a transfer of his share. R. died shortly after the stock-taking of 1855, but before the results of it had been duly made up & entered in books. R. had, by his will, appointed his brother, then one of his partners, to be one of his exors.; another exor. was his eldest son, who was not then a partner, but afterwards became so. He directed a sale of his real property, its produce to form part of his personal estate, which he directed to be converted into money & divided equally among his children; as to the males, part at twenty-one, the remainder at twenty-five; as to the females, at twenty-five, with a provision for maintenance in the meantime. The arts. of partnership were acted upon as to the mode of taking the partnership accounts, & so were the directions in the will so far as to the payment of interest on capital, but no promissory notes were given by the partners, nor any covenant of indemnity executed. The shares of the children were duly allotted, & their intermediate allowances paid, but the real estate was not sold, nor the personal estate converted, the money to which testator had been entitled being really permitted to remain in the trade, accounts of profits being duly kept & appropriations to the various children regularly made. The youngest child, on arriving at twenty-five years of age, filed a bill against the exors. as for a breach of trust in not executing the directions in the will; & she prayed for accounts & a declaration of her liberty to elect between the receipt of profits & the receipt of interest on the money that ought to have been invested:—*Held:* (1) the bill was not sustainable; the will could not affect the arts. of partnership; (2) those arts. constituted a contract for the sale of testator's share to his partners, though the time for the sale was not fixed; (3) the giving of the promissory notes by the partners in the concern to the exors., some of the persons filling both characters, would have been a useless formality; (4) mere delay in the payment of the value of the share did not affect the validity of the contract; & no misconduct in fact being established, the bill must be dismissed.—VYSE *v.* FOSTER (1874), L. R. 7 H. L. 318; 44 L. J. Ch. 37; 31 L. T. 177; 23 W. R. 355, H. L.

Annotations:—*As to* (1) **Folld.** Hordern *v.* Hordern, [1910] A. C. 465. *As to* (2) **Folld.** Hordern *v.* Hordern, [1910] A. C. 465. *As to* (4) **Refd.** Hordern *v.* Hordern, [1910] A. C. 465. *Generally*, **Refd.** Hunter *v.* Dowling (1893), 62 L. J. Ch. 617; Stevenson *v.* Akt. Fur Carton Nagen Industrie, [1918] A. C. 239. **Mentd.** Steuart *v.* Gladstone (1879), 10 Ch. D. 626; Price *v.* Price (1880), 42 L. T. 626; Jesse *v.* Lloyd (1883), 48 L. T. 656; *Re* Wilcoxon, *Ex p.* Andrews (1884), 25 Ch. D. 505; *Re* Hotchkys, Freke *v.* Calmady (1886), 32 Ch. D. 408; *Re* Hulkes, Powell *v.* Hulkes (1886), 33 Ch. D. 552; Conway *v.* Fenton (1888), 40 Ch. D. 512; Hale *v.* Sheldrake (1889), 60 L. T. 292; *Re* De Teissier's S. E., *Re* De Teissier's Trusts, De Teissier *v.* De Teissier, [1893] 1 Ch. 153; Chillingworth *v.* Chambers, [1896] 1 Ch. 685; *Re* Hawkers S. E. (1897), 66 L. J. Ch. 341; *Re* Montagu, Derbishire *v.* Montagu, [1897] 1 Ch. 685: Rowley *v.* Ginnever (1897), 66 L. J. Ch. 669; *Re* Davis, Davis *v.* Davis, [1902] 2 Ch. 314; Smith *v.* Nelson (1905), 92 L. T. 313.

1162. Profits of subsisting contract—How ascertained.]—Five persons entered into a contract with a foreign govt. for the construction of certain works. Before the works had been begun one of the contractors died, having appointed his brother & his two sons exors. & trustees of his will. An agreement was subsequently drawn up between the four surviving contractors & the exors. & trustees of the will of deceased contractor, by which it was provided that the contract with the foreign govt. should be carried out on the joint account of the co-contractors, & in the best interests of all concerned in the contract, & that the exors. & trustees of the will of deceased contractor should be sleeping partners, the surviving contractors being the acting partners. This agreement was signed by the surviving contractors before the will of deceased contractor had been proved, the names of the exors. & trustees being left in blank in the agreement. Subsequently the brother of deceased contractor renounced probate & disclaimed, & his sons proved the will & signed the agreement. The surviving contractors alleged that they had entered into the agreement on the faith of having the brother of deceased contractor responsible under it & filed a bill to set aside the agreement, & praying for a declaration that the partnership in the contract was dissolved by the death of deceased contractor, so far as his estate was concerned, & that it might be wound up:—*Held:* (1) independently of the agreement, the legal personal representatives of deceased contractor were entitled to share in the profits, & were liable to contribute to the losses under the contract, & they were entitled to have such profits or losses ascertained by having the contract completed; (2) the agreement was intended to be between the surviving contractors & the persons who should prove the will of deceased contractors as was proved by the names of the latter being left in blank, & the agreement was binding on all parties.—MCCLEAN *v.* KENNARD (1874), 9 Ch. App. 336; 43 L. J. Ch. 323; 30 L. T. 186; 22 W. R. 382, L. JJ.

Profits made after dissolution.]—*See* Part VI., Sect. 6, sub-sect. 2, *post*.

D. Effect of Laches or Acquiescence.

1163. Effect of desertion.]—LAKE *v.* CRADDOCK, No. 1017, *ante*.

1164. —— Speculative undertaking—Claim not made until success assured.]—Motion for a receiver on a mining concern refused upon a claim of partnership in the equitable interest, not raised, until the concern at a great expense became prosperous, & denied by the answer.—NORWAY *v.* ROWE (1812), 19 Ves. 144; 34 E. R. 472, L. C.

Annotations:—**Apld.** Prendergast *v.* Turton (1844), 13 L. J. Ch. 268; Clements *v.* Hall (1857), 24 Beav. 333. (*See* (1858), 27 L. J. Ch. 349.) **Distd.** Clarke & Chapman *v.* Hart (1858), 6 H. L. Cas. 633. **Apld.** Whalley *v.* Whalley (1860), 2 De G. F. & J. 310. **Distd.** Hunter *v.* Stewart (1861), 4 De G. F. & J. 168. **Refd.** Tatam *v.* Williams (1844), 3 Hare, 347; Cowell *v.* Watts (1850), 2 H. & Tw. 224; Myers *v.* United Guarantee & Life Assce. (1855), 7 De G. M. & G. 112; Sheppard *v.*

PART V. SECT. 11, SUB-SECT. 1.—D.

1164 i. *Effect of desertion—Speculative undertaking—Claim not made until success assured.*]—DUNLOP *v.* NICOLL, 21 C. L. T. 84.—CAN.

e. —— *Whether amounting to abandonment of share.*]—However speculative the subject-matter of a partnership may be, it is a matter of inference, to be drawn from the facts of the case, whether there has or has not been an abandonment by a partner of his share; or loss thereof consequent upon his refusing or neglecting to take his part in the business, & allowing a length of time to elapse, in such circumstances.—*Re* MOUNG THA HUYIN MAH

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Oxenford (1855), 1 K. & J. 491; Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; Rule *v.* Jewell (1881), 18 Ch. D. 660; Palmer *v.* Moore, [1900] A. C. 293. **Mentd.** Hodgson *v.* Dean (1825), 2 Sim. & St. 221; Deere *v.* Guest (1836), 1 My. & Cr. 516; Boddington *v.* Woodley (1838), 8 Sim. 167; Bowser *v.* Colby (1841), 1 Hare, 109; Manser *v.* Jenner (1843), 2 Hare, 600; Haigh *v.* Jaggar (1845), 2 Coll. 231; Boyd *v.* Boyd (1848), 11 L. T. O. S. 325; Rock *v.* Mathews (1848), 2 De G. & Sm. 227; Prince Albert *v.* Strange (1849), 1 Mac. & G. 25; *Re* German Mining Co. (1854), 2 Eq. Rep. 983; Holmes *v.* Powell (1856), 8 De G. M. & G. 572; Talbot *v.* Hope Scott (1858), 4 K. & J. 96.

1165. —— —— —— Where sum set aside.]—The rule that a ct. of equity will not assist persons who stand aloof from a joint undertaking in a time of adversity, & then claim a share in it, when it has been rendered prosperous by the exertions of others, does not apply when the others have set apart a sum to answer the share of the person so standing aloof. *Semble:* it would ordinarily apply to a case in which the members of a co. appropriated shares whose owners stood aloof.—*Re* SHADWELL WATERWORKS CO., *Ex p.* DIBBENS (1869), 18 W. R. 160.

1166. —— —— —— Where acquiescence in dissolution.]—ROWDEN *v.* PARKER (1905), 50 Sol. Jo. 140.

1167. —— Other partner carrying on business at own risk.]—In May, 1843, A. & B. agreed by parol to become jointly interested in certain lands for the purpose of a building speculation. The lease of the lands was taken in B.'s name, & A. & B. continued in joint occupation of the lands till July, 1843, when B. assumed exclusive possession & ejected A. From July, 1843, B. at his sole labour & expense, carried on operations upon the land by preparing it for building purposes & erecting houses thereon, A. never asserting any title thereto until Jan. 1845, when he claimed an equal interest with B. Upon B. repudiating A.'s title, a bill was filed by A. for specific performance of the parol agreement:—*Held:* assuming A.'s title to have been good originally, he had debarred himself from asserting that title by making no claim for eighteen months after his exclusion, during all which time he had permitted B. to carry on the undertaking at his own cost & risk; & the bill was dismissed, with costs.—COWELL *v.* WATTS (1850), 2 H. & Tw. 224; 47 E. R. 1665; *sub nom.* COWELL *v.* WATTS, WATTS *v.* COWELL, 19 L. J. Ch. 455, L. C.

1168. Effect of acquiescence—Sale of partnership property—Right to share of increased profits.]—BAYNE *v.* FERGUSON & KYD (1817), 5 Dow, 151; 3 E. R. 1284, H. L.

1169. Claim by personal representative—Duty to contribute to expenses—Effect of concealment by surviving partner.]—The representative of deceased partner in a mining concern may forfeit his right to the subsequent profits if he do not with reasonable expedition contribute to its expenses, but this doctrine will not apply to a case where the survivor keeps the representative of deceased partner in ignorance of the real state of the case.

A. & B. were partners in a lead mine, & on A.'s death, B. continued to work it, & four years afterwards obtained a renewal of the lease from N. A.'s representative was not informed of this renewal, nor were any accounts rendered to him by B., though he applied for them:—*Held:* A.'s interest in the mine did not cease at his death, but survived to his representative; the terms on which he was to take such interest to be settled afterwards.—CLEMENTS *v.* HALL (1858), 2 De G. & J. 173; 27 L. J. Ch. 349; 31 L. T. O. S. 1; 4 Jur. N. S. 494; 6 W. R. 358, L. C. & L. JJ.

Annotation:—**Distd.** Rule *v.* Jewell (1881), 29 W. R. 755.

Mining partnerships.]—*See* MINES, Vol. XXXIV., pp. 626, 627, Nos. 225–229.

Cost book mining companies.]—*See* COMPANIES, Vol. X., p. 1105, Nos. 7760–7762.

Limited liability companies.]—*See* COMPANIES, Vol. IX., p. 593, Nos. 3961, 3962.

SUB-SECT. 2.—LOSSES.

See Partnership Act, 1890 (c. 39), s. 24 (1).

1170. Partner may be liable as to creditors—Without liability as to co-partners—Manager with share of profits.]—GEDDES *v.* WALLACE, No. 248, *ante.*

1171. Whether presumption of equal division.]—Where it appeared in evidence that A. & B. had taken some pasturage jointly, & that each had turned his cattle upon it, but how many each had turned on was not shown, A. having paid the whole rent, in an action for half the sum so paid by A.:—*Held:* the jury were not warranted in finding that the share of each was a moiety.—SHARPE *v.* CUMMINGS (1844), 2 Dow. & L. 504; 14 L. J. Q. B. 10; 4 L. T. O. S. 141; 9 Jur. 68.

1172. ——.]—COLLINS *v.* JACKSON, JACKSON *v.* COLLINS, No. 1143, *ante.*

1173. Whether liability in same proportion as profits—Where variation of partnership agreement—Money subsequently borrowed by some of partners.]—BELL *v.* BARNETT, No. 1152, *ante.*

1174. ——.]—*Semble:* there is no positive rule of law that losses are to be borne between partners in the same proportions in which they enjoy profits; but where partners have provided for the division of profits in certain proportions, & have made no provision as to losses, it is a fair inference that they intended to bear losses in like proportion.—*Re* ALBION LIFE ASSURANCE SOCIETY (1880), 16 Ch. D. 83; 43 L. T. 523; 29 W. R. 109, C. A.

Annotation:—**Reid.** *Re* Credit Assce. & Guarantee Corpn. (1902), 87 L. T. 216.

1175. Loss incurred in winding up—Injudicious sale by one partner part payment—Right to appropriation from other partners' estate.]—CRAGG *v.* FORD, No. 327, *ante.*

1176. Liability of estate of deceased partner—After part payment of losses—Discharge of balance by other partners.]—A debt owing by a partnership firm at the death of one partner in 1848 was more than doubled between that time & the death of the two other partners in 1853. Part of the debt owing at the decease of the first partner having been paid by his representatives:—*Held:* they were not entitled to require that the amount recovered from the estates of the two other partners should be appropriated to the discharge of the balance of the debt owing at the death of the first

THEIN MYAH (1900), I. L. R. 28 Calc. 53; 5 C. W. N. 114.—**IND.**

f. *Interest not allowed.*]—MCCULLOUGH *v.* CLEMOW (1895), 26 O. R. 467.—**CAN.**

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g. *Whether liability in same proportion as profits.*]—A partnership was formed between two civil engineers & architects. They invested moneys of the partnership in the purchase of real estate, which resulted in a loss:—*Held:* the loss was to be borne by the partners in the same proportion as they were to share the profits & loss of their other business.—STORM *v.* CUMBERLAND (1871), 18 Gr. 245.—**CAN.**

h. *Share of loss presumed from share of profits.*]—BODIN *v.* DUCHER (1909), 11 W. L. R. 145.—**CAN.**

k. ——.]—An agreement that a person admitted as a member of a firm shall share the profits of the firm amounts *primâ facie* to an agreement

partner.—DENISON *v.* AVISON (1865), 2 Hem. & M. 647; 12 L. T. 340; 71 E. R. 615.

1177. ——.]—A. & B. went into partnership without written arts.; the parol agreement between them being that profits should be shared & losses borne in equal shares. A. died, & on accounts of his estate being taken in an administration suit, it was found that he had advanced more capital than B., to the extent of £1,900. The net assets of the partnership were only £1,400:—*Held:* the deficiency of £500 was a debt to which both estates were liable to contribute equally.—NOWELL *v.* NOWELL (1869), L. R. 7 Eq. 538.

1178. —— Completion of subsisting contract.]—McCLEAN *v.* KENNARD, No. 1162, *ante*.

1179. —— Custom of firm—Losses written off.]—Testator gave all his property, which included a share in a partnership business, upon trust as to one moiety to pay the annual proceeds thereof to his daughter for life, & after her decease for her children. He directed his trustees to carry on the business until the expiration of the existing partnership term, & authorised them to employ any of the trust premises therein, but he made no provision as to the manner in which losses should be borne between tenant for life & remaindermen. The partnership deed contained no provision as to the mode in which losses were to be borne, but it had been the custom of the firm during testator's lifetime to divide all the profits of each year, & in any year in which there was a loss to write such loss off the capital according to the proportionate shares therein of the partners:—*Held:* testator's daughter was entitled to receive without deduction one moiety of that share in the profits of each year which testator if living, would have received, & the losses of an unprofitable year must be written off capital, according to the custom of the firm, there being no liability upon testator's daughter, as tenant for life, to recoup out of subsequent profits any losses sustained by the settled share in the capital of the partnership.—GOW *v.* FORSTER (1884), 26 Ch. D. 672; 51 L. T. 394; 32 W. R. 1019.

Variation of agreement to share losses.]—*See* Part III., Sect. 5, *ante*.

Right to account of profits.]—*See* Part V., Sect. 2, sub-sect. 2, *ante*.

Right of action for account.]—*See* Part V., Sect. 13, sub-sect. 5, *post*.

Parties to action for account.]—*See* Part V., Sect. 13, sub-sect. 2, B., *post*.

SECT. 12.—ACCOUNTS.

SUB-SECT. 1.—IN GENERAL.

See Partnership Act, 1890 (c. 39), s. 28.

1180. Basis of right to account.]—PUBLIC TRUSTEE *v.* ELDER, No. 1894, *post*.

1181. Right to claim in administration action.]—Under the usual decree for an account on a bill by creditors, the master refused to proceed upon the claim of the surviving partners of testator, in respect of a debt alleged to be due to them on the balance of certain dealings between the partnership & testator in his separate capacity; but, on motion to be admitted to go in before the master & prove this debt under the decree, it was referred to the master to take the account.—PAYNTER *v.* HOUSTON (1817), 3 Mer. 297; 36 E. R. 114, L. C.

Annotations:—**Reld.** Powdrell *v.* Jones (1854), 2 Sm. & G. 305. **Mentd.** Ford *v.* Bryant (1846), 9 Beav. 410.

SUB-SECT. 2.—INTEREST.

A. In General.

See Partnership Act, 1890 (c. 39), s. 24 (3).

1182. Interest on capital—General rule—Not allowed.]—COOKE *v.* BENBOW, No. 1133, *ante*.

1183. —— Stipulation presumed.]—A stipulation that interest should be allowed on the capital of partners presumed under the circumstances.

In a partnership between A. & B. interest was allowed on the capitals. C., who was a clerk & relative, was cognisant of the terms on which this partnership was carried on. B. retired, & A. & C. continued the business: the whole capital embarked therein belonged to A. There was an absence of all proof of any agreement between A. & C. in respect of interest on capital. D. & E. were afterwards admitted into the business, & an interest account of capital was then resumed:—*Held:* under these circumstances, & from the knowledge that C. had of the terms on which the first partnership had been carried on, it must be assumed that interest on capital was to be allowed in the second partnership.—MILLAR *v.* CRAIG (1843), 6 Beav. 433; 49 E. R. 893.

Annotation:—**Mentd.** Allfrey *v.* Allfrey (1849), 1 Mac. & G. 87.

1184. —— Advance by one partner only.]—In taking the accounts of all partnership dealings & transactions between A. & B., the chief clerk certified that B. had advanced all the sums required in the erection of certain houses, & that he was entitled to be allowed interest on such sums from the dates when advanced, down to the date of the certificate, & that he ought to be charged with interest on the rents received by him. But, on motion for that purpose, the certificate was varied by striking out the sums allowed for interest.—STEVENS *v.* COOK (1859), 5 Jur. N. S. 1415.

Annotation:—**Reld.** Hill *v.* King (1863), 8 L. T. 220.

1185. —— ——.]—A. & B. agreed, orally, to be partners, & to advance an equal sum of money in respect of capital. A. advanced his share of capital, but it did not appear that B. had done so. There was no stipulation about interest. On bill filed to take the partnership account:—*Held:* A. was not entitled to interest on his capital.—HILL *v.* KING (1863), 3 De G. J. & Sm. 418; 1 New Rep. 341; 33 L. J. Ch. 136; 8 L. T. 220; 9 Jur. N. S. 527; 46 E. R. 697, L. C.

1186. —— With annual rests.]—(1) In taking the accounts of a partnership, interest after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed; but this rule may be varied by the terms of the arts., as, for example, by a provision treating the capital left in by a partner as an interest-bearing loan.

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that he shall share losses also.—FISH *v.* PRICE (1902), 19 S. C. 519.—**S. AF.**

l. *Liability of anonymous partner.*]—*Semble:* an anonymous partner is bound, in proportion to his share in the partnership, to free the ostensible partner from the losses sustained by the partnership.—WATERMEYER *v.* KERDEL'S TRUSTEES (1834), 3 Men. 424.—**S. AF.**

PART V. SECT. 12, SUB-SECT. 2.—A.

1182 i. *Interest on capital—General rule—Not allowed.*]—In the absence of a special custom or an agreement, interest is not usually allowable to a partner on advances of capital made by him to the partnership, or for partnership purposes.—JARDINE *v.* HOPE (1872), 19 Gr. 76.—**CAN.**

v. McKECHNIE (1909), 10 W. L. R. 372.—**CAN.**

m. —— *Employed in business—After death of partner—Proviso for repayment by instalments.*]—BEATER *v.* MURRAY (1870), 19 W. R. 92.—**IR.**

n. —— *Stipulation for—Right to compound interest.*]—RAWSON *v.* HARRI-

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(2) Any sums of money received after the dissolution & retained by either partner ought to be debited to him, & applied first in reduction of the interest due to him & then in reduction of his capital.—BARFIELD *v.* LOUGHBOROUGH (1872), 8 Ch. App. 1; 42 L. J. Ch. 179; 27 L. T. 499; 21 W. R. 86, L. C.

Annotation:—*As to* (1) **Distd.** Kelly *v.* Stevens (1886), 3 T. L. R. 189.

1187. —— Employed in business—After expiration of partnership.]—Where A. retired from a certain partnership, but left £60,000 capital in the business ostensibly as part of the partnership capital of B. such sum to be repaid at the end of three years, being the agreed term of the new co-partnership, & where B. retained & employed in the business the sum beyond the expiration of the period:—*Held:* interest at 5 per cent. *per annum* was payable on the £60,000 from the expiration of the three years, & also on the profits from the time of the realisation of the different portions of the same.—SPARTALI *v.* CONSTANTINIDI (1872), 20 W. R. 823; *on appeal*, 21 W. R. 116, L. JJ.

1188. Account settled only after lapse of time.]—No interest allowed on an account in India not settled by the parties but at a distance of time, & with great difficulty by a third person.—BODDAM *v.* RYLEY (1785), 2 Bro. C. C. 2; 29 E. R. 1, L. C.; *on appeal* (1787), 4 Bro. Parl. Cas. 561, H. L.; *previous proceedings* (1783), 1 Bro. C. C. 239, L. C.

Annotations:—**Consd.** Fergusson *v.* Fyffe (1841), 8 Cl. & Fin. 121; Barfield *v.* Loughborough (1872), 8 Ch. App. 1. **Mentd.** Cox *v.* Newman (1813), 2 Ves. & B. 168.

1189. Interest on balance found due on account—Liability of deceased partner's estate—Breach of duty to account.]—A large shareholder was the manager of the affairs of a co. He rendered accounts regularly from 1826 to his death in 1851. These accounts were not challenged in his life, but after his death items exceeding £2,000 a year were questioned by the co., for which no vouchers could be produced, & no satisfactory explanation given. The account was opened for the whole period of twenty-five years, & it was directed to be taken with special directions.

It will be difficult to persuade me, if, in the result of the accounts, it shall appear that considerable balances have been annually retained by testator, not merely as agent, but in a great measure in the character of a director & trustee, it would, I think, be difficult to persuade me, that his estate can avoid accounting for interest on sums which would have been paid to shareholders, or would have borne interest for the co. in his hands, if he had kept his accounts in the open & proper manner he ought to have done, & communicated them to the shareholders, as it was his duty to do; & if it shall appear also, that these sums belonging to the co. while in his hands produced interest or profit for himself (ROMILLY, M. R.).—STAINTON *v.* CARRON CO. (1857), 24 Beav. 346; 27 L. J. Ch. 89; 30 L. T. O. S. 299; 3 Jur. N. S. 1235; 53 E. R. 391.

Annotation:—**Mentd.** Crawford *v.* Crawford (1867), 16 W. R. 411.

1190. ——.]—Partnership arts. provided that neither party should draw from the partnership more than his presumptive share of the profits, but no provision was made for payment of interest in case of either partner overdrawing. Upon decree of dissolution:—*Held:* one of the partners having overdrawn, he could not be charged with interest upon the sums overdrawn.—MEYMOTT *v.* MEYMOTT (1862), 31 Beav. 445; 32 L. J. Ch. 218; 9 Jur. N. S. 426; 54 E. R. 1211.

1191. —— From date of certificate.]—(1) Under the common decree in a partnership suit, interest is payable, on the balance found due from one partner to another, from the date of the certificate.

(2) The costs of a suit to take the partnership accounts are ordinarily paid out of the partnership assets.—BONVILLE *v.* BONVILLE (1865), 35 Beav. 129; 55 E. R. 844.

1192. Interest on profits left in business—Not allowed—In absence of special agreement.]—DINHAM *v.* BRADFORD, No. 1135, *ante*.

B. After Dissolution.

1193. Whether interest allowed on capital—General rule.]—A partner retired from a firm carrying on the business of brickmakers, & his son was introduced in his place. The capital of the father was entered as a liability of the new firm:—*Held:* it did not carry interest.—RHODES *v.* RHODES (1860), John. 653; 29 L. J. Ch. 418; 1 L. T. 478; 6 Jur. N. S. 600; 8 W. R. 204; 70 E. R. 581.

Annotations:—**Mentd.** Hill *v.* South Staffordshire Ry. (1874), L. R. 18 Eq. 154; Ralph *v.* Carrick (1877), 37 L. T. 112; *Re* Birks, Kenyon *v.* Birks (1899), 47 W. R. 374.

1194. —— ——.]—BARFIELD *v.* LOUGHBOROUGH, No. 1186, *ante*.

1195. —— When payable under partnership deed—Interest in lieu of profits.]—(1) By a partnership deed, interest at 5 per cent. was payable on the partners' capital, & it was provided that, on death or retirement of a partner, the clear balance ascertained at the last stock taking should be repaid, with interest at 5 per cent., by certain instalments. But upon the death of a partner the last stock taking was to be conclusive "as to the share & amount of interest of deceased partner in the business, & should be the sum to be paid to his exors.," with interest from the last stock taking in lieu of profits from that time:—*Held:* the estate of deceased partner was entitled not only to 5 per cent. for interest but also to 5 per cent. for profits.

(2) By partnership arts., the clear balance, as ascertained "from the last stock taking" of deceased partner, together with any additional capital, if any, was to be paid to his exors. by instalments, & the last stock taking was to be "conclusive as to the share or amount of interest of deceased partner in the business, & was to be the sum to be paid to his exors.":—*Held:* as additional capital was to be taken into account, so, impliedly, capital drawn out in the interval between the last stock taking & the death of a partner must be deducted.—BROWNING *v.* BROWNING (1862), 31 Beav. 316; 54 E. R. 1160.

SON (1916), 35 N. Z. L. R. 1195.—**N.Z.**

o. *Whether compound interest allowed.*]—Compound interest should not be allowed, where not provided for in the partnership agreement.—FOSTER *v.* MITCHELL (1912), 22 O. W. R. 571; 3 O. W. N. 1509; 3 D. L. R. 888.—**CAN.**

PART V. SECT. 12, SUB-SECT. 2.—B.

p. *Whether interest allowed on capital—Settlement of account delayed by misconduct.*]—When deft. was, at the dissolution of a partnership, to receive £150 more than pltf., & it appeared that a settlement of the accounts had been delayed by the misconduct of deft.:—*Held:* he was not entitled to interest on the £150 from the time of the dissolution.—O'LONE *v.* O'LONE (1851), 2 Gr. 125.—**CAN.**

q. —— *When payable under deed of dissolution—From date of valuation—Valuation delayed.*]—ROWE *v.* COTTON (1859), 17 U. C. R. 533.—**CAN.**

r. —— *Election between profits &*

—— —— **Until principal paid.**]—PILLING *v.* PILLING (1865), 3 De G. J. & Sm. 162 ; 46 E. R. 599, L. JJ.

Annotations :—**Refd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1. **Mentd.** Bruner *v.* Moore, [1904] 1 Ch. 305 ; Morrell *v.* Studd & Millington, [1913] 2 Ch. 648.

1197. —— —— Effect of decree for dissolution & sale.]—Partnership arts. provided for allowance of interest on capital before division of profits, & for taking the accounts with half-yearly rests. By a decree for a dissolution of the partnership, the partnership property, stock & effects were directed to be sold & the business to be carried on until the sale, & the balances to be paid into ct. & invested in 3 per cent. annuities. About fourteen months elapsed between the date of the decree & the complete disposition of the partnership property :—*Held :* the partnership arts. were inapplicable to the carrying on of the business after the date of the decree, but each partner was entitled to so much of the fund in ct. as represented his share of the capital & accumulations of interest, & the residue, if any, ought to be divided equally between them.—WATNEY *v.* WELLS (1867), 2 Ch. App. 250 ; 36 L. J. Ch. 861 ; 16 L. T. 248 ; 15 W. R. 627, L. C.

Annotations :—**Apld.** Dinham *v.* Bradford (1869), 5 Ch. App. 519 ; Barfield *v.* Loughborough (1872), 8 Ch. App. 1. **Consd.** Yates *v.* Finn (1880), 13 Ch. D. 839. **Refd.** Sheppard *v.* Scinde, Punjaub & Delhi Ry. & Abbott (1887), 56 L. J. Ch. 558.

1198. —— —— Capital treated as interest-bearing loan.]—BARFIELD *v.* LOUGHBOROUGH, No. 1186, *ante*.

1199. —— When money improperly detained.]—KEILY *v.* STEVENS (1886), 3 T. L. R. 189.

1200. Interest due to deceased partner—Whether compound interest allowed.]—As to the proper mode in the absence of any agreement expressed or implied, of taking the partnership accounts of the bankers, as between a surviving partner & the estate of deceased partner.

A firm of two bankers were accustomed to keep the accounts, both of the customers & of the partners, at compound interest. One partner died :—*Held :* in the absence of any special agreement, it was not proper to continue the accounts as between the surviving partner & the estate of deceased partner at compound interest.—BATE *v.* ROBINS (1863), 32 Beav. 73 ; 55 E. R. 28.

1201. —— Whether capital or income.]—Partnership arts. provided that the partnership should continue for five years notwithstanding the death of any partner before the expiration of the term, that the profits should be divided annually, & that before any division of profits each partner should, at the end of each year, be credited with interest at 5 per cent. on his capital in the business at the beginning of the year. One of the partners died before the expiration of the five years :—*Held :* the whole of the share of deceased partner of the profits divided at the annual division next after his death was income of his estate, but the interest on his share of capital was apportionable, & so much of such interest as accrued in his lifetime was *corpus* & the remainder income of his estate.—IBBOTSON *v.* ELAM (1865), L. R. 1 Eq. 188 ; 35 Beav. 594 ; 12 Jur. N. S. 114 ; 14 W. R. 241 ; 55 E. R. 1027.

Annotations :—**Apld.** Browne *v.* Collins (1871), L. R. 12 Eq. 586. **Folld.** Lambert *v.* Lambert (1874), 29 L. T. 878. **Refd.** Cooper *v.* Laroche (1869), 38 L. J. Ch. 591.

SUB-SECT. 3.—PARTNERSHIP BOOKS.

A. Right to Possession.

See Partnership Act, 1890 (c. 39), s. 24 (9).

1202. Sale by one partner—Purchaser buying new books—Entries confined to transactions subsequent to sale.]—One of several partners as brewers transfers the premises to A., who buys books & carries on the same business there ; the other partners are not entitled to the possession of these books, the contents of which do not relate to any entries anterior to A.'s entry.—DORE *v.* WILKINSON & SPURVEY (1817), 2 Stark. 287, N. P.

Annotation :—**Mentd.** Mennie *v.* Blake (1856), 6 E. & B. 842.

1203. Where partnership dissolved—Exclusive ownership given to one partner—Copy delivered to other.]—LINGEN *v.* SIMPSON, No. 1118, *ante*.

Where one partner bankrupt.]—*See* BANKRUPTCY, Vol. IV., pp. 231, 459, Nos. 2167, 4147–4151.

B. Right of Access.

See Partnership Act, 1890 (c. 39), ss. 24 (9), 28.

1204. General rule.]—Where a partner is required, at the suit of a person entitled to ask it, to give discovery as to matters contained in the usual course of business in the partnership books, it is no excuse for his not giving that discovery to allege generally that his co-partners refuse to allow him access to the partnership books.

The books being thus in the possession of the partnership must *primâ facie* be held to be at least accessible to defts. (KNIGHT BRUCE, V.-C.).—TAYLOR *v.* RUNDELL (1841), 1 Y. & C. Ch. Cas. 128 ; 5 Jur. 1129 ; 62 E. R. 821 ; *subsequent proceedings* (1843), 1 Ph. 222, L. C.

1205. Who may exercise right—After dissolution of partnership—Receiver appointed in action for account.]—Where a partnership has expired by effluxion of time, & in a suit for an account, etc., a receiver has been appointed before decree, the ct. will not compel deft., the former managing partner, to deliver up to the receiver, for the purpose of making out bills of costs, partnership books, & accounts, which have remained in his hands, & title deeds belonging to a third party, which came into the possession of the co-partners as solrs., such deft. offering the receiver free access thereto, & to assist in making out the bills.—DACIE *v.* JOHN (1824), M'Cle. 206 ; 13 Price, 446 ; 147 E. R. 1044.

1206. —— —— Bankruptcy commissioner.]—In 1811 A. & B. entered into partnership, which continued till 1818 when it was dissolved & the affairs wound up except as to some outstanding debts. In 1820 a deed of release was executed from which these debts were excluded. Partnership books relating generally to these & other

interest—Right of estate of deceased partner—Surviving partner with power to continue business.]—JAMIESON *v.* JAMIESON, [1920] 3 W. W. R. 576.—**CAN.**

t. *Interest on money misappropriated.*]—A partner, during the continuance of the partnership, drew bills in the name of the firm, the proceeds of which he applied to his own purposes :—*Held :* on these he was liable to be charged interest, although the general rule is, that, after a dissolution of partnership, interest is never charged against one partner in favour of another.—WILSON *v.* MCCARTHY (1877), 25 Gr. 152.—**CAN.**

PART V. SECT. 12, SUB-SECT. 3.—B.

1204 i. *General rule.*]—A partner may at all reasonable times inspect the books of the partnership.—VAN DER WALT *v.* PELSER (1895), 12 S. C. 353.—**S. AF.**

a. *Who may exercise right—Representatives of deceased partner.*]—The representatives of the deceased partner have a right to inspect the books of the partnership.—BILTON *v.* BLAKELY (1858), 6 Gr. 575 ; 7 Gr. 214.—**CAN.**

b. *After dissolution.*]—WALMSLEY *v.* WALMSLEY (1846), 3 Jo. & Lat. 556.—**IR.**

c. ——.]—Even after the dissolution of a partnership a former partner is entitled, irrespective of his motive,

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debts were all along suffered to remain in A.'s hands. All the outstanding debts were afterwards settled. In 1830, B. was declared bkpt., till which time the books were never called for by B.:—*Held:* A. & B. nevertheless continued tenants in common in respect of them, & the length of time did not affect that relationship; &, therefore, although there was no charge of fraud in the settled account, yet the comr. had jurisdiction to call A. before him, & examine him & the books relative to the former dealings of bkpt.

Now it is said that since that time [1820] he has never examined them, that may be, but that does not create an adverse right. If they had not been in the situation of tenants in common of this property, its remaining in the possession of an individual for a length of time might be considered as an adverse possession, so as to deprive the other party of any remedy, whatever the property might be. But here the proposition of law is, that no length of possession by a tenant in common is sufficient to deprive the co-tenant of those remedies which another party, a stranger, would have been prevented from exercising (ERSKINE, C.J.).—*Re* MARTINDALE, *Ex p.* TRUEMAN (1832), 1 Deac. & Ch. 464, Ct. of R.

1207. —— Trustee of deceased partner—Capital left in business.]—The provision is that testator is to have an examination of the books & stock whenever he likes: I am of opinion that the trustee ought not to be told that he is to have an examination every year whatever happens & that he is to have it only once a year. In my opinion his discretion ought not to be fettered in that way (KAY, L.J.).—*Re* BENNETT, JONES *v.* BENNETT, [1896] 1 Ch. 778; 65 L. J. Ch. 422; 74 L. T. 157; 44 W. R. 419; 40 Sol. Jo. 335, C. A.

Annotation:—**Mentd.** *Re* Sherry, Sherry *v.* Sherry, [1913] 2 Ch. 508.

1208. —— Agent of partner.]—Partnership arts. provided that proper books of account should be kept by the managing partners for the time being, & that each of the partners should have free access to, & liberty to examine & copy, or take extracts from any of the books & writings of the partnership at all reasonable times:—*Held:* under this provision, as well as under Partnership Act, 1890 (c. 39), s. 24 (9), any partner was entitled to have the books & accounts examined on his behalf by an agent appointed by him for the purpose, provided that the agent was a person to whom no reasonable objection could be taken by the other partners, the agent also undertaking not to make use of the information which he should thus acquire except for the purpose of confidentially advising his principal.—BEVAN *v.* WEBB, [1901] 2 Ch. 59; 70 L. J. Ch. 536; 84 L. T. 609; 49 W. R. 548; 17 T. L. R. 440; 45 Sol. Jo. 465, C. A.

Annotations:—**Apld.** Norey *v.* Keep, [1909] 1 Ch. 561; Dodd *v.* Amalgamated Marine Workers' Union, [1924] 1 Ch. 116.

1209. —— —— Whether for purposes adverse to partnership interests.]—DUCHÉ *v.* DUCHÉ (1920), 149 L. T. Jo. 338, C. A.

1210. —— Trustee in bankruptcy of partner.]—An underwriter at Lloyd's carried on an underwriting business on behalf of himself & also on behalf of five other persons, called his "names." An agreement was entered into between him & each "name," by which it was stipulated that proper underwriting & account books should be provided & kept in the usual manner, & should at all times be open to the inspection of the "name." The "name" was to pay to the underwriter a fixed sum *per annum* as a remuneration for his services in conducting the business, keeping & providing books & papers, & for providing a proper office & clerical assistants, etc. The underwriter in fact kept books of account relating to the transactions in which he was jointly interested with the "names" or any of them, there being in the books six parallel columns, one for each "name," & one for the underwriter himself. The underwriter became bkpt., the books being at this time in the possession of accountants:—*Held:* the "names" had a joint property in the books with bkpt., & the trustee in the bkpcy. was not entitled to have the books delivered up to him, but the "names" must undertake to give to the trustee reasonable facilities for inspecting the books.—*Re* BURNAND, *Ex p.* BAKER, SUTTON & CO., [1904] 2 K. B. 68; 52 W. R. 437; 20 T. L. R. 377; 48 Sol. Jo. 368; *sub nom. Re* BURNAND, *Ex p.* WILSON, 73 L. J. K. B. 413; 11 Mans. 113; *sub nom. Re* BURNAND, *Ex p.* TRUSTEE, 91 L. T. 46, C. A.

1211. Right to extract names—For purpose of soliciting customers after dissolution—Partner without share in goodwill.]—A partner who has no share in the goodwill of the business is not entitled during the partnership to extract from the books of the firm the names & addresses of customers for the purpose of soliciting such customers on his own behalf after the termination of the partnership.

Applts. & resp. carried on a business in partnership on the terms that, on the expiration of the partnership by effluxion of time, the goodwill of the business should belong to applts.:—*Held:* applts. were entitled to an injunction restraining resp. from canvassing in any way by himself or his agents any person who had been, prior to the dissolution of the partnership, a customer of the firm, with a view of inducing such person to deal with him after such dissolution.—TREGO *v.* HUNT, [1896] A. C. 7; 65 L. J. Ch. 1; 73 L. T. 514; 44 W. R. 225; 12 T. L. R. 80, H. L.

Annotations:—**Folld.** Jennings *v.* Jennings, [1898] 1 Ch. 378; Gillingham *v.* Beddow, [1900] 2 Ch. 242. **Consd.** Bevan *v.* Webb, [1901] 2 Ch. 59. **Apld.** Curl *v.* Webster, [1904] 1 Ch. 685. **Consd.** Hill *v.* Fearis, [1905] 1 Ch. 466. **Extd.** Boorne *v.* Wicker, [1927] 1 Ch. 667. **Refd.** *Re* David & Matthews, [1899] 1 Ch. 378; Green (Northampton) *v.* Morris, [1914] 1 Ch. 562; McEllistrim *v.* Ballymacelligott Co-op. Agricultural & Dairy Soc., [1919] A. C. 548; Farey *v.* Cooper, [1927] 2 K. B. 384. **Mentd.** West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507; Valentine Meat Juice Co. *v.* Valentine Extract Co. (1900), 83 L. T. 259; Morris *v.* Saxelby, [1915] 2 Ch. 57.

C. Discovery.

See, generally, DISCOVERY, Vol. XVIII., pp. 42 *et seq.*

1212. Discovery of partnership documents—Grounds for refusal—Refusal of access by co-partners.]—TAYLOR *v.* RUNDELL, No. 1204, *ante.*

—— **Joint order.**]—*See* DISCOVERY, Vol. XVIII., p. 57, No. 140.

—— **At what stage of proceedings granted.**]—*See* DISCOVERY, Vol. XVIII., p. 64, No. 218.

—— **Postponement pending trial of issue.**]—*See* DISCOVERY, Vol. XVIII., pp. 67, 68, Nos. 256, 257.

Affidavit of documents.]—*See* DISCOVERY, Vol. XVIII., pp. 77–79, Nos. 329–333, 342.

—— **Actions by third parties.**]—*See* Part IV., Sect. 6, sub-sect. 2, G., *ante.*

to inspect & examine the partnership books, unless he has clearly parted with that right.—ROMERSA *v.* BUCH, [1917] T. P. D. 266.—**S. AF.**

PART V. SECT. 12, SUB-SECT. 3.—C.

d. *Production of partnership documents—Effect of refusal by defendant to produce — Judgment for plaintiff.*]—KATAKAM VENKAIYA *v.* BHUPAIAM PEDDA MULLASAPPAH (1868), 4 Mad. 142.—**IND.**

1213. Production of partnership documents—Grounds for refusal—Denial of partnership.]—In a suit seeking a partnership account, deft. denied that any partnership had existed, but admitted that the names of both of the alleged partners had been used on the showboard, & otherwise in the business, as if they were partners, but with the view only of introducing the alleged partner into the business on the retirement of deft.; & deft. admitted the possession of books, accounts & documents relating to the business & matters in question, but said that they related exclusively to his own title, & to matters connected with his own property & affairs in which the alleged partner had no interest, & that they did not relate to any business carried on in partnership, or in conjunction with the alleged partner:—*Held:* the statement in the answer was not sufficient to exclude the title of pltf. to the production of the documents mentioned in the schedule.—HARRIS *v.* HARRIS (1845), 4 Hare, 179; 9 Jur. 80; 67 E. R. 610; *subsequent proceedings*, 9 Jur. 987.

Annotations:—**Refd.** Ferrier *v.* Attwool (1866), 14 W. R. 582. **Mentd.** A.-G. *v.* Thompson (1849), 8 Hare, 106.

1214. —— —— ——.]—To a bill for the purpose of establishing a partnership deft. put in a plea denying the partnership, & accompanied by an answer raising distinct defences, & admitting the possession of documents which he declined to produce:—*Held:* the plea was bad in substance & form, & deft. could not thereby escape from the production of the documents admitted by his answer, & bearing upon the matter in dispute.—MANSELL *v.* FEENEY (1861), 2 John. & H. 313; 4 L. T. 436; 9 W. R. 532; 70 E. R. 1076; *subsequent proceedings*, 2 John. & H. 320.

Annotation:—**Mentd.** Wilson *v.* Hammonds (1869), L. R. 8 Eq. 323.

1215. —— —— **Co-partners not assenting—Where all partners not parties to action.**]—Order against A. to produce the partnership books of the years 1792, 1793, & 1794, at which time neither B. nor C. was a partner. The agent of the partnership, who has the possession of the books, refuses to produce them, A., B., & C. having before directed him not to produce the books to any one, & neither of the partners having individually any power over the books. *Subpœna duces tecum* directed to B., C., & the agent to appear & produce the books at a certain time & place. Motion now, that A. be directed to join & concur with B., C. & the agent in producing the books, or giving directions to enable them to produce them, refused with costs.—STUART *v.* BUTE (LORD) (1843), 13 Sim. 453; 60 E. R. 175; *sub nom.* BUTE *v.* STUART, 1 L. T. O. S. 142; 7 Jur. 385.

1216. —— —— **Entries relating to partner's private affairs.**]—Where deft., who was the surviving partner in a firm of commission wine merchants, being required to set out in his answer an account of the partnership assets, liabilities, & dealings for the six months preceding the death of deceased partner, set out the account in a book which he referred to in his answer, but refused to set it out in his answer, on the ground that he would thereby disclose private matters, & pltf., excepted for insufficiency. The ct. allowed the exception, & held, that deft. ought to have set out the account in a schedule to his answer, & that the objection, that the names of the customers were privileged, did not apply to such a case.—TELFORD *v.* RUSKIN (1860), 1 Drew. & Sm. 148; 29 L. J. Ch. 867; 8 W. R. 575; 62 E. R. 334.

Annotation:—**Mentd.** The Don Francisco (1862), 6 L. T. 133.

1217. —— —— —— **General statement on oath not sufficient.**]—In an administration action brought by a beneficiary under the will of W. against J., his exor., & co-partner, an order was made for taking the partnership accounts as between J. & his testator's estate. Upon an application for discovery of documents in defts.' possession, J. admitted the possession of the partnership books, but claimed to seal up all entries made by him in a partnership book which he swore by his affidavit related to his own private affairs & were not material to the action:—*Held:* (1) it was not a case in which the oath of the person ordered to produce was conclusive as to the relevancy of the document. To exclude the right which a partner, or a representative of the partner, has to inspection of the partnership books, a general statement on oath that certain entries related to the producing party's private affairs was not sufficient. He must so far show the nature of the particular entries as to enable the party requiring production to judge whether he could safely dispense with the inspection of them, & the liberty given in the order for production must in such a case specify the particular entries which he should be allowed to seal up; (2) J. was entitled to seal up entries which he swore related only to certain trust matters & which had no relation to the partnership, & also letters to his medical man; but was not allowed to seal up entries of correspondence between him & his bankers & solrs., although in his affidavit he swore that they related only to his private affairs.—*Re* PICKERING, PICKERING *v.* PICKERING (1883), 25 Ch. D. 247; 53 L. J. Ch. 550; 50 L. T. 131; 32 W. R. 511, C. A.

Annotations:—*Generally*, **Refd.** Ehrmann *v.* Ehrmann (1896), 65 L. J. Ch. 889. **Mentd.** Jones *v.* Andrews (1887), 57 L. T. 843.

1218. —— **Effect of refusal to produce after notice.**]—If one of several partners receive money on the joint account, & give his note for it, & enter his expenditures in the partnership books, & then the other partners possess themselves of the books, & bring an action against him for the moneys he received to their use, the ct. will not order pltfs. to produce the books at the trial, but deft. may give them notice so to do, & thereby raise a presumption against them if they refuse.—WARD *v.* APPRICE (1704), 6 Mod. Rep. 264; 87 E. R. 1011.

—— **Sealing up books.**]—*See* DISCOVERY, Vol. XVIII., p. 175, No. 1289.

1219. —— —— **Power of court to inspect.**]—Pltfs. objected to the inspection by deft. of certain sealed up parts of certain books referred to in an affidavit of documents, on the ground that they were irrelevant to the matters in question in a partnership action. On a motion by deft. for production of the books & for liberty to unseal such parts as had been sealed up, pltfs. were ordered to make a further affidavit as to whether the sealed up parts related exclusively to private matters or contained matters relating to the partnership; one of pltfs., in obedience to the order, deposed that the sealed up parts were irrelevant, & he specified the nature of the matters therein contained, & objected to further discovery:—*Held:* the ct. had power to unseal & to inspect the sealed up parts of the books, & the circumstances of the case justified the ct. in exercising such power.—EHRMANN *v.* EHRMANN,

Sect. 12.—*Accounts: Sub-sect.* 3, *C. & D. Sect.* 13: *Sub-sects.* 1 & 2, *A.*]

[1896] 2 Ch. 826; 65 L. J. Ch. 889; 75 L. T. 243.

Annotation:—**Mentd.** Birmingham & Midland Motor Omnibus Co. *v.* L. & N. W. Ry., [1913] 3 K. B. 850.

——.]—*See, further,* DISCOVERY, Vol. XVIII., pp. 111, 112, Nos. 633, 635, 637.

—— **Actions by third parties.**]—*See* Part IV., Sect. 6, sub-sect. 2, G., *ante.*

1220. What interrogatories allowed—What sums drawn out of business—Action by execution.]—The exors. of a wine merchant were authorised by his will to carry on his business. His extrix. entered into partnership with B., & G., & carried on the business in partnership with them for fourteen years. At the end of that term the partnership was dissolved. Shortly afterwards the extrix. having discovered that B. & F. were carrying on together the business of wine merchants in the neighbourhood of the old firm, filed her bill against B., F., G., & others, alleging that under a scheme concocted by B. & G., the good will & stock-in-trade & assets belonging to the old firm had been appropriated to & used in the business of B. & F., & claiming that testator's estate was entitled to share in the profits made by B. & F. F. declined to answer an interrogatory asking what sums had been drawn out of the business of B. & F. by the several partners therein:—*Held:* on exceptions, F. must answer this interrogatory.—SAULL *v.* BROWNE (1874), 9 Ch. App. 364; 43 L. J. Ch. 568; 30 L. T. 697; 22 W. R. 427, L. JJ.

Annotation:—**Mentd.** Grumbrecht *v.* Parry (1883), 49 L. T. 570.

——.]—*See* DISCOVERY, Vol. XVIII., pp. 213, 214, 227, Nos. 1611–1616, 1741–1744.

D. Admissibility in Evidence.

See, generally, EVIDENCE, Vol. XXII., pp. 361–365, Nos. 3679–3716.

1221. Admissibility for & against partners.]—(1) Partnership books are evidence against partners, on the principle that they are the acts & declarations of such partners, being kept by themselves, or by their authority by their servants, & under their direction & superintendence.

(2) Entries in the books of an incorporated co. are not evidence against a member of the co., in respect of a contract entered into by him with the co., although the act by which the co. is incorporated authorises each member to inspect & take copies of the books, or any part of them.

So, although the entries relate to transactions at a meeting at which such member was present, it appearing that the entries were made after the meeting had terminated, from memoranda made by the clerk at the meeting.—HILL *v.* MANCHESTER & SALFORD WATER WORKS CO. (1833), 5 B. & Ad. 866; 2 Nev. & M. K. B. 573; 3 L. J. K. B. 19; 110 E. R. 1011.

Annotations:—*Generally,* **Mentd.** Mestayer *v.* Biggs (1834), 4 Tyr. 466; *Re* Young *v.* Brompton, etc., Waterworks Co. (1861), 1 B. & S. 675.

1222. ——.]—*Semble:* by the ordinary rules of the ct. partnership books are admissible in evidence for & against all the partners & their estates.—LODGE *v.* PRICHARD (1853), 3 De G. M. & G. 906; 1 Sm. & G. App. 8; 20 L. T. O. S. 274; 1 W. R. 211; 43 E. R. 354, L. JJ.

Annotations:—**Mentd.** Ewart *v.* Williams, Williams *v.* Ewart (1854), 3 Eq. Rep. 171; Cookes *v.* Cookes (1863), 8 L. T. 532.

SECT. 13.—ENFORCEMENT OF RIGHTS.

SUB-SECT. 1.—IN GENERAL.

1223. Jurisdiction of court—Foreign domicil.]—The principles governing the jurisdiction of this ct. in partnership cases are analogous to the rules of the civil law. Three circumstances must be found to exist; but any one of them will support the required jurisdiction, (*a*) the domicil of defts. in the suit must be within the territorial jurisdiction of the court; (*b*) the subject-matter of the suit must also be within it; (*c*) the partnership contract must be entered into or be performed within that jurisdiction.

Where pltf. when residing here filed a bill against defts., who were all domiciled in Scotland, to obtain a decree for the administration of the trusts of a Scotch deed relating to a mining partnership in Scotland, so that no one of the above requisites, neither the *forum domicilii,* nor the *forum loci rei sitæ,* nor the *forum contractus,* existed in the case, a demurrer to pltf.'s bill for want of equity was allowed.—COOKNEY *v.* ANDERSON (1862), 31 Beav. 452; 1 New Rep. 77; 32 L. J. Ch. 305; 7 L. T. 491; 8 Jur. N. S. 1220; 54 E. R. 1214; *on appeal* (1863), 1 De G. J. & Sm. 365, L. C.

Annotations:—**Refd.** Baille *v.* Blanchet (1864), 4 New Rep. 48; Henderson *v.* Campbell (1865), 13 W. R. 704; Dobson *v.* Festi, Rasini, [1891] 2 Q. B. D. 92. **Mentd.** Curtiss *v.* Grant (1863), 9 Jur. N. S. 766; National Insce. & Investment Assocn. *v.* Carstairs (1863), 2 New Rep. 348; Steele *v.* Stuart (1863), 1 Hem. & M. 793; Foley *v.* Maillardet (1864), 1 De G. J. & Sm. 389; Norris *v.* Cotterill (1864), 5 New Rep. 215; Samuel *v.* Rogers (1864), 1 De G. J. & Sm. 396; Turner *v.* Sowdon (1864), 10 L. T. 60; Central Railroad & Banking Co. of Georgia *v.* Mitchell (1865), 2 Hem. & M. 452; Drummond *v.* Drummond (1866), 2 Ch. App. 32; Gibson *v.* Fisher (1867), L. R. 5 Eq. 51; *Re* Herefordshire Banking Co. (1867), L. R. 4 Eq. 250; Blake *v.* Blake (1870), 18 W. R. 944; Matthaei *v.* Galitzin (1874), L. R. 18 Eq. 340; *Re* Morton, *Ex p.* Robertson (1875), L. R. 2 Eq. 733; *Re* Hawthorne, Graham *v.* Massey (1883), 23 Ch. D. 743; *Re* Busfield, Whaley *v.* Busfield (1886), 32 Ch. D. 123; Companhia de Mocambique *v.* British South Africa Co., De Sousa *v.* Same, [1892] 2 Q. B. 358; Turnbull *v.* Walker (1892), 67 L. T. 767.

1224. —— **Conditions precedent to exercise.**]—COOKNEY *v.* ANDERSON, No. 1223, *ante.*

1225. When proceedings stayed—Compromise of action—Repudiation.]—A partnership having, in an action brought by pltf. been by order of the ct. dissolved, pltf. & defts. signed an agreement of compromise whereby it was agreed that pltf. should be paid a sum of money for his share in the business. Pltf. subsequently repudiated the agreement & proposed to proceed with his action alleging that his signature had been obtained by fraud. On summons taken out by one of defts. & supported by co-deft.:—*Held:* the ct. had under Jud. Act, 1873 (c. 66), s. 24 (5), (7), jurisdiction to order the stay of all further proceedings in the action.—EDEN *v.* NAISH (1878), 7 Ch. D. 781; 47 L. J. Ch. 325; 26 W. R. 392.

Annotation:—**Refd.** Scully *v.* Dundonald (1878), 8 Ch. D. 658.

—— **Agreement for arbitration.**]—*See, generally,* ARBITRATION, Vol. II., pp. 361–377, Nos. 311–411.

—— **During pendency of suit in colonial court.**]—*See, generally,* CONFLICT OF LAWS, Vol. XI., pp. 477–480, Nos. 1313–1329.

1226. Reference to official referee—Jurisdiction of court to order—Action for money had & received.]—To an action for money had & received deft. pleaded amongst other matters that "pltf. & deft. still are partners or co-adventurers in holding

in two firms—Admissibility of books of one—An action against other.]—MILLER *v.* WHITE (1889), 16 S. C. R. 445.—CAN.

certain horse races & race meetings, which partnership still subsists, & the alleged causes of action arose out of such partnership & not otherwise." An order having been made by a judge at chambers referring all the issues in the action to an official referee :—*Held :* the order was right.—GOODWIN *v.* BUDDEN (1880), 42 L. T. 536, D. C.

1227. —— —— As to profits—Where misrepresentation alleged.]—The power given by Jud. Act, 1873 (c. 66), s. 56, refer " any question arising in any cause or matter " to an official or special reference applies only to questions which must necessarily be decided in the cause or matter & not to questions which it may prove unnecessary to decide. Such reference may be directed before the trial.

Pltf. sued for rescission of a contract of partnership between him & deft. & for damages on the ground that he had entered into the partnership on the faith of false representations made by deft. as to the amount of his professional income. Deft. by his defence denied having made any positive statement as to the amount of the income & stated that pltf. had for months before the partnership was entered into attended at his office as clerk, & had full access to the books & that pltf. had expressed himself satisfied with the business. It further appeared that pltf. had continued for nearly four years in the partnership which was then dissolved by agreement & that he had never complained to deft. of misrepresentation. The judge in chambers after notice of trial, ordered on the application of pltf. a reference as to the amount of deft.'s profits for the six years immediately preceding the partnership :—*Held :* the question what deft.'s profits were would be immaterial unless it was established that deft. had made a positive statement as to their amount & that pltf. had entered into the partnership in reliance on such statement & pltf. had not by his conduct lost the right to complain of misrepresentation the question referred was one which might never arise & the reference ought to be discharged.—WEED *v.* WARD (1889), 40 Ch. D. 555 ; 58 L. J. Ch. 454 ; 60 L. T. 208 ; 37 W. R. 406, C. A.

Annotation :—**Mentd.** Hurlbatt *v.* Barnett, [1893] 1 Q. B. 77.

Reference to arbitration—Grant of injunction to stay.]—*See, generally,* ARBITRATION, Vol. II., pp. 377–380, Nos. 412–427.

1228. When substituted service allowed—Defendants residing abroad.]—Where a bill was filed by a partner in a business carried on in England, for the purpose of dissolving the partnership & taking accounts & also to restrain pltf.'s co-partner & his agent from proceeding with an action for debt. The ct. refused to allow the bill to be served upon defts., who resided abroad, but permitted substituted service to be made upon their attorney in the action.—BAILLE *v.* BLANCHET (1864), 4 New Rep. 48 ; 10 L. T. 368.

1229. Money received by partner on account of firm—Not received in fiduciary capacity—Debtor's Act, 1869 (c. 62), s. 4 (3).]—PIDDOCKE *v.* BURT, No. 12, *ante.*

SUB-SECT. 2.—PARTIES TO ACTIONS.

A. In General.

See, now, R. S. C., Ord. 16, r. 9 ; Ord. 48A, r. 10.

1230. Whether all partners necessary parties—When impracticable or inconvenient.]—The strict rule, that all persons materially interested must be parties, dispensed with, where it is impracticable, or very inconvenient ; as in the case of a very numerous assocn. in a joint concern ; in effect a partnership.—COCKBURN *v.* THOMPSON (1809), 16 Ves. 321 ; 33 E. R. 1005, L. C.

Annotations :—**Distd.** Long *v.* Yonge (1830), 2 Sim. 369. **Consd.** Wallworth *v.* Holt (1841), 4 My. & Cr. 619. **Distd.** Deeks *v.* Stanhope (1844), 14 Sim. 57. **Refd.** Wilson *v.* Stanhope (1846), 2 Coll. 629 ; Bedford *v.* Ellis, [1901] A. C. 1 ; Markt *v.* Knight S.S. Co., Sale & Frazar *v.* Knight S.S. Co., [1910] 2 K. B. 1021. **Mentd.** Willats *v.* Busby (1842), 5 Beav. 193 ; Scott *v.* Scott, [1912] P. 241.

1231. —— Action involving construction of articles—Committee of management not sufficiently representing partners.]—Bill by three of the partners in a numerous trading co. claiming certain privileges under the arts. of co-partnership, against the members of the committee for managing the commercial concerns of the co. dismissed, because it was not filed by pltfs. on behalf of themselves & the other partners not members of the committee.

The ct. will not bind all the partners in a trading co. as to the construction of the arts. of partnership, upon a point of general interest, in a suit by some of the partners against a committee for the management of the commercial concerns, not otherwise authorised to represent the partnership.—BALDWIN *v.* LAWRENCE (1824), 2 Sim. & St. 18 ; 57 E. R. 251.

Annotation :—**Refd.** Mocatta *v.* Ingilby (1835), 5 L. J. Ch. 145.

1232. —— When interests of some may be adverse.]—The ct. allows some of the partners in a joint stock co. to sue on behalf of themselves & the other partners, where it is clearly for the benefit of the absent parties ; but where the interests of the partners may be adverse in the suit, they must all be made parties.

A bill was filed by three shareholders in a joint stock co. against the directors, to set aside an alleged fraudulent sale of the property of the co., & prayed that the affairs of the co. might be wound up & settled :—*Held :* all the shareholders ought to be parties.—EVANS *v.* STOKES (1836), 1 Keen. 24 ; 5 L. J. Ch. 129 ; 48 E. R. 215.

Annotations :—**Apld.** Deeks *v.* Stanhope (1844), 14 Sim. 57. **Consd.** Richardson *v.* Hastings (1844), 7 Beav. 323. **Refd.** Richardson *v.* Hastings (1847), 16 L. J. Ch. 322 ; Carlisle *v.* S. E. Ry. (1850), 2 H. & Tw. 366 ; Fawcett *v.* Laurie (1860), 1 Drew. & Sm. 192.

1233. Action for conversion of partnership property.]—SMYTH *v.* MILWARD (1699), 2 Lut. 1493 ; 125 E. R. 823.

Annotations :—**Consd.** Buckley *v.* Barber (1851), 6 Exch. 164. **Mentd.** R. *v.* Glastonby (1737), Lee *temp.* Hard. 355.

1234. Action for sale of security—Whether personal representative necessary party.]—A. & B. deposited with a firm, of which A. was a member, the title deeds of an estate of which they were joint owners, as a security for a debt due from them to the firm. A. died intestate. The surviving partners in the firm filed a bill against his heir & B. for a sale of the estate :—*Held :* A.'s personal representative ought to have been made a party to the suit.—SCHOLEFIELD *v.* HEAFIELD (1836), 7 Sim. 667 ; 5 L. J. Ch. 218 ; 58 E. R.

Joint stock companies.]—*See* COMPANIES, Vol. X., p. 1220, Nos. 8624–8628.

PART V. SECT. 13, SUB-SECT. 2.—A.

1. *Whether all partners necessary parties—Action for share of profits & private debt.*]—One partner is entitled in *actio pro socio* to claim from another partner his ascertained share of the ascertained profits made by that partner on behalf of the partnership as well as a refund of money actually paid by him to that partner & in which no other of the partners is interested without joining the other partners in the action.—SEMPFF *v.* NEUBAUER, [1903] T. H. 202.—S. AF.

Sect. 13.—*Enforcement of rights: Sub-sect.* 2, *B., C. & D.*]

B. Actions for Account.

See, now, R. S. C., Ord. 16, r. 9; Ord. 48A, r. 10.

1235. Whether all partners necessary parties—Action by representative of deceased partner.]—The personal representatives of deceased merchant may bring an action of account against one of his surviving partners, charging him as general bailiff to render account of deceased's share of the partnership stock-in-trade.—HACKWELL *v.* EUSTMAN (1616), Cro. Jac. 410; 1 Roll. Rep. 421; 79 E. R. 350.

Annotation:—**Refd.** Hall *v.* Huffham (1678), Freem. K. B. 468.

1236. —— ——.]—IRETON *v.* LEWES (1673), Cas. *temp.* Finch, 96; 23 E. R. 52.

1237. —— **Action by some on behalf of the rest.**]—Part of the proprietors of an undertaking may bring some others of them to an account, without making all the members parties, especially if they sue on behalf of themselves & all the rest.—CHANCEY *v.* MAY (1722), Prec. Ch. 592; 24 E. R. 265; *sub nom.* ANON, 2 Eq. Cas. Abr. 168.

Annotations:—**Consd.** Cockburn *v.* Thompson (1809), 16 Ves. 321. **Refd.** Good *v.* Blewitt (1807), 13 Ves. 397; Meux *v.* Maltby (1818), 2 Swan. 277; Long *v.* Yonge (1830), 2 Sim. 369; Wallworth *v.* Holt (1841), 4 My. & Cr. 619.

1238. —— ——.]—One of thirty-eight proprietors of a newspaper was appointed bookkeeper, & received the moneys of the concern: a bill being filed against him for an account, etc., by twelve of the proprietors on behalf, etc.:—*Held:* the remaining twenty-five were necessary parties.

Where it clearly appears that the suit is for the common benefit of all the parties, who are very numerous, the ct. permits the suit to be prosecuted by some for the benefit of all; but . . . I am by no means satisfied that this suit is for the benefit of all the parties interested (LORD LANGDALE, M.R.).—BAINBRIDGE *v.* BURTON (1840), 2 Beav. 539; 48 E. R. 1290.

1239. —— **Account between sub-partners.**]—BROWN *v.* DE TASTET, No. 930, *ante*.

1240. —— **When defendant alleges no interest by one co-partner.**]—A., B., C., & D., being partners, in a bill by B. against A. for an account of partnership dealings, if the answer of A. alleges, that D. has no interest in the accounts, & if that allegation is admitted at the bar by pltf.'s counsel to be true, deft. cannot, on a petition for a rehearing, object that D. ought to be a party to the suit.—BODIN *v.* FARQUHAR (1822), 1 L. J. O. S. Ch. 21.

1241. —— **Where previous settlement with some.**]—A., B., C., D., & E., being separately engaged in trade, embarked in a joint speculation in buying & selling English wheat; & it was agreed that the purchases & sales should be conducted principally by A., but partly by B., on behalf of all the parties, for their joint profit & at their joint risk, in the several proportions in which they respectively held bonded corn at the time of entering into the agreement. The transactions were continued a certain time, & a heavy loss incurred. A. having settled with B., & released C. & D. in respect of their several proportions, filed a bill against the representatives of E. to which B. was made a party, for an account & payment of E.'s proportion of the loss:—*Held:* there was nothing to distinguish this from an ordinary partnership transaction, & C. & D. were necessary parties to the suit.—HILLS *v.* NASH (1845), 1 Ph. 594; 15 L. J. Ch. 107; 6 L. T. O. S. 273; 10 Jur. 148; 41 E. R. 759, L. C.

Annotation:—**Refd.** Public Trustee *v.* Elder, [1926] Ch. 776.

1242. —— **Action against representative of deceased partner.**]—Testator was a member of a partnership at will in a bank, without any provision entitling the exor. of deceased partner to an interest in the goodwill of the concern. The credit, in which the bank was, rendered capital unnecessary, & at testator's death the property of the concern exceeded its liabilities by a very small amount, testator's share in which was far exceeded by the balance due from him to the bank on his private account, as a customer. After his death the surviving partners admitted into the firm his son, who was his exor., but who was not admitted into the firm in that character, & the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at testator's death. In a suit against the exor. for the administration of testator's estate:—*Held:* he was not accountable to testator's estate for the profits which he had received as a partner in the bank.

It is in the first place to be borne in mind that pltf. has so constructed his suit as to preclude him from obtaining a partnership account in the cause, for which the absence from the record of C., who never was a party, & the circumstance that his estate is not represented before us, are alone a sufficient reason, if there were no other ground. That omission is not through any wish or neglect on the part of any of defts. (KNIGHT BRUCE, L.J.).

I desire on the present occasion to express very distinctly my entire concurrence in the opinion expressed in the case of *Willett* v. *Blanford*, No. 1845, *post*, . . . that the profits derived from the trade carried on after the death of testator must depend upon the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership & deceased partner at the time of his death, & the conduct of the parties after his death. That all these may materially affect the rights of the parties. I fully adopt this view, &, applying it to the present case, I venture to say that it depends on the nature of this trade, on the capital employed from time to time in it, on the conduct of the parties, on the extent of the skill & industry of each partner employed in the concern, to what extent the profits derived from the trade ought to be attributed to the capital, & to what extent they ought to be attributed to other sources; & that, under the circumstances of this case, it would be going much too far to hold that pltf. ought to succeed in the claim which he makes for the profits derived from testator's third of this concern (TURNER, L.J.).—SIMPSON *v.* CHAPMAN (1853), 4 De G. M. & G. 154; 43 E. R. 466, L. JJ.

Annotations:—**Consd.** Wedderburn *v.* Wedderburn (1856), 22 Beav. 84; Macdonald *v.* Richardson, Richardson *v.* Marten (1858), 1 Giff. 81; Vyse *v.* Foster (1872), 8 Ch. App. 315, n. **Refd.** McDonald *v.* Richardson, Richardson *v.* Marten (1864), 10 L. T. 166; Yates *v.* Finn (1880), 13 Ch. D. 839.

PART V. SECT. 13, SUB-SECT. 2.—B.

g. Mortgage of share in partnership—Who is necessary party—Mortgagee.]—Where partners are claiming an interest which they have mortgaged to others, the mtgees. are necessary parties to the suit.—EVANS *v.* GUTHRIDGE (1863), 2 W. & W. 83.—**AUS.**

h. Assignment of share to trustees—Who are necessary parties—Trustees.]—LITTLE *v.* WILLIAMS (1864), 1 W. W. & A'B. (E.) 32.—**AUS.**

k. Old & new firms with common member—Joinder with old members against new firm.]—A member of a partnership, who on its dissolution

1243. —— Alien enemy partner.]—PUBLIC TRUSTEE *v.* ELDER, No. 1894, *post.*

—— Cost book companies.]—*See* COMPANIES, Vol. X., p. 1106, Nos. 7770, 7772.

—— Proceedings against trustees of friendly society.]—*See* FRIENDLY SOCIETIES, Vol. XXV., p. 291, No. 22.

—— Members of club.]—*See* CLUBS, Vol. VIII., p. 527, Nos. 146–148.

1244. Mortgage of share in partnership—Who is necessary party—Mortgagee—When trustee for third party.]—After a dissolution of partnership between J. & P., J. assigned all his interest in the partnership to B., by way of mtge. to secure £500. J. subsequently assigned all his property to pltfs., the trustees of creditors' deed. B. was trustee of the mtge. for R. who made an affidavit in the suit that his mtge. was satisfied :—*Held :* the suit might proceed in the absence of B., as he was a mere trustee ; & in the absence of R., as he could not after making the affidavit insist that he was a necessary party in respect of his interest under the mtge.—WILLIAMS *v.* POOLE (1873), 28 L. T. 292 ; 21 W. R. 252, L. C. & L. JJ.

Annotation :—**Refd.** Whetham *v.* Davey (1885), 30 Ch. D. 574.

1245. —— —— Cestui que trust of mortgagee—When mortgage satisfied.]—WILLIAMS *v.* POOLE, No. 1244, *ante.*

C. Actions for Dissolution.

See, now, R. S. C., Ord. 16, r. 9 ; Ord. 48A, r. 10.

1246. General rule—All partners must be parties.]—Some of the members of a partnership cannot file a bill, on behalf of themselves & the others, for a dissolution of the partnership : but all the members, however numerous, must be parties to the suit.—LONG *v.* YONGE (1830), 2 Sim. 369 ; 57 E. R. 827.

Annotation :—**Refd.** Dooks *v.* Stanhope (1844), 14 Sim. 57.

1247. —— ——.]—A. gave a bond to the public officer of a joint stock banking co., in which he afterwards became a shareholder, to secure advances made to him by the co. The bank afterwards suspended their business, & brought an action on the bond in the name of the officer. A. then filed a bill on behalf of himself alone, against the officer & the directors of the co., praying for an account of the dealings & transactions of the co. down to the time when their business ceased, that his share of the capital & profits might be ascertained & set off against the money due on the bond, & that the surplus might be paid to him :—*Held :* the bill prayed in effect for a dissolution of the co., &, therefore, all the shareholders ought to have been made parties to it.—ABRAHAM *v.* HANNAY (1843), 13 Sim. 581 ; 13 L. J. Ch. 18 ; 60 E. R. 225.

1248. —— ——.]—(1) A bill may be filed respecting a partnership without praying a dissolution.

(2) In a continuing partnership, if a few have an interest in a particular subject adverse to all the rest, a bill may be filed against the few, by one on behalf, etc.

(3) In the case of an insolvent partnership not formally dissolved, a bill may be filed by one or more on behalf of the rest against the governing body, to have the assets collected & applied towards the payment of the debts, without seeking to ascertain the rights and liabilities of the parties as between themselves, but leaving them open to future litigation.

By the rules of a club, the bankers were alone authorised to receive money on account of the club. Some of the members subscribed & purchased the furniture, which, by deed executed by the subscribers, was vested in the pltf. A. B., in trust to repay the amounts subscribed & to pay the surplus to the committee for the benefit of the club. The club becoming embarrassed, was afterwards dissolved, & the committee were authorised to wind up the affairs. Two of the committee, C. & D., sold the furniture, & alone received the produce, together with other general assets of the club. A bill was filed by A. B. on behalf, etc., against C. & D., & E., a non-subscribing member, to recover the moneys in the hands of C. & D., & praying that the furniture money might be paid to the pltf., on the trusts of the deed, "or otherwise as the ct. might direct," & that the general assets recovered might be paid to the bankers or otherwise, etc. :—*Held :* the bill was not defective for want of parties, & neither the other parties to the deed, nor the other members of the club, were necessary parties. —RICHARDSON *v.* HASTINGS (1844), 7 Beav. 323 ; 13 L. J. Ch. 142 ; 2 L. T. O. S. 456 ; 8 Jur. 207 ; 49 E. R. 1089.

1249. —— ——.]—HILLS *v.* NASH, No. 1241, *ante.*

1250. ——.]—Where pltf. by his bill prays the dissolution & winding-up of a co., he cannot sue on behalf, etc. All the partners must be made parties.—HARVEY *v.* BIGNOLD (1845), 8 Beav. 343 ; 50 E. R. 135.

1251. Who is a partner within the rule—Personal representative of partner—Though death in insolvent circumstances.]—In a suit for winding up a partnership & for contribution, the personal representative of deceased shareholder is a necessary partner, notwithstanding that deceased partner died " in insolvent circumstances." *Qu. :* whether in such a case it is sufficient to bring before the ct. an administrator *ad litem ?*—COX *v.* STEPHENS (1863), 2 New Rep. 506 ; 33 L. J. Ch. 62 ; 8 L. T. 787 ; 9 Jur. N. S. 1144 ; 11 W. R. 929.

Annotations :—**Mentd.** Rowsell *v.* Morris (1873), L. R. 17 Eq. 20 ; Curtius *v.* Caledonian Fire & Life Insce. (1881), 30 W. R. 125.

1252. —— Son of partner nominated under agreement.]—EHRMANN *v.* EHRMANN, No. 969, *ante.*

1253. Exception to rule—Partner out of jurisdiction.]—By a contract between A., B., & C., to perform certain works, which formed the agreement for the limited partnership between them it was stipulated that the co-partnership should cease & determine on the completion of such works. Before the completion, one of the partners, C., had left for Australia, & was out of the jurisdiction. On bill filed by A., against B. & C. for a dissolution, & the consequential accounts :—*Held :* the ct. had jurisdiction to declare that the partnership ceased & determined on the completion of such works, notwithstanding the absence of C. out of the jurisdiction, & to direct the usual accounts.—DUXBURY *v.* ISHERWOOD (1864), 10 L. T. 712 ; 12 W. R. 821.

D. Actions for Fraud.

1254. Who should be parties—Retired partner.]—A person employed on behalf of himself & his co-

becomes a member of a new partnership, is entitled to join with the members of the old partnership in an action against the other members of the new partnership for an account of moneys & assets received by it belonging to the old partnership, where there is no allegation that the new partnership has taken over the assets & liabilities of the old one.—CARTER & MCINTOSH *v.* MOFFAT, [1913] T. P. D. 247.—**S. AF.**

Sect. 13.—*Enforcement of rights: Sub-sect.* 2, *D.; sub-sects.* 3 *&* 4, *A.* (*a*) *&* (*b*).]

partners in negotiating the terms of a lease is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of £12,000 was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered, one of the partners withdrew; &, subsequently, another partner assigned a share in the stock & in his proportion of this claim to persons then admitted into the concern:—*Held:* the retired, the continuing, & the new partners were properly joined as co-pltfs., in a suit to have the trust declared.—FAWCETT *v.* WHITEHOUSE (1829), 1 Russ. & M. 132; 8 L. J. O. S. Ch. 50; 39 E. R. 51, L. C.

Annotations:—**Mentd.** Imperial Mercantile Credit Assocn. *v.* Coleman (1870), 6 Ch. App. 562, n.; Dunne *v.* English (1874), L. R. 18 Eq. 524; Hay's Case (1875), 10 Ch. App. 593; New Sombrero Phosphate Co. *v.* Erlanger (1877), 5 Ch. D. 73.

1255. —— New partner.]—FAWCETT *v.* WHITEHOUSE, No. 1254, *ante.*

1256. —— Public officer of joint stock company.]—A. filed a bill against the public officer of a joint stock bank, alleging that he had been induced to purchase five hundred shares in the bank, by fraudulent representations made by the directors, in their reports, as to the prosperous state of the co.'s affairs, & praying for a declaration to that effect & that the purchase might be declared void, as between him & the co., & that the latter might repay him his purchase-money:—*Held:* as the litigation was between one member of the partnership as such, & the other members as such, the public officer was improperly made a party to it as representing the co.; & a demurrer by him was allowed.—SEDDON *v.* CONNELL (1840), 10 Sim. 58; 59 E. R. 534; *sub nom.* SEDDON *v.* CONNELL, SEDDON *v.* MAULT, SEDDON *v.* EVANS, 9 L. J. Ch. 341.

Annotation:—**Refd.** Harrison *v.* Brown (1852), 5 De G. & Sm. 728.

SUB-SECT. 3.—BREACH OF AGREEMENT TO ENTER INTO PARTNERSHIP.

1257. Right of action for breach—Non-payment of premium.]—Arts. for a co-partnership by which pltf. agreed to take deft. as a partner & give him half the interest in the lease of the house, to commence from & after Sept. 29. Deft. covenanted to pay £300 on or before that day, as a premium to be admitted a partner. On non-payment of the money at the day, pltf. may sue, averring his readiness to have taken deft. as a partner, without executing or tendering arts. of co-partnership or a conveyance of the lease.—WALKER *v.* HARRIS (1793), 1 Anst. 245; 145 E. R. 861.

1258. —— Specific performance.]—As a general rule, the ct. will not decree specific performance of a contract for partnership.

Where pltf.'s appropriate remedy is an action at law, where there are no legal difficulties in his way which the ct. can remove, & where there has been no part performance, the ct. will not decree specific performance of a contract for partnership.—SCOTT *v.* RAYMENT (1868), L. R. 7 Eq. 112; 38 L. J. Ch. 48; 19 L. T. 481.

1259. What should be averred—Readiness of plaintiff—Execution & tender of article not necessary.]—WALKER *v.* HARRIS, No. 1257, *ante.*

1260. What must be proved—Terms of intended partnership.]—An action cannot be supported for breach of an agreement to become a partner generally, without proof of the specific terms of the intended partnership.—FIGES *v.* CUTLER (1822), 3 Stark. 139, N. P.

Annotations:—**Refd.** M'Neill *v.* Reid (1832), 9 Bing. 68; Hoggins *v.* Gordon (1842), 3 Q. B. 466; Duke *v.* Forbes (1847), 1 Exch. 356.

1261. Right to inspect partnership deed.]—Where pltf. made affidavit that he sued deft., to recover damages for a breach of agreement in not entering into partnership, pursuant to a partnership deed drawn up & signed by pltf., but remaining in the custody of deft. or his attorney; & that pltf. possessed neither copy nor counterpart of the deed; the ct. granted a rule enabling pltf. to inspect the deed & take a copy, though deft. swore he had not executed the deed. On a motion for leave to inspect a partnership deed, the affidavit should state that the party moving has neither copy nor counterpart.—MORROW *v.* SAUNDERS (1819), 1 Brod. & Bing. 318; 3 Moore, C. P. 671; 129 E. R. 745.

Annotations:—**Consd.** Ratcliffe *v.* Bleasby (1825), 3 Bing. 148. **Refd.** Steadman *v.* Arden (1846), 15 M. & W. 587. **Mentd.** Bankin *v.* Hamilton (1850), 15 Q. B. 187.

1262. ——.]—Deft., after settling a draft of arts. of partnership with pltf., having engrossed & executed a deed, differing in some respects from the draft of the arts., pltf. refused to execute the deed; but having afterwards commenced an action for breach of agreement to take him into partnership, he moved to be at liberty to inspect & copy the deed. The ct. refused to order such inspection.—RATCLIFFE *v.* BLEASBY (1825), 3 Bing. 148; 10 Moore, C. P. 523; 3 L. J. O. S. C. P. 208; 130 E. R. 470.

Annotations:—**Refd.** Rowe *v.* Howden (1828), 4 Bing. 539, n.; Rundle *v.* Beaumont (1828), 4 Bing. 537; Cocks *v.* Nash (1833), 9 Bing. 723; Doe d. Egremont *v.* Date (1842), 11 L. J. Q. B. 220; Powell *v.* Bradbury (1847), 4 C. B. 541.

1263. Defence to action—Dishonesty of plaintiff to former partner—Concealment from plaintiff.]—To an action for the breach of an agreement to enter into partnership with pltf., deft. pleaded, that, before & at the time of the making of the agreement, pltf. carried on trade in partnership with S., which partnership was then about to be wound up & dissolved; that deft. made the agreement on the faith & under the belief that pltf. had up to that time acted with honesty towards his said partner in the conduct of said business & in relation to the pecuniary affairs thereof; but that, after the making of the agreement & before breach, & before the commencement of the suit, deft. discovered that pltf. had before the time of making the agreement acted with fraud & dishonesty towards his said partner in the conduct of said business & in relation to

PART V. SECT. 13, SUB-SECT. 3.

1258 i. *Right of action for breach—Specific performance.*]—The application of the doctrine of specific performance to partnerships is governed by the same rules as those which govern it in other cases. There are only two classes of cases in which specific performance of an agreement to enter into a partnership has been decreed; first, where the parties have agreed to execute some formal instrument which would confer rights that would not exist unless it was executed; secondly, where there has been an agreement which has come to an end to carry on a joint adventure, & the decree that the agreement is valid, prefaced by the declaration that the contract ought to be specifically performed, is made merely as the foundation of a decree for an account.—VIRDACHALA NATTAN *v.* RAMASAVAMI NAYAKAN (1862), 1 Mad. 341.—**IND.**

1. *Damages.*]—In a suit brought for damages for breach of a contract to admit pltf. into partnership:—*Held:* one year's profits would be a fair award of damages.—LEWIN *v.* MORRISON (1867), 2 Agra, 351.—**IND.**

the pecuniary affairs thereof, which said fraudulent & dishonest acts of pltf. were unknown to deft. at the time of his entering into the agreement in the declaration mentioned, wherefore deft. repudiated & declined to carry into effect said agreement:—*Held:* this plea afforded no answer to the action.—ANDREWES *v.* GARSTIN (1861), 10 C. B. N. S. 444; 31 L. J. C. P. 15; 4 L. T. 580; 7 Jur. N. S. 1124; 9 W. R. 782; 142 E. R. 525.

SUB-SECT. 4.—MISREPRESENTATION AND FRAUD.

A. Inducing Partnership.

(a) In General.

See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 6 *et seq.*

1264. Duty of joining partner—Not bound to inquire into truth of representation.]—Where a person has been induced to enter into a contract by a material misrepresentation of the other party, he is entitled to have the contract set aside, & not merely to have the representation made good.

B. & W., who were partners in a bank, agree to take R. into partnership with them. W., who took no actual part in the business, & was known to R. not to do so, joined with B. in producing to R. during the negotiation, as a true account of the affairs of the bank, a paper stating the amount in which it was indebted to customers to be £11,000, the amount being in fact £26,000. R. entered into the partnership without examining the books, & continued in it for four years, taking no part in the business, & never examining the books. At the end of that time the bank turned out to be insolvent. R. then filed a bill against B. & the exors. of W., asking to have the agreement for partnership rescinded, & to have an indemnity against the debts of the concern:—*Held:* (1) the delivery of the paper to R. as a true account of the state of the bank was such a misrepresentation as entitled R. to have the contract rescinded; (2) the case as regarded W. was not varied by the facts that W. took no part in the affairs of the bank, & was known by R. not to do so, & did not know the representation to be untrue; (3) R.'s having brought an action against B. & W. for the misrepresentation, & recovered damages against B., did not take away his right against W.'s estate; (4) the lapse of time was no bar to pltf., for although he had means of ascertaining the representation to be untrue, he was entitled as between him & the persons who made it to believe it to be true & was not bound to make inquiry until there was something to raise suspicion.—RAWLINS *v.* WICKHAM (1858), 3 De G. & J. 304; 28 L. J. Ch. 188; 32 L. T. O. S. 231; 5 Jur. N. S. 278; 7 W. R. 145; 44 E. R. 1285, L. JJ.; *affg.* S. C. *sub nom.* RAWLINS *v.* WICKHAM, WICKHAM *v.* RAWLINS, 1 Giff. 355.

Annotations:—As to (1) **Consd.** *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576; Newbigging *v.* Adam (1886), 34 Ch. D. 582. **Refd.** Scholefield *v.* Templer (1859), John. 155; Gorsuch *v.* Cree (1860), 8 C. B. N. S. 574; Davies *v.* Marshall (1861), 10 C. B. N. S. 697; Evans *v.* Robins (1863), 11 L. T. 211; Hallows *v.* Fernie (1867), L. R. 3 Eq. 520; *Re* Reese River Silver Mining Co., Smith's Case (1867), 2 Ch. App. 604; A.-G. *v.* Ray (1874), 9 Ch. App. 397; A.-G. & National Debt Reduction Comrs. *v.* Ray (1874), 43 L. J. Ch. 321; Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; Hart *v.* Swaine (1877), 7 Ch. D. 42; Edwick *v.* Hawkes (1881), 18 Ch. D. 199; Redgrave *v.* Hurd (1881), 20 Ch. D. 1; *Re* Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622; Hindle *v.* Brown (1907), 98 L. T. 44. *As to* (2) **Refd.** Conybeare *v.* New Brunswick & Canada Ry. (1860), 1 Giff. 339. *As to* (3) **Consd.** Moore & De La Torre's Case (1874), L. R. 18 Eq. 661. **Apld.** Betjemann *v.* Betjemann, [1895] 2 Ch. 474. *As to* (4) **Apld.** Betjemann *v.* Betjemann, [1895] 2 Ch. 474. *Generally,* **Refd.** Lacey *v.* Hill, Leney *v.* Hill (1876), 4 Ch. D. 537; Adam *v.* Newbigging (1888), 13 App. Cas. 308; **Mentd.** Graham *v.* Wickham (1865), 2 De G. J. & Sm. 497; Overend, Gurney *v.* Gurney (1869), 17 W. R. 719; Peek *v.* Gurney (1873), L. R. 6 H. L. 377; Mathias *v.* Yetts (1882), 46 L. T. 497; Joliffe *v.* Baker (1883), 11 Q. B. D. 255; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392.

1265. Liability of partner innocent of fraud.]—RAWLINS *v.* WICKHAM, No. 1264, *ante.*

1266. Grounds for relief—Necessity for positive statement & reliance thereon.]—WEED *v.* WARD, No. 1227, *ante.*

(b) Remedies of Defrauded Partner.

See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 52 *et seq.*

1267. Rescission of partnership agreement—Appointment of receiver—Subsequent proof in bankruptcy of defrauding partner.]—A. induced by the fraudulent representations of B. as to the profits of his business gave him money for a share of it. On the discovery of the fraud, A. filed a bill in equity for an account, to have the partnership declared void & for a receiver. The receiver was ordered; B. becomes bkpt. Petition by A. to be admitted to prove under his commission refused, with liberty to make a claim. Although A. as against B. might have an equity to say he never was a partner, it would be difficult to say so as against third persons.—*Re* HOOPER, *Ex p.* BROOME (1811), 1 Rose, 69, L. C.

Annotation:—**Dbtd.** Bury *v.* Allen (1845), 1 Coll. 589.

1268. —— Concealment of insolvency.] —Prisoner, by false & fraudulent representations made to the prosecutor as to his business, customers & profits induced the prosecutor to enter into a partnership with him & to advance £500 as part of the capital of the concern; & the prosecutor, after such advance, recognised & acted upon such partnership:—*Held:* this was not an obtaining of money by false pretences within the meaning of the statute.

I am far from saying that where a party is induced by false pretences to enter into a partnership & to advance money, the allegations being altogether fraudulent & false, or colourable merely, he might not have ground for maintaining an indictment for obtaining the money by false pretences, or from saying that he might not rescind a contract obtained by fraud. . . . If he does enter into the contract of partnership & does not rescind it, & advances money as part of the capital of the concern, he has not parted with his money within the meaning of the statute; because, being a partner, he is still interested in that money (COCKBURN, C.J.).

I am not aware of any cases in which it is held that money advanced to a concern by one of the partners in it can be treated as money obtained by another partner by false pretences (ERLE, J.).—R. *v.* WATSON (1857), Dears. & B. 348; 27 L. J. M. C. 18; 30 L. T. O. S. 171; 21 J. P. 823;

PART V. SECT. 13, SUB-SECT. 4.—A. (a).

1266 i. *Grounds for relief—Necessity for positive statement & reliance thereon.*]—SWANSON *v.* GRAHAME (B. C.) (1908), 8 W. L. R. 982.—**CAN.**

PART V. SECT. 13, SUB-SECT. 4.—A. (b).

m. *Rescission of partnership agreement—Misrepresentation as to value of partnership property.*]—MORRISON *v.* EARLS (1884), 5 O. R. 434.—**CAN.**

Sect. 13.—*Enforcement of rights: Sub-sect.* 4, *A.* (*b*) & (*c*), & *B.*]

4 Jur. N. S. 14; 6 W. R. 67; 7 Cox, C. C. 364; 160 E. R. 1035, C. C. R.

Annotation:—**Mentd.** R. *v.* Meakin (1869), 17 W. R. 683.

1269. ——.]—THOMPSON *v.* GEARY (1843), 1 L. T. O. S. 359; *previous proceedings* (1842), 5 Beav. 131.

1270. —— **Misrepresentation as to state of accounts.**]—RAWLINS *v.* WICKHAM, No. 1264, *ante.*

1271. —— ——.]—Pltf. agreed to purchase a share in a partnership business, on the footing of a balance sheet prepared by an accountant employed by the vendor, which all parties believed, with the exception of slight errors, to be, & was treated as, generally correct. It turned out to be grossly inaccurate in regard to the existing liability. The ct. set aside the contract.—CHARLESWORTH *v.* JENNINGS (1864), 34 Beav. 96; 11 L. T. 439; 55 E. R. 569.

1272. —— **Misrepresentation as to profits.**]—B., a practising surgeon, took C. into partnership having represented to him that his practice produced about £700 a year. C. paid a premium. It was afterwards discovered that the practice did not amount to more than half the amount stated, & also that B. had, the year previous to the partnership, made a return to the comr. of the property tax that his income amounted only to £350 *per annum.* The Master of the Rolls ordered a dissolution of the partnership, & that deft. should repay pltf. half the premium he had paid:—*Held:* sufficient misrepresentation had been proved to uphold the decree of the ct. below.—JAUNCEY *v.* KNOWLES (1859), 29 L. J. Ch. 95; 1 L. T. 116; 8 W. R. 69, L. C.

1273. —— **Misrepresentation without fraud.**]—(1) If a community of interest in an adventure which is being carried on exists in fact, no concealment of name, or verbal equivalent for the ordinary phrases of profit or loss, or indirect expedient for enforcing control over the adventure, will prevent the transaction from being held to be in substance & reality a partnership.

N. was induced to enter into what was in fact a partnership with A. by misrepresentations not amounting to fraud. Not long afterwards the business, which had been carried on at a loss, was found to be insolvent:—*Held:* notwithstanding the insolvency, N. was entitled to a rescission of the contract, A. being restored to the sole possession of the business, which was in fact worthless when the contract was made.

In such a case there is no analogy after insolvency between the case of an ordinary partnership & that of an incorporated co.

(2) Applts. counterclaimed a large sum for goods supplied & money lent to the partnership:—*Held:* they could not recover & they were bound to indemnify resp. against liability on bills given to secure said sum.—ADAM *v.* NEWBIGGING (1888), 13 App. Cas. 308; 57 L. J. Ch. 1066; 59 L. T. 267; 37 W. R. 97, H. L.; *affg.* S. C. *sub nom.* NEWBIGGING *v.* ADAM (1886), 34 Ch. D. 582, C. A.

Annotations:—*Generally,* **Mentd.** Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; Whittington *v.* Seale-Hayne (1900), 82 L. T. 49; Armstrong *v.* Jackson, [1917] 2 K. B. 822; Hulton *v.* Hulton, [1917] 1 K. B. 813; Compagnie Chemin de Fer Paris-Orleans *v.* Leoston Shipping Co. (1919), 36 T. L. R. 68.

1274. Rescission of agreement made by one partner—In fraud of others—Secret commission.]—Four out of five persons, who entered into a provisional contract to purchase a mine, which they agreed to sell for their joint benefit to a co., were deceived by the fifth. who, assuring them that the vendors would not take less than £85,714, obtained secretly from the latter an agreement, that, if the contract were perfected, & money paid he should receive thereout a bonus of £20,000 for his pains in effecting the sale. Two of the four having absolute powers from the rest to sell to the intended co., then formed themselves with others into a committee of management, &, still ignorant of the surreptitious agreement, issued a prospectus, stating, that a contract had been entered into for the purchase by the co. of the entire property for £125,000, "including all preliminary expenses, & a premium to the parties who incurred the risk & responsibility of the original purchase." The co. having been established, the requisite capital paid up, & the provisional contract perfected:—*Held:* the £20,000 transaction was fraudulent, & void, not only as against the four original purchasers, but also as against the co., notwithstanding the mine proved cheap at the price at which they became shareholders. It was not enough that the co. got the whole of their bargain. They had a right to the best bargain which the two members of the committee of management, had they known the facts, would have been in a position, acting fairly & rightly to give them.—BECK *v.* KANTOROWICZ, KANTOROWICZ *v.* CARTER, KALB *v.* KANTOROWICZ (1857), 3 K. & J. 230; 69 E. R. 1093.

Annotations:—**Reid.** Imperial Mercantile Credit Assocn. *v.* Coleman (1871), 6 Ch. App. 562; Lydney & Wigpool Iron Ore Co. *v.* Bird (1886), 33 Ch. D. 85.

1275. Criminal indictment—Obtaining money by false pretences.]—R. *v.* WATSON, No. 1268, *ante.*

1276. Return of premium—Misrepresentation as to profits.]—JAUNCEY *v.* KNOWLES, No. 1272, *ante.*

1277. —— **Misrepresentation without fraud.**]—ADAM *v.* NEWBIGGING, No. 1273, *ante.*

1278. Lien on surplus partnership assets—After satisfying debts & liabilities.]—Pltf. was induced by the fraud of deft. to purchase a share of his business, & to enter into partnership with him. Judgment being given for the rescission of the agreement, & the dissolution of the partnership:—*Held:* pltf. was entitled, in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets after satisfying the partnership debts & liabilities, &, in respect of any sums, which he had paid or might pay in satisfaction of partnership debts, he was entitled to stand in the place of partnership creditors to whom he made the payments.—MYCOCK *v.* BEATSON (1879), 13 Ch. D. 384; 49 L. J. Ch. 127; 42 L. T. 141; 28 W. R. 319.

1279. Right to subrogation to partnership creditors—In respect of debts paid by defrauded partner.]—MYCOCK *v.* BEATSON, No. 1278, *ante.*

1280. Alternative relief—Cancellation of agreement or account & injunction.]—Pltf., by his statement of claim, claimed to have an agreement for a partnership with deft. in a land speculation cancelled on the ground that he had been induced to enter into it by the misrepresentation of deft., & in ignorance of its real effect; or, in the alternative, that the partnership created by the agreement might be dissolved & the accounts taken, & deft. restrained from interfering with the management of the works in violation of the agreement. Deft. moved for an order for pltf. to amend his statement of claim by confining it to one of the alternative claims:—*Held:* there was no inconsistency in the alternative claims, or in the allegations in support of them; & the motion was refused.—BAGOT *v.* EASTON (1877),

7 Ch. D. 1; 47 L. J. Ch. 225; 37 L. T. 369; 26 W. R. 66, C. A.

Effect of arbitration clause in partnership agreement.]—*See* ARBITRATION, Vol. II., p. 351, Nos. 266–268.

(c) *Loss of Right to Relief.*

See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 74 *et seq.*

1281. Continuance in business after discovery of fraud.]—If A., having been induced by false representations made by B. to enter into partnership with him, continues, after he has discovered the fraud, to take part in the partnership affairs, he cannot afterwards recover from B. moneys paid by him in the course of the business of the partnership, under the common money counts.—NYE *v.* BEALE (1852), 18 L. T. O. S. 270.

1282. ——.]—R. *v.* WATSON, No. 1268, *ante*.

1283. ——.]—B. entered into partnership with a merchant on representations which he alleged to be fraudulent. He afterwards found that the merchant adulterated the article of food they dealt in, but continued the partnership for two months longer, when, the business not being successful, he filed his bill to have the partnership set aside on the ground of fraud, & the capital which he had advanced returned:—*Held:* he was not entitled to the relief sought.—RIDDEL *v.* SMITH (1864), 10 L. T. 561; 12 W. R. 899.

1284. ——.]—WEED *v.* WARD, No. 1227, *ante*.

1285. Recovery of damages against one partner—Right to sue other partner.]—RAWLINS *v.* WICKHAM, No. 1264, *ante*.

Lapse of time.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 525, Nos. 1810–1811.

B. On Sale of Share in Partnership.

1286. Sale to surviving partners — Validity—Where for purpose of re-sale to executor.]—(1) Sale of testator's share in a partnership trade, & the property belonging to it, by his exors., to his partners, for the purpose of being re-sold to one of his exors., set aside, & his estate held entitled to his aliquot proportion of the subsequent profits, as if the partnership had continued.

(2) Interest allowed at 5 per cent. on sums paid out of his estate.

(3) Arts. of partnership, providing that, upon its expiration, the stock-in-trade should be divided, received, & taken by the partners, according to their respective interests:—*Held:* they could not be carried into execution literally, &, therefore, by the general law of partnership, the settlement must be by a sale & division of the whole.—COOK *v.* COLLINGRIDGE (1823), Jac. 607; 1 L. J. O. S. Ch. 74; 37 E. R. 979, L. C.; *subsequent proceedings* (1825), 27 Beav. 456, L. C.

Annotations:—*As to* (1) **Consd.** Crawshay *v.* Collins (1826), 2 Russ. 325. **Apld.** Wedderburn *v.* Wedderburn (1838), 4 My. & Cr. 41; McDonald *v.* Richardson, Richardson *v.* Morten (1864), 10 L. T. 166; De Cordova *v.* De Cordova (1879), 4 App. Cas. 692. **Refd.** Portlock *v.* Gardner (1842), 6 Jur. 795; Wedderburn *v.* Wedderburn (1856), 22 Beav. 84. *As to* (3) **Consd.** Cookson *v.* Cookson (1837), 8 Sim. 529. *Generally*, **Refd.** Willett *v.* Blanford (1842), 1 Hare, 253; Travis *v.* Milne, Milne *v.* Milne (1851), 9 Hare, 141; Vyse *v.* Foster (1874), L. R. 7 H. L. 318; *Re* Norrington, Brindley *v.* Partridge (1879), 13 Ch. D. 654. **Mentd.** Wilkes *v.* Saunion (1877), 7 Ch. D. 188.

1287. —— ——.]—There is no such principle in equity that surviving partners cannot become purchasers, from the representatives, of the share of deceased partner.

A trader directed his trustees & exors., with all convenient speed, to sell & convert into money his residuary estate, but he provided, that three or, in case of any substantial reason, seven years might be allowed for withdrawing his capital from the business in which he was a partner. Parties beneficially interested under the will, filed their bill against the surviving partners & the legal personal representatives, insisting that the administratrix had improperly allowed testator's capital to remain in the business beyond the prescribed period, & asking to have a share in the profits made while the capital remained in the business. Defts. pleaded, that before testator's death, the partners made a valuation, when the share of testator appeared to be £63,000; that a year after his death, it was agreed between the surviving partners & the administratrix, that the new firm "should take to" the whole stock on payment to her of £63,000, & should become purchasers of testator's share at that sum; that they gave her a bond for £40,000, & placed the residue at her disposal, which was drawn out from time to time at her pleasure. It appeared that the capital had not been finally withdrawn till 1845. By the plea they insisted, that they had thus become purchasers of the share, for valuable consideration & without notice of the trusts of the will:—*Held:* this was a valid defence to the claim to participate in the profits.—CHAMBERS *v.* HOWELL (1847), 11 Beav. 6; 11 L. T. O. S. 509; 12 Jur. 905; 50 E. R. 718.

1288. —— —— **When made at gross under value.**]—Sale by an administrator to his brother & co-partner set aside, it appearing to the ct., from the evidence, that the sale was made at an under value so gross, that it ought to be deemed fraudulent & void.—RICE *v.* GORDON (1848), 11 Beav. 265; 50 E. R. 818; *subsequent proceedings* (1851), 14 Beav. 508.

Annotation:—**Mentd.** Evans *v.* Bromridge (1855), 2 K. & J. 174.

1289. —— —— **When purchasing partner might have become trustee.**]—J. carried on business in partnership with D., & by his will appointed B. & D. his exors. & trustees & guardians of his infant children. B. proved the will, but D. did not, & he afterwards renounced by deed the office of trustee. D. purchased J.'s share of the partnership estate from B.:—*Held:* in the absence of proof of misrepresentation or fraud, the sale could not be avoided merely on the ground that when entered upon the purchaser might, at his option, have become a trustee of the property purchased, he not having, in point of fact, done so.—CLARK *v.* CLARK (1884), 9 App. Cas. 733; 53 L. J. P. C. 99; 51 L. T. 750, P. C.

Annotation:—**Apld.** *Re* Boles & British Land Co.'s Contract, [1902] 1 Ch. 244.

1290. Sale to co-partner—Inadequate consideration—Concealment of accounts.]—A partner who superintended, exclusively, the accounts of the concern, agreed to purchase his co-partner's share of the business for a sum which he knew, from accounts in his possession, but which he concealed from his co-partner, was an inadequate consideration: the agreement was set aside.—MADDEFORD *v.* AUSTWICK, AUSTWICK *v.* MADDEFORD (1826), 1 Sim. 89; 57 E. R. 512; *affd.* (1833), 2 My. & K. 279, L. C.; *subsequent proceedings* (1840), 11 Sim. 209.

Annotations:—**Folld.** Law *v.* Law, [1905] 1 Ch. 140. **Refd.** Rawlins *v.* Wickham, Wickham *v.* Rawlins (1858), 1 Giff. 355.

PART V. SECT. 13, SUB-SECT. 4.—B.

n. *Sale to co-partners—To avoid dissolution.*]—STROUD *v.* WILEY (1900), 20 C. L. T. 398; 27 A. R. 516.—CAN. J.—VOL. XXXVI.

1291. —— By bankrupt partner.]—P. was engaged in a speculation in New South Wales, in partnership with M. & three other persons, M. being interested as exor. of a deceased partner. M. & F. were the London agents of the concern. In 1830 P. became bkpt., being at the time indebted to the partnership concern for advances made in respect of his share. He disputed the commission, & the concern being brought into a state of great embarrassment & difficulty by his circumstances & conduct, a deed was executed in Aug. 1829, whereby P. assigned his share to M. & F. in trust to secure the amount due from him to the concern, & subject thereto in trust for P.; & P. covenanted not to interfere in the control or management of the concern. In Dec. 1831, P., his commission still existing, agreed, with the assistance of solrs. acting on his behalf, to release his interest to his partners, in consideration of £250, but the completion of this contract was deferred by reason of the *supersedeas* not having been obtained. P. afterwards received £50 on account of the £250, & otherwise recognised the agreement. The agreement was, on May 2, 1836, & at his request, completed, without the intervention of any professional person on his behalf, & no further accounts & explanation appeared to have been furnished him. In May, 1839, having obtained an assignment of his interest from his assignees, he filed a bill to set aside the deeds of Aug. 1829, & May, 1836, on the grounds of fraud, misrepresentation, concealment, & the gross inadequacy of the consideration; but the ct. dismissed the bill, with costs, holding that the transactions were in themselves unobjectionable, & were dealings with the property which were not connected with any trusts between the parties, & were not to be regarded as a purchase of trust property by trustees for their own advantage, & consequently open to be impeached in a ct. of equity.—KNIGHT *v.* MARJORIBANKS (1849), 2 Mac. & G. 10; 2 H. & Tw. 308; 47 E. R. 1700, L. C.

Annotations:—**Consd.** Kirkwood *v.* Thompson (1865), 2 Hem. & M. 392. **Apld.** Melbourne Banking Corpn. *v.* Brougham (1882), 7 App. Cas. 307. **Refd.** Rushbrook *v.* Lawrence (1869), L. R. 8 Eq. 25.

1292. —— Agreement to dissolve—Inquiry directed as to value of business.]—DEMPSTER *v.* DEMPSTER (1887), 3 T. L. R. 299.

1293. —— Necessity for full disclosure of facts known to vendor.]—(1) It is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, & is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, & not to conceal what he alone knows; & that unless such information has been furnished, the sale is voidable & may be set aside.

(2) But if the vendor on discovering that certain material facts have been concealed from him by the purchaser, & though believing that there has been a concealment of further material facts nevertheless does acts constituting a election, & neither he nor his after his death can afterwards, on discovering the full extent of the concealment, repudiate the sale.

(3) There is no authority for the proposition, & it is contrary to principle, that the duty of full disclosure resting on the partner purchasing from his co-partner is such that the purchasing partner cannot rely on any binding election on the part of the selling partner unless & until full disclosure has been made.—LAW *v.* LAW, [1905] 1 Ch. 140; 21 T. L. R. 102; *sub nom. Re* LAW, LAW *v.* LAW, 74 L. J. Ch. 169; 92 L. T. 1; 53 W. R. 227; 49 Sol. Jo. 118, C. A.

SUB-SECT. 5.—ACCOUNTS.

A. Jurisdiction.

See Judicature Act, 1925 (c. 49), s. 56 (1) (*b*).

1294. Chancery Division.]—Deft. in an action brought in the Ch. Div. to set aside an agreement of partnership & alternatively to take partnership accounts commenced a cross action in the Q. B. Div. for hire of ships or for money paid. Pltf. applied to have the two actions consolidated on the ground that the one brought in the Q. B. Div. was really for the balance of accounts rendered under the partnership agreement, & involved the same matters as were raised in the action in the Ch. Div. The Div. Ct. had declined to consolidate the actions:—*Held:* though the fact that pltf. had charged deft. with fraud did not give the latter an absolute right to a trial by a jury, the discretion exercised by the Div. Ct. ought not to be overruled, but the accounts between the parties must be taken in the Ch. Div.—HOULT *v.* ANDERSON (1886), 2 T. L. R. 257, C. A.

1295. —— Transfer of complicated accounts.]—WARNE *v.* DELL (1875), 1 Char. Cham. Cas. 19.

——.]—*See, also,* EQUITY, Vol. XX., p. 266, No. 269; EXECUTORS, Vol. XXIV., p. 650, No. 6764.

Stay of proceedings—Lis alibi pendens.]—*See* CONFLICT OF LAWS, Vol. XI., p. 479, No. 1323.

Accounts of foreign partnership.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 353, 390, Nos. 375, 648.

B. Whether Application for Dissolution Necessary.

1296. Whether necessary.]—No relief upon a bill by one partner against another [for an account] not praying a dissolution.—FORMAN *v.* HOMFRAY (1813), 2 Ves. & B. 329; 35 E. R. 344, L. C.

Annotations:—**Distd.** Harrison *v.* Armitage (1819), 4 Madd. 143. **Refd.** Taylor *v.* Davis (1834), 4 L. J. Ch. 18.

1297. ——.]—One partner may file a bill against his co-partner for an account, although he does not pray by his bill a dissolution of the partnership.—HARRISON *v.* ARMITAGE (1819), 4 Madd. 143; 56 E. R. 661.

Annotations:—**Refd.** Loscombe *v.* Russell (1830), 4 Sim. 8; Taylor *v.* Davis (1834), 4 L. J. Ch. 18; Wallworth *v.* Holt (1841), 4 My. & Cr. 619; Fairthorne *v.* Weston (1844), 3 Hare, 387.

1298. ——.]—(1) A bill to have the accounts of a partnership taken without praying for a dissolution is demurrable.

PART V. SECT. 13, SUB-SECT. 5.—A.

o. *County court.*]—A county ct. has jurisdiction, where the amount of the claim does not exceed the ordinary jurisdiction of the ct., to entertain an action by a partner against his co-partners for a purely money demand, which is part of the partnership assets, although it may involve the taking of the partnership accounts.—ALLEN *v.* FAIRFAX CHEESE CO. (1892), 21 O. R. 598.—**CAN.**

p. ——.]—PASSICK *v.* ZABOROWSKI, [1926] 1 D. L. R. 615; [1926] 1 W. W. R. 217; 35 Man. L. R. 376.—**CAN.**

q. *Civil court.*]—A suit between co-partners for a settlement of accounts & share of profits is maintainable in the civil cts. of India, which are cts. both of law & equity.—RAM NARAIN *v.* HEERA LALL (1866), 1 Agra, 226.—**IND.**

(2) With respect to occasional breaches of agreement between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the ct. stands neuter: but, when it finds that the acts are of such a character as to show that the parties cannot continue partners, & that relief cannot be given by a dissolution, the ct. will decree it although it is not specifically asked (SHADWELL, V.-C.).—LOSCOMBE *v.* RUSSELL (1830), 4 Sim. 8; 58 E. R. 4.

Annotations:—*As to* (1) **Consd.** Taylor *v.* Davis (1834), 4 L. J. Ch. 18; Knebell *v.* White (1836), 2 Y. & C. Ex. 15. [illegible] *v.* Weston (1844), 3 Hare, 387. *As to* (2) **Reld.** Wallworth *v.* Holt (1841), 4 My. & Cr. 619; Anderson *v.* Anderson (1857), 25 Beav. 190.

1299. ——.]—The ct. will direct an account of past partnership transactions, though the bill does not pray a dissolution; but it will make no order for carrying on partnership concerns, unless with a view to a dissolution.—RICHARDS *v.* DAVIES (1831), 2 Russ. & M. 347; 39 E. R. 427.

Annotations:—**Reld.** Wallworth *v.* Holt (1841), 4 My. & Cr. 619; Fairthorne *v.* Weston (1844), 3 Hare, 387.

1300. ——.]—(1) A bill for an account of partnership transactions must pray for a dissolution of the co-partnership.

(2) Generally, a bill for an account need not contain an offer by pltf. to pay the balance if found against him.

(3) Upon a bill for an account, evidence to show on which side the balance lies cannot be used at the hearing.—KNEBELL *v.* WHITE (1836), 2 Y. & C. Ex. 15; Donnelly, 5; 5 L. J. Ex. Eq. 98; 47 E. R. 189.

Annotation:—*Generally,* **Mentd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421.

1301. ——.]—RICHARDSON *v.* HASTINGS, No. 1248, *ante.*

1302. —— **On sale of whole partnership concern by minority.**]—CHAPPLE *v.* CADELL (1822), Jac. 537; 37 E. R. 953, L. C.

1303. —— **On attempt to force dissolution—By exclusion of partner & misapplication of assets.**]—A bill for a partnership account & a receiver, during the existence of the partnership, is not demurrable merely on the ground that a dissolution is not prayed; &, therefore, where, to a bill by one partner against another, alleging that deft., by conducting himself in violation of the partnership contract, excluding pltf., & applying the assets to his own use, sought to force pltf. to dissolve the partnership before the end of the term, & praying an account of the partnership transactions & a receiver, but no dissolution, deft. answered one interrogatory, &, submitting that the bill was demurrable, declined, under Ord. 38, Aug. 1841, to answer the remainder, exceptions for insufficiency were allowed & sustained.—FAIRTHORNE *v.* WESTON (1844), 3 Hare, 387; 13 L. J. Ch. 263; 2 L. T. O. S. 497; 8 Jur. 353; 67 E. R. 432.

Annotations:—**Consd.** Kaye *v.* Wall (1845), 4 Hare, 283. **Apld.** Watney *v.* Trist (1876), 45 L. J. Ch. 412.

1304. —— **Partnership at will.**]—LEYBORNE-POPHAM *v.* SPENCER-BROWN (1893), 9 T. L. R. 309.

—— **Accounts of mining partnership.**]—*See* MINES, Vol. XXXIV., p. 623, No. 206.

C. On Whose Application Ordered.

(a) Partners and Their Representatives.

See Partnership Act, 1890 (c. 39), s. 31.

1305. Partner—Indebted to partnership—Satisfaction of debt.]—MELIORUCCHI *v* ROYAL EXCHANGE ASSURANCE Co. (1728), 1 Eq. Cas. Abr. 8; 21 E. R. 833.

Annotation:—**Mentd.** Ryall *v.* Rowles (1750), 1 Ves. Sen. 348.

1306. —— **Against agents of co-partners.**]—Some partners in an adventure held, under circumstances, to be precluded from having an account against agents appointed by their co-partner.—MAXWELL *v.* GREIG (1828), Coop. Pr. Cas. 491; 6 L. J. O. S. Ch 128; 47 E. R. 613.

1307. —— **As assignee of co-partner—Joint speculation between two firms.**]—Where the firm of S. & co. advanced moneys for the purpose of a joint speculation with the firm of B. & co., & the speculation was afterwards terminated, & afterwards one of the partners of the firm of S. & co. disclaimed all interest in the speculation & in any balance due from B. & co. in favour of his co-partner, & then the partnership of S. & co. was dissolved; a demurrer for want of equity, to a bill filed by the party in whose favour the disclaimer was made, for an account against B. & co. in respect of the joint transactions, was overruled.—KINDER *v.* ASHBURTON (LORD) (1838), 2 Jur. 1032.

1308. On behalf of self & co-partner—Against partners with adverse interest.]—RICHARDSON *v.* HASTINGS, No. 1248, *ante.*

1309. —— **Although guilty of misconduct—Dissolution of partnership at will by notice.**]—Where a partnership at will has been dissolved by notice a partner is entitled to an order for accounts, although he is found to have destroyed part of the account books, made false entries in the accounts, & to have been guilty of other misconduct in relation to the firm's business. His right to a declaration that the partnership is dissolved & to an order for accounts to be taken is a legal, not an equitable right.—RAM SINGH *v.* RAM CHAND (1923), L. R. 51 Ind. App. 154.

1310. Representative of deceased partner.]—HACKWELL *v.* EUSTMAN, No. 1235, *ante.*

1311. ——.]—HEYNE *v.* MIDDLEMORE (1665), 1 Rep. Ch. 261; 21 E. R. 567.

1312. ——.]—MORRIS *v.* HARRISON (1701), Colles, 157; 1 E. R. 228.

1313. ——.]—CLEGG *v.* FISHWICK, No. 1468, *post.*

1314. ——.]—(1) The right of a surviving partner to the partnership assets is absolute. There is no fiduciary relation between him & the representatives of his deceased partner; but he is liable to account for the partnership assets, &, in taking such account, Stat. of Limitations is applicable.

(2) In the absence of fraud or collusion, or some other circumstance creating a privity between the parties, the only person who can file a bill against a surviving partner for an account of the partnership assets is the legal personal representative of his deceased partner.—TAYLOR *v.* TAYLOR (1873), 28 L. T. 189.

Annotation:—*Generally,* **Reld.** Stamp Duties Comr. *v.* Salting, [1907] A. C. 449.

1315. —— **Foreign partnership with English assets.**]—A firm consisting of three persons, A., B. & C. carried on business at Hayti: A. & B. were also in partnership at Liverpool, & acted as the agents of the Hayti firm. C. resided at Hayti, & died there. A. resided at Liverpool, & died there, leaving English assets. B. who also resided at Hayti, instituted a suit there to have the

PART V. SECT. 13, SUB-SECT. 5.—C. (a).

r. *Partner—Co-trustee of share of deceased partner—Account solely of own dealing.*]—BRUCE *v.* LIGAR (1869), 6 W. W. & A'B. (E.) 240.—AUS.

t. —— *Legatee of co-partner.*]—ROBERTSON *v.* JUNKIN (1896), 26 S. C. R. 192.—CAN.

a. —— *Although guilty of misconduct.*]—Where a partnership at will has been dissolved by notice a partner

Sect. 13.—*Enforcement of rights: Sub-sect.* 5, *C.* (*a*)

accounts of the Hayti firm taken & wound up as against the foreign representatives of C. The extrix. of A. was not a party to this suit, & no final decree had been made :—*Held :* the pendency of this suit was no bar to a bill filed by the English representative of C. to have the accounts taken between the two firms, & the Hayti partnership wound up in this ct.—MAUNDER *v.* LLOYD (1862), 2 John. & H. 718 ; 1 New Rep. 123 ; 11 W. R. 141 ; 70 E. R. 1248.

Annotations :—**Refd.** Matthaei *v.* Galitzin (1874), L. R. 18 Eq. 340. **Mentd.** Steele *v.* Stuart (1863), 1 Hem. & M. 793.

(*b*) *Third Parties.*

See Partnership Act, 1890 (c. 39), s. 31.

1316. Legatee of deceased partner—Where surviving partner an executor—Surviving partner taking over.]—By arts. of partnership, in case of the death of a partner the survivor was to pay the amount of his capital according to the last half-yearly rest, & to take the stock, etc. After the death of one, a different arrangement was entered into between his exors. one of whom was the surviving partner, & his widow, who was beneficially interested under the will, by which the surviving partner was to take the stock at a valuation, & get in the credits, & pay the joint debts, & out of the share of deceased partner in the surplus, to pay his separate debts & the widow's legacy. The widow by this bill sought to set aside this arrangement for fraud, & to have an account of the partnership transactions, & of the profits subsequent to her husband's death :—*Held :* the pltf. was entitled to the production of the accounts of the business, as carried on after testator's death.

v. RICHARDS (1839), 2 Beav. 305 ; 48 E. R. 1198.

1317. —— ——.]—A bill was filed by parties beneficially interested under the will of a partner, who had by his will made his co-partner his exor., who, as alleged, had, after his partner's death, improperly employed his assets in trade. Subsequently to testator's death his exor. took two persons into partnership with him. Those two partners were not made parties to the suit, but they appeared as witnesses to prove the amount of profits made by the exor. in continuing the business after the death of testator. A bill was also filed by the exor. against the parties beneficially interested under the will, for the usual & other accounts :—*Held :* the exor. was accountable for the profits made on the assets improperly employed, & directed him to account & pay over those profits, although the persons subsequently taken into partnership were not parties to the suit, & not before the ct. in any other character than above-mentioned.—MACDONALD *v.* RICHARDSON, RICHARDSON *v.* MARTEN (1858), 1 Giff. 81 ; 32 L. T. O. S. 237 : 5 Jur. N. S. 9 ; 65 E. R. 833.

Annotations :—**Refd.** Vyse *v.* Foster (1872), 8 Ch. App. 315, n. **Mentd.** Lazarus *v.* Mozley (1859), 1 L. T. 3.

1318. ——.]—CRAMER *v.* JENNINGS (1850), 15 L. T. O. S. 201 ; 14 Jur. 518.

1319. —— **Against surviving partners & executors — Without collusion alleged or proved.**]—Legatees can sustain a bill against the exors. & the surviving partners of their testator, although collusion between the exors. & surviving partners is not alleged or proved.—TRAVIS *v.* MILNE, MILNE *v.* MILNE (1851), 9 Hare, 141 ; 20 L. J. Ch. 665 ; 68 E. R. 449.

Annotations :—**Consd.** Stainton *v.* Carron Co. (1854), 18 Beav. 146. **Apld.** Brett *v.* Beckwith (1856), 26 L. J. Ch. 130 ; Flockton *v.* Bunning (1868), 8 Ch. App. 323, n. **Consd.** Yeatman *v.* Yeatman (1877), 7 Ch. D. 210 ; Meldrum *v.* Scorer (1887), 56 L. T. 471. **Refd.** Beningfield *v.* Baxter (1886), 12 App. Cas. 167 ; Alcoy & Gandia Ry. & Harbour Co. *v.* Greenhill (1897), 76 L. T. 542.

1320. Residuary legatee of deceased partner—Against surviving partners & executors—Without collusion alleged or proved.]—Residuary legatees may sustain a bill for an account against the exor. & the surviving partner of testator, though collusion between the exor. & the surviving partner is neither charged nor proved.—BOWSHER *v.* WATKINS (1830), 1 Russ. & M. 277 ; 39 E. R. 107.

Annotations :—**Consd.** Cropper *v.* Knapman (1836), 2 Y. & C. Ex. 338. **Distd.** Davies *v.* Davies (1837), 2 Keen, 534 ; Yeatman *v.* Yeatman (1877), 7 Ch. D. 210. **Refd.** Brett *v.* Beckwith (1856), 26 L. J. Ch. 130 ; Ambler *v.* Lindsay (1876), 35 L. T. 93. **Mentd.** Holland *v.* Prior (1834), 1 My. & K. 237 ; Bolton *v.* Powell, Howard *v.* Earle (1851), 16 Jur. 24 ; *Re* Lovett, Ambler *v.* Lindsay (1876), 3 Ch. D. 198.

1321. —— —— ——.]—Where one of two exors. was a partner with the testator, the residuary legatees may sustain a bill for an account of the partnership transactions against the exors., though collusion between them is neither charged nor proved.—CROPPER *v.* KNAPMAN (1836), 2 Y. & C. Ex. 338 ; 6 L. J. Ex. Eq. 9 ; 160 E. R. 426 ; *subsequent proceedings* (1840), 4 Y. & C. Ex. 249.

1322. —— —— ——.]—A., B., & C. having been in partnership together, & A. & C. having died, a bill was filed by the residuary legatees of A. against his exors., & against B. & the exors. of C., for an account of the personal estate of A. :—*Held :* under the special circumstances of the case, B. & the exors. of C. were properly made parties, although no collusion between them & the exors. of A. was either charged or proved.—LAW *v.* LAW (1847), 16 L. J. Ch. 375 ; 11 Jur. 463, L. C.

Annotation :—**Mentd.** Barker *v.* Birch (1847), 1 De G. & Sm. 376.

1323. —— —— **One legatee out of jurisdiction.**]—Three out of four of testator's children, residuary legatees the fourth being out of the jurisdiction filed a bill against their mother, the tenant for life, & their uncle who had carried on business in partnership with their father, & who were extrix. & exor. & trustees of the will, alleging that the uncle had possessed himself of & employed the estate of testator, & had occasioned great loss to it, that he had mismanaged the partnership business ; that he intended to get in & to apply the outstanding debts to his own use, & that he had bought at a valuation a portion of the estate, but had not paid the purchase-money ; & praying for accounts of the estate of testator, & of what the uncle had, or but for his wilful default & neglect might have received, & that he might be charged with what was now due from him in all respects, & with all losses occasioned by his mismanagement : & for a receiver & for an injunction. A demurrer by the uncle for multifariousness & for want of

is entitled to an order for accounts although he is found to have destroyed part of the account books, made false entries in the accounts, & to have been guilty of other misconduct in relation to the firm's business.—RAM SINGH *v.* RAM CHAND (1923), I. L. R. 5 Lah. 23. —**IND.**

b. *Retired partner.*]—GOPULA CHETTY *v.* VYAYARAGHA (1922), I. L. R. 45 Mad. 378.—**IND.**

PART V. SECT. 13, SUB-SECT. 5.—C. (b).

c. *Trustees & beneficiary of settlement of partner.*]—To a bill filed by one co-partner against another seeking to set aside a marriage settlement as having been made by the settlor at a time when he was insolvent, the trustee & *cestuis que* trust of the settlement are necessary parties, as they are entitled to have the accounts of the partnership taken, & assets thereof applied in exoneration of the settled lands.—THOMAS *v.* TORRANCE (1859), 1 Ch. Ch. 46.—**CAN.**

d. *Assignee of interest in partnership.*]—CANADIAN PACIFIC RY. CO. *v.* RAT PORTAGE LUMBER CO. (1905), 5 O. W. R. 473 ; 10 O. L. R. 273.—**CAN.**

e. ——.]—The assignee of an interest

parties was overruled.—POINTON *v.* POINTON (1871), L. R. 12 Eq. 547; 40 L. J. Ch. 609; 25 L. T. 294; 19 W. R. 1051.

Annotation:—**Refd.** Coates *v.* Legard (1874), L. R. 19 Eq. 56.

1324. —— Surviving partners with power to purchase—Mala fides must be shown.]—VYSE *v.* FOSTER, No. 1161, *ante.*

1325. Separate creditor of deceased partner.]—Bill by the separate creditor of deceased partner, sustained, under the circumstances of the case, against the representative of deceased partner jointly with the surviving partner.—NEWLAND *v.* CHAMPION (1748), 2 Coll. 46; 1 Ves. Sen. 105; 63 E. R. 629, L. C.

Annotations:—**Consd.** Doran *v.* Simpson (1799), 4 Ves. 651. **Distd.** Law *v.* Law (1845), 2 Coll. 41. **Mentd.** Alsager *v.* Rowley (1802), 6 Ves. 748; Holland *v.* Prior (1834), 1 My. & K. 237.

1326. Mortgagee of share—Of deceased partner.]—(1) A. & B. being assignees of a lease of a colliery, & working the colliery as partners in trade, A. mortgaged his share to C. & died. C. then filed his bill against B., & the exors. of A., charging that B. had excluded A. from the concern, & taken upon himself the sole management of it; & praying for an account of the profits of the concern since he had been manager, & for a receiver, & & injunction against his further interference:—*Held:* the bill, though filed by a mtgee., & not by an absolute assignee of A.'s share, was sustainable.

(2) If you look to the constitution of a mercantile partnership, what is the meaning of a partner mortgaging his share? Nothing more than that he covenants to pay the amount borrowed. It cannot mean that another person is, by means of such a transaction, to be forced into the partnership. That mtge. is nothing more than a personal covenant; it conveys no interest in the partnership effects (LORD ABINGER, C.B.).—BENTLEY *v.* BATES (1840), 4 Y. & C. Ex. 182; 9 L. J. Ex. Eq. 30; 4 Jur. 552.

Annotations:—*As to* (1) **Consd.** Roberts *v.* Eberhardt (1853), 2 Eq. Rep. 780; Dodds *v.* Preston (1888), 59 L. T. 718. **Refd.** Redmayne *v.* Forster (1866), 35 L. J. Ch. 847. *Generally*, **Mentd.** Adair *v.* New River Co. & Metropolitan Water Board (1908), 25 T. L. R. 193.

1327. —— Of retiring of partner—Statutory right independent of partnership deed—Arbitration clause in deed immaterial.]—BONNIN *v.* NEAME, No. 693, *ante.*

1328. Trustee in bankruptcy.]—When a bkpt. four years previously to his bkpcy. had been engaged in a partnership business, & two important items in his accounts were connected with the transactions of that partnership business, the trustee was held to be entitled to demand a cash account of that business, notwithstanding the lapse of time.—*Re* CRAWFORD, *Ex p.* CRAWFORD (1873), 28 L. T. 244; 21 W. R. 509.

D. Against Whom Accounts Ordered.

1329. Surviving partner.]—HACKWELL *v.* EUSTMAN, No. 1235, *ante.*

1330. ——.]—BROWN *v.* DE TASTET, No. 930, *ante.*

1331. ——.]—TAYLOR *v.* TAYLOR, No. 1314, *ante.*

1332. Surviving partners & executors.]—VYSE *v.* FOSTER, No. 1161, *ante.*

1333. ——.]—SMITH *v.* CHANDOS (DUKE) (1740), Barn. Ch. 412; 27 E. R. 700, L. C.; *subsequent proceedings* (1741), 2 Atk. 159, L. C.

1334. ——.]—NEWLAND *v.* CHAMPION, No. 1325, *ante.*

1335. —— Without collusion proved or alleged.]—BOWSHER *v.* WATKINS, No. 1320, *ante.*

1336. —— ——.]—CROPPER *v.* KNAPMAN, No. 1321, *ante.*

1337. —— ——.]—LAW *v.* LAW, No. 1322, *ante.*

1338. —— ——.]—TRAVIS *v.* MILNE, MILNE *v.* MILNE, No. 1319, *ante.*

—— Surviving partner one of executors.]—*See* EXECUTORS, Vol. XXIV., pp. 690, 691, Nos. 7164–7167.

—— Executor becoming partner in own right.]—*See* EXECUTORS, Vol. XXIV., p. 690, No. 7163.

1339. Continuing partner—Account to mortgagee of share of retiring partner—Notwithstanding terms of partnership deed.]—BONNIN *v.* NEAME, No. 693, *ante.*

Solvent partner.]—*See* BANKRUPTCY, Vol. V., pp. 658, 659, No. 5866, 5868.

1340. Executor of surviving partner.]—A. & W. were partners in trade. A., the partnership accounts being unsettled, died leaving W. one of his exors., & B. an infant, his residuary legatee. On B.'s attaining twenty-one, he executed a general release to A.'s exors., save & except, nevertheless, & without prejudice to the share & interest late of testator A. of & in such outstanding credits of his said co-partnership with W. as had not been received & accounted for as aforesaid. After this release was executed W. made several payments to B. in respect of moneys received on account of the partnership. W. died & G. & M. his exors., accounted to B. for sums to which A. had he been alive, would have been entitled. On bill filed by B. against the representatives of W. the ct. directed the accounts of what was due from W. to A. at A.'s death, what became due from W. to A.'s estate, & what since W.'s death had been received by his representatves in respect of debts due to the partnership firm, to be taken.—ALLEN *v.* WILSON (1851), 18 L. T. O. S. 180, L. J.

—— Purchase of assets for own benefit.]—*See* EXECUTORS, Vol. XXIV., p. 689, No. 7156.

E. Parties to Action for Account.

See Sub-sect. 2, B., *ante.*

F. Grounds for Granting or Refusing.

1341. Engaging in new business—In fraud of co-partner.]—PILLANS *v.* HARKNESS (1713), Colles, 442; 1 E. R. 363, H. L.

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in a partnership which has previously terminated by effluxion of time is entitled to call for an account.—SASKATOON TOWNSITES *v.* SIMPSON, [1920] 1 W. W. R. 884.—**CAN.**

PART V. SECT. 13, SUB-SECT. 5.—D.

1329 i. *Surviving partner.*]—CATOMORE *v.* MURRAY, Mac. 1055.—**N.Z.**

i. —— *Continuing business.*]—FARQUHARSON *v.* STEWART (P. E. I.) (1912), 10 E. L. R. 408; 1 D. L. R. 591.—**CAN.**

g. *Partners—Partnership in name of one.*]—An agreement between two that they should carry on business as co-partners in the sole name of one of them, the other being in debt, & wishing by this means to keep the property from his creditors, does not exempt the partner whose name was used from rendering an account of the partnership dealings to his co-partner.—BRIGHAM *v.* SMITH (1870), 3 E. & A. 46.—**CAN.**

h. —— *Co-partner director of company contracting with partnership.*]—CAMERON *v.* BICKFORD (1884), 11 A. R. 52.—**CAN.**

k. ——.]—A partner is entitled to be called upon for an account of the expenditure of the money, which he has received, & it is open to him to spend the money received by him & to account for it in dealing with the partnership.—DEBI PRASAD BHAGAT *v.* NAGAR MULL (1908), I. L. R. 35 Calc. 1108.—**IND.**

l. *Executor of deceased partner.*]—STRATHY *v.* CROOKS (1857), 6 Gr. 162.—**CAN.**

PART V. SECT. 13, SUB-SECT. 5.—F.

m. *General rule.*]—It is only in exceptional cases that a suit can be brought by one partner against another, which involves the taking of partnership accounts prior to dissolution.—

Sect. 13.—*Enforcement of rights: Sub-sect.* 5, *F. G.* (*a*) & (*b*).]

1342. Refusal to account.]—ASHTON *v.* SMITH (1726), Show. Parl. Cas. 4th ed. 284, H. L.

1343. Attempt to force dissolution—By exclusion of co-partner & misapplication of assets.]—FAIRTHORNE *v.* WESTON, No. 1303, *ante*.

1344. Purchase of co-partner's share—Sale under execution.]—(1) A partner having purchased from the sheriff, under an execution, the share of his partner in the partnership effects:—*Held:* the latter was entitled to have an account taken of the partnership dealings & transactions.

(2) The assignment had the effect of dissolving the partnership (KNIGHT-BRUCE, V.-C.).

(3) Pltf. is entitled to . . . a reference to the master to inquire what were the particulars of the stock-in-trade, debts, effects, & liabilities at the time of the execution; what debts were then due to the partnership; what was then due by the partners to the partnership; what, if anything, had been received in respect of the partnership, & by whom, & how the same had been applied, & whether the debts & liabilities of the partnership at the time of the execution had been discharged, & by whom (KNIGHT BRUCE, V.-C.).—HABERSHON *v.* BLURTON (1847), 1 De G. & Sm. 121; 9 L. T. O. S. 4; 11 Jur. 161; 63 E. R.

Annotation:—*As to* (2) **Apld.** Aspinall *v.* L. & N. W. Ry. (1853), 11 Hare, 325.

1345. Partners denying partnership.]—CLARKE & CHAPMAN *v.* HART, No. 1382, *post*.

1346. Breach of trust—Trust funds employed as capital.]—FLOCKTON *v.* BUNNING (1868), 8 Ch. App. 323, n., L. JJ.

1347. Retention of assets after dissolution—Assets applied in continuing business—Fraud immaterial.]—In a suit for partnership after a dissolution the judge on Aug. 30, 1909, declared the partnership dissolved & referred the matter to the assistant referee (*a*) to inquire who were the partners entitled to the assets & goodwill, (*b*) to take an account of the dealings of the parties with the assets. This adjudication was not appealed from. The report of the assistant referee showed that large sums, forming part of the assets were in the hands of applts., & had been used by them in continuing the business for their benefit. The judge by his decree ordered these sums to be paid into ct. together with interest thereon at 6 per cent. *per annum* from the date of the dissolution. Upon appeal, present applts. contended (*inter alia*), that the judge had no jurisdiction to refer the question as to who were the partners, & further that they should not have been ordered to pay interest:—*Held:* it was well settled that when on the dissolution of a firm one of the partners retained assets of the firm in his hands without any settlement of accounts & applies them in continuing the business for his own benefit, he might be ordered to account for those assets with interest thereon, & this apart from fraud or misconduct in the nature of fraud.—AHMED MUSAJI SALEJI *v.* HASHIM EBRAHIM SALEJI (1915), L. R. 42 Ind. App. 91, P. C.

Solicitors' accounts.]—*See* SOLICITORS.

Engaging in separate business.]—*See* Part V., Sect. 2, sub-sect. 2, B., *ante*.

G. Basis of Taking Accounts.

(*a*) *In General.*

1348. Practice of firm.]—The common account of the dealings & transactions of co-partners is to be taken according to the arts. or usage of the partnership, although no special directions to that effect are inserted in the decree.—WATNEY *v.* WELLS (1862), 1 New Rep. 82; 32 L. J. Ch. 194; 9 Jur. N. S. 396; 11 W. R. 228.

1349. —— Partnership articles notwithstanding.]—COVENTRY *v.* BARCLAY, No. 1356, *post*.

—— —— Share of deceased partner.]—*See* Part V., Sect. 13, sub-sect. 5, G. (*b*), *post*.

Compare Nos. 248, 255, *ante*.

1350. —— Profits devoted to equipment & replacing assets.]—GARWOOD *v.* GARWOOD, No. 1157, *ante*.

1351. Time from which taken.]—An account in partnership in trade shall not be inspected after the last balance.

(2) A partnership in trade is continued for some purposes after a dissolution.—BEAK *v.* BEAK (1675), Cas. *temp.* Finch, 190; 3 Swan. 627; 23 E. R. 104.

Annotations:—*As to* (2) **Refd.** Buckley *v.* Barber (1851), 6 Exch. 164; Rodriguez *v.* Speyer, [1919] A. C. 59.

1352. Partnership commencing at different times—Separate accounts taken.]—Where partnerships have commenced at different times; upon a bkpcy. of all, the ct. will direct separate accounts & that each estate shall first bear its own debts.—*Ex p.* MARLIN (1785), 2 Bro. C. C. 15; 29 E. R. 8.

Annotation:—**Refd.** *Ex p.* Bonbonus (1803), 8 Ves. 540.

1353. Successive partnership—Credit of receipts not specifically appropriated.]—R. & A. having carried on the business of navy agents as partners in equal shares, & R. having retired, leaving the partnership accounts unsettled, with large balances due to the firm from its customers, A. took C. into partnership, the customers' accounts were transferred to the new partnership books, & the business was carried on as before, until A.'s death, without any agreement in writing, or settlement of accounts between these partners, or other evidence to show their shares in the concern. On a bill being filed by A.'s representatives against C. for an account, he stated that the agreement was that if A. would bring into the partnership £40,000 of good debts due from the customers to the former partnership, his share in the concern should be two-thirds & C.'s one-third, otherwise they should have equal shares; & that, in consequence of A.'s not bringing in the £40,000 of good debts, the agreement was varied accordingly. There were entires in the accounts debiting the partners equally with the prices of wines purchased, & with losses on transactions in the public funds; & one witness said that C. directed him in A.'s presence to make up the general partnership accounts in equal shares:—*Held:* in taking the accounts between C. & A., & between them & the former firm, the moneys

KASSA MAL *v.* GOPI (1886), I. L. R. 9 All. 120.—**IND.**

n. ——.]—In regard to suits by one partner against another for a partial account, the general rule, as applied in India, is that if the account is sought in respect of a matter, which, though arising out of partnership business, or connected with it does not involve the taking of general accounts, the ct. will, as a rule, give the relief applied for.—KARRI VENKATA REDDI *v.* KOLLU NARASAYYA (1908), I. L. R. 32 Mad. 76.—**IND.**

o. *Expense of moving buildings—Contract not proceeded with.*]—MCKENZIE & BLUNDELL *v.* BALL (Sask.) (1913), 24 W. L. R. 367.—**CAN.**

PART V. SECT. 13, SUB-SECT. 5.—G. (a).

1351 i. *Time from which taken.*]—KENNEDY *v.* GAUDAUR (1901), 1 O. L. R. 430; 21 C. L. T. 224.—**CAN.**

1351 ii. ——.]—HAMILTON BRASS MANUFACTURING CO. *v.* BARR CASH & PACKAGE CARRIER CO. (1906), 38 S. C. R. 216; 27 C. L. T. 224.—**CAN.**

1351 iii. ——.]—TUNSTALL *v.* MCKECHNIE (1909), 10 W. L. R. 372.—**CAN.**

p. *Account on footing of wilful default.*]—It is contrary to the ordinary course to charge partners with what

paid in by the customers of both firms without specific appropriation or contract, were to be applied first in discharge of their debts to the former firm, according to the rule in *Clayton's Case* (1816), 1 Mer. 572, although A. in an affidavit made by him in a suit between himself & R.'s representatives, swore that it was agreed between him & C. that the advances to be made by them to creditors should be first repaid out of their payments, & the surplus only in liquidation of their debts to the former firm.—COPLAND *v.* TOULMIN (1840), 7 Cl. & Fin. 349; West, 164; 7 E. R. 1102, H. L.; *varying* S. C. *sub nom.* TOULMIN *v.* COPLAND (1836), 3 Y. & C. Ex. 625.

Annotation:—**Mentd.** Digby *v.* Boycatt (1845), 4 Hare, 444.

1354. Partner accounting bound by debits—Though credits not admitted by co-partner.]—Where the accounts of a partnership between two had been carelessly kept, & after the death of one the other furnished to the exors. of deceased partner an account current of the partnership dealings, which afforded them the only evidence to charge the surviving partner:—*Held:* they were entitled to use it for that purpose in a suit instituted by the surviving partner to have the accounts taken, without being bound by the entries on the credit side of the account current.—MOREHOUSE *v.* NEWTON (1849), 3 De G. & Sm. 307; 13 L. T. O. S. 361; 13 Jur. 420; 64 E. R. 491.

1355. Unsaleable assets must be valued.]—A. & B. carried on the business of carrying mails under a contract entered into by the Postmaster-General with B. & not assignable. A. died. B. continued to carry on the business under the contract, & refused to account for the value of the contract to the exors. of deceased partner:—*Held:* as the contract was not assignable & its value could not be ascertained in the usual way by sale, it must be referred to chambers to ascertain the value, & the surviving partner must pay that amount to the exors. of deceased, with a share of the profits since the death of deceased, a fair sum being allowed to the surviving partners for his services in carrying on the business.—AMBLER *v.* BOLTON (1872), L. R. 14 Eq. 427; 41 L. J. Ch. 783; 20 W. R. 934.

Annotation:—**Distd.** McClean *v.* Kennard (1874), 9 Ch. App. 336.

Banking partnership.]—*See* BANKERS, Vol. III., p. 138, No. 114.

(*b*) *For Ascertaining Share of Deceased Partner.*

1356. Practice of firm, partnership articles notwithstanding—Valuation to be at last annual rest—Arbitrary valuation.]—Where arts. of partnership have been followed by a long uninterrupted course of practice, which, though not wholly inconsistent with, is not the proper meaning & intention of, the arts., that course of practice will be held to be the practical construction of the language of the arts., as evidence of a new agreement by the partners.

Arts. of partnership provided that a valuation of stock should be taken every year, & entered in a book called the valuation & rest-book, which was to be signed by the several partners. One of the partners, who had regularly signed the books from 1831 to 1859, was absent through ill-health or bodily incapacity from the meeting in 1860, & died two months after it took place. He never expressed any dissatisfaction at the mode of making out the account:—*Held:* (1) the estate of deceased partner was as much bound by the settlement of 1860, as if the book had actually been signed by him; & he must be considered, in equity, as if he had signed the same.

It was the practice of the firm to set apart, every year, out of the balance, a portion which was left undivided, called (erroneously) a "sinking fund," out of which to pay contingencies-losses, & uncertain liabilities:—*Held:* (2) the estate of deceased partner was entitled to participate in this fund.—COVENTRY *v.* BARCLAY (1863), 3 De G. J. & Sm. 320; 3 New Rep. 224; 9 L. T. 496; 9 Jur. N. S. 1331; 12 W. R. 500; 46 E. R. 659, L. C.

Annotations:—*As to* (1) **Refd.** Vyse *v.* Foster (1874), L. R. 7 H. L. 318; Cruikshank *v.* Sutherland (1922), 92 L. J. Ch. 136. *As to* (2) **Refd.** *Re* Barber, *Ex p.* Barber (1870), 5 Ch. App. 687.

1357. —— —— No rest for several years.]—Arts. of partnership provided that, on Dec. 31, in every year, or such other day as all the partners should agree upon, a general partnership account & rest, & a valuation & appraisement of the property & stock should be made, & signed by the partners, &, on the expiration of the partnership term, the partnership property should be realised & divided on the footing of such last annual rest; &, if any partner should die during the partnership term, his representatives should receive payment of his share of the capital & stock, as ascertained at the last annual rest, with interest thereon, in lieu of profits from that time, by instalments; & such representatives to have no right to look into the partnership books. The partnership continued for several years, but the partners did not make the annual account & rest as provided by the arts. One partner died:—*Held:* (1) the representatives of deceased partner were not entitled to a sale of the partnership property, as upon a dissolution; (2) the rest, & not the day of the rest, was the essence of the partnership contract; &, therefore, the representatives of deceased partner were entitled to participate in the profits up to the time of his death; & also to have the account taken, by means of the partnership books, in the usual way.—SIMMONS *v.* LEONARD (1844), 3 Hare, 581; 67 E. R. 512.

Annotation:—*As to* (2) **Refd.** Lawes *v.* Lawes, *Re* Lawes (1878), 38 L. T. 709.

1358. —— —— Unexpected depreciation of assets after issue of balance sheet.]—Partnership arts. provided for a balance sheet being made out up to Dec. 31 in each year, which, after a certain time, was to be binding on the partners, except that manifest errors, when discovered, should be corrected. It was also provided that a like account should be made out on Dec. 31 next after the death of a partner, & that his exors. should be entitled to receive by six instalments from the surviving partners the value of his interest as appearing from such balance sheet. The uniform practice of the firm in making out their balance sheets was to treat the loss occasioned by any asset turning out bad as attributable to the year in which it was discovered to be bad. In the year

but for their wilful default they would have received.—DAVIDSON *v.* THIRKELL (1852), 3 Gr. 330.—**CAN.**

q. *Items charged in account—Unsuccessful litigation.*]—Costs of unsuccessful litigation with a tenant of certain partnership property & salary to one partner as manager are proper items which to charge to a partnership business upon taking of accounts.—STEWART *v.* FARQUHARSON (P. E. I.) (1914), 14 E. L. R. 240.—**CAN.**

PART V. SECT. 13, SUB-SECT. 5.—G. (b).

r. *Items to be taken into account—Amounts advanced & drawn out—Subsisting liabilities & assets.*]—A suit based on the right of a deceased partner cannot be limited to a demand for his share in the proceeds of property alleged to have come into the possession of the partnership during its existence. The agreement on which the partnership was formed, the amounts advanced & drawn out by the several partners, & the subsisting liabilities & assets, if

Sect. 13.—*Enforcement of rights: Sub-sect.* 5, *G.* (*b*), *& H.* (*a*), (*b*) *&* (*c*).]

1864 one of the partners died; &, after the balance sheet had been made out, various assets which had been treated as good were ascertained to be irrecoverable, owing to the failure since Dec. 31, 1864, of debtors to the firm, & depreciation of consignments, which, when the balance sheet was made out, had not been realised:—*Held:* the exors. of deceased partner were entitled to receive the value of his share as appearing by the balance sheet, without any deduction for the losses subsequently ascertained.—*Re* BARBER, *Ex p.* BARBER (1870), 5 Ch. App. 687; 23 L. T. 230, 18 W. R. 940, L. J.

1359. —— —— Substitution of yearly for half yearly accounts.]—LAWES *v.* LAWES, No. 258, *ante.*

1360. —— —— Whether goodwill credited—Not accounted for in annual valuation.]—One partner died while negotiations were pending for the sale of business premises to a railway co. By the partnership deed the share of deceased partner was to be taken at the value put upon it by the last balance sheet, & in the past balance sheets there was no mention of goodwill:—*Held:* in taking the accounts deceased partner must be credited with a share of the premises, plant, etc., at the price subsequently paid for them by the railway co., but his estate was not entitled to any share of the sum paid for goodwill.—HUNTER *v.* DOWLING, [1895] 2 Ch. 223; 64 L. J. Ch. 713; 72 L. T. 653; 43 W. R. 619; 13 R. 474.

1361. —— Provision for settlement for division of profits—No settlement for several years.]—Stipulations in arts. of partnership for an annual settlement of accounts, & for payment to the representatives of deceased partner, of an allowance in lieu of profits since the last annual account, proportioned to the amount of his share of profits, during two years preceding, are waived in equity by omission through several years to settle annual accounts, & by engaging in business to which the stipulations cannot be applied without injustice; & an injunction was granted to restrain the representatives of deceased partner from proceeding on a bond given by the surviving partners, for repayment of his share according to the arts., before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained.—JACKSON *v.* SEDGWICK (1818), 1 Swan. 460; 1 Wils. Ch. 297; 36 E. R. 465, L. C.

Annotations:—**Apld.** Blisset *v.* Daniel (1853), 10 Hare, 493. **Refd.** Ekins *v.* Brown (1854), 1 Ecc. & Ad. 400; Lawes *v.* Lawes (1878), 27 W. R. 186.

1362. —— —— Settlement on day other than day provided.]—Partnership arts. direct a yearly settlement on Mar. 25, & if a partner die his estate is to share in no profits subsequent to the last yearly settlement. The last settlement is on Nov. 5, 1811, & a partner dies in Feb. 1813. His estate shares in profits up to Nov. 5, 1812.—PETTYT *v.* JANESON (1819), 6 Madd. 146; 56 E. R. 1047.

Annotations:—**Consd.** Coventry *v.* Barclay (1863), 33 Beav. 1. **Apld.** Hunter *v.* Dowling, [1893] 3 Ch. 212.

1363. —— —— Substitution of yearly for half yearly accounts.]—LAWES *v.* LAWES, No. 258, *ante.*

1364. Allowance for making up books—Work not performed on account of illness.]—Where an allowance was made to one of two partners for his labour in making up the books of the partnership, & during the last eighteen months of his life he was incapacitated by illness from performing that duty, in an account between his exors. & the surviving partner, the allowance during the last eighteen months was disallowed to deceased partner's estate.—MCDONALD *v.* RICHARDSON, RICHARDSON *v.* MARTEN (1864), 10 L. T. 166.

II. Defences to Action.

(a) Accord and Satisfaction.

1365. Necessity for both accord & satisfaction.]—To a bill for an account of the dealings & transactions of a partnership, by the exors. of deceased partner, deft. pleaded that, for a certain consideration, an agreement, not in writing, was entered into between testator & himself, that all accounts between them & all claims of testator in respect of the estate, moneys & effects of the partnership, & the debts due to & from the same, should be waived:—*Held:* the agreement should be construed to import that deft. thereby took upon himself the discharge of the partnership liabilities, but the plea was bad, inasmuch as it did not aver that no such liabilities still remained to be discharged.

Semble: there is no rule that a release or a stated account are the only defences which can be set up by way of plea to a bill for an account.—BROWN *v.* PERKINS (1842), 1 Hare, 564; 11 L. J. Ch. 307; 6 Jur. 727; 66 E. R. 1155.

(b) Illegal Business.

1366. Illegality of business.]—The profits of a partnership in underwriting, illegal by 6 Geo. 1, c. 18, s. 12, cannot be the subject of account in equity.—KNOWLES *v.* HAUGHTON (1805), 11 Ves. 168; 32 E. R. 1052.

Annotations:—**Consd.** Ewing *v.* Osbaldiston (1837), 2 My. & Cr. 53. **Refd.** Wallworth *v.* Holt (1841), 4 My. & Cr. 619.

1367. ——.]—(1) Demurrer allowed to a bill for a discovery, & injunction against an action; the effect being a contract for participation in an illegal transaction: the result of a combination of wholesale grocers, by the title of The Fruit Club, acting by a select committee, of which defts. were members, to purchase all imported fruit; though not strictly forestalling, regrating or monopoly.

(2) Insurances, illegal within 6 Geo. 1, c. 18, s. 12, not allowed in an account before the master.—COUSINS *v.* SMITH (1807), 13 Ves. 542; 33 E. R. 397, L. C.

Annotations:—*As to* (1) **Refd.** Mogul S.S. Co. *v.* McGregor, Gow (1889), 23 Q. B. D. 598. *Generally,* **Mentd.** Meux *v.* Maltby (1818), 2 Swan. 277.

1368. ——.]—A. & B., British subjects, purchased & repaired an American built ship, on a joint speculation, with a view to employing her in the trade between the two countries, until an opportunity should occur for reselling her to advantage; for which purpose they procured her to be registered in the United States in the name of C., a citizen of that country, upon a false declaration that she was *bonâ fide* the sole property of C. After the ship had made several voyages, B., who had had the management of her, attempted

any, must all be taken into account.—KESHAV GOPAL GINDE *v.* RAYAPA (1875), 12 Bom. 165.—**IND.**

t. *No settlement for several years—Repeated applications by deceased partner before death.*]—FORSTER *v.* ORR'S TRUSTEES (1802), 4 Pat. App. 295.—**SCOT.**

PART V. SECT. 13, SUB-SECT. 5.—H. (b).

1366 i. *Illegality of business.*]—An American ship was sent from Britain on a joint adventure for purchases of slaves, which transaction was illegal:—*Held:* no action of accounting could be maintained between the parties.—GIBSON *v.* STEWART (1840), 1 Robin. App. 260; 14 Sc. Jur. 166.—**SCOT.**

a. —— *Pawnbrokers Act.*]—FRASER *v.* HAIR (1848), 10 Dunl. (Ct. of Sess.) 1402; 20 Sc. Jur. 509.—**SCOT.**

to exclude A. from his share in the speculation, &, in spite of the dissent of A., sent her on another voyage to America:—*Held:* even supposing the declaration above mentioned & the registration thereby effected to have been a fraud upon the American law, & the subsequent employment of the ship so registered to have been a fraud upon the English Navigation Laws, such fraud would not prevent A. from maintaining a suit against B. for an account & payment of his share of the realised profits of the speculation. In decreeing such account, ct. also directed an inquiry what had become of the ship since she was sent on her last voyage, & what was her value when so sent, with a view to making B. personally liable for such value in case either the ship or the proceeds of her sale should not be ultimately forthcoming.—SHARP *v.* TAYLOR (1849), 2 Ph. 801; 14 L. T. O. S. 1; 41 E. R. 1153, L. C.

Annotations:—**Apld.** Ralli *v.* Universal Marine Insce. (1861), 2 John. & H. 159; Beeston *v.* Beeston (1875), 1 Ex. D. 13. **Dbtd.** Sykes *v.* Beadon (1879), 11 Ch. D. 170. **Apld.** Bridger *v.* Savage (1885), 15 Q. B. D. 363. **Refd.** Coyle *v.* Alleyne (1854), 2 W. R. 382; Williams *v.* Trye (1854), 2 Eq. Rep. 766; Sheppard *v.* Oxenford (1855), 1 K. & J. 491; Liverpool Corpn. *v.* Wright (1859), John. 359; Pare *v.* Clegg (1861), 4 L. T. 669; Sichel *v.* Raphael (1864), 3 New Rep. 662; *Re* South Wales Atlantic S.S. Co. (1876), 2 Ch. D. 763; Rawlings *v.* General Trading Co., [1921] 1 K. B. 635.

1369. ——.]—A partnership of a great number of persons was constituted before the passing of the Joint Stock Cos. Registration Act. The members subscribed a certain sum, & received a sort of scrip certificate, specifying the number of shares to which each was entitled. No deed was executed, nor was any register of shareholders kept. They occasionally held meetings, at one of which deft. & another person were appointed sole directors & trustees of the property of the association, which consisted of mines, plant & slaves in the Brazils. Deft. survived his co-trustee, &, disputes having arisen, a bill was filed against him by pltf., who was a derivative shareholder by purchase of one of the scrip certificates, for an account of the receipts & payments of deft., & of the debts of the assocn., & for payment of such debts, & a division of the profits, & for a receiver & injunction, but the bill did not pray for a dissolution. Pending a motion for a receiver & injunction deft. clandestinely left England for Brazil. *Qu.:* whether the assocn. was legal:—*Held:* pltf., having been treated by deft. as a member of the assocn., could maintain the suit.—SHEPPARD *v.* OXENFORD (1855), 1 K. & J. 491; 25 L. T. O. S. 90; 3 W. R. 397; 69 E. R. 552, L. JJ.

Annotation:—**Refd.** *Re* Great Cambrian Mining & Quarrying Co., Bowen's Case (1856), 4 W. R. 800.

1370. —— **Highwaymen in partnership.**]—EVERET *v.* WILLIAMS (1725), Lindley on Partnership, 9th ed., p. 124, n.; Law Quarterly Review, Vol. 9, p. 197; 2 Pothier on Obligations by Evans, p. 3, n.

Annotations:—**Refd.** Ashhurst *v.* Mason, Ashhurst *v.* Fowler (1875), L. R. 20 Eq. 225; Hegarty *v.* Shine (1878), 14 Cox, C. C. 124; Sykes *v.* Beadon (1879), 11 Ch. D. 170; Thwaites *v.* Coulthwaite, [1896] 1 Ch. 496; Burrows *v.* Rhodes, [1899] 1 Q. B. 816; Soc. Anon. des Anciens Établissements Panhard et Levassor *v.* Panhard Levassor Motor Co., [1901] 2 Ch. 513; Jeffrey *v.* Bamford, [1921] 2 K. B. 351.

1371. —— **Shipping partnership—Registration of ship in names of two partners only.**]—A., B. & C. agreed to purchase a ship, & that it should be registered in the name of A. & B. only, but the profits of the ship to be divided by the three. C. filed a bill against A. & B. for an account of the profits of the ship. On the ground of public policy, the agreement was held to be illegal.—BATTERSBY *v.* SMYTH (1818), 3 Madd. 110; 56 E. R. 451.

Annotations:—**Refd.** Davenport *v.* Whitmore (1836), 2 My. & Cr. 177; Armstrong *v.* Armstrong (No. 2) (1855), 21 Beav. 78.

1372. —— —— **False registration.**]—SHARP *v.* TAYLOR, No. 1368, *ante*.

—— **Betting partnership.**]—*See* GAMING & WAGERING, Vol. XXV., pp. 413, 414, Nos. 165–170.

1373. Illegal conduct of legal business.]—The fact that one partner has been guilty of illegal acts in the conduct of the partnership business is no defence to an action for account by the other partner, where the objects of the partnership were not illegal, & the innocent partner at the time of entering into the partnership intended that it should be carried on lawfully. Pltf. & deft. were partners in a bookmaker's & betting business, which was carried on by deft.; pltf. claimed an account of the profits of the partnership, & deft. contended that, having regard to the nature of the business, no such relief could be obtained:—*Held:* as a bookmaking & betting business could be carried on without contravening Betting Act, 1853, c. 119, & as pltf. when he entered into this partnership contemplated that the business would be so carried on in the usual way, the fact that deft. had acted illegally was immaterial, & pltf. was entitled to the account claimed.—THWAITES *v.* COULTHWAITE, [1896] 1 Ch. 496; 65 L. J. Ch. 238; 74 L. T. 164; 60 J. P. 218; 44 W. R. 295; 12 T. L. R. 204; 40 Sol. Jo. 2

Annotations:—**Expld.** Saffrey *v.* Mayer, [1901] 1 K. B. 11. **Consd.** Keen *v.* Price, [1914] 2 Ch. 98; Jeffrey *v.* Bamford, [1921] 2 K. B. 351. **Refd.** Hyams *v.* Stuart King, [1908] 2 K. B. 696; Brookman *v.* Mather (1913), 29 T. L. R. 276. **Mentd.** Hawke *v.* Dunn, [1897] 1 Q. B. 579.

Legality of partnership generally.]—*See* Part III., Sect. 1, *ante*.

(c) *Delay.*

1374. Settlement presumed—Account left with balance outstanding.]—BRIDGES *v.* MITCHELL (1726), Bunb. 217; Gilb. Ch. 224; 145 E. R. 652.

Annotations:—**Refd.** Wilkinson *v.* Lovell (1783), 2 Dick. 601; Foster *v.* Hodgson (1812), 19 Ves. 180; Tatam *v.* Williams (1844), 3 Hare, 347.

1375. Action against representative of deceased partner—No new liabilities arising.]—Bill by surviving partners against the exors. of a partner who had died thirteen years before the institution of the suit, for an account of the partnership dealings & transactions, charging that deceased partner was indebted to the firm at the time of his death, dismissed with costs, on the ground of the lapse of time, no new liabilities of the former partnership appearing to have arisen, or become known, after the death of deceased partner.—TATAM *v.* WILLIAMS (1844), 3 Hare, 347; 67 E. R. 415.

Annotation:—**Consd.** Knox *v.* Gye (1872), L. R. 5 H. L. 656.

1376. Payment of annuity—Under agreement admitted by defendant.]—The dissolution of a partnership being provided for by a proposed agreement to dissolve, & a stipulation that an annuity of £100 *per annum* should be paid to the retiring partner by the continuing one; although that agreement was not formally executed, nor the bill filed till more than six years after the date of such agreement for the usual partnership accounts,

PART V. SECT. 13, SUB-SECT. 5.—H. (c).

b. *Account barred by limitation.*]—N *v.* STEWART (1865), 11 Gr. 272.—**CAN.**

c. *Presumption of acquiescence on long delay.*]—TOOTHE *v.* KITTREDGE (1895), 24 S. C. R. 287.—**CAN.**

d. *Delay of thirty years—Whether bar to relief.*]—M'LAREN *v.* LIDDELL'S TRUSTEES (1860), 22 Dunl. (Ct. of Sess.) 373; 32 Sc. Jur. 164.—**SCOT.**

Sect. 13.—*Enforcement of rights: Sub-sect.* 5, *H.* (*c*) & (*d*), & *I.* (*a*) & (*b*).]

& a performance of that agreement as to the annuity:—*Held:* Stat. Limitations did not apply as to the annuity, but an account of the arrears must be a part of the partnership accounts.—MURRAY *v.* PARKER (1850), 19 L. J. Ch. 530; 15 L. T. O. S. 22; 14 Jur. 664.

1377. Account barred by limitation—Operation in bar of particular items.]—If a partnership has been dissolved but no account has been taken, the proper remedy of a partner in respect of an asset received by another partner is to have an account taken; if his right to sue for an account is barred by limitation, he cannot sue the partner who has received the asset for a share of it.—GOPALA CHETTY *v.* VIJAYARAGHAVACHARIAR, [1922] 1 A. C. 488; 91 L. J. P. C. 233; 127 L. T. 192; 38 T. L. R. 442, P. C.

See, also, EQUITY, Vol. XX., pp. 276, 279, Nos. 355, 389.

Analagous application of Statutes of Limitations.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 515–516, Nos. 1732–1745.

(*d*) *Other Defences.*

1378. Denial of partnership.]—DREW *v.* DREW (1813), 2 Ves. & B. 159; 35 E. R. 279.

Annotations:—**Consd.** Sanders *v.* King (1821), 6 Madd. 61; Roberts *v.* Le Hir (1876), 29 L. T. 873. **Refd.** Thring *v.* Edgar (1825), 2 Sim. & St. 274. **Mentd.** Kirkman *v.* Andrews (1842), 4 Beav. 554.

1379. ——.]—SANDERS *v.* KING (1821), 6 Madd. 61; 56 E. R. 1013.

Annotations:—**Refd.** Thring *v.* Edgar (1825), 2 Sim. & St. 274. **Mentd.** Hardman *v.* Ellames (1834), 2 My. & K. 732; Harland *v.* Emerson (1834), 8 Bli. N. S. 62.

1380. ——.]—A plea of no partnership to a bill for a partnership account is defective in substance, if not supported by an answer to allegations in the bill, which, if true, would establish the partnership.

To a bill for a partnership account by the representatives of an alleged partner against the survivor, suggesting a pretence by deft. that no partnership existed, & charging that deft. was in possession of documents by which the fact of the partnership alleged by the bill would appear, deft. pleaded no partnership, & supported his plea by an answer to the alleged facts, but did not answer as to whether he was in possession of documents showing the truth of the bill:—*Held:* deft., for the purpose of the argument of the plea, must be intended to admit that he had in his possession evidence which would prove the partnership; & the plea must therefore be overruled.—HARRIS *v.* HARRIS (1844), 3 Hare, 450; 13 L. J. Ch. 349; 8 Jur. 978; 67 E. R. 458.

Annotation:—**Consd.** Mansell *v.* Feeney (1861), 2 John. & H. 313.

1381. ——.]—The bill alleged that defts. A., B. & C. carried on business as merchants at Monte Video under the firm of A. & Co.; & at Liverpool under the firm of B. & Co.; & that the members of both firms were identical. It further alleged that certain goods, the subject-matter of the suit, were consigned to A., B. & C. to their firm of A. & Co., through their firm of B. & Co.; & that A., B. & C., as well in respect of their firm of A. & Co., as in respect of their firm of B. & Co., received these goods with full knowledge that they were pltfs.' trust property, & sold them & received the proceeds for them on that footing. Deft. C. pleaded to the whole of the bill, that he was not, & never had been, a partner in the Monte Video firm; & averred that the members of the two firms were not identical:—*Held:* though this plea would have been a good plea if the bill had merely sought to charge him as a partner in the Monte Video firm, yet as it contained allegations sufficient to render him liable as a partner in the Liverpool firm, the latter liability was totally uncovered by the plea, which must therefore be overruled.—ROBERTS *v.* LE HIR (1874), 29 L. T. 873.

1382. —— **Termination by forfeiture of share under partnership deed.**]—(1) Where an agreement to work mines on the costbook principle has been entered into by several persons, the written statement of one of them, made subsequently to the date of the agreement, that his shares are liable to forfeiture on non-payment of calls, will not affect his rights under the agreement.

A., B., & C., in Nov. 1848, entered into an agreement to work mines on the costbook principle. A. did not pay up his calls. In a letter of Nov. 1849, to his co-adventurers, he spoke of his shares as liable to forfeiture. He received a notice of a meeting of the co-adventurers, to be held May 3, 1850, to declare his shares forfeited. He denied the right to forfeit them. The meeting was held, but instead of declaring A.'s shares forfeited, the co-adventurers passed a resolution to give him time to May 15, after which it was declared that if the calls were not paid up, the shares would be treated as forfeited. The calls were not paid on the day named, & a letter was afterwards written, stating that the shares had been forfeited on May 31:—*Held:* even if there had been a right of forfeiture necessarily incident to work a mine on the costbook principle, the proper steps to exercise that right had not been taken, & the shares were not forfeited.

(2) A. had, in his letter of Nov. 1849, stated that his shares were liable to forfeiture; he repeatedly afterwards denied the existence of such liability. In May, 1850, they were declared forfeited. A further correspondence ensued, in the course of which he said he should wait to enforce his rights till the profits of the mines would pay the law charges. In Aug. 1853, he filed his bill:—*Held:* these circumstances did not disentitle him to relief in equity, the matter in which he sought relief being one which related to an executed & not an executory interest.—CLARKE & CHAPMAN *v.* HART (1858), 6 H. L. Cas. 633; 27 L. J. Ch. 615; 32 L. T. O. S. 380; 5 Jur. N. S. 447; 10 E. R. 1443; *affg.* S. C. *sub nom.* HART *v.* CLARKE (1854), 6 De G. M. & G. 232, L. JJ.

Annotations:—*As to* (2) **Distd.** Rule *v.* Jewell (1881), 18 Ch. D. 660. **Refd.** Garden Gully United Quartz Mining Co. *v.* McLister (1875), 1 App. Cas. 39. *Generally*, **Mentd.** Drysdale *v.* Piggott (1856), 8 De G. M. & G. 546; *Re* Agriculturist Cattle Insce., Spackman's Case (1864), 12 W. R. 1133; Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; Palmer *v.* Moore, [1900] A. C. 293; Hopkinson *v.* Mortimer, Harley, [1917] 1 Ch. 646.

1383. —— **Admissions sufficient for purpose of action.**]—Deft. who, by answer, denies pltf.'s right to an account, but makes admissions sufficient for the purposes of the suit up to decree, cannot be required to give, by answer, further accounts. A bill was filed by one partner to set aside an agreement under which the partnership had been dissolved, & alleged that the other partner had represented a certain debt to be bad which was not so. The interrogatories asked deft. to set forth what sums he had received in respect of this debt, & also to set out the partnership accounts. Deft., by his answer as to the debt, set forth the particulars as to a patent assigned to him by debtors, & proceedings connected therewith, & said that he had received on account of his interest in the patent more than the amount of the debt;

& by his answer as to the accounts deft. said that they were very extensive, that pltf. had always access to the books, & that deft. had no means of giving the information sought except by referring to the books, & could only give the particulars required by employing an accountant, & submitted that he ought not to be obliged to set forth the accounts :—*Held :* the answer was sufficient.—LOCKETT *v.* LOCKETT (1869), 4 Ch. App. 336 ; 38 L. J. Ch. 290 ; 17 W. R. 476, L. JJ.

Annotations :—**Apld.** Wier *v.* Tucker (1872), L. R. 14 Eq. 25. **Refd.** Thompson *v.* Dunn (1870), 18 W. R. 334.

1384. Waiver of right to account.]—BROWN *v.* PERKINS, No. 1365, *ante.*

1385. Failure to prosecute for felony—Embezzlement.]—In an action to recover damages for breach of the covenants of a partnership deed, pltf. alleged larceny & embezzlement upon the part of deft. ; & deft. demurred upon the ground that under such circumstances no action can be brought until the thief has been prosecuted, or unless circumstances are stated to show that the prosecution is impossible :—*Held :* demurrer was not the proper course for staying the action.—ROOPE *v.* D'AVIGDOR (1883), 10 Q. B. D. 412 ; 48 L. T. 761 ; 47 J. P. 248, D. C.

Annotation :—**Mentd.** Appleby *v.* Franklin (1885), 17 Q. B. D. 93.

Account stated.]—*See* Sub-sect. 5, J., *post.*

I. Practice.

(*a*) *In General.*

See R. S. C., Ord. 33.

1386. Accounts taken before master.]—PAYNTER *v.* HOUSTON, No. 1181, *ante.*

1387. —— If specially directed.]—Although a decree direct that all accounts be taken, the master will not take the accounts of a partnership, unless especially directed so to do.—WOOLLEY *v.* GORDON (1829), Taml. 11 ; 48 E. R. 6.

1388. ——.]—WARNE *v.* DELL (1875), 1 Char. Cham. Cas. 19.

1389. At what stage of proceedings accounts taken—Before hearing of action—R. S. C., Ord. 33, r. 2.]—In a suit to take the accounts of a partnership defts. by their answer, filed before Nov. 1, 1875, admitted the partnership & that they had not accounted ; & alleged that pltf. had not accounted, & that moneys were due from him to them. Pltf. joined issue, & moved under the new practice, before the hearing, under the above rule upon affidavit of service, that the accounts of the partnership dealings might be taken :—*Held :* he was entitled to the order under above rule or R. S. C., 1875, Ord. 40, r. 11, & order made accordingly.—TURQUAND *v.* WILSON (1875), 1 Ch. D. 85 ; 45 L. J. Ch. 104 ; 24 W. R. 56 ; 1 Char. Pr. Cas. 124.

Annotation :—**Mentd.** Gilbert *v.* Smith (1876), 2 Ch. D. 686.

1390. Statement of claim—Necessity for offer by plaintiff to pay adverse balance—If found against him.]—KNEBELL *v.* WHITE, No. 1300, *ante.*

1391. Evidence as to balance of accounts—Admissibility.]—KNEBELL *v.* WHITE, No. 1300, *ante.*

1392. —— ——.]—(1) In an action by a coach proprietor against his co-proprietor for the amount of certain monthly balances of accounts, it appeared that up to July 5, 1842, pltf. & another proprietor horsed the coach between them ; that on that day the latter sold a part of his interest to deft., upon certain terms contained in a written agreement of that date, which, although not seen by pltf., was communicated to him ; & that the business was afterwards carried on according to its terms :—*Held :* as this agreement could not bind pltf., it was therefore inadmissible in evidence against him.

(2) It also appeared that after July 5, the accounts between the three were settled every twenty-eight days by a clerk who had formerly settled for the two ; he made them out monthly, & sent them to deft., without ever hearing any complaint from him as to his not having received them, or of any incorrectness in them :—*Held :* these accounts were admissible in evidence, as tending to show the striking of a balance between the parties, & they need not be stamped either as awards or agreements ; & it was a question for the jury whether by arrangement between the parties it was agreed that the accounts should be settled & stated in that way between them.—DIXON *v.* WING (1843), 1 L. T. O. S. 647, N. P. ; *subsequent proceedings* (1844), 3 L. T. O. S. 159.

Interpleader by sheriff.]—*See* INTERPLEADER, Vol. XXIX., p. 470, Nos. 184–186.

Interrogatories.]—*See* DISCOVERY, Vol. XVIII., pp. 213–214, 227, 228, Nos. 1611–1616, 1741, 1743, 1747.

(*b*) *Payment into Court.*

See R. S. C., Ord. 22.

1393. Whether partner bound to pay in.]—Order for a partner to pay into ct. partnership money received by him contrary to good faith ; but in general, a partner insisting that the balance of the account is in his favour, is not obliged to bring into ct. what is in his hands, unless the other partners do the same.—FOSTER *v.* DONALD (1820), 1 Jac. & W. 252 ; 37 E. R. 371, L. C.

Annotations :—**Apld.** Birley *v.* Kennedy (1865), 6 New Rep. 395. **Refd.** Richardson *v.* Bank of England (1838), 4 My. & Cr. 165.

1394. Pending suit for account—Interlocutory application.]—RICHARDSON *v.* BANK OF ENGLAND, No. 11, *ante.*

1395. On admission of sum due.]—Money admitted to have been received by a surviving partner on account of the late partnership, ordered to be paid into ct., although by his answer & examination he alleged that partnership debts to a large amount were still outstanding, for which he was liable, & also that his co-partner had drawn out of the partnership sums to the amount of

PART V. SECT. 13, SUB-SECT. 5.—I. (a).

e. *Necessity to prove partnership—Whether accounts ordered as matter of course.*]—FORBES *v.* PEARSON, 20 C. L. T. 413.—**CAN.**

f. *Further accounts—When ordered—Wrong method employed by master.*]—HANEY *v.* MILLER (1913), 24 O. W. R. 354 ; 4 O. W. N. 992 ; 10 D. L. R. 212.—**CAN.**

g. *Appeal from district registrar's report—Governed by Ord. 36, rr. 54 & 55.*]—PAULSON *v.* HATHAWAY (B. C.), [1917] 2 W. W. R. 760.—**CAN.**

h. *Whether previous demand for account necessary.*]—In a partnership action for an account, it is unnecessary to prove a previous demand for an account.—FOOK LUNG FIRM *v.* LAI YUEN FIRM (1912), 7 Hong Kong L. R. 150.—**HONG KONG.**

k. *Nature of decree.*]—A decree for an account is not a mere direction to inquire & report. It proceeds, & must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights only, leaving it to be inquired into how much is due to him from the party accounting.—BABOO JANOKEY DOSS *v.* BINDABUN DOSS (1843), 3 Moo. Ind. App. 175.—**IND.**

PART V. SECT. 13, SUB-SECT. 5.—I. (b).

l. *Whether partner bound to pay in—Where co-partner fraudulent.*]—CORELLI *v.* SMITH (Man.) (1913), 23 W. L. R. 381 ; 10 D. L. R. 382 ; 4 W. W. R. 114.—**CAN.**

1395 i. *On admission of sum due.*]—An order will only be made for a payment of money into ct. by partners either when defts. have clearly admitted a certain amount to be due, or

Sect. 13.—*Enforcement of rights: Sub-sect.* 5, *I.* (*b*) (*c*).]

double the sums drawn out by himself; it appearing that there was a sufficient sum in ct. to pay the outstanding debts, & that, taking into consideration the true shares of the partners, which deft. had not done, the co-partner had not overdrawn his co-partnership account.

The partnership of A. & B. being dissolved, is succeeded by that of B. & C., who take upon themselves to adjust the affairs of the former partnership.

B. dies, & his exors. file a bill against C. for an account of the partnership dealings of B. & C.

In the progress of the suit the ct. directs the accounts of both partnerships to be taken, & C., by his answer & examination, admits that he has received a sum on account of the partnership of A. & B.:—*Held:* he must pay that sum into ct. notwithstanding A.'s representatives are not parties to the suit, inasmuch as he must be taken to have received it, subject to his explanation to the contrary, as surviving partner of B.—TOULMIN *v.* COPLAND (1837), 3 Y. & C. Ex. 643; 160 E. R. 851.

Annotation:—**Mentd.** Digby *v.* Boycatt (1845), 4 Hare, 444.

1396. ——.]—A., B., & C., being in partnership, A., who had nearly the whole of the capital, retired, taking a warrant of attorney from B. & C. to secure to him £12,500, but leaving his whole capital in the firm.

The accounts of the partnership were not then made up. Soon afterwards A., who still interfered in the business, mortgaged certain leaseholds, his private property, & certain policies of assurance on his life, for the purpose of paying off a partnership debt.

A month or two afterwards A. died, having made B. & C. his exors., & having by his will directed that they might apply the moneys to be received from the policies in carrying on the trade, provided they gave such security to his residuary legatee as W. might approve.

W. refused to act, & B. & C., without giving any security pursuant to the will, applied the money arising from the policies in discharge of the mtge.

Upon a bill filed against them by one of A.'s residuary legatees, they alleged by their answer, that A.'s share in the capital, at the time of his retirement, was far below £12,500, & that the warrant of attorney was given merely to secure what upon an account taken might be found to be his share. They admitted, however, that they had in their hands a balance of £989 belonging to A.'s estate:—*Held:* as between B., C., & A., the amount of the policies must, *primâ facie*, be taken to be a debt due from the continuing partnership to A.'s estate, & that they could only employ that money in the trade upon the terms of the will; & not having so done, they must pay the amount of that debt, namely, £7,000 as well as the £989 into ct.—COSTEKER *v.* HORROX (1839), 3 Y. & C. Ex. 530; 3 Jur. 996; 160 E. R. 811.

1397. ——.]—After a decree to take the accounts of a partnership, the chief clerk directed that two accountants, one of whom was employed by pltf. & the other by deft. in investigating the accounts for the purposes of the suit, should report on the accounts, showing what items were undisputed & what were disputed, & verify the report by affidavit. The accountants verified an account showing £541 due from deft. to pltf. on the undisputed items, & verified also an account of disputed items. These were items of charge against deft., so that, however they were decided upon, the £541 would not be reduced:—*Held:* (1) the £541 ought to be ordered into ct.; for that, although no certificate had been made, the fact that £541 at least was due from deft. was ascertained with sufficient certainty to entitle pltf. to have it ordered into ct. (2) Deft. must be taken to have admitted by his agent that at least £541 would be found due from him.

It has been held in the Ct. of Ch. for many years, that an admission by an accounting party of a sum being due is sufficient to ground an order upon him to pay the sum into ct. (JESSEL, M.R.).—LONDON SYNDICATE *v.* LORD (1878), 8 Ch. D. 84; 48 L. J. Ch. 57; 38 L. T. 329; 26 W. R. 427, C. A.

Annotations:—*As to* (1) **Apld.** Wanklyn *v.* Wilson (1887), 35 Ch. D. 180. *As to* (2) **Reid.** Hampden *v.* Wallis (1884), 27 Ch. D. 251; *Re* Beeny, Ffrench *v.* Sproston, [1894] 1 Ch. 499. *Generally*, **Mentd.** Freeman *v.* Cox (1878), 47 L. J. Ch. 560.

1398. —— **Admission in error—Leave to withdraw on payment in.**]—The *cestui que trust* under a settlement sued B. & J., who were in partnership as solrs., to recover a sum of trust money alleged to have been received by the firm & not duly invested. J. was the sole trustee of the settlement, & was in difficulties. B., by his defence, admitted that J. had paid the money into the banking account of the firm, but without B.'s knowledge; & he made a like admission in his answer to interrogatories. J. made a like admission. Upon these admissions, an order was made in chambers for B. & J. to pay the money into ct. B. moved to discharge this order so far as it affected him, on the ground that this admission had been made by mistake, & he adduced evidence which showed conclusively that the money never had come into the banking account of the firm:—*Held:* as the admission was shown to have been made by mistake, it was right that B. should be allowed to amend his defence for the purpose of withdrawing it; & on the materials before the ct., apart from that admission, there was no such admission by B. of receipt of the money as would justify an order on him for payment into ct.; but as on these materials there was still a strong case for contending that the firm had received the money, the order to amend ought not to have been made, except on the terms of the money being brought into ct.—HOLLIS *v.* BURTON, [1892] 3 Ch. 226; 67 L. T. 146; 40 W. R. 610; 36 Sol. Jo. 625, C. A.

Annotations:—**Mentd.** *Re* Beeny, Ffrench *v.* Sproston, [1894] 1 Ch. 499; Nutter *v.* Holland (1894), 71 L. T. 508.

1399. —— **Sufficiency of admission.**]—HOLLIS *v.* BURTON, No. 1398, *ante*.

1400. ——.]—PULLINGER *v.* BARNATO BROTHERS, THE BARNATO-PULLINGER POOL (1896), 12 T. L. R. 280.

1401. Loans between partners.]—RICHARDSON *v.* BANK OF ENGLAND, No. 11, *ante*.

1402. Sum ascertained with sufficient certainty—Although no certificate made.]—LONDON SYNDICATE *v.* LORD, No. 1397, *ante*.

1403. ——.]—Upon an interlocutory application for the payment of money into ct. made before the trial of an action for the taking of an account, where an account has been rendered, & the ct. has before it the parties to the account & evidence as to the items in dispute between them, the ct. will look into the facts of the case, & if in the fair exercise of its judicial discretion it can

when the ct. is satisfied that there is a probability amounting to reasonable certainty that a certain amount will be found to be due in any event by defts.—FLEMING *v.* MCKECHNIE & MCMILLAN (1905), 25 N. Z. L. R. 216.—N.Z.

arrive at a conclusion that a sum will be due to pltf. on the taking of the account, & what the amount of that sum will be the ct. will order deft. to pay that amount into ct.—WANKLYN *v.* WILSON (1887), 35 Ch. D. 180 ; 56 L. J. Ch. 209 ; 56 L. T. 52 ; 35 W. R. 332 ; 3 T. L. R. 277.

Annotation :—**Refd.** Hollis *v.* Burton (1892), 67 L. T. 146.

1404. Money received in breach of good faith.]—FOSTER *v.* DONALD, No. 1393, *ante*.

1405. —— Misapplication of capital of retired partner.]—COSTEKER *v.* HORROX, No. 1396, *ante*.

1406. Money withdrawn contrary to partnership articles.]—A partner who had drawn out money standing to the partnership account, in derogation of the partnership arts., was ordered, upon motion, to pay that sum into ct.—BIRLEY *v.* KENNEDY (1865), 6 New Rep. 395.

1407. Gross fraud alleged.]—Deft. [co-partner] ordered to pay money into ct. before answer in a case of gross fraud appearing upon affidavit by the pltf. & by the deft. in answer.—JERVIS *v.* WHITE (1802), 6 Ves. 738 ; 31 E. R. 1284, L. C.

Annotations :—**Refd.** Freeman *v.* Cox (1878), 8 Ch. D. 148. **Mentd.** Neville *v.* Matthewman, [1894] 3 Ch. 345.

(*c*) *Costs.*

See R. S. C., Ord. 65.

1408. Payable out of assets.]—BONVILLE *v.* BONVILLE, No. 1191, *ante*.

1409. —— After settlement of balance due to partners—And payment of partnership debts.]—AUSTIN *v.* JACKSON (1879), 11 Ch. D. 942, n.

Annotations :—**Apld.** Potter *v.* Jackson (1880), 13 Ch. D. 845 ; Ross *v.* White, [1894] 3 Ch. 326.

1410. —— —— ——.]—(1) The rule as to costs in a partnership action is the same as in any other administration action, that is, they are payable out of the assets, partnership assets meaning the assets remaining after payment of all the partnership debts, including balances due to any of the partners.

(2) If the assets are insufficient for payment of the costs of the action, then such costs must be borne by the partners in proportion to their shares in the profits.

(3) Where, however, a partnership action has been rendered necessary by the negligence or other misconduct of a partner, the ct. will order that partner to pay the costs of the action so far as they have been occasioned by his misconduct, including the costs up to the trial.—HAMER *v.* GILES, GILES *v.* HAMER (1879), 11 Ch. D. 942 ; 48 L. J. Ch. 508 ; 41 L. T. 270 ; 27 W. R. 834.

Annotations :—*As to* (1) **Apld.** Austin *v.* Jackson (1879), 11 Ch. D. 942, n. **Expld.** Jackson *v.* Smith, *Ex p.* Digby (1884), 53 L. J. Ch. 972. **Apld.** Ross *v.* White, [1894] 3 Ch. 326. **Refd.** Potter *v.* Jackson (1880), 13 Ch. D. 845 ; Rosher *v.* Crannis (1890), 63 L. T. 272. *As to* (2) **Apld.** Austin *v.* Jackson (1879), 11 Ch. D. 942, n.

—— ——.]—The balance found due in a partnership action from the firm to one of the partners must be paid out of the assets in priority to the costs of the action.—POTTER *v.* JACKSON (1880), 13 Ch. D. 845 ; 49 L. J. Ch. 232 ; 42 L. T. 294 ; 28 W. R. 411.

Annotations :—**Apld.** Rosher *v.* Grannis (1890), 63 L. T. 272 ; Ross *v.* White, [1894] 3 Ch. 326.

1412. —— ——.]—Two partners had voluntarily brought sums of money into their partnership, although there was no stipulation in the partnership agreement that they should bring in any capital, & at the date of the dissolution of the partnership pursuant to an order in an action for such dissolution, moneys were found to be due to pltf. & deft. respectively in respect of the sums so brought in :—*Held :* (1) the two sums were loans by the individual partners ; & the case fell entirely within the principle of the decision in *Potter* v. *Jackson*, No. 1411, *ante ;* (2) such loans must be paid out of the partnership assets in priority to the costs of the action.—ROSHER *v.* CRANNIS (1890), 63 L. T. 272.

Annotations :—*As to* (1) **Consd.** Ross *v.* White, [1894] 3 Ch. *As to* (2) **Apld.** Ross *v.* White, [1894] 3 Ch. 326.

1413. —— ——.]—The costs of a partnership action, being costs of administration, are payable out of the assets remaining after the rights of the partners have been adjusted, & a clear amount ascertained which is divisible between them according to their respective interests in the partnership. Where, therefore, on the further consideration of a partnership action it appeared that there was a debt owing to one partner on loan account, & a larger balance in respect of capital due to him than was due to his co-partner : —*Held :* a fund in ct. representing the partnership assets ought to be applied (*a*) in payment of the debt, (*b*) in payment of the excess of the balance due to the one partner over the balance due to the other, & (*c*) in payment, so far as it would extend, of the costs of the action, & the rest of the costs should be borne by the partners in proportion to their interests in the partnership.—ROSS *v.* WHITE, [1894] 3 Ch. 326 ; 64 L. J. Ch. 48 ; 71 L. T. 277 ; 38 Sol. Jo. 630 ; 7 R. 420, C. A.

1414. —— In discretion of court.]—By arts. of partnership between three partners, on the death of any partner the survivors were entitled to take his share at a valuation. One of the partners having died, his extrix. brought her action to have it declared that the goodwill was to be included in the valuation, & to have the value of deceased partner's share in the assets ascertained. A decree was made declaring that the goodwill must be valued as part of the assets, & directing accounts. The chief clerk made his general certificate, finding (*inter alia*) that tow specified leaseholds belonging to the partnership were of no value. Pltf. took out a summons to vary the certificate by estimating these leaseholds as worth a considerable sum. The summons was adjourned into ct., & the judge, refused to vary certificate, but ordered the costs of both parties to be paid out of the estate :—*Held :* the ct. cannot make a successful deft. pay the costs of a pltf. who has wholly failed ; but it was within the discretion of the ct. to order all costs reasonably incurred in ascertaining the fund to be paid out of the fund, & an appeal would not lie.

An order for payment of costs of it [the claim] out of the estate is a discretionary order within R. S. C., Ord. 55 [now Ord. 65] & is not appealable

PART V. SECT. 13, SUB-SECT. 5.—I. (c).

m. *General rule.*]—The costs connected with the taking of the accounts are generally, &, in the absence of special circumstances, to be borne by the partners, in proportion to their shares in the partnership concern, as they all participate in the benefit resulting from the adjustment of the accounts.—CHALMERS *v.* MCHAFFIE, Mac. 673.—N.Z.

n. *Application of rule.*]—The rule which charges the costs of taking partnership accounts on both parties is not to be applied where it would be tantamount to the denial of any remedy. — WOOLANS *v.* VANSICKLE (1870), 17 Gr. 451.—CAN.

o. *Payable out of assets—After payment of partnership debts—Including balances due to partners.*]—In partnership actions, in the absence of special circumstances such as misconduct or negligence, the assets will be applied, first, in payment of creditors, next, in payment of the sum found due to the successful party, & lastly, in payment of the costs of all parties.—CHAPMAN *v.* NEWELL (1891), 14 P. R. 208.—CAN.

p. —— —— ——.]—The rule as to costs in an action for a declaration of the dissolution of a partnership & for an account of the partnership dealings, is, that the costs of the action should be paid from the commencement out

Sect. 13.—*Enforcement of rights: Sub-sect.* 5, *I.* (*c*), *J.* (*a*) & (*b*) *i.*]

(BOWEN, L.J.).—BUTCHER *v.* POOLER (1883), 24 Ch. D. 273; 52 L. J. Ch. 930; 49 L. T. 573; 32 W. R. 305, C. A.

1415. —— —— On reference of accounts to arbitration.] —The ct. does not deal with the question of costs where it does not adjudicate upon the subject-matter of the suit. Therefore, where, upon a motion for an injunction to restrain a partner from dealing with the partnership assets, it was referred to arbitrators to take the accounts, that being the only question at issue, & the result was that a certain sum was due to pltf.:—*Held:* the ct. knowing nothing of the merits of the case, would make no order against deft. in respect of the costs of the arbn. & award.—ANDREWS *v.* MORGAN (1854), 24 L. T. O. S. 172; 3 W. R. 145.

—— —— ——.]—*See, also,* ARBITRATION, Vol. II., p. 596, No. 2280.

1416. When assets insufficient—Costs payable by partners in proportion to interests.]—HAMER *v.* GILES, GILES *v.* HAMER, No. 1410, *ante.*

1417. —— ——.]—ROSS *v.* WHITE, No. 1413, *ante.*

1418. Action due to negligence or misconduct of partner.]—HAMER *v.* GILES, GILES *v.* HAMER, No. 1410, *ante.*

1419. —— Refusal to account.] —PAYNE *v.* FELTON (1826), 4 L. J. O. S. Ch. 175.

1420. —— Neglect to account.]—In a suit by the exors. of deceased partner against a surviving partner who was bound under the arts. to pay them annually half the profits of the business, the bill alleging that no accounts had been rendered, though application had been made for some years but not alleging, that anything was due from deft., & praying for an account & for the winding-up of the partnership—deft. having by his answer admitted the allegations in the bill & submitted to render an account without alleging that nothing was due:—*Held:* deft. must pay the costs up to the hearing.—NORTON *v.* RUSSELL (1875), L. R. 19 Eq. 343; 23 W. R. 252.

1421. —— Fraud alleged by defendant—Misrepresentation by plaintiff.]—It is a general rule that where a deft. has set up charges of fraud against pltf., which have failed; he will be decreed to pay the costs of those charges at the hearing.

But in the case of a bill for partnership accounts, where pltf. was living out of the jurisdiction, & had been guilty himself of misrepresentation; & where it appeared doubtful whether there were any profits recoverable by pltf. at all; the costs occasioned by the charges of fraud were not separated from the general costs of the suit.—WARRIN *v.* THOMAS (1854), 23 L. T. O. S. 185; 2 W. R. 442.

1422. Appeal as to costs.]—BUTCHER *v.* POOLER, No. 1414, *ante.*

J. Settled Accounts.

(*a*) *When Accounts are Deemed to be Settled.*

See, generally, EQUITY, Vol. XX., p. 271, Nos. 304–309.

1423. Accounts must be accepted—Mere delivery insufficient.]—The mere fact of the delivery of an account [by co-partner] without evidence of acquiescence, does not afford sufficient legal presumption of settlement.—IRVINE *v.* YOUNG (1823), 1 Sim. & St. 333; 1 L. J. O. S. Ch. 108; 57 E. R. 134.

1424. —— Sufficiency of plea of plene computavit.]—In an action of account, it is not sufficient for deft. to plead that he rendered to pltf. a reasonable account; that which amounts to a plea of *plene computavit* must be the rendering of an account to the satisfaction of pltf., or an account which shows an agreed balance between pltf. & deft. Consequently, where deft. rendered an account, in which he charged himself as factor for the whole & pltf. required him to furnish an account, in which he should charge himself as factor for one moiety only, & as owner of the other, & thus make himself liable to a moiety of the losses arising from the sale of the whole:—*Held:* the pleading of such account did not amount to a plea of *plene computavit*, & pltf. was entitled to his judgment *quod computet.*—BAXTER *v.* HOZIER (1839), 5 Bing. N. C. 288; 7 Scott, 233; 8 L. J. C. P. 169; 132 E. R. 1115.

Annotation:—**Refd.** Cottam *v.* Partridge (1842), 4 Man. & G. 271.

1425. ——.]—Proprietors of a stage coach arranged among themselves that each should horse the coach for certain stages, & receive the payments & make the requisite disbursements on such stages; & it was the practice that one or more of the partners every month made up, & sent round to the other partners, a written account from the waybills, showing the receipts & disbursements of each proprietor, the share of net profits, if any, due to each, & the proprietors by & to whom the ascertained shares should be paid: & the payments were made accordingly. In *assumpsit* by one partner against another for a balance so adjusted, & not paid, the partnership still continuing, pltf.'s case rested upon a written account made out as above, but not stamped:—*Held:* if an action at law would lie at all on a settlement of partnership accounts which was not a final close of all the partnership transactions, still the settlement in question, not appearing to have been agreed to by the partners generally, or by pltf. & deft., could be binding only as an award; & it could not so operate for want of a

of the partnership assets, unless there is some good reason to the contrary; but "partnership assets" means the assets remaining after payment of all the partnership debts, including balances due to any of the partners.—CLARK *v.* WILSON (Man.) (1913), 23 W. L. R. 258; 3 W. W. R. 937; 10 D. L. R. 360.—**CAN.**

q. —— ——.]—YOUNG *v.* BERRYMAN (1825–1897), N. B. Dig. 314.—**CAN.**

1418 i. *Action due to negligence or misconduct of partner.*]—GARVEN *v.* ALLAN (1852), 3 Gr. 238.—**CAN.**

1418 ii. ——.]—Where an action for dissolution of partnership has been rendered necessary by the negligence or misconduct of one of the partners, that partner will be ordered to pay the costs up to trial so far as they have been occasioned by his misconduct; but the cost of subsequently taking the accounts must not be borne by that partner unless there has been some misconduct in relation to the accounts.—GAY *v.* PERRY (1905), 25 N. Z. L. R. 285.—**N.Z.**

1419 i. —— *Refusal to account.*]—HAWKSHAW *v.* PELTIER (Man.) (1915), 33 W. L. R. 43.—**CAN.**

r. —— *Unsatisfactory bookkeeping by both partners.*]—WHEATLEY *v.* WHEATLEY (Man.) (1911), 17 W. L. R. 117.—**CAN.**

t. *Delay in filing bill for account.*]—HAGGART *v.* ALLAN (1851), 2 Gr. 407.—**CAN.**

a. *All items of account not proved.*]—GODET *v.* LEBLANC (1876), R. E. D. 75.—**CAN.**

b. *Liability of trustees or assignees of bankrupt partner.*]—Where trustees or assignees of bkpt. partners are made parties to a suit for adjusting the relations & accounts of the partners, & they take active measures in the assertion of claims made by them, they are to be regarded for the purposes of the costs of the suit as standing in no better position than the partners whom they represent.—MCKAY *v.* BURKE, Mac. 674.—**N.Z.**

PART V. SECT. 13, SUB-SECT. 5.—J. (a).

c. *Accounts accepted by all partners.*]—EVANS *v.* HOLMES (Sask.) (1922), 66 D. L. R. 55; [1922] 2 W. W. R. 696.—**CAN.**

d. *Account deemed settled though items*

stamp.—CARR *v.* SMITH (1843), 5 Q. B. 128 ; Dav. & Mer. 192 ; 1 L. T. O. S. 385 ; 7 Jur. 600 ; 114 E. R. 1197.

Annotations :—**Expld.** Goodyear *v.* Simpson (1845), 15 M. & W. 16. **Refd.** Northampton Gaslight Co. *v.* Parnell (1855), 3 C. L. R. 409.

1426. Account deemed settled though one item reserved.]—MCKELLAR *v.* WALLACE, No. 1429, *post.*

1427. Account contrary to partnership deed—Insufficient though signed.]—Where three brothers entered into a partnership for seven years, or for such further time as the partners might agree upon, & at the end of such seven years a general account was taken, but nothing was said about continuing the partnership, & the general account did not include pltf.'s share of the goodwill :—*Held :* although he signed the account he was not bound by it as it was not according to the terms of the arts., & no mention of the goodwill was made in the account.—BARROW *v.* BARROW (1872), 27 L. T. 431.

Amount must be precise.]—*See* CONTRACT, Vol. XII., p. 575, No. 4794.

Promise to settle on terms of account.]—*See* CONTRACT, Vol. XII., p. 577, Nos. 4809, 4810.

Must be between partners.]—*See* CONTRACT, Vol. XII., p. 582, Nos. 4861, 4863.

(*b*) *Opening of Settled Accounts.*

i. *Grounds for Opening.*

See, generally, EQUITY, Vol. XX., pp. 271–277, Nos. 310–358.

1428. Fraud—Account between surviving partner & executor.]—A bill was filed by residuary legatees against the exor. & the surviving partner of testator, for an account of the partnership transactions. It charged that an unfair valuation of the partnership stock had been made by a clerk of the surviving partner ; & that there was no settled account between the deft., or that, if any, the same was fraudulent & collusive. Deft., the surviving partner, pleaded a settled account with the exor. to the whole bill, except such parts thereof as were comprised in his answer in support of the plea, and by which he denied any fraud or collusion whatever :—*Held :* (1) the plea, being to part of the relief & part of the discovery, instead of to the whole of the relief & part of the discovery, was irregular in point of form, but leave was given to amend ; (2) deft. was not bound to set forth the settled account, or to aver that he had delivered up the vouchers to the exor. ; (3) though the charge of an unfair valuation of the partnership stock was not expressly denied by the answer, the plea did not, therefore, cover too much, as such a valuation might have been admitted consistently with a just final account.—DAVIES *v.* DAVIES (1837), 2 Keen, 534 ; 1 Jur. 446 ; 48 E. R. 733.

Annotation :—Generally, **Mentd.** Yeatman *v.* Yeatman (1877), 7 Ch. D. 210.

1429. —— Account settled with item reserved.]—Accounts of long standing & great complication of a mercantile firm at Calcutta, one of the partners of whom afterwards acted as agent in England, involving charges for agency & partnership transactions, were mutually agreed to be investigated & closed. After long negotiations & discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum reserving one item of the account, amounting to a considerable sum, for future investigation. This reserved item was subsequently settled by the acceptance of a bill of exchange for a lesser amount, as such reserved item, if opened, would have disarranged the settled general account. The bill of exchange was dishonoured, & an action brought to recover the amount. A bill was then filed for an injunction, for the cancelment of the bill of exchange, & that the accounts so settled might be opened :—*Held :* the transaction amounted to an adjustment of the general accounts between the parties, subject to the reserved item which was ultimately settled, & the accounts so settled & closed could not, in the absence of fraud, be re-opened.—M'KELLAR *v.* WALLACE (1853), 8 Moo. P. C. C. 378 ; 5 Moo. Ind. App. 372 ; 1 Eq. Rep. 309 ; 22 L. T. O. S. 309 ; 14 E. R. 144, P. C.

Annotation :—**Mentd.** PERRY *v.* Attwood (1856), 6 E. & B. 691.

1430. —— Alleged concealment of destruction of vouchers—Effect of lapse of time.]—M. was a partner with E., deft., in the trade of a wool-broker, but becoming embarrassed through private speculations in the purchase of Australian shares, withdrew all his capital from the firm on the eve of his bkpcy. M. died before passing his final examination in the bkpcy., & pltf., his widow, became his personal representative being also residuary legatee of his estate. The bkpcy. was superseded, & accounts were rendered between pltf. & deft., which accounts pltf. examined by means of skilled referees of her own choosing, & with the aid of an experienced solr., & also approved the same, receiving the balance & giving a formal receipt for the same. Fourteen years after the date of this receipt, she filed her bill to have the accounts retaken, alleging a fraudulent concealment from her by her referees, with the knowledge of deft., of the fact of the destruction of all vouchers for the particulars of the account some time previously to the investigation of accounts which was made by them on her behalf, & specifying two erroneous items in the accounts. The evidence of error in these items was defective : —*Held :* neither the alleged errors in the account, nor the alleged fraudulent concealment, being clearly made out, the ct. would not suffer the settled accounts to be reopened at this distance of time.—CUTHBERT *v.* EDINBOROUGH (1872), 21 W. R. 98.

-.]—*See, also*, EQUITY, Vol. XX., pp. 272, 273, No. 318–332.

1431. Mistake.]—CUTHBERT *v.* EDINBOROUGH, No. 1430, *ante.*

1432. —— Though account settled by arbitration.]—On a general reference, by three partners, of all matters in difference to arbn., the arbitrators found the partnership capital, on the day of the dissolution, to be, in merchandise & good debts, of a given amount, including a debt due from A., one of the partners, & that there were some dubious debts. They then ascertained the amount of the debts due from the partnership, & found the gross value of the stock, which, including the debt due from A., they awarded to be divisible between

reserved.]—SIM *v.* SIM (1851), 11 I. Ch. R. 310.—**IR.**

PART V. SECT. 13, SUB-SECT. 5.—J. (b) i.

1431 i. *Mistake.*]—In an action against a partner to set aside releases & open up the accounts :—*Held :* all it was necessary to establish was, that in the accounts as settled there were such errors & mistakes as would inflict material injustice upon pltf. if the accounts should be held to be closed.—WEST *v.* BENJAMIN (1898), 29 S. C. R. 282.—**CAN.**

1431 ii. ——.]—JACKSON *v.* JACKSON (N.W.P.) (1907), 5 W. L. R. 512.—**CAN.**

1431 iii. ——.]—YORK *v.* POWELL (1909), 10 W. L. R. 407 ; 2 Alta. L. R. 58.—**CAN.**

e. Gross negligence.]—SMITH *v.* CROOKS (1852), 3 Gr. 321.—**CAN.**

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the other partners B. & C. They next found the dubious debts to be divisible as received between the three partners; & they awarded that A. should give security for the payment of his debt by instalments; & directed B. to receive the outstanding debts & effects, & to pay all debts owing by the partnership, of whch accounts were to be stated periodically; & of the balance of receipts, special credit was to be given for A.'s share against his debt, & the remainder was to be divided between B. & C.; & any balance of payments was to be borne in the same proportions. The award was acted upon by all parties, but B. subsequently received some debts which were omitted in the accounts laid before the arbitrators, & on which their award proceeded; & he also received good debts to a larger amount than had been estimated by the arbitrators. On a bill by A. against his co-partners:—*Held:* he was entitled, notwithstanding the reference was of all matters in difference, to an account of the good debts received beyond the amount estimated by the arbitrators, & to an account of the receipts in respect of dubious debts; & any over receipt, in respect of good debts, ought to follow the directions of the award with respect to the dubious debts.—SPENCER *v.* SPENCER (1828), 2 Y. & J. 249; 148 E. R. 911.

1433. —— Account taken by court.]—Where it appears clearly upon the accounts taken before the master in a suit for the administration of the estate of testator, who had been in his lifetime in partnership with deft., his exor., that an error has been committed in the accounts, & in the principle upon which they have been taken, the ct. will direct the master to review his report after the cause has been heard upon further directions, provided that error be made apparent to the satisfaction of the ct. In such case, the party requiring the indulgence must pay all costs.

The mode in which the exor.'s accounts were taken was to separate the exorship. & the partnership accounts. Deft. being the accounting party in both accounts, he had both accounts very much under his own control, & might have transferred sums from one to the other as he pleased. The errors are said to consist in the transfer of sums from one account to the other. . . . The ct. will correct an error which clearly appears to have been made in the report, even after the decree on further direction, taking care that the other party is not injured by the mistake of the party complaining of his own errors. . . . It is quite clear that if the exor. is charged with a sum derived from the partnership account, that sum should be found as an item of discharge in the partnership account. It should have been transferred from one account to the other. . . . Refer it back to the master to inquire whether any errors appear in the mode in which the two accounts of the exorship. & the partnership have been kept. The first report will stand as regular. All the expenses incurred since the first report to the present time are to be paid by deft., the exor. Both parties are to be at liberty to surcharge & falsify (LORD LYNDHURST).—EASUM *v.* EASUM (1847), 9 L. T. O. S. 429, L. C.

1434. —— ——.]—SYER *v.* GLADSTONE (1878), cited in 14 Ch. D., p. 835; 44 J. P., p. 734, C. A.

Annotation:—**Refd.** Turner *v.* Turner, Hall *v.* Turner (1880), 14 Ch. D. 829.

1435. —— One error proved.]—Upon the dissolution of a partnership, & the settlement of all accounts between the partners, B., the continuing partner, took some of the debts as good debts. One turned out to be bad, the securities for it having been fraudulently abstracted by a clerk:—*Held:* B. could not sustain a bill to rectify or set aside the settlement of accounts.—LAING *v.* CAMPBELL (1865), 36 Beav. 3; 55 E. R. 1057.

Annotation:—**Mentd.** City Discount Co. *v.* M'Lean (1874), 43 L. J. C. P. 344.

1436. —— On clear & conclusive proof.]—By a clause in arts. of partnership executed in 1878 between two brothers it was provided that on the death of either the survivor should pay to the exors. of deceased the full share to which they should be entitled on the taking of a general account in writing of the partnership assets, such stock & other assets as shall not consist of money to be valued either by mutual agreement or valuation in the usual way nothing being charged for goodwill. One brother died in 1886, & the survivor as sole exor. under his will effected the valuation as directed, paid for the share as surviving partner, & thenceforth carried on the business on his own account. In an action brought in 1908 by the residuary legatees under the will against the surviving partner in effect for an account on the footing that there had been no operative sale & purchase in 1886 by reason of the valuation then made not being in manner authorised by the clause, & that the business must be deemed to have been carried on for the benefit of both parties to the suit:—*Held:* on the true construction of the clause there was a binding contract of sale & purchase, & the valuation was only an incident in carrying out the same. The evidence showed that a substantially accurate method had been adopted, but even if error had been shown either in the method or the results it could not destroy the contract, but would fall to be corrected by the ct. on being clearly & conclusively proved. The price of goodwill must in any event be excluded from the valuation, & applts. could not rely exclusively on the dual character of deft. which had been imposed upon him by their own testator.—HORDERN *v.* HORDERN, [1910] A. C. 465; 80 L. J. P. C. 15; 102 L. T. 867; 26 T. L. R. 524, P. C.

——.]—*See, also,* EQUITY, Vol. XX., pp. 274-276, Nos. 333–353.

Ignorance.]—*See* EQUITY, Vol. XX., p. 276, No. 355.

ii. *Delay in Enforcement of Right.*

1437. Whether right affected—After seven years.]—A [partnership] account stated & balanced, & no objection made to it in seven years, decreed to stand & not to look back.—TILSLEY *v.* JEVON (1673), Cas. *temp.* Finch, 66; 23 E. R. 35.

1438. —— After twenty-two years—Account of subsequent transactions decreed.]—A father & son were in partnership together. The son died, & the father furnished a statement of the partnership accounts to the extrix. of the son, which did not contain any particular items, & which showed some debts due to the partnership to be outstanding. No further accounts or information were called for, till after the death of the father, which took place twenty two years after his accounts had been furnished. An investigation of the partnership books was then made, & several errors in the furnished accounts were stated to be found. The representatives of the son then filed a bill to have the partnership accounts taken:—*Held:* they were barred by long acquiescence; but accounts were directed to be taken of the debts which were outstanding when the accounts

were furnished by the father.—SCOTT *v.* MILNE (1843), 12 L. J. Ch. 233 ; 7 Jur. 709, L. C.

1439. ——.]—CUTHBERT *v.* EDINBOROUGH, No. 1430, *ante*.

—— **Unless fraud proved.**]—*See* EQUITY, Vol. XX., p. 274, No. 342.

—— **Error due to ignorance.**]—*See* EQUITY, Vol. XX., p. 276, No. 355.

(c) *Right to Surcharge and Falsify.*

See EQUITY, Vol. XX., p. 277, Nos. 359, 369.

K. When Action for Payment Lies.

1440. Settlement of account must be final.]—FROMONT *v.* COUPLAND, No. 67, *ante*.

1441. ——.]—GREEN *v.* BEESLEY, No. 2, *ante*.

1442. ——.]—CARR *v.* SMITH, No. 1425, *ante*.

1443. ——.]—PUBLIC TRUSTEE *v.* ELDER, No. 1894, *post*.

1444. Separate debt between partners—Agreement for payment out of partnership funds—Whether right of action suspended.]—Pltf. & deft. being partners, & deft. being indebted to pltf. on a separate account, it was agreed between them that pltf. should take 2½ per cent. interest on his separate account for six months, from Mar. 1, 1827, & 5 per cent. afterwards ; that the partnership accounts should be made up, & the deft.'s share of the proceeds go towards the liquidation of his separate debt ; that pltf. should receive sums due to the firm, discharge partnership debts, & apply the balance towards discharging deft.'s separate debt ; that the partnership might be dissolved any Jan. 1 on six months' notice being given, but that in consequence of pltf.'s concessions as to interest, it was expected there should be no dissolution Jan. 1 next ensuing :—*Held :* this agreement did not suspend pltf.'s right to sue deft. for the separate debt due from him to pltf.—SIMPSON *v.* RACKHAM (1831), 7 Bing. 617 ; 5 Moo. & P. 612 ; 131 E. R. 238.

1445. On agreement to take share at valuation—Before settlement of general account.]—Pltf. & deft. had worked a coal pit in partnership till it was exhausted, when pltf. said he would join in no more coal pits, & deft. said he should work another whether pltf. joined him or not. The materials & utensils belonging to the mine were valued, & each party was to take an article by turn, according to that valuation, till the whole was divided. The valuation was made, & it was subsequently agreed that deft. should take the whole at the valuation, & he took possession of them. The other partnership debts & credits remained unsettled :—*Held :* this was a transaction so separate & distinct from the general accounts, that pltf. might sue for his moiety of the value of the materials & utensils before the final settlement of the partnership accounts.—JACKSON *v.* STOPHERD (1834), 2 Cr. & M. 361 ; 4 Tyr. 330 ; 3 L. J. Ex. 95 ; 149 E. R. 800.

1446. For balance of prior accounts—Acceptance of payment of subsequent balances immaterial.]—Two proprietors of a stage coach, A. & B., dissolved their partnership in Nov. During their partnership, monthly accounts were made up, on each of which a balance was struck in favour of A. These balances were never carried forward from one account to another. B. had paid A. the balance on the Nov. account, which was made up to the time of the dissolution :—*Held :* A. might maintain an action for the balances in his favour on the Sept. & Oct. accounts.—BRIERLY *v.* CRIPPS (1836), 7 C. & P. 709, N. P.

Annotation :—**Refd.** Dixon *v.* Wing (1843), 1 L. T. O. S. 647.

1447. Money paid to use of co-partner—Plea of partnership transaction.]—*Assumpsit* for money paid, for interest, & on an account stated. Plea, that at the time of the commencing of this suit, & at the time of the accruing of the causes of action in the declaration mentioned, pltf. & deft. carried on business in co-partnership, & that the causes of action arose out of transactions between pltf. & deft. as such co-partners ; & that, at the time of the commencement of the suit, the accounts of the partnership were not settled or adjusted, or any balance struck between pltf. & deft. :—*Held :* the plea was ill, because it did not show that this was a partnership transaction.—WORRALL *v.* GRAYSON (1836), 1 M. & W. 166 ; 1 Gale, 375 ; Tyr. & Gr. 477 ; 5 L. J. Ex. 101 ; 150 E. R. 391.

Annotation :—**Mentd.** Trott *v.* Smith (1844), 12 M. & W. 688.

1448. Bills of exchange—Payable at different periods.]—On a contract by a retiring partner to pay a certain sum, by bills due at different periods, two only of them having become due before action, & to execute a deed of dissolution, pltf. was held entitled to recover the whole sum, less interest, & a further sum, to be reduced to a shilling on his execution of the deed, but not the expenses of the deed.—MORLEY *v.* BAKER (1862), 3 F. & F. 146, N. P.

1449. —— **Plea of consideration from partnership funds.**]—In an action on a bill of exchange a plea of partnership between pltf. & deft. is good if it shows either that the bill in respect of which the action is brought is a partnership asset, or that it was met with moneys which came out of the partnership funds. If the plea contains both these averments, deft. is entitled to judgment if he proves one & fails to prove the other.—WESTON *v.* ABRAHAMS (1869), 20 L. T. 586.

—— **Security for loan from partnership funds.**]—*See* BILLS OF EXCHANGE, Vol. VI., p. 130, No. 870.

Where cause of action arises.]—*See* ACTION, Vol. I., p. 13, No. 109.

Account stated.]—*See* CONTRACT, Vol. XII., pp. 572, 576, Nos. 4763, 4769, 4803, 4804.

Money had & received.]—*See* CONTRACT, Vol. XII., pp. 540, 548, Nos. 4490, 4491, 4553.

Money paid under mistake of fact.]—*See* MISTAKE, Vol. XXXV., p. 153, No. 506.

L. Right of Retainer of Executor Partner.

See EXECUTORS, Vol. XXIII., p. 378, Nos. 4477–4479.

SUB-SECT. 6.—ACTION OTHER THAN FOR ACCOUNT.

Action for debt in account.]—*See* Sub-sect. 5, K., *ante*.

1450. Action for specific performance.]

PART V. SECT. 13, SUB-SECT. 5.—K.

f. *For balance of prior accounts.*]—A., one of two partners, entered in the partnership books : "I have examined our books & find them correct, & a balance due my co-partner of £288." No promise to pay the balance was proved by B., the co-partner, & subsequently to that entry the two partners continued the business, & afterwards finally settled & dissolved :—*Held :* B. had no right of action against A., upon the balance stated in the entry.—ALLAN *v.* GARVEN (1848), 4 U. C. R. 242.—**CAN.**

g. *For balance admitted due on dissolution.*]—When on a dissolution one partner has admitted a balance due his co-partner, assumpsit will lie although there be no promise to pay.—MCNICOL *v.* MCEWEN (1834), 3 O. S. 485.—**CAN.**

PART V. SECT. 13, SUB-SECT. 6.

h. *Exclusion of partner—Measure of damages for.*]—Where three partners enter into a contract to perform a

Sect. 13.—*Enforcement of rights: Sub-sects.* 6, 7 & 8, *A. & B.*]

HIBBERT *v.* HIBBERT (1807), Collyer on Partnership, p. 133.

Annotation:—**Distd.** Scott *v.* Rayment (1868), L. R. 7 Eq. 112.

.]—Specific performance of an agreement refused the same not having been accepted by pltf. in due time, nor any acceptance by him ever notified to deft., & pltf. having, after deft. had signed the agreement, attempted to vary the terms of it, though he ultimately acquiesced in deft.'s terms.—THORNBURY *v.* BEVILL (1842), 1 Y. & C. Ch. Cas. 554; 6 Jur. 407; 62 E. R. 1014.

Annotation:—**Mentd.** Aubin *v.* Holt (1855), 2 K. & J. 66.

1452. ——.]—An agreement between two solrs. in partnership together, that one of them should continue to carry on the business under their joint names, & should be entitled to all the profits thereof, & should grant to the other partner an annuity of £300 during the life of his mother, & in the event of his dying in the lifetime of his mother should pay to his widow an annuity of £100 during the remainder of his mother's life, & should indemnify him against all liability in respect of his name being used, & that the partnership should cease on the death of the mother of the retiring partner:—*Held:* the agreement must be considered to mean that an annuity was to be granted by deed, & the retiring partner was entitled to enforce specific performance of such agreement.—AUBIN *v.* HOLT (1855), 2 K. & J. 66; 25 L. J. Ch. 36; 4 W. R. 112; 69 E. R. 696.

.]—*See, further,* SPECIFIC PERFORMANCE.

1453. Demand in nature of unliquidated damages—Enforceable in equity.]—BURY *v.* ALLEN, No. 1775, *post.*

1454. Action for breach of covenant—By continuing partners to outgoing partner—Action against one—Joint liability.]—A firm of three dissolved partnership, one of them retiring; &, by the deed of dissolution, the two continuing partners covenanted for themselves, their heirs, exors. & administrators, that they, or one of them, would pay to the outgoing partner certain specified sums:—*Held:* this only constituted a joint liability at law, & could not be otherwise construed in equity; & a demurrer to a creditors' bill filed by the outgoing partner against the extrix. of one of the covenantors, who died before the other, was allowed.—WILMER *v.* CURREY (1848), 2 De G. & Sm. 347; 11 L. T. O. S. 491; 12 Jur. 847; 64 E. R. 156.

Annotation:—**Consd.** Beresford *v.* Browning (1875), 1 Ch. D. 30.

1455. —— **Effect of release.**]—In an action by applt. against resp. for alleged breaches of certain covenants contained in their deed of partnership, & for fraud alleged to have been committed by deft. in obtaining a deed of dissolution thereof; it appeared that as regards the breaches pltf. had, by the deed of dissolution, in consideration of deft. having given up the whole of the partnership assets to pltf., released deft. from all matters & things whatever touching or concerning the joint trade, without prejudice nevertheless to the covenants & agreements in the said deed of dissolution contained:—*Held:* as the release could not be separated from the rest of the deed of dissolution, & as pltf. had not disaffirmed, & was not in a condition to disaffirm or rescind the contract, of which the release formed part, the same was binding upon him.—URQUHART *v.* MACPHERSON (1878), 3 App. Cas. 831, P. C.

1456. Action for fraud.]—URQUHART *v.* MACPHERSON, No. 1455, *ante.*

.]—*See, generally,* MISREPRESENTATION & , Vol. XXXV., pp. 52 *et seq.*

SUB-SECT. 7.—ARBITRATION.

NOTE.—*The following page & number references are to* ARBITRATION, Vol. II.

What constitutes submission.]—*See* p. 320, No. 58.

Parties to reference.]—*See* p. 326, Nos. 99, 100.

Construction of submission.]—*See* pp. 332, 337, 341, 342, Nos. 144, 166, 210–211.

Ouster of jurisdiction of court.]—*See* pp. 353, 354, Nos. 280, 281.

Stay of proceedings.]—*See* pp. 363, 367, 368, 369, 373, Nos. 324, 348–351, 356, 386.

Injunction to restrain arbitration.]—*See* p. 378, No. 414.

Revocation of agreement to submit.] — *See* p. 386, Nos. 475, 476.

Validity of award.]—*See* pp. 478, 482, 498, 506, Nos. 1227, 1248, 1388, 1463, 1464.

SUB-SECT. 8.—RECEIVERS.

A. In General.

See, generally, RECEIVERS.

1457. Effect of appointment—Operates as injunction.]—BAXTER *v.* WEST, No. 1496, *post.*

1458. Foreign co-partners—Assets at home & abroad—Application for receiver of foreign assets— certain work, as partners, & two of them, after the work has been commenced, exclude the third from all participation in it, the partner so excluded may sustain an action against them for such exclusion, while the work is still in progress. The measure of damages in such case will be the profits that might reasonably be expected to result from the undertaking.—GRANT *v.* CREELMAN, 2 Thom. 37.—**CAN.**

k. —— *From account due to firm.*]—An agreement was entered into between two creditors of a partnership concern & the exors. of a deceased partner that on the recovery of a certain sum of money due the partner it should be divided; two-thirds to the said creditors, & one-third to the daughter of the partner. In an action by another partner:—*Held:* pltf. was entitled to the one-third retained by the exors. for the benefit of the daughter.—OPPENHEIMER *v.* SWEENY (1907), 13 B. C. R. 117.—**CAN.**

l. —— *Outstanding accounts.*]—A partner should not be given judgment as creditor against his partner as debtor in respect of outstanding accounts against the partnership.—HAGARTY *v.* GOETZ (Sask.) (1921), 62 D. L. R. 220; [1921] 3 W. W. R. 517.—**CAN.**

m. *Agreement to keep books & collect debts.*]—An action cannot be maintained by one partner against another, on an offer made on arranging for a dissolution to pay a certain sum if he were allowed to keep the books & collect the debts.—BURGESS *v.* FANNING (1835), 4 O. S. 188.—**CAN.**

n. *Superintendence of work by partner—After termination of partnership.*]—McDONALD *v.* McKEEN (1896), 28 N. S. R. (16 R. & G.) 329.—**CAN.**

o. *Action for breach of contract—Placer mining partnership.*]—CAMERON *v.* SUTTLES (1908), 7 W. L. R. 686.—**CAN.**

p. *Declaration of interest in quarry.*]—COULTHARD *v.* SINCLAIR (B. C.) (1909), 11 W. L. R. 215.—**CAN.**

q. *Right of partners to sue firm.*]—Partners, however numerous, do not in law acquire that quality of a separate entity which would enable one partner to sue the firm, as a shareholder may sue his co.—BIGELOW *v.* POWERS (1911), 20 O. W. R. 245; 3 O. W. N. 186; 25 O. L. R. 28.—**CAN.**

PART V. SECT. 13, SUB-SECT. 8.—A.

r. *Property carried by order.*]—A receiver order in a partnership suit carries existing chattel property & debts continuing due to the firm at the time the order is made but not money in the hands of one of the partners which on account taken he might be subject to hand over to the other partners.—MORETON *v.* HARLEY (1863), 2 W. & W. 74.—**AUS.**

t. *Action for dissolution—Sale of assets before trial—When ordered.*]—In special circumstances an order may

Lis alibi pendens.]—EVANS *v.* PULESTON, [1880] W. N. 127, C. A.

1459. —— Alien enemy—Substratum of business gone.]—FELDT *v.* CHAMBERLAIN (1914), 58 Sol. Jo. 788.

-.]—*See, generally,* ALIENS, Vol. II., pp. 153, 154, Nos. 242–248.

—— —— **Appointment of controller.**]—*See* ALIENS, Vol. II., pp. 149, 150, 151, Nos. 216–229.

—— —— **Appointment of custodian.**]—*See* ALIENS, Vol. II., pp. 151, 152, 153, Nos. 230–241.

Mining partnerships.]—*See* MINES, Vol. XXXIV., pp. 622, 623, 625, Nos. 194, 195, 198–201, 221.

B. On Whose Application Appointed.

1460. Retired partner.]—COLLENRIDGE *v.* COOK (1837), 1 Jur. 771.

1461. Dormant partner.]—HALE *v.* HALE, No. 1507, *post.*

1462. Person entitled to an account—Servant sharing in profits.]—S., a general merchant, entered into a contract with K. that in consideration of the general services of K. in the business of S. the latter would allow him, in addition to a certain salary, a certain proportion of the net profits on all new business entered into through him.

Qu.: whether this contract was not a partnership :—*Held:* at any rate, K. had acquired a right as against S. to an account, & also the appointment of a receiver.

By the agreement pltf. had really become a partner with deft., & there was a want of evidence to show that, notwithstanding the terms of the agreement, there was added any clause or stipulation that pltf. should not be considered as partner. Then, if a partnership had been constituted by that agreement, there was nothing whatever in the correspondence to show that it was removed by the subsequent course of dealing between them. Without, therefore, further entering into that point, there was certainly an interest created in pltf., by virtue of his stipulated share in the profits, to know the amount of those profits, & therefore an interest to see that those things out of which the profits arose were properly managed, which in itself very much resembles a partnership interest (SHADWELL, V.-C.).—KATSCH *v.* SCHENCK (1849), 18 L. J. Ch. 386 ; 13 L. T. O. S. 543 ; 13 Jur. 668.

Annotation :—**Apld.** Heyhoe *v.* Burge, Marse *v.* Burge (1850), 14 L. T. O. S. 487.

1463. Solvent partner — Bankruptcy of co-partner.]—(1) Two surgeons, in consideration of £900 paid by one to the other, entered into partnership for seven years. Before the expiration of a year & a half the partner who had received the £900 became bkpt. On a bill by the solvent partner against the bkpt.'s assignee :—*Held:* the consideration for which the £900 had been paid having failed, pltf. entitled to an allowance of a sum proportionate to the period of the partnership which remained, with a lien for that amount on the partnership assets.

It is a settled principle, that, if money has been paid as the consideration for a contract which fails, this ct. will restore to the person who has paid the money a due proportion of it, having regard to the extent to which the consideration has failed. . . . Here, the equity sought is in administering the affairs of this partnership, which has come to an untimely end, & therefore the greater part of that for which the consideration has been paid is gone. . . . But the principle applies to a contract for a partnership as much as to any other. . . . The principle upon which the ct. interferes is, that the consideration in respect of which the money is paid fails, & is not obtained by the person who pays the money, in consequence of an unforeseen interruption (PARKER, V.-C.).

The evidence shows, that when L. received this £900 he was not in flourishing circumstances. His bkpcy. is not accounted for as having been occasioned by any sudden or unexpected loss, but by a progressive course of expenditure beyond the amount of his receipts from his practice. Nor was his bkpcy. brought about at all at the instance of his partner. Pltf. is thought entitled to a return of a proportionate part of the premium (PARKER, V.-C.).

(2) Notwithstanding 12 & 13 Vict. c. 106, s. 152, a receiver was appointed on the motion of the solvent partner.—FREELAND *v.* STANSFELD (1854), 2 Sm. & G. 479 ; 2 Eq. Rep. 1181 ; 23 L. J. Ch. 923 ; 18 L. T. O. S. 220 ; 24 L. T. O. S. 41 ; 16 Jur. 792 ; 1 Jur. N. S. 8 ; 2 W. R. 575 ; 65 E. R. 490.

Annotations :—As to (1) **Refd.** Mackenna *v.* Parkes (1866) 15 L. T. 500 ; Atwood *v.* Maude (1868), 3 Ch. App. 369.

1464. —— ——.]—HULME *v.* ROWBOTHAM, [1907] W. N. 162.

1465. Defendant in partnership suit.]—SARGANT *v.* READ, No. 1516, *post.*

1466. Party denying existence of partnership.]—Deft. in an action for dissolution of partnership, who does not admit the existence of the partnership, but claims to own the whole business, cannot move in the action for appointment of a receiver.—HARDY *v.* HARDY (1917), 62 Sol. Jo. 142.

1467. Representative of deceased partner.]—MADGWICK *v.* WIMBLE, No. 960, *ante.*

1468. —— After assignment of interest of deceased partner.]—The administratrix of deceased partner assigned all the interest of that partner in the partnership premises unto or in trust for the parties entitled to his estate :—*Held:* (1) administratrix was entitled to a receiver in respect of intestate's share of the partnership, including a renewed lease.

(2) As administratrix was still subject to the partnership liabilities, she was entitled to institute a suit against the surviving partners for the purpose of taking the partnership accounts.—CLEGG *v.* FISHWICK (1849), 1 Mac. & G. 294 ; 1 H. & Tw. 390 ; 19 L. J. Ch. 49 ; 13 Jur. 993 ; 41 E. R. 1278 ; *sub nom.* GLEGG *v.* FISHWICK, 15 L. T. O. S. 472, L. C.

Annotations :—Generally, **Mentd.** Clements *v.* Hall (1858), 27 L. J. Ch. 350, n. ; Oceanic Steam Navigation Co. *v.* Sutherberry (1880), 16 Ch. D. 239, n.

1469. ——.]—Two partners on the termination of their partnership came to an arrangement for mutual convenience that a third person should collect the outstanding assets ; it was acted upon for some time, & then one of the partners died :—*Held:* the surviving partner could not repudiate

be made, in an action for the dissolution & winding-up of an insolvent partnership, for the sale of assets by the receiver before the trial.—MCLAREN *v.* WHITING (1895), 16 P. R. 552.—**CAN.**

a. *Objects of appointment.*]—The very essence, object & purpose of appointing a receiver is to place the partnership assets under the protection of the ct. & to prevent any body except the receiver who is the officer of the ct. from receiving any part of such assets. Money due to a partnership cannot be legally paid to one of the partners after a receiver is appointed.—IRVINE *v.* HERVEY (N. S.) (1913), 13 E. L. R. 297 ; 13 D. L. R. 868 ; 47 N. S. R. 316.—**CAN.**

PART V. SECT. 13, SUB-SECT. 8.—B.

b. *General creditor—Assignment for benefit of creditors by partners.*]—HUDSON BAY CO. *v.* GREEN (1881), 1 B. C. R. pt. 1, 247.—**CAN.**

Sect. 13.—*Enforcement of rights: Sub-sect.* 8, *B. & C.* (*a*), (*b*) & (*c*).]

the agreement & alone collect the debts, but the exors. of deceased partner had a right to have a receiver appointed.—DAVIS *v.* AMER (1854), 3 Drew. 64 ; 61 E. R. 826.

Bankruptcy of co-partner.]—*See* No. 1464, *ante.*

C. When Appointment Made.

(*a*) *In General.*

See, generally, RECEIVERS.

1470. On dissolution—No absolute right to receiver.]—HARDING *v.* GLOVER, No. 1499, *post.*

1471. —— ——.]—(1) The mere fact of dissolution of a partnership does not give one partner an absolute right, as against his co-partners, to have a receiver appointed of the partnership business ; (2) Arts. of partnership entered into by pltf. & deft. provided that all doubts, difficulties, or divergencies that might arise between the partners during the course of the partnership, or at its liquidation or its total or partial dissolution, should be resolved & adjusted by friendly arbn. The term of the partnership had expired, & it was continued at will. Pltf. brought an action for dissolution, & moved for the appointment of a receiver & manager. Deft. moved for a stay of proceedings under Arbitration Act, 1889 (c. 49), s. 4 :—*Held :* the ct. had jurisdiction while appointing a receiver to stay all proceedings in the action except for the purpose of carrying out the order for a receiver.

I make an order referring it to chambers to appoint a fit & proper person or persons to be receiver & manager or receivers & managers, any party to be at liberty to propose himself. If B. [a partner] proposes himself, my opinion is that he is a fit & proper person, & that he must give security to pltf. I also make an order staying all further proceedings, with liberty to apply (STIRLING, J.).—PINI *v.* RONCORONI, [1892] 1 Ch. 633 ; 61 L. J. Ch. 218 ; 66 L. T. 255 ; 40 W. R. 297 ; 36 Sol. Jo. 254.

Annotation :—As to (2) **Consd.** Jack *v.* Bell (1892), 36 Sol. Jo. 760.

1472. Where remedy provided by articles.]—Under a bill by some partners in a joint concern on behalf of themselves, & the others, three hundred in number, for a dissolution, receiver, etc., & an account, alleging mismanagement by the managers, the ct. refused to interfere by injunction & the appointment of a receiver, in the first instance, until they had tried the means of redress, provided by the arts.—CARLEN *v.* DRURY (1812), 1 Ves. & B. 154 ; 35 E. R. 61, L. C

Annotation :—**Mentd.** Hallett *v.* Dowdall (1852), 18 Q. B. 2.

—— **Arbitration clause.**]—*See* ARBITRATION, Vol. II., pp. 363–368, Nos. 324, 328–351.

1473. Where legality of business in question.]—On dissolution of a partnership between two sleeping, & one managing partners, nurserymen, & bill filed for taking partnership accounts, etc. ; an issue was directed to try whether the partnership deed was usurious or not. A motion for an injunction & a receiver, against the managing partner, refused, in consideration of the nature of the business.—FYSON *v.* MILLER (1833), 2 L. J. Ch. 158, L. C.

1474. Where management given to one partner—Manager appointed.]—TIBBITS *v.* PHILLIPS, No. 932, *ante.*

1475. —— **Under deed of dissolution.**]—(1) On the dissolution of a partnership between pltf. & deft., it was by deed agreed that the deft. should have sole management of the liquidation of the firm ; that neither of the partners should make any claim on the other of them, but deft. should pay all debts of the firm, & indemnify pltf. against the same & should also pay & account to him for the share of any dividends which might be received in respect of any debts, after all the firm debts had been paid out of the existing assets of the firm. Among the assets of the firm was a debt due from a firm in Java. A Dutch co. was formed for the purpose of taking over the property of the Java firm, subject to an arrangement being come to with the creditors of that firm to accept shares in the co. in payment or part payment of their debts. In an action by pltf. against deft. for an account of the partnership, & to restrain deft. from compromising the claim of the firm against the Java firm, the judge, made an order appointing deft. receiver, with liberty to compromise the claim in question, upon terms to be approved by the judge in chambers :—*Held :* there was no power, express or implied, in the deed of dissolution enabling one deft. to enter into the arrangement in question, & the ct. could not appoint deft. receiver, & give him as such receiver greater power than he had under the deed of dissolution, without the consent of pltf.

(2) There is no power in one partner, in the absence of special authority from his co-partners or evidence of a special course of dealing, to accept shares in a co. even though fully paid up in satisfaction of a debt due to the firm.—NIEMANN *v.* NIEMANN (1889), 43 Ch. D. 198 ; 59 L. J. Ch. 220 ; 62 L. T. 339 ; 38 W. R. 258, C. A.

1476. Applicant also defendant in cross-action—Relating to partnership.]—NORTON *v.* GOVER, [1877] W. N. 206.

1477. Pending reference to arbitration.]—Pltf. & three other persons, G., N., & F., all British subjects, entered into an agreement, in the Russian language & registered in Russia, to trade in co-partnership in Russia, providing (*inter alia*) that the head office of the firm should be in St. Petersburg ; & reserving to G. & N. the right to recall their capital within a year, &, if not paid within a month, the firm was to be wound up ; & also providing that " all disputes, no matter how or where they shall arise, shall be referred to the St. Petersburg Commercial Ct.," whose decision shall be final. Pltf. alleged that there was a contemporaneous English agreement, but not registered in Russia, by which G. & N. agreed to compensate pltf. in the event of a dissolution within a year, under the powers reserved to them. The two partners exercised their right within the year to recall their capital, & immediately took steps to wind up the partnership in Russia. Pltf. having thereupon commenced an action in England, alleging that the proceedings of his co-partners, defts., were taken without his knowledge & sanction, & were invalid & not binding on him, & claiming a dissolution of the partnership, relief in respect of the English agreement, the appoint-

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c. *On dissolution—No answer to bill for dissolution.*]—BARLETT *v.* STYMEST (1868), N. B. Dig. 648.—**CAN.**

d. —— *To protect security till hearing of pending action.*]—Two partners dissolved. On a bill afterwards filed by one for exclusion, deft. justified the exclusion on the ground of a parol agreement, which the other denied, & it was not otherwise proved :—*Held :* pltf. was entitled to a receiver for his security until the hearing.—STEELE *v.* GROSSMITH (1872), 19 Gr. 141.—**CAN.**

e. *Partner refusing to perform his part—Or render accounts.*]—Where a business is carried on jointly, & one of the parties refuses to perform his part of the bargain or to render

ment of a receiver & other relief, defts. moved a stay of proceedings in the action & a reference to the St. Petersburg Commercial Ct. :—*Held :* although the ct. had jurisdiction to appoint a receiver pending a reference to arbn., it was not proper to do so unless a special case was made, as the course of liquidation before the tribunal chosen by the parties themselves would thereby be interfered with.—LAW *v.* GARRETT (1878), 8 Ch. D. 26 ; 38 L. T. 3 ; 26 W. R. 426, C. A.

Annotations :—**Apld.** Halsey *v.* Windham, [1882] W. N. 108. **Consd.** Compagnie Du Senegal *v.* Wood (1883), 53 L. J. Ch. 166. **Mentd.** Kirchner *v.* Grubnar, [1909] 1 Ch. 413 ; The Cap Blanco, [1913] P. 130.

1478. On ex parte application.]—HICK *v.* LOCKWOOD. [1883] W. N. 48.

1479. Where existence of partnership disputed.]—I do not see my way to appoint a receiver. A partnership is alleged on the one side & denied on the other ; that is the very question to be tried at the hearing (CHARLES, J.).—TUCKER *v.* PRIOR (1887), 31 Sol. Jo. 784.

(b) Necessity for Dissolution.

1480. General rule.]—SMITH *v.* JEYES, No. 249, *ante.*

1481. Receiver not appointed during subsistence of partnership.]—Motion to appoint a receiver of partnership stock & debts in a suit by one against the other partners for embezzling.

The ct. thought that a receiver of the stock of a subsisting partnership while the trade is going on, could not be appointed ; unless upon the very grossest abuse ; for it must destroy the trade.—OLIVER *v.* HAMILTON (1794), 2 Anst. 453 ; 145 E. R. 933.

Annotation :—**Apprvd.** Hall *v.* Hall (1850), 3 Mac. & G. 79.

1482. Receiver appointed with a view to winding up.]—Although an agreement to refer disputes to arbn. is, generally, no objection to a suit in a ct. of equity, yet upon the nature of the subject the management of the Opera House, & the anxious provision of the parties for arbn., the ct. refused upon motion to interfere before they had taken that course. The principle upon which a ct. of equity interferes between partners by appointing a manager, receiver, etc., is merely with a view to the relief, by winding up & disposing of the concern, & dividing the produce : not to carry it on. The ct. therefore would not upon motion appoint a manager, etc., of the Opera House, except upon the principle, applicable to any other partnership as necessary to the relief ; a foreclosure ; taking into consideration also the difficulties from the nature of the subject & the contract an anxious provision for arbn., &, that one party was by the express contract manager.—WATERS *v.* TAYLOR (1808), 15 Ves. 10 ; 33 E. R. 658, L. C.

Annotations :—**Apld.** Roberts *v.* Eberhardt (1853), Kay, 148. **Refd.** Automatic Self Cleansing Filter Syndicate Co. *v.* Cuninghame, [1906] 2 Ch. 34. **Mentd.** Gourlay *v.* Somerset (1815), 19 Ves. 429.

1483. Where grounds for dissolution.] — (1) The ct. will not, upon motion, appoint a receiver of a partnership, unless it appears that pltf. will be entitled to a dissolution at the hearing.

(2) Trifling circumstances of conduct are not sufficient to authorise the ct. to award a dissolution. It is said that pltf. has made larger advances of capital than he was bound to do, & has received none of the profits, but that is no ground for a dissolution. It is then stated that deft. has exchanged carpets for household furniture ; that may perhaps be an improper act, but still there may be a thousand reasons why the ct. should not do more than restrain him in future from so doing, & more particularly when he states in his answer, that he did it because he thought it the best thing that could be done. With respect to the books, they ought to be kept in the partnership counting house ; it is sworn that this is the case, but if that is not the case, it is no ground for dissolving the partnership, or appointing a receiver (LORD ELDON, C.).—GOODMAN *v.* WHITCOMB (1820), 1 Jac. & W. 589 ; 37 E. R. 492, L. C.

Annotations :—*As to* (1) **Consd.** Hall *v.* Hall (1850), 3 Mac. & G. 79. **Refd.** Roberts *v.* Eberhardt (1853), Kay, 148 ; Baxter *v.* West (1860), 1 Drew. & Sm. 173. *As to* (2) **Consd.** Hall *v.* Hall (1850), 3 Mac. & G. 79. **Apld.** Anderson *v.* Anderson (1857), 25 Beav. 190.

1484. ——.]—CHAPMAN *v.* BEACH (1820), 1 Jac. & W. 594 ; 37 E. R. 494, L. C.

1485. ——.]—SMITH *v.* JEYES, No. 249, *ante.*

1486. Where dissolution disputed.]—The Lord Chancellor refused, upon motion, to appoint a receiver of a partnership, where the question raised was, whether the partnership had been dissolved ; but directed an issue to try that fact.—FAIRBURN *v.* PEARSON (1850), 2 Mac. & G. 144 ; 42 E. R. 56, L. C.

1487. ——.]—A partnership existed which had various branch partnerships & businesses at various places, & in the several sub-partnership deeds a proviso was inserted that such partnerships should be determined by the head partner of the general partnership firm upon certain terms, upon giving certain notices. The head partner being desirous of terminating one of the then subordinate partnerships, the proper notices were given. Pltf. denied the validity of these notices, & also disputed the principle upon which the last balance sheet of the profits had been taken & made up. He thereupon filed his bill for an account & for a receiver :—*Held :* until the validity or invalidity of these notices was determined at the hearing, a receiver would not be appointed, no prospective damage to pltf.'s concern in the meantime being alleged.—BOWKER *v.* HENRY (1862), 6 L. T. 43.

1488. Where dissolution uncertain.]—BAXTER *v.* WEST, No. 1496, *post.*

Where partnership assets in danger.] —*See* Sub-sect. 8, C. (*c*), *post.*

Where partner guilty of misconduct.] —*See* Sub-sect. 8, C. (*d*), *post.*

On death of partner.]—*See* Sub-sect. 8, C. (*e*), *post.*

Mining partnerships.]—*See* MINES, Vol. XXXIV., p. 623, No. 201.

(c) Preservation of Assets.

1489. Collection of debts—Business continued by remaining partners—Estate of deceased partner interested.]—Surviving partner trading on his own account with debtors to the partnership. Ordered, that an attorney be appointed to sue for the debts, unless the surviving partner would give security to answer a moiety of the debts to the administratrix of deceased partner.—ESTWICK *v.* CONNINGSBY (1682), 1 Vern. 118 ; 23 E. R. 355.

1490. —— —— Interest of retired partner.]—COLLENRIDGE *v.* COOK (1837), 1 Jur. 771.

1491. —— Costs due to solicitor partner.]—In an action for dissolution of partnership between solrs. a receiver was appointed to get in outstanding costs due from clients, & the books of the firm were placed in his hands. The entries of attendances made by R., one of the partners, were not

accounts, a receiver will be appointed, whether the agreement for joint working constitute a partnership or not.—ROEDDE *v.* NEWS-ADVERTISER PUBLISHING CO. (1894), 4 B. C. R. 7.—**CAN.**

f. Receiver of salary of partner—Government official.]—CANE *v.* MAC DONALD (1902), 9 B. C. R. 297.—**CAN.**

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sufficiently detailed to enable the receiver to make out proper bills. R. refused to settle the bills, unless remunerated by 5 per cent. on the amount thereof. The other partner thereupon took out a summons for an order that R. should be directed to settle the bills within one week:—*Held:* the summons must be refused.—RAY *v.* FLOWER ELLIS (1912), 56 Sol. Jo. 724, C. A.

1492. Restraint of waste.]—The ct. will not treat a bill to restrain an acting partner from collecting or creating debts & appointing a receiver, as if it were in nature of a bill to restrain waste, whatever they might do where such partner should have been shown to have been guilty of culpable conduct or to be insolvent. Nor will they permit pltf. in aid of such a motion, to use an affidavit made & filed after the coming in of deft.'s answer; though in a case analogous with that of irreparable waste, such an affidavit made & filed before answer may be used. An application for an injunction, & the appointment of a receiver should be made the subject of two successive motions.—LAWSON *v.* MORGAN (1815), 1 Price, 303; 145 E. R. 1410.

1493. Daily depreciation of assets.]—BAILEY *v.* FORD, No. 1868, *post.*

1494. Rights of partners in question.]—Exclusion is a sufficient ground for appointing a receiver in partnership cases; but partners may, by contract, provide for an exclusion on the happening of certain events.

Upon a motion for a receiver of a partnership, the ct. will not determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights.—BLAKENEY *v.* DUFAUR (1851), 15 Beav. 40; 51 E. R. 451.

1495. After dissolution by notice—Until sale of business.]—After dissolution of a partnership by notice pursuant to the arts. the ct. will, until a sale of the business as a going concern, appoint a receiver & manager for the purpose, in the meantime, of preserving the assets by carrying into effect existing contracts & entering into such new contracts as are necessary for carrying on the business in the ordinary way, but so as not to impose, by speculative dealing or otherwise, onerous liabilities on the partners.—TAYLOR *v.* NEATE (1888), 39 Ch. D. 538; 57 L. J. Ch. 1044; 60 L. T. 179; 37 W. R. 190; 4 T. L. R. 748.

Annotations:—**Refd.** Burt, Boulton & Hayward *v.* Bull, [1895] 1 Q. B. 276; *Re* David & Matthews, [1899] 1 Ch. 378.

(*d*) *Misconduct of Partner.*

1496. General rule—Misconduct a ground for appointment—Before end of partnership term.]—(1) The appointment of a receiver operates as an injunction, & this ct. will not, on motion, appoint a receiver in partnership cases unless it sees its way to a decree for a dissolution at the hearing. If a partnership is continuing, or may continue, the ct. will only decree accounts to be taken.

(2) The question of a term or no term is one proper for the hearing of the cause, but if there be misconduct, the ct. can appoint a receiver before the end of a partnership term.—BAXTER *v.* WEST (1858), 28 L. J. Ch. 169; 32 L. T. O. S. 155.

1497. —— —— Though dissolution not ordered.]—JACK *v.* BELL (1892), 36 Sol. Jo. 760.

1498. Receipt of secret benefit—Detention of partnership property.]—Upon the purchase of a steam vessel, it was agreed among the purchasers that two of them should be the ship's husbands, & should not be removed except on certain grounds specified in the agreement. The ship's husbands thus appointed obtained a charterparty for her, & they privately stipulated for a weekly payment, by way of commission for themselves, in addition to the weekly sum payable by the terms of the charterparty. In the month of May following, the captain, who was a part owner, had a conversation with a clerk of the charterers, in which an observation of the latter led him to suspect that there was some underhand bargain; but the subsequent part of the conversation removed the suspicion. In Oct. he acquired correct knowledge of what had been done, &, together with the other part owners, except the ship's husbands, gave the ship's husbands notice of dismissal. The ship's husbands denied the right to dismiss them, & they possessed themselves of some of the machinery of the ship, which was at an engineer's for repairs. The other part owners thereupon filed a bill, & moved for an injunction to restrain the ship's husbands from interfering with her sailing by detention of the machinery, & for a receiver of the machinery:—*Held:* (1) the application was not too late; &, on it appearing that a decree of possession could not be obtained in the Ct. of Admiralty, by reason of pltfs. being in possession of the hull, or at all events could not be obtained in time to enable the vessel to fulfil her engagement; (2) the Ct. of Ch. had jurisdiction upon motion to appoint a receiver of the machinery, & to direct possession of it to be delivered to him: & an order was made accordingly, the captain [who was a part owner] being appointed receiver *ad interim.*—BRENAN *v.* PRESTON (1852), 2 De G. M. & G. 813; 1 W. R. 69, 86; 42 E. R. 1090, L. JJ.

1499. Breach of duty—Trading with partnership property on own account—After dissolution.]—Receiver not ordered merely on a dissolution of partnership. Ordered on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account.—HARDING *v.* GLOVER (1810), 18 Ves. 281; 34 E. R. 323, L. C.

Annotation:—**Refd.** Pini *v.* Roncoroni, [1892] 1 Ch. 633.

1500. —— —— ——.]—Pending the winding up of the business of a partnership, which has become dissolved by the death of one of the partners, it is a ground for appointing a receiver & manager, & for not appointing the surviving partner to that office, that the latter has, while carrying on the business after his partner's death, so acted as to diminish the value of the assets by transferring to a new business to be carried on by himself the benefit of the custom & goodwill of the partnership business. After the death of one of two partners the surviving partner continued to carry on the partnership business, & while so doing excluded the husband of the daughter & representative of deceased partner from the partnership premises, took a new shop near the old one, & used his influence with the customers of the old business

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g. *Partner wrongfully claiming to use partnership assets—On ground of co-partner's alleged misconduct.*]—After the dissolution of a partnership, one of the partners claimed the greater portion of the partnership property as his own by reason of certain misconduct which he charged against pltf., & made use of the partnership property in carrying on business on his own account:—*Held:* such proceedings were wrong, & entitled the other partner to a receiver.—DOUPE *v.* STEWART (1867), 13 Gr. 637.—CAN.

to divert them to his new business:—*Held:* a receiver & manager of the partnership business until sale must be appointed, & the surviving partner could not be appointed.—YOUNG *v.* BUCKETT (1882), 51 L. J. Ch. 504; 46 L. T. 266; 30 W. R. 511.

1501. —— —— After death of co-partner.]—MADGWICK *v.* WIMBLE, No. 960, *ante*.

1502. —— Application of profits contrary to agreement.]—The ct. will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered, &, where it will interfere for that purpose, will take care that the decree shall not be defeated by any thing done in the meantime. Thus, where in 1812, the then proprietors of Covent Garden theatre executed a deed, by which they covenanted & agreed that the profits of the theatre should be exclusively appropriated to particular purposes, & that the treasurer for the time being should be irrevocably directed so to apply the profits, & in 1822, parties then entitled, under the former proprietors, to seven eighths of the theatre, entered into an agreement, which provided in some respects for a different application of the profits, & otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject, the ct., upon a bill filed by that party, for the specific performance of the covenants & agreements contained in the deed of 1812, appointed a receiver.

I call that the act of all, which is the act of the majority, provided all are consulted & the majority are acting *bonâ fide*, meeting, not for the purpose of negativing what anyone may have to offer, but for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative (LORD ELDON, C.).—CONST *v.* HARRIS (1824), Turn. & R. 496; 37 E. R. 1191, L. C.

Annotations:—**Consd.** Hall *v.* Hall (1850), 3 Mac. & G. 79; Wall *v.* London & Northern Assets Corpn. (1898), 2 Ch. 469. **Refd.** G. W. Ry. *v.* Rushout (1852), 5 De G. & Sm. 290; *Re* Vale of Neath & South Wales Brewery Joint Stock Co., Lawe's Case (1852), 1 De G. M. & G. 421; Simpson *v.* Westminster Palace Hotel Co. (1860), 2 De G. F. & J. 141; Steuart *v.* Gladstone (1878), 38 L. T. 557. **Mentd.** Hamp *v.* Robinson (1865), 3 De G. J. & Sm. 97; Bruner *v.* Moore, [1904] 1 Ch. 305; Morrell *v.* Studd & Millington, [1913] 2 Ch. 648.

1503. —— Violation of articles—Though dissolution not prayed.]—FAIRTHORNE *v.* WESTON, No. 1303, *ante*.

1504. —— —— ——.]—In an action between partners, the writ filed in which claimed an injunction to restrain deft. from drawing out of the partnership funds more than the amount stipulated in the arts. by way of subsistence money, a receiver, & an account, but did not claim a dissolution of the partnership:—*Held:* the ct. could appoint a receiver, not being also a manager of the partnership business, although a dissolution was not claimed.—MEDWIN *v.* DITCHAM (1882), 47 L. T. 250.

1505. Mismanagement.]—Motion for the appointment of a receiver upon a mtgee. of mines who had become a partner by purchasing shares in them, upon the ground of mismanagement, & excluding the mtgor. from interference, refused; the parties having regulated their rights by subsequent agreement & the mtgee. not admitting that his mtge. was satisfied. The rights & duties of a person in that situation not to be governed solely by principles applicable to one who stands simply in the character of a mtgee. or partner. Mtgee. in possession of mines not bound to expend more than a prudent owner. If he can be deprived of the possession on the ground of mismanagement, it must be of a clear & specified nature.—ROWE *v.* WOOD (1822), 2 Jac. & W. 553; 37 E. R. 740, L. C.

1506. Exclusion of partner—Against unsatisfied mortgagee.]—ROWE *v.* WOOD, No. 1505, *ante*.

1507. —— Denial of rights to share in partnership.]—(1) A receiver of a partnership granted in a case where no misconduct in management was alleged, on the ground that deft. insisted on a legal objection as destroying all right of his partner to a share in the partnership.

(2) Receiver of a brewery granted on the application of a spiritual person who was a dormant partner therein.—HALE *v.* HALE (1841), 4 Beav. 369; 49 E. R. 382.

Annotation:—**Mentd.** *Re* London & Eastern Banking Corpn. (1859), 1 De G. F. & J. 17.

1508. —— Where no express consent.]—BLAKENEY *v.* DUFAUR, No. 1494, *ante*.

1509. ——.]—FAIRTHORNE *v.* WESTON, No. 1303, *ante*.

1510. ——.]—NAISH *v.* ODY (1897), 41 Sol. Jo. 726.

1511. Delay in winding up.]—A., B., & C. jointly undertook to execute some railway contracts. There was no deed of partnership, but A. had a letter of attorney from B. & C. authorising him to receive moneys & grant discharges. When the works had been completed but before the period of the obligation of the railway contractors to maintain the works in repair had expired C. died. At that time a large sum for extra work was due to the joint adventurers, which was the subject of a reference to the railway co.'s engineer. One year after C.'s death, the reference still pending, C.'s exor. presented a petition to the ct. alleging undue delay, & praying for the appointment of a receiver:—*Held:* the circumstances did not warrant the interference of the ct., & the petition dismissed with costs.—COLLINS *v.* YOUNG (1853), 21 L. T. O. S. 25; 1 W. R. 538, H. L.

1512. Sufficiency to sustain interlocutory application—Failure to co-operate in management.]—Two persons carried on business in partnership as attorneys & solrs. without arts. The partners not agreeing, one served the other with a notice of immediate dissolution, & erased his name from the doors, & excluded him from the offices. The ct. restrained all such proceedings pending the winding up of the concern, & granted a receiver. The same two persons were tenants in common of a coal mine, the expenses of working which were paid out of the profits of the law partnership. The same partner excluded from the other business filed a bill for an account, & a receiver, & a manager of the mine; but the ct. refused to grant the receiver, the other partner not obstructing pltf., & the bill not praying a dissolution.—ROBERTS *v.* EBERHARDT (1853), Kay, 148; 2 Eq. Rep. 780; 23 L. J. Ch. 201; 22 L. T. O. S. 253; 2 W. R. 125; 69 E. R. 63.

Annotations:—**Distd.** Marsden *v.* Kaye (1857), 30 L. T. O. S. 197. **Refd.** Medwin *v.* Ditcham (1882), 47 L. T. 250.

1513. —— Prevention of conduct of business.]—ROBERTS *v.* EBERHARDT, No. 1512, *ante*.

(*e*) *Death of Partner.*

1514. Death of both partners.]—In a cause for an account of a partnership, both partners being dead, a receiver shall be appointed: *secus* in the case of a surviving partner.—PHILIPS *v.* ATKINSON (1787), 2 Bro. C. C. 272; 29 E. R. 149.

1515. Death of one partner.]—PHILIPS *v.* ATKINSON, No. 1514,

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D. Who may be Appointed.

1516. Whether partner may be appointed — When for benefit of business.]—Under R. S. C., Ord. 52, r. 4, deft. in an action may, before judgment, apply for an injunction & a receiver.

I cannot help seeing that allowing the senior pltf. to be receiver will not seriously affect the position of the deft. as regards that point. On the other hand, if I deprive pltf. of the opportunity of being receiver, I might inflict most serious injury on the business. It has been verified by affidavit, & it is a fact so well known that I might almost take judicial notice of it, that brokers in this class of business cannot carry on the business at all without pledging their personal credit to their bankers. You cannot get an indifferent person as receiver to take such an onerous duty upon himself. The only person willing to undertake it would be, no doubt, a person largely interested in the success of the business, which senior pltf. is, I think; therefore, there are in this case sufficient grounds for making an exception to the general rule, & I shall give senior pltf. liberty to propose himself as receiver (JESSEL, M.R.).—SARGANT *v.* READ (1876), 1 Ch. D. 600; 2 Char. Pr. Cas. 81; 45 L. J. Ch. 206.

Annotations:—**Mentd.** *Re* Lloyd, Allen *v.* Lloyd (1879), 12 Ch. D. 447; Taylor *v.* Neate (1888), 39 Ch. D. 538; Carter *v.* Fey, [1894] 2 Ch. 541; Burt, Boulton & Hayward *v.* Bull, [1895] 1 Q. B. 276; Collison *v.* Warren, [1901] 1 Ch. 812.

1517. —— Fit & proper person.] — PINI *v.* RONCORONI, No. 1471, *ante*.

1518. —— Solvent partner.]—Solvent partner appointed receiver without salary of the partnership property.

I think this is a case in which the solvent partner should be enabled to deal solely with the partnership property, & the petitioner shall be appointed receiver of the property without a salary; & that it shall be referred to one of the masters in Chancery to settle & approve of the proper security to be taken from petitioner for the due execution of his office as receiver, & that petitioner shall give such security when so approved of & settled (LEACH, V.-C.).—*Re* UPPERTON, *Ex p.* STOVELD (1823), 1 Gl. & J. 303.

—.]—Arts. of partnership provided that the partnership should continue for fourteen years from Jan. 1, 1891; that if any partner should die or become bkpt., he should be deemed to have ceased to be a partner on the date of such death or bkpcy., & his share in the capital should remain as a loan to the surviving or continuing partners or partner during the residue of the term of fourteen years, or during such shorter period as they should carry on the business, either alone or in partnership with others, bearing interest at 5 per cent. & the payment of the said loan with interest should be secured by the joint & several bond, or the bond or covenant of the surviving or continuing partners or partner. The partnership firm consisted of a father & his three sons, of whom deft. was the youngest. The whole of the capital was provided by the father. In June, 1892, the father & the two elder sons became bkpt., & the trustees in their bkpcy. brought an action against deft. for a declaration that the provisions of the arts. under which deft. claimed to retain as a loan the respective shares of bkpts. in the capital of the partnership were void as against creditors of bkpts., & moved for the appointment of a receiver & manager of the partnership business. Deft claimed the right, as solvent partner, to be appointed receiver & manager:—*Held:* deft. was entitled to be appointed receiver & manager; but that he must give security, pass his accounts, furnish pltfs. with proper accounts, allow them all reasonable access to the books, & pay the balances in his hands, as & when they reached a certain amount to be agreed upon, into ct., or into a joint banking account of pltfs. & himself.—COLLINS *v.* BARKER, [1893] 1 Ch. 578; 62 L. J. Ch. 316; 68 L. T. 572; 41 W. R. 442; 9 T. L. R. 167; 37 Sol. Jo. 193; 3 R. 237.

1520. —— Captain of ship.] — BRENAN *v.* PRESTON, No. 1498, *ante*.

1521. —— Retired partner—When liable for partnership debts.]—A retired partner, who had advanced all the capital, & was liable for the partnership debts, appointed receiver of the partnership assets on his own application.—HOFFMAN *v.* DUNCAN (1853), 18 Jur. 69.

1522. —— When guilty of misconduct—Transfer of goodwill to own business.]—YOUNG *v.* BUCKETT, No. 1500, *ante*.

1523. —— —— Mismanagement of business.]—JACK *v.* BELL (1892), 36 Sol. Jo. 760.

1524. Nominee of partners—Though prior order for master to appoint.]—On the application of all the parties to a cause, the ct. made an order appointing at once a party named by them to be receiver of the partnership estate & effects, the absolute property of the parties to the cause, without requiring him to give any other than his own personal security, notwithstanding a previous order made in the cause directing a reference to the master in the usual form to appoint a receiver of the partnership estate & effects.—MANNERS *v.* FURZE (1847), 11 Beav. 30; 17 L. J. Ch. 70; 10 L. T. O. S. 362; 12 Jur. 129; 50 E. R. 727.

Annotation:—**Mentd.** Tylee *v.* Tylee (1853), 17 Beav. 583.

1525. —— Two persons nominated—Joint receivership.]—COOMBER *v.* ATKINS (1895), 39 Sol. Jo. 793.

1526. Whether security required—From partner.] —*Re* UPPERTON, *Ex p.* STOVELD, No. 1518, *ante*.

1527. ——— ———.]—PINI *v.* RONCORONI, No. 1471, *ante*.

1528. ——— ———.]—COLLINS *v.* BARKER, No. 1519, *ante*.

1529. —— From nominee of partners.] — MANNERS *v.* FURZE, No. 1524, *ante*.

E. Rights and Liabilities of Receiver.

(a) In General.

See, generally, RECEIVERS.

1530. Position of receiver—When appointed by court—Officer of the court.]—DAVY *v.* SCARTH, No. 1538, *post*.

1531. —— —— ——.]—In an action for dissolution of partnership a receiver & manager was, by a consent order, appointed to carry on the partnership business with a view to its sale as a going concern. In carrying on the business the receiver & manager made payments which the assets were insufficient to satisfy in full & claimed

PART V. SECT. 13, SUB-SECT. 8.—D.

h. *Whether partner may be appointed —Reference to master.*]—HEWITT *v.* AKEHURST (1878), 4 V. L. R. (E.) 93.—AUS.

k. —— *Dissolution — Exclusion.*] — Where a dissolution of partnership has taken place, & one of the partners has improperly excluded the other partner from the management of the partnership affairs, the rule of the ct. is to appoint an independent person receiver, & not one of the partners.—REDWOOD *v.* REDWOOD (1908), 28 N. Z. L. R. 260.—N.Z.

PART V. SECT. 13, SUB-SECT. 8.—E. (a).

l. *Right to possession of partnership property—Property having passed prior*

to be indemnified by the partners personally in respect of the balance due to him :—*Held :* (1) the receiver was an officer of the ct. & could only look to the assets under the control of the ct. for his indemnity ; (2) therefore, he was not entitled to be indemnified by the partners personally, & the fact that the order appointing him was made by consent of the partners did not put him in any better position as against them.—BOEHM *v.* GOODALL, [1911] 1 Ch. 155 ; 80 L. J. Ch. 86 ; 103 L. T. 717 ; 27 T. L. R. 106 ; 55 Sol. Jo. 108.

1532. Power to enter into new contracts.]—TAYLOR *v.* NEATE, No. 1495, *ante*.

1533. Power to accept shares in company—In satisfaction of debt to partnership—Jurisdiction of court to confer.]—NIEMANN *v.* NIEMANN, No. 1475, *ante*.

1534. Right to indemnity—Not against partners personally—Though appointed by consent order.]—BOEHM *v.* GOODALL, No. 1531, *ante*.

1535. Representation in legal proceedings—Whether applicant's solicitors competent—Where interests conflicting.] — A receiver of assets appointed on the application of pltf. in a partnership action cannot be represented by pltf.'s solrs. in matters in which his interests as such receiver conflict with pltf.'s interests.—BLOOMER *v.* CURRIE (1907), 51 Sol. Jo. 277.

Alien enemy partnership.]—*See* ALIENS, Vol. II., p. 154, No. 247.

Receivers of companies.]—*See* COMPANIES, Vol. X., pp. 800–804, Nos. 5065–5099.

Unauthorised payments by receiver—Whether acknowledgment to defeat Statute of Limitations.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 398, No. 775.

(*b*) *Remuneration.*

See, generally, RECEIVERS.

1536. Receiver appointed by court—Discharge by order of judge in bankruptcy—Remuneration assessed by registrar.] — (1) When receivers, appointed in an action for dissolution of partnership, are discharged by order of the judge in bkpcy., their office is to determine from the date of the order by which they are discharged.

(2) The remuneration of such receivers shall be assessed by the registrar.—*Re* PARKER & PARKER, *Ex p.* OFFICIAL RECEIVER (1884), 1 Morr. 39.

1537. —— Without salary—Right to remuneration for personal work—Though outside duties of receiver.]—HARRIS *v.* SLEEP, No. 939, *ante*.

1538. —— Right to remuneration out of funds held as receiver—Though indebted to partnership.] —A partner who is appointed receiver of the partnership assets by the ct. on the usual terms, is entitled to be paid his remuneration & costs as receiver out of the funds in his hands as receiver. although as a partner he is indebted to the partnership & is unable to pay what he owes.

Although he [deft.] was a partner, he is also an officer of the ct. appointed for the convenience of both parties & on the terms that he should do certain work & be paid remuneration therefor. . . . I think he is entitled to have the remuneration, irrespective of his debt to the partnership (FARWELL, J.).—DAVY *v.* SCARTH, [1906] 1 Ch. 55 ; 75 L. J. Ch. 22 ; 54 W. R. 155.

1539. Receiver appointed by parties—Right to quantum meruit—Ordinary scale not applicable.]—A receiver & manager appointed by quondam their business is, in the absence entitled to a *quantum meruit*, & not to remuneration according to the scale laid down for official receivers, nor under the 5 per cent. rule, which no longer exists.—PRIOR *v.* BAGSTER (1887), 57 L. T. 760 ; 4 T. L. R. 32.

(*c*) *In regard to Judgment Creditors.*

1540. Right of creditor to charging order—On moneys coming to receiver.]—After judgment had been pronounced in a Ch. action for dissolution of a partnership, & a receiver had been appointed, a creditor obtained judgment in the Q. B. Div. against the firm for the amount of his debt & costs. On an application in the Ch. action by judgment creditor an order was made giving him a charge for his debt & costs on all the partnership moneys come or coming to the receiver ; he, creditor, undertaking to deal with the charge according to the order of the ct. : the intention of the ct. being to preserve to him all the rights he would have had if he had issued execution & the sheriff had seized & sold the assets on the day the application was made.—KEWNEY *v.* ATTRILL (1886), 34 Ch. D. 345 ; 56 L. J. Ch. 448 ; 55 L. T. 805 ; 35 W. R. 191.

Annotations :—**Consd.** Ridd *v.* Thorne, [1902] 2 Ch. 344. **Refd.** Brand *v.* Sandground (1901), 85 L. T. 517. **Mentd.** Willis *v.* Cooper, Slattery *v.* Cooper, Willis *v.* Cooper (1900), 44 Sol. Jo. 698.

1541. —— Where firm reconstituted—Other claims arising previously.]—ARMSTRONG *v.* PARIS (1888), 4 T. L. R. 247.

1542. —— Action against firm—Without knowledge of appointment of receiver.]—BRAND *v.* SANDGROUND, No. 813, *ante*.

1543. —— Operation of order.]—In a partnership action where a receiver had been appointed, a judgment creditor of the partnership firm obtained an order, following *Kewney* v. *Attrill*, No. 1540, *ante*, giving him a charge for his debt & costs upon the assets in or to come into the hands of the receiver, creditor undertaking to deal with the charge according to the order of the ct. Upon an application by the solr. of the pltf. in the action for a charging order for his costs under Solrs. Act, 1860 (c. 127), s. 28, in priority to judgment creditor :—*Held :* the solr. was entitled to succeed.

Semble : an order in the form of *Kewney* v. *Attrill*, No. 1540, *ante*, only operates as a charge as among creditors of the partnership themselves, or as against the several partners of the firm.—RIDD *v.* THORNE, [1902] 2 Ch. 344 ; 71 L. J. Ch. 624 ; 86 L. T. 655 ; 50 W. R. 542 ; 46 Sol. Jo. 514.

1544. —— Priority of solicitor's lien for costs.]—RIDD *v.* THORNE, No. 1543, *ante*.

1545. Right of creditor to order for payment—Where all partners bankrupt.] — MITCHELL *v.* WEISE, *Ex p.* FRIEDHEIM, [1892] W. N. 139.

F. Interference with Receiver.

(*a*) *In General.*

See, generally, RECEIVERS.

1546. Contempt of court—Liability for costs of motion.]—Partnership assets were in the possession of a receiver appointed by the ct., of which an execution creditor had distinct notice. A seizure of the property on the part of the execution creditor & of the sheriff, was held to be contempt, & the ct. ordered them to pay the costs of it & of a motion

to appointment.]—CAMPBELL *v.* LEPAN (1871), 21 C. P. 363.—**CAN.**

m. *Management of business—Degree of care to be exercised.*]—PLISSON *v.* DUNCAN (1905), 36 S. C. R. 647.—**CAN.**

n. *Right to inspection of partnership books—To whom right extends.*]—DESAULNIER *v.* JOHNSTON (Man.) (1910), 15 W. L. R. 205.—**CAN.**

Sect. 13.—*Enforcement of rights: Sub-sect.* 8, *F.* (*a*) & (*b*), & *G.*; *sub-sect.* 9, *A.* (*a*), (*b*) *i.*, *ii.*, *iii.* *iv.*, &

to commit.—LANE *v.* STERNE (1862), 3 Giff. 629; 9 Jur. N. S. 320; 10 W. R. 555; 66 E. R. 559.

Annotation:—**Mentd.** Martin *v.* L. C. & D. Ry. (1866), 35 L. J. Ch. 795.

1547. —— ——.]—MITCHELL *v.* CONDY, [1873] W. N. 232.

1548. ——.]—HELMORE *v.* SMITH (2), No. 1555, *post.*

1549. ——.]—KING *v.* DOPSON, No. 1557, *post.*

1550. Injunction to restrain interference.]—Two brothers carried on a business in partnership for some years, when the business began to fail, & one brother brought an action for dissolution of the partnership against the other to whose mismanagement he attributed the failure. Pltf. obtained an order appointing a receiver & manager of the business, who dismissed deft. from the management, & afterwards an order was made for the dissolution of the partnership, the taking of the partnership accounts, & the realisation of the partnership effects. Deft set up & managed a rival business under a similar name, which he alleged belonged to his sons as partners, & for which his wife & her sisters advanced the capital. On a motion by pltf. for an injunction to restrain deft. from interfering with the management of the old business by the receiver & manager, it was proved that deft. had spread rumours to the effect that the old business would shortly be closed & sold by auction, & had induced some of the employees of the old business to leave, after giving due notice, & to enter the employment of the new business, & also had attempted to obtain from the landlord the tenancy of a field which had long been in the occupation of the old partnership, & used in the old business:—*Held:* (1) any act calculated to injure property under the control of the receiver & manager was an interference with the management of the receiver & manager, whom the ct. was bound to protect; (2) & an injunction was granted restraining deft. from interfering with the management of the receiver & manager.—DIXON *v.* DIXON, [1904] 1 Ch. 161; 73 L. J. Ch. 103; 89 L. T. 272.

(*b*) *What Amounts to Interference.*

See, generally, RECEIVERS.

1551. Any act calculated to destroy value of business.]—DIXON *v.* DIXON, No. 1550, *ante.*

1552. Seizure of assets by creditor.]—LANE *v.* STERNE, No. 1546, *ante.*

1553. —— **Before appointment of receiver — Though after nomination.**]—After the institution of a suit seeking dissolution of a partnership & appointment of a receiver, an action was brought against the partnership firm & a judgment recovered. Before the receiver was actually appointed, but after he had been nominated, a writ of *fi. fa.* was issued upon the judgment, under which the sheriff took possession of certain partnership property, & refused to give up possession thereof after the appointment of the receiver. Upon motion to commit the sheriff for contempt of ct.:—*Held:* there was no contempt.—DEFRIES *v.* CREED (1865), 6 New Rep. 17; 34 L. J. Ch. 607; 12 L. T. 262; 11 Jur. N. S. 360; 13 W. R. 632.

Annotation:—**Refd.** Edwards *v.* Edwards (1876), 45 L. J. Ch. 391.

1554. Prior publication of receiver's report.]—MITCHELL *v.* CONDY, [1873] W. N. 232.

1555. Libel on business.]—A libel on the business carried on by a receiver & manager appointed by the ct. is a contempt of ct. & may be punished by committal of the offender.—HELMORE *v.* SMITH (2) (1886), 35 Ch. D. 449; 56 L. J. Ch. 145; 56 L. T. 72; 35 W. R. 157; 3 T. L. R. 139, C. A.

Annotations:—**Distd.** *Re* Gent, Gent-Davis *v.* Harris (1892), 40 W. R. 267. **Apld.** King *v.* Dopson (1911), 56 Sol. Jo. 51. **Mentd.** *Re* Evelyn, *Ex p.* General Public Works & Assets Co., [1894] 2 Q. B. 302; Robb *v.* Green, [1895] 2 Q. B. 1; R. *v.* Davies, [1906] 1 K. B. 32; R. *v.* Daily Mail, *Ex p.* Farnsworth (1921), 90 L. J. K. B. 871.

1556. Inducing employees to leave.]—DIXON *v.* DIXON, No. 1550, *ante.*

1557. Competing in business.]—When a receiver & manager of a partnership business has been appointed, a partner who starts a competing business in such a manner as to be likely to injure the original business, *e.g.*, by issuing circulars that the original business is no longer carried on, may be punished by committal for contempt of ct.—KING *v.* DOPSON (1911), 56 Sol. Jo. 51.

G. Discharge of Receiver.

See, generally, RECEIVERS.

1558. Grounds for discharge—Misconduct of receiver.]—MITCHELL *v.* CONDY, [1873] W. N. 232.

1559. Discharge by order of judge in bankruptcy —Date of determination of office.]—*Re* PARKER & PARKER, *Ex p.* OFFICIAL RECEIVER, No. 1536, *ante.*

SUB-SECT. 9.—INJUNCTION.

A. In a Going Concern.

(*a*) *In General.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 361 *et seq.*

1560. Partner seeking injunction must be able to perform partnership contract.]—Two persons having agreed to work a coach from Bristol to London, one providing horses for a part of the road, & the other for the remainder, & in consequence of the horses of one having been taken in execution, the other having provided horses for that part which had been undertaken by the first, & claiming the whole profits of the journey; the ct. refused an injunction against continuing to provide horses.

I cannot restrain deft. unless I have the means of assuring him that he shall find pltfs.' horses ready. I should . . . issue the injunction on the supposition that pltf. would do that which he has not done & which it seems he is not at present in a condition to do (LORD ELDON, C.).—SMITH *v.* FROMONT (1818), 2 Swan. 330; 1 Wils. Ch. 472; 36 E. R. 642, L. C.

Annotations:—**Mentd.** Keppel *v.* Bailey (1834), 2 My. & K. 517; Lumley *v.* Wagner (1852), 1 De G. M. & G. 604.

1561. Plaintiff must be partner—Not servant of firm.]—WALKER *v.* HIRSCH, No. 80, *ante.*

Suspension of injunction pending appeal.]—*See* INJUNCTION, Vol. XXVIII., p. 517, No. 1224.

(*b*) *In respect of What Matters.*

i. *Use of Firm Name.*

1562. Abuse or misapplication.]—(1) The ct. will not, on the application of one partner, restrain another from using the partnership property, or

PART V. SECT. 13, SUB-SECT. 9.—A. (a).

o. *Disobedience to order.*]—An injunction having been granted to restrain the deft. from collecting the assets of a partnership, & he being in contempt for not answering, the ct. made an order authorising pltf. to collect them, the order providing an indemnity to deft., & that pltf. should bring into ct. the sums received when they should amount to £50.—O'BRIEN *v.* (1871), 5 I. R. Eq. 51.—IR.

name, unless a case of misapplication or abuse is made out against him.

(2) Neither will it restrain a partner in a patent from publishing a book containing an account of the invention.—HAWKINS *v.* BLACHFORD (1823), 1 L. J. O. S. Ch. 142.

1563. For purposes of other business.]—ENGLAND *v.* CURLING, No. 250, *ante*.

1564. ——.]—AAS *v.* BENHAM, No. 913, *ante*.

ii. *Exclusion of Partner from Partnership Business.*

1565. Injunction granted.]—If A. obtains a patent, & enters into an agreement with B., the effect of which is to make B. a partner in the patent, B. is entitled, not merely to share in the profits, but to interfere in the management of it; & if, upon a bill being filed, A. insists that he alone is entitled to act in the management, & that such was the true intent of the agreement, an injunction will be granted against A.—BLACHFORD *v.* HAWKINS (1823), 1 L. J. O. S. Ch. 141.

1566. ——.]—FAIRTHORNE *v.* WESTON, No. 1303, *ante*.

1567. ——.]—A partner having excluded his co-partner, an injunction was granted to restrain him from obstructing or interfering with his co-partner in the exercise & enjoyment of his rights under the partnership arts.—HALL *v.* HALL (1850), 12 Beav. 414; 50 E. R. 1119; *subsequent proceedings*, 3 Mac. & G. 79, L. C.

1568. ——.]—ROBERTS *v.* EBERHARDT, No. 1512, *ante*.

iii. *Use of Partnership Assets.*

1569. Abuse or misapplication.]—HAWKINS *v.* BLACHFORD, No. 1562, *ante*.

1570. For private purposes.] — GARDNER *v.* M'CUTCHEON, No. 911, *ante*.

1571. ——.]—FAIRTHORNE *v.* WESTON, No. 1303, *ante*.

1572. Renewal of lease—Against wish of partner.]—CLEMENTS *v.* NORRIS, No. 920, *ante*.

iv. *Other Cases.*

1573. Turning away customers.]—CHARLTON *v.* POULTER (1753), cited 19 Ves. at p. 147, n.; 34 E. R. 477.

Annotation:—**Refd.** Taylor *v.* Davis (1834), 4 L. J. Ch. 18.

1574. Possibility of future injury.]—A person having in arts. of partnership covenanted not to do certain acts after a specified period of time the ct. will not before the arrival of that period grant an injunction to restrain him from acting in breach of his agreement nor for mischief which is no breach at law of the covenant between the parties.—COATES *v.* COATES (1821), 6 Madd. 287; 56 E. R 1100.

1575. ——.]—GLASSINGTON *v.* THWAITES, No. 898, *ante*.

——.] — *See, generally*, INJUNCTION, Vol. XXVIII., pp. 405, 406, Nos. 322–327.

1576. Matters outside partnership relations.]—GLASSINGTON *v.* THWAITES, No. 898, *ante*.

1577. Publishing account of invention.]—HAWKINS *v.* BLACHFORD, No. 1562, *ante*.

1578. Publishing notice of dissolution.]—ENGLAND *v.* CURLING, No. 250, *ante*.

1579. Exclusion of name on manufactures of partnership.]—By arts. of partnership, the partnership, which was for twenty-one years, was to be carried on for the first fourteen years under the style of A. & co., & for the last seven [years] under the style of A. & B. During the first fourteen years, & for rather more than a year afterwards, the name of A. alone was stamped upon certain manufactures of the partnership. An injunction, restraining the use of the name of A. upon the goods, or of any other name than that of A. & B., for the remainder of the term, refused.—POWELL *v.* ALLARTON (1835), 4 L. J. Ch. 91.

1580. Participation in manufacture of patent.]—(1) *Semble*: If a partner in a business, in which a secret process of manufacture & composition of materials is used, who has not, under the partnership contract, a right to the knowledge of the secret, should openly take part in the manufacture, & should, with the knowledge & concurrence of his partners, be permitted to acquire a knowledge of the process & ingredients, the other partners will be considered to have waived a right to the preservation of the secret for their separate benefit.

(2) The injunction restrained the sale of medicine by deft. under the name of the medicine prepared according to the secret prescription, not on the ground of the use of the name alone, but because it was by the use of the name that deft. was availing himself of the breach of faith & contract. *Qu.*: whether, apart from that ground of interference, the ct. would have restrained the use of the name before pltf.'s right had been established at law.

(3) Bonds executed by partners to each other, relating to their rights as partners, of the same date as the partnership deed, read with the deed as part of the partnership contract.

(4) The payment of the expenses of advertisements out of partnership funds is not necessarily a ground for giving to each partner, at the expiration of the partnership, a continuing share in the advantages of publicity produced by the advertisement; the partnership having had, during its continuance, the benefit of the expenditure.—MORISON *v.* MOAT (1851), 9 Hare, 241; 20 L. J. Ch. 513; 18 L. T. O. S. 28; 15 Jur. 787; 68 E. R. 492; *affd.* (1852), 21 L. J. Ch. 248, L. JJ.

Annotations:—*As to* (1) **Consd.** Trego *v.* Hunt, [1895] 1 Ch. 462. *Generally*, **Refd.** Reuter's Telegram Co. *v.* Byron (1874), 43 L. J. Ch. 661; Tuck *v.* Priester (1887), 19 Q. B. D. 629; Pollard *v.* Photographic Co. (1888), 40 Ch. D. 345; Lamb *v.* Evans, [1893] 1 Ch. 218; Robb *v.* Green, [1895] 2 Q. B. 315; Amber Size & Chemical Co. *v.* Menzel, [1913] 2 Ch. 239; Alperton Rubber Co. *v.* Manning (1917), 86 L. J. Ch. 377. **Mentd.** Ashburton *v.* Pape, [1913] 2 Ch. 469.

1581. Acts injuring partnership property.]—The ct. will restrain a purchaser from doing acts of waste & destruction, & will restrain a partner from doing an intentional serious injury to the partnership property.—MARSHALL *v.* WATSON (1858), 25 Beav. 501; 53 E. R. 728.

(c) *Where Dissolution not Claimed.*

1582. Whether dissolution should be claimed.]—(1) An injunction will not be granted to restrain the breach of a covenant in arts. of partnership

PART V. SECT. 13, SUB-SECT. 9.—A. (b) ii.

1565 i. *Injunction granted.*]—Injunction granted to restrain a partner from excluding his co-partner from the partnership business & from doing any act to prevent its being carried on according to the articles.—VIRDACHALA NATTAN *v.* RAMASVAMI NAYAKAN (1862), 1 Mad. 341.—**IND.**

PART V. SECT. 13, SUB-SECT. 9.—A. (b) iv.

p. *Interference with partnership assets.*]—WILSON *v.* CORBY (1865), 11 Gr. 92.—**CAN.**

q. *Interference in management—Causing irreparable damage to business.*]—Injunction against a co-partner interfering in the management of the business, which was under a contract with the Postmaster-General for the service of the mail, when the effect of suffering him to interfere, would be irreparable injury to the partnership business by causing the contract to be put an end to.—ANDERSON *v.* WALLACE (1826), 2 Mol. 540.—**IR.**

Sect. 13.—*Enforcement of rights: Sub-sect.* 9, *A.* (*c*) (*d*), & *B.* (*a*), (*b*), (*c*), (*d*) &

which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership.

This ct. will interfere where there is a breach of covenants in arts. of partnership, so important in its consequences as to authorise the party complaining to call for a dissolution of the partnership (LORD ELDON, C.).

(2) There is one case which is constantly occurring, that of a partner raising money for his private use on the credit of the partnership firm; & the ct. interferes then because there is a ground for dissolving the partnership; but then the danger must be such, there must be that abuse of good faith between the members of the partnership, that the ct. will try the question whether the partnership should not be dissolved in consequence (LORD ELDON, C.).—MARSHALL *v.* COLMAN (1820), 2 Jac. & W. 266; 37 E. R. 629, L. C.

Annotations:—*As to* (1) **Consd.** Taylor *v.* Davis (1834), 4 L. J. Ch. 18; Watney *v.* Trist (1876), 45 L. J. Ch. 412.

1583. ——.]—The ct. will grant an injunction to restrain the breach of a covenant in a deed of partnership, although the bill does not pray a dissolution of the partnership.—TAYLOR *v.* DAVIS (1834), 4 L. J. Ch. 18.

Annotation:—**Refd.** Fairthorne *v.* Weston (1844), 3 Hare, 387.

1584. ——.]—*Semble:* the ct. will interfere between co-partners to prevent the destruction of the partnership property, although a dissolution of the partnership may not be prayed.—MILES *v.* THOMAS (1839), 9 Sim. 606; 59 E. R. 492.

Annotation:—**Refd.** Fairthorne *v.* Weston (1844), 3 Hare, 387.

1585. ——.]—SMITH *v.* JEYES, No. 249, *ante*.

1586. ——.]—FAIRTHORNE *v.* WESTON, No. 1303, *ante*.

1587. ——.]—RICHARDSON *v.* HASTINGS, No. 1248, *ante*.

1588. ——.]—ELMSLIE *v.* BERESFORD, [1873] W. N. 152.

1589. ——.]—WATNEY *v.* TRIST, No. 956, *ante*.

(d) Bankruptcy of One Partner.

1590. Interference with property by trustee in bankruptcy—Sale.]—On a separate commission against one partner, the assignees took possession of the partnership property, & were about to sell it. Injunction, on filing of bill & affidavit, granted to restrain the sale.—ALLEN *v.* KILBRE (1819), 4 Madd. 464; 56 E. R. 776.

1591. ——.]—Thirteen persons became members of a joint stock co., & executed a deed of partnership, by which it was provided, "that the affairs of the co. should be conducted by a board of directors; that the assignees of any bkpt. or insolvent proprietor should not, in that capacity, be proprietors in respect of any shares which belonged to such bkpt. or insolvent, but might procure some person to become a proprietor in respect of such shares; & that all dividends & other profits which might be declared or appropriated on any shares of any bkpt. or insolvent proprietor in the interval between the time of his bkpcy., & of some person becoming a proprietor of such shares should not be received; neither, during such interval, should the rights & privileges attending such shares, be exercised by any person whomsoever, but the same should remain in suspense; & as soon as any person should become a proprietor of such shares, then the assignee of such bkpt. or insolvent proprietor should be entitled to receive the dividends & other profits which might have been suspended." The business was carried on under the terms of the partnership deed, & shortly after the date thereof the sheriff seized in execution the effects of the co. on their premises, under a judgment obtained against one of the proprietors by separate creditor of such proprietor, with the purpose of selling his interest, but before any sale took place, & whilst the sheriff was in possession of the co.'s effects, the proprietor became bkpt., & A., who was chosen his assignee, entered, by means of the messenger appointed under the fiat, into possession of the co.'s effects, & interfered with the management thereof. In the meantime, the sheriff sold to one of the other proprietors the effects seized by him under the execution, at the suit of separate creditor—*Held:* the solvent proprietors were entitled to an injunction against the assignee of bkpt. proprietor, to restrain him from interfering with the partnership property, or with the management of the business of the partnership. The solvent proprietors being entitled to the possession of the partnership property & effects, a manager or receiver was refused.—FRANCIS *v.* SPITTLE (1840), 9 L. J. Ch. 230, L. C.

B. After Dissolution or While Dissolution Pending.

(a) Agreements Not to Compete.

See TRADE & TRADE UNIONS.

(b) Dealings with Partnership Books, etc.

See Partnership Act, 1890 (c. 39), s. 24 (9).

1592. Exclusive use of books.]—An injunction, restraining one partner from the exclusive use of the partnership books, continued at the hearing, although the partnership had then become dissolved by effluxion of time.—TAYLOR *v.* DAVIS (1838), 7 L. J. Ch. 179.

1593. Removal of books.]—An injunction granted to restrain deft., who had removed the partnership books from the place of business, from keeping them at any other place.—GREATREX *v.* GREATREX (1847), 1 De G. & Sm. 692; 10 L. T. O. S. 284; 11 Jur. 1052; 63 E. R. 1254.

1594. Delivery of firm letters to continuing partner.]—There had been an omission to make any stipulation as to the delivery of the letters & what has been done by deft. in telling the postmaster that the firm has been dissolved is not such an interference with the rights of pltf. as will justify the ct. in granting an injunction (STIRLING, J.).—PATCHING *v.* JORDAN (1888), 4 T. L. R. 478.

(c) Improper Carrying on of Business.

1595. Receipt of partnership debts.]—READ *v.* BOWERS (1793), 4 Bro. C. C. 441; 29 E. R. 978, L. C.

1596. ——.]—Injunction to restrain a surviving partner from disposing of the joint stock, & receiving the outstanding debts.—HARTZ *v.* SCHRADER (1803), 8 Ves. 317; 32 E. R. 376.

1597. Disposal of joint stock.]—HARTZ *v.* SCHRADER, No. 1596, *ante*.

1598. Partnership disputed.]—Both parties ordered to be examined upon the trial of an issue, directed upon a motion for an injunction, supported by pltf.'s affidavit, & opposed upon the affidavit of deft. contradicting it.

Pltf. represented that the person carrying on this concern as his own was really carrying on a partnership concern. Deft. denied the partnership stating himself to be solely interested. In such a state of things the ct. could only be neuter,

& granting an issue was more favourable to pltf. . . . It was very fit that the jury should try the credit of these parties (LORD ELDON, C.).—DE TASTET *v.* BORDENAVE (1822), Jac. 516; 37 E. R. 945, L. C.

Annotations:—**Mentd.** Butlin *v.* Masters (1847), 1 Coop. *temp.* Cott. 521, n.; Parker *v.* Morrell (1848), 2 Ph. 453; Hepworth *v.* Heslop (1849), 6 Hare, 622; Morgan *v.* Morgan (1851), 14 Beav. 72.

(*d*) *Interference with Partnership Business or Property.*

1599. Interference with business—Partnership dissolved by conduct of parties.]—Partnership in the Opera House, dissolved by the conduct of the parties, making it impossible to carry it on upon the terms stipulated. Decree accordingly for a sale of the whole concern; restraining the managing partner from acting; with liberty to either party to lay proposals before the master for management until the sale.—WATERS *v.* TAYLOR (1813), 2 Ves. & B. 299; 35 E. R. 333, L. C.

Annotations:—**Apld.** De Berenger *v.* Hammel (1829), cited in Bythewood & Jarman's Precedents, 3rd ed. Vol. VII., p. 83. **Refd.** Aspinall *v.* L. & N. W. Ry. (1853), 11 Hare, 325; Anon. (1856), 2 K. & J. 441; Ogilvy *v.* Gregory, Gregory *v.* Ogilvy (1856), 4 W. R. 221; Jones *v.* Lloyd (1874), L. R. 18 Eq. 265. **Mentd.** Chambers *v.* Waters (1829), 3 Sim. 42; Taylor *v.* Waters (1836), 5 L. J. Ch. 210; Automatic Self Cleansing Filter Syndicate Co. *v.* Cuninghame, [1906] 2 Ch. 34.

1600. —— Breach of agreement between partner & third parties.]—Where an agreement had been entered into between A. & B., who were partners without any written arts., & persons in their employ, containing terms & provisions of a harsh description, & where one of the partners had filed a bill against the other for a dissolution of the partnership, the ct. refused to interfere, at the suit of the other partner, to restrain the breach of the negative terms of the agreement.—CROFT *v.* HAW (1836), Donnelly, 82; 5 L. J. Ch. 305; 47 E. R. 241.

1601. —— Issue of circulars—Relating to infringement of patent.]—A. & B. entered into partnership for the purpose of working a patent taken out by B., the partnership deed providing that the patent rights should belong solely to B. During the continuance of the partnership the partners issued circulars asserting the validity of the patent, & warning the public against its infringement, although they had been advised that the patent was in fact void. The partnership having continued for seven years, was dissolved by deed, & A. & B. each proceeded to manufacture the patented articles for himself; but shortly afterwards B. commenced issuing circulars to A.'s customers, asserting that A. was infringing his patent, & threatening them with legal proceedings in case they purchased from A. A. then moved for an injunction to restrain B. from issuing these circulars, contending that, the patent being void, he had an equal right with B. to manufacture the articles intended to be protected by it:—*Held:* although A. had, during the continuance of the partnership, precluded himself from disputing the validity of the patent, yet, after the expiration of the partnership, he was as much at liberty as any other person to dispute its validity, & B.'s proper course for asserting his claim to the patent was, instead of issuing the circulars complained of, to have instituted proceedings against A. to establish its validity. On B. declining to undertake to institute any such proceedings, the ct. granted the injunction.—AXMANN *v.* LUND (1874), L. R. 18 Eq. 330; 43 L. J. Ch. 655; 31 L. T. 119; 22 W. R. 789.

Annotations:—**Mentd.** Halsey *v.* Brotherhood (1880), 15 Ch. D. 514; Challender *v.* Royle (1887), 36 Ch. D. 425.

1602. Interference with property—By partner purchasing property under terms of dissolution—Failure to pay purchase price.]—Pltf. & deft., partners, having agreed to dissolve partnership & that deft., on payment of half the value of the effects should take the whole, deft. took possession of the improved property, but failed to make payment, & had begun to pull down part of the buildings:—*Held:* it was not waste; & an injunction to restrain him from so doing refused.—COFTON *v.* HORNER (1818), 5 Price, 537; 146 E. R. 687.

1603. Applicant guilty of improper conduct.]—*Qu.:* whether a partnership for an indefinite time, without deed, can be dissolved on notice by either party.

Where deft. in a suit, founded on charges of misconduct, for an account & a dissolution of the partnership & for an injunction to restrain him from receiving debts, drawing bills, etc., or further interfering in the partnership concern, denied or explained facts of appropriation to his own use of debts received by him from persons indebted to the concern, & alleged that he could not put in his answer to the bill because pltf. had possessed himself of the partnership books, & carried them away from the partnership premises, the ct. would not even grant the injunction, on the ground of pltf. having acted improperly. In refusing such an application, however, the ct. did so expressly without prejudice to any future application.—LITTLEWOOD *v.* CALDWELL (1822), 11 Price, 97; 147 E. R. 413.

(*e*) *Solicitation of Old Customers.*

i. *In General.*

1604. Against whom restraint granted—Not partner expelled under provision in articles.]—A partner who has been expelled under a provision in the arts. of partnership, & has been repaid his share of the capital, will not be restrained from carrying on the business on his own account, & soliciting the old customers of the firm.—DAWSON *v.* BEESON (1882), 22 Ch. D. 504; 52 L. J. Ch. 563; 48 L. T. 407; 31 W. R. 537, C. A.

Annotations:—**Mentd.** Pearson *v.* Pearson (1884), 54 L. J. Ch. 32; Reynolds *v.* Coleman (1887), 35 W. R. 813.

1605. Continuing partner appointed receiver—Sale of goodwill not provided for—Retiring partner not restrained.]—HORST *v.* HORST (1901), 45 Sol. Jo. 754.

ii. *Articles or Contract Entitling Continuing Partner to Goodwill.*

1606. Retiring partner restrained from soliciting customers—Form of injunction].—BURROWS *v.* FOSTER (1862), 1 New Rep. 156, L. JJ.

Annotation:—**Distd.** Clark *v.* Leach (1863), 32 L. J. Ch. 290.

1607. —— Not from dealing with them.]—Where two partners dissolved partnership on the terms that one shall have the goodwill & continue the business, & the retiring partner sets up a similar business in the neighbourhood, the ct. will grant an injunction to restrain the retiring partner from soliciting the old customers of the firm, but

r. *Retiring partner restrained from soliciting customers—Assignment of goodwill on dissolution—Reserving right to trade mark on article sold by firm.*]—COLEGROVE *v.* YOUNG (1902), 22 N. Z. L. R. 491.—N.Z.

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will not restrain him from dealing with them.—LEGGOTT *v.* BARRETT (1880), 15 Ch. D. 306; 51 L. J. Ch. 90; 43 L. T. 641; 28 W. R. 962, C. A.

Annotations:—**Consd.** Trego *v.* Hunt, [1896] A. C. 7. **Refd.** Mogford *v.* Courtenay (1881), 45 L. T. 303. **Mentd.** Walker *v.* Mottram (1881), 19 Ch. D. 355; Palmer *v.* Johnson (1884), 13 Q. B. D. 351; Pearson *v.* Pearson (1884), 27 Ch. D. 145; Mason *v.* Schuppisser (1899), 81 L. T. 147; Greswolde-Williams *v.* Barneby (1900), 83 L. T. 708; Monk *v.* Arnold (1902), 86 L. T. 580; Millbourn *v.* Lyons, [1914] 2 Ch. 231.

1608. —— On behalf of new firm.]—A between M. & C. who carried on the business of wine merchants, having determined at the end of seven years by effluxion of time, & M. being entitled to the goodwill, C. proposed to issue a circular to all the customers of the firm & the trade generally, which, after announcing that he had joined another firm of wine merchants, & drawing attention to one of their circulars which was annexed, continued, "I take this opportunity to thank you for your valued support during the last seven years, & to solicit a continuance of the same in future." The annexed circular was an announcement by F. & co., an old established firm of wine merchants, that C. had joined their firm, & concluded as follows: "Thanking you for your support in the past, & soliciting a continuance in the future, to the new firm." M. having objected to these circulars being issued, C. proposed to omit the words "& to solicit a continuance of the same in future":—*Held:* the circulars amounted to a suggestion that the new firm were the successors in trade of the old firm, & C. must be restrained from issuing either of the three, & from applying to any person who was a customer or correspondent of the old firm & asking them to deal with him or not to deal with M.—MOGFORD *v.* COURTENAY (1881), 45 L. T. 303; 29 W. R. 864.

Annotation:—**Mentd.** Pearson *v.* Pearson (1884), 54 L. J. Ch. 32.

1609. —— What customers included.]—TREGO *v.* HUNT, No. 1211, *ante*.

1610. —— ——.]—The rule laid down in *Trego* v. *Hunt*, No. 1211, *ante*, that the vendor of the goodwill of a business may not solicit any person, who was a customer of the old business prior to the sale, to continue to deal with the vendor, or not to deal with the purchaser, applies to all such persons, & ought not to be limited so as to exclude persons who before solicitation have of their own accord become customers of the vendor.—CURL BROTHERS, LTD. *v.* WEBSTER, [1904] 1 Ch. 685; 73 L. J. Ch. 540; 90 L. T. 479.

1611. —— Though articles permit setting up business.]—One of two partners bought out the other under their arts. The arts. provided that the outgoing partner might set up a similar business in the neighbourhood:—*Held:* the proviso was merely declaratory, & did not authorise solicitation of old customers.—GILLINGHAM *v.* BEDDOW, [1900] 2 Ch. 242; 69 L. J. Ch. 527; 82 L. T. 791; 64 J. P. 617.

1612. —— Covenant against carrying on business.]—JACKSON *v.* CHAPMAN (1897), 41 Sol. Jo. 738.

1613. —— Though goodwill not specifically mentioned.]—A. & B. had formerly carried on business in partnership & B. had brought an action for rescission of the partnership on the ground of misrepresentations by A. This action was compromised on the terms that judgment should be entered for B. for £1,200, the partnership to be dissolved, A. retaining the "assets." The goodwill was not specifically mentioned in the terms of the compromise. A. subsequently brought another action to restrain B. from canvassing the customers of the old firm. Upon motion for an interlocutory injunction:—*Held:* the relations of vendor & purchaser existed between the parties, B. was subject to the ordinary obligations of a vendor, & consequently, upon the authority of *Trego* v. *Hunt*, No. 1211, *ante*, was entitled to an injunction.—JENNINGS *v.* JENNINGS, [1898] 1 Ch. 378; 67 L. J. Ch. 190; 77 L. T. 786; 46 W. R. 344; 14 T. L. R. 198; 42 Sol. Jo. 234.

Annotations:—**Refd.** *Re* David & Matthews, [1899] 1 Ch. 378. **Mentd.** *Re* Leas Hotel Co., Salter *v.* Leas Hotel Co., [1902] 1 Ch. 332.

(*f*) *Use of Firm Name.*

1614. Executors of deceased partner restrained.]—The rule laid down in *Trego* v. *Hunt*, No. 1211, *ante*, that a vendor of the goodwill of a business is not entitled to solicit its customers extends to a vendor's exors. carrying out a contract for the sale of the goodwill, the exor. will be restrained at the suit of the purchaser from soliciting customers of the business.

Where therefore a deed of partnership provided that on the death of a partner the surviving partner should acquire deceased partner's share of the capital property & assets of the partnership business, or alternatively that the surviving partner might elect to have the whole of the assets of the partnership realised & divided, an injunction was granted at the instance of the surviving partner to restrain an exor. of deceased partner from soliciting customers of the firm.—BOORNE *v.* WICKER, [1927] 1 Ch. 667; *sub nom.* BORNE *v.* WICKER, 71 Sol. Jo. 310.

Annotation:—**Refd.** Farey *v.* Cooper, [1927] 2 K. B. 384.

1615. Whether restrained by injunction—Use by surviving partner—Of deceased partner's name.]—WEBSTER *v.* WEBSTER, No. 595, *ante*.

1616. —— —— Of firm name—Use likely to appropriate goodwill.]—L. & D. formerly carried on business as co-partners under the style of L. & D. On the death of L. in 1876 D. & M. entered into partnership under arts. whereby it was provided that the style of the firm should be the same as before, namely, L. & D.; &, amongst other things, that "in case of the death of one of the partners a general account of the position shall be made, including all effects & securities of whatsoever nature that they possess, & the value of such effects & securities be estimated as at the date of such decease." There was also a provision for the appointment of an appraiser. The partnership expired by the death of D. in 1896, whereupon an appraiser was agreed upon between D.'s personal representative & M., who subsequently appointed the same person arbitrator. Questions arose before the arbitrator whether he ought to consider the question of goodwill & set a value thereon, & whether in considering the goodwill he should appraise the value thereof on the footing that, if it were sold, M. would be at liberty to carry on a rival business, but without any right to solicit customers of the old firm, & whether or not under the name of L. & D. The arbitrator stated a special case for the opinion of the ct. in accordance with Arbitration Act, 1889 (c. 49), s. 19:—*Held:* the arbitrator ought to consider the question of goodwill, if any, & to set such a value upon it as he might consider to have been attached to the business at the death of D., & the value, if any, of the goodwill ought to be appraised on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but would not have the

right to solicit any person who was a customer of the old firm prior to the death of D., or the right to carry on business under the name of L. & D.

The goodwill of the business would be an asset, & might well be the most valuable asset of the partnership. The exors., therefore, in the absence of special provisions in the partnership contract, would be entitled to require that the goodwill should be sold together with the other assets for the purposes of division between the exors. & the surviving partner (ROMER, J.).

Though a surviving partner is within his rights in carrying on a similar or rival business, he could, in my opinion, be restrained from carrying on that rival business in the name of the partnership firm so as to lead to the belief that he was carrying on the partnership business, or so as otherwise to appropriate to himself the goodwill of that business (ROMER, J.).—*Re* DAVID & MATTHEWS, [1899] 1 Ch. 378; 68 L. J. Ch. 185; 80 L. T. 75; 47 W. R. 313.

Annotations:—**Distd.** Burchell *v.* Wilde (1900), 48 W. R. 491. **Reid.** Gillingham *v.* Beddow, [1900] 2 Ch. 242; Hill *v.* Fearis, [1905] 1 Ch. 466. **Mentd.** *Re* Leas Hotel Co., Salter *v.* Leas Hotel Co., [1902] 1 Ch. 332; Pomeroy *v.* Scale (1906), 22 T. L. R. 795.

1617. —— Use by executor of deceased partner.]—A. & B. carried on the business of a pencil maker, under the firm of A. & L. A. died, & B. carried on the business under the firm of B. & co., successors to A. & L. A.'s exor., having commenced the same business under the firm of A. & L., an injunction was granted to restrain him from using that firm, until the right should have been tried at law.—LEWIS *v.* LANGDON (1835), 7 Sim. 421; 4 L. J. Ch. 258; 58 E. R. 899.

Annotations:—**Reid.** Robertson *v.* Quiddington (1860), 28 Beav. 529; *Re* David & Matthews, [1899] 1 Ch. 378.

Agreement as to use of name.]—(1) The ct. will not, after the dissolution of a partnership, grant one partner an injunction against another who carries on the business separately, & uses the name or style of the original firm, unless the user of the name has been made the subject of express stipulation between them.

(2) The name or style of a firm constitutes part of its assets, & is a proper subject for valuation.—BANKS *v.* GIBSON (1865), 34 Beav. 566; 6 New Rep. 373; 34 L. J. Ch. 591; 29 J. P. 629; 11 L. N. S. 680; 13 W. R. 1012; 55 E. R. 753.

Annotations:—*As to* (1) **Distd.** Scott *v.* Rowland (1872), 26 L. T. 391; Levy *v.* Walker (1879), 10 Ch. D. 436. **Apld.** Chappell *v.* Griffith (1885), 53 L. T. 459. **Consd.** *Re* David & Matthews, [1899] 1 Ch. 378. **Expld.** Burchell *v.* Wilde, [1900] 1 Ch. 551. *Generally*, **Mentd.** Condy *v.* Mitchell (1878), 26 W. R. 269; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356.

1619. —— ——.]—A vendor who had carried on a business under the name of "Madame Elise," which was the name of his wife, sold the goodwill, & interest of the business, together with the exclusive right of using the name of "Madame Elise & co.":—*Held*: the purchaser was not entitled to trade under the old name alone, inasmuch as it would lead people to believe that the old business was still being carried on, & might cause the vendor to incur liability.—CHATTERIS *v.* ISAACSON (1887), 57 L. T. 177; 3 T. L. R. 705.

Annotations:—**Distd.** Burchell *v.* Wilde (1900), 48 W. R. 491. **Consd.** Rosher *v.* Young (1901), 17 T. L. R. 347.

1620. —— ——.]—ROSHER *v.* YOUNG (1901), 17 T. L. R. 347; 45 Sol. Jo. 344.

Use not exposing other partner to risk—Appreciable risk in business sense.]—Upon the dissolution of a partnership, without any sale or assignment of the goodwill of the business, & without any provision as to the use of the firm name, each of the partners is entitled to carry on business under that name, provided that he does not by so doing expose his former partners to any risk of liability. Whether there will be any such risk is a matter to be determined having regard to the circumstances of each case.

In 1882, a partnership of solrs. was constituted, the partners being W. B. the elder, W. B. the younger, deft. W., & pltfs., J. B. & C. B., & they carried on business under the style of "Burchell & co." In June, 1893, W. B. the elder having died & W. B. the younger having retired, pltfs. & deft. W. agreed to continue in partnership under the style of "Burchell & co." In 1899, the partnership was dissolved by consent, there being no sale of the goodwill or assets & no provision as to the use of the firm name. Pltfs. then proceeded to carry on business at the old office as "Burchells & co." & deft. W. & his son, whom he had taken into partnership, at new offices as "Burchell & co."

Pltfs. claimed the exclusive right to use the name "Burchell" or "Burchells," & to restrain defts. from using either of those names in any way as part of their firm name:—*Held*: subject to the above limitation, defts. were entitled to use the name "Burchell & co.," though it would be more satisfactory if they would undertake to continue to use the name "Burchell, Wilde & co."

The case of *Banks* v. *Gibson*, No. 1618, *ante*, must be read subject to the qualification that use of the old name must not expose the other partners to liability.—BURCHELL *v.* WILDE, [1900] 1 Ch. 551; 69 L. J. Ch. 314; 82 L. T. 576; 48 W. R. 491; 16 T. L. R. 257, C. A.

Annotations:—**Apld.** Townsend *v.* Jarman, [1900] 2 Ch. 698; Rosher *v.* Young (1901), 17 T. L. R. 347. **Consd.** Walter *v.* Ashton, [1902] 2 Ch. 282.

1622. —— Use by continuing partner.]—Two ladies, C. & W., carried on business in London in partnership under the firm of C. & W. C. married L. After this a decree for dissolution was made, & it was ordered that "the said partnership business, & the leasehold premises, trade fixtures, stock-in-trade, goodwill, & business," should be sold as a going concern to W. or to L. & wife, whichever should be the highest bidder. W. became the purchaser of all the property directed to be sold. L. & wife, who carried on business in Paris under the firm of C. et Cie., commenced action to restrain W. from carrying on the business under the style or firm of C. & W.:—*Held*: L. & wife had no right to restrain W. from using the name of the old firm.

The assignment of the goodwill & business included the exclusive right to use the name of the old firm.—LEVY *v.* WALKER (1879), 10 Ch. D. 436; 48 L. J. Ch. 273; 39 L. T. 654; 27 W. R. 370, C. A.

Annotations:—**Apld.** Chappell *v.* Griffith (1885), 53 L. T. 459. **Consd.** Chatteris *v.* Isaacson (1887), 57 L. T. 177. **Distd.** Gray *v.* Smith (1889), 43 Ch. D. 208. **Consd.** Burchell *v.* Wilde, [1900] 1 Ch. 551. **Reid.** Jennings *v.* Jennings, [1898] 1 Ch. 378; *Re* David & Matthews, [1899] 1 Ch. 378; Pomeroy *v.* Scalé (1906), 23 T. L. R. 170; Waring & Gillow *v.* Gillow & Gillow (1916), 32 T. L. R. 389. **Mentd.** Bodega Co. *v.* Owens (1889), 6 R. P. C. 236; Thynne *v.* Shove (1890), 45 Ch. D. 577.

PART V. SECT. 13, SUB-SECT. 9.—B. (f).

1618 i. *Whether restrained by injunction—Agreement as to use of name.*]—DICKSON *v.* M'MASTER & Co. (1866), 18 Ir. Jur. 202.—**IR.**

1618 ii. —— ——.]—MEILANDT *v.* BELL, [1907] T. H. 122.—**S. AF.**

by retired partner.]—SMITH *v.* M'BRIDE & SMITH (1888), 16 R. (Ct. of Sess.) 36; 26 Sc. L. R. 22.—**SCOT.**

Sect. 13.—*Enforcement of rights: Sub-sect.* 6, B. (f) & (g). *Part VI. Sect.* 1: *Sub-sect.* 1.]

1623. —— Use by retired partner—Suggesting connection with old firm.]—A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or is in any way connected with it.

Pltf., an old established tailor, took deft., who had been his foreman, into partnership, & the business was carried on under the name of H. & P. The partnership was afterwards dissolved by a decree of the ct., in which it was provided that the business of the partnership should belong to pltf. Pltf. accordingly kept up the shop under the name of H. & Co. Subsequently deft. set up a shop only a few doors from pltf.'s shop, & painted over the door the words "P., from H. & P.":—*Held:* having regard to the manner in which the names were painted up, deft. had done that which was calculated to lead the public to suppose that he was still connected with the old firm, & pltf. was entitled to an injunction.—HOOKHAM *v.* POTTAGE (1872), 8 Ch. App. 91; 27 L. T. 595; 21 W. R. 47, L. JJ.

Annotations:—**Apld.** Thorleys Cattle Food Co. *v.* Massam (1880), 14 Ch. D. 763. **Distd.** Matthews *v.* Hodgson (1886), 2 T. L. R. 899. **Refd.** Trego *v.* Hunt, [1896] A. C. 7. **Mentd.** Walker *v.* Mottram (1881), 19 Ch. D. 355.

1624. —— Effect of agreement as to goodwill.]—Upon a sale of the goodwill of a business, the vendor is at liberty to set up a precisely similar business. But he is not at liberty to do so under the old style or firm, although his name should be the only one appearing in that firm.—CHURTON *v.* DOUGLAS (1859), John. 174; 28 L. J. Ch. 841; 33 L. T. O. S. 57; 5 Jur. N. S. 887; 7 W. R. 365; 70 E. R. 385.

Annotations:—**Apld.** Hudson *v.* Osborne (1869), 39 L. J. Ch. 79. **Consd.** Levy *v.* Walker (1879), 10 Ch. D. 436; Ginesi *v.* Cooper (1880), 14 Ch. D. 596. **Apld.** Mogford *v.* Courtenay (1881), 45 L. T. 303; Pomeroy *v.* Scalé (1906), 22 T. L. R. 795. **Refd.** Scott *v.* Rowland (1872), 26 L. T. 391; Leggott *v.* Barrett (1880), 15 Ch. D. 306; Trego *v.* Hunt, [1896] A. C. 7; Aerators *v.* Tollit (1902), 71 L. J. Ch. 727. **Mentd.** Walker *v.* Mottram (1881), 19 Ch. D. 355; Pearson *v.* Pearson (1884), 27 Ch. D. 145; West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507.

1625. —— ——.]—On a dissolution of partnership the whole of the stock-in-trade was purchased at a valuation by one of the partners, but no assignment was made of the goodwill of the business:—*Held:* the outgoing partner was entitled to an injunction to restrain the use of his name in the style of the firm.—SCOTT *v.* ROWLAND (1872), 26 L. T. 391; 20 W. R. 508.

Annotation:—**Distd.** Burchell *v.* Wilde (1900), 48 W. R. 491.

1626. —— ——.]—A. & B. carried on business in partnership as solrs. under the style of "A., Son, & B." Upon the dissolution of the partnership no arrangement was made as to the sale of the goodwill, & A. carried on business in the old premises as "A. & Son," & B., having taken premises a few doors off, carried on business under the style of "A. & B." A. objected, & he moved for an *interim* injunction:—*Held:* in the absence of an agreement as to the goodwill, it was the *primâ facie* right of each partner to use the style of the old firm, if he did not hold out that the old partner was still in partnership, or expose him to any risk.—CHAPPELL *v.* GRIFFITH (1885), 53 L. T. 459; 50 J. P. 86; 2 T. L. R. 58.

Annotation:—**Consd.** Burchell *v.* Wilde, [1900] 1 Ch. 551.

1627. —— ——.]—CHATTERIS *v.* ISAACSON, No. 1619, *ante*.

1628. —— ——.]—GRAY *v.* SMITH, No. 237, *ante*.

1629. —— —— Benefit of agreement.]—(1) The benefit of a partner's covenant not to carry on a similar business to that of the partnership during a fixed period from the commencement thereof passes by an assignment of the goodwill of the partnership.

(2) Unless the right to use the firm name is expressly assigned, the assignee of the goodwill must not use the name so as to expose any partner to liability:—*Semble:* if the firm name merely consists of the surname of a partner with the addition of the words "& co.," & the partner has not used the firm name as his own except in connection with the firm, there is no appreciable risk that its user will expose him to liability.—TOWNSEND *v.* JARMAN, [1900] 2 Ch. 698; 69 L. J. Ch. 823; 83 L. T. 366; 49 W. R. 158.

Annotations:—*As to* (2) **Refd.** Pomeroy *v.* Scalé (1906), 23 T. L. R. 170; Boussod, Valadon *v.* Marchant (1907), 24 T. L. R. 111. *Generally*, **Mentd.** Leetham *v.* Johnstone-White, [1907] 1 Ch. 322; Dowes *v.* Fitch, [1920] 2 Ch. 159.

1630. —— Agreement not to use firm name—How far "late of" permitted.]—MATTHEWS *v.* HODGSON (1886), 2 T. L. R. 899, C. A.; *affg.* S. C. *sub nom.* MATHEWS *v.* HODGSON, 2 T. L. R. 800.

(g) *Wrongful Dealing with Assets.*

1631. Action for ejectment from partnership property.]—ELLIOT *v.* BROWN (1791), 3 Swan. 489, n.; 36 E. R. 948, L. C.

Annotations:—**Refd.** Dale *v.* Hamilton (1846), 5 Hare, 369. **Mentd.** Jackson *v.* Jackson (1804), 9 Ves. 591.

1632. ——.]—Arts. of partnership were entered into between deft. & pltf., two brothers, whereby, after reciting the partnership, & that the effects consisted (*inter alia*) of a leasehold messuage or dwelling-house, workshop & land at N., & that the brothers were jointly entitled to another messuage or dwelling-house at M., it was agreed that deft. should stand possessed of the property at N., as to the messuage or dwelling-house, & one-half of the land, for his own absolute use & benefit, & as to the workshop & other part of the land in trust to assign same to pltf.; that the property at M. should be assigned to pltf.; & that when & so soon as pltf. & deft. should erect a messuage or dwelling-house at M. of equal value with the dwelling-house at N., that same should be assigned to pltf., who should thereupon reassign the workshop to deft. It was also agreed that an equal division should be made of the partnership effects, & that neither of the partners should apply any part of the co-partnership moneys or effects for his own private use until such division as aforesaid. A renewed lease of the property at N. was afterwards obtained by deft. to himself alone. The partnership continued for some time, but no assignment was made, nor was any dwelling-house built, as contemplated by the agreement. Afterwards deft. assigned to B. another deft., the dwelling-house & half the land at N., of which pltf. was then in possession, & B. commenced proceedings by way of ejectment in the county ct. against pltf., in order to obtain possession of the premises. Upon bill filed by pltf., praying for a partnership account, & for an injunction

1623 i. —— —— *Suggesting connection with old firm.*]—MELROSE-DROVER, LTD. *v.* HEDDLE (1901), 4 F. (Ct. of Sess.) 1120; 39 Sc. L. R. 529; 8 S. L. T. 361.—**SCOT.**

against B. :—*Held :* from the circumstances which had arisen, deft. was not entitled to hold the dwelling-house & half the land at N. in severalty, but pltf. had still sufficient interest in the property to maintain his right to an injunction against B. deft.'s assignee, from bringing the action of ejectment, & injunction granted accordingly.—HAWKINS *v.* HAWKINS (1858), 32 L. T. O. S. 79 ; 11 Jur. N. S. 1044.

1633. Disposal of lease of partnership property.]—Deceased partner having contracted in his own name for a lease of premises to be employed in the partnership trade, the ct. refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes, & with the assent of the surviving partner.—ALDER *v.* FOURACRE (1818), 3 Swan. 489 ; 36 E. R. 947, L. C.

1634. Recovering debts.]—RIGBY *v.* DRAKELEY (1824), 10 Price, 134, n. ; 147 E. R. 267.

1635. Intentional injury to partnership property.]—MARSHALL *v.* WATSON, No. 1581, *ante*.

1636. Use of trade name—Weekly publication—Advertisement of severance of connection.]—Deft. was one of the proprietors & the editor of a weekly periodical, called *Household Words*. On a dissolution of the partnership :—*Held :* (1) he was not justified in advertising that the publication would be discontinued ; for the right to use the name must be sold for the benefit of all the partners, it being part of the partnership assets ; (2) he might advertise the discontinuance of the publication as regarded himself.—BRADBURY *v.* DICKENS (1859), 27 Beav. 53 ; 28 L. J. Ch. 667 ; 33 L. T. O. S. 54 ; 54 E. R. 21.

Annotations :—Generally, **Refd.** Mellersh *v.* Keen (No. 2) (1860), 28 Beav. 453. **Mentd.** Platt *v.* Walter (1867), 17 L. T. 157.

1637. ——.]—M. & C., who had traded together in co-partnership, & manufactured & sold an article known in the market as C.'s Fluid, dissolved partnership, & each commenced the same business on his own account, C. in his own name, & M. under the name of C.'s Fluid co. On a bill filed by C. to restrain M. from trading under the name of C.'s Fluid co., & from manufacturing & selling as C.'s fluid an alleged spurious compound :—*Held :* as M. had under the partnership arts. the right to manufacture & sell C.'s fluid, he could not be restrained from selling a spurious article as C.'s fluid, so long as he did not induce the public to believe that the article sold by him was the article manufactured & sold by C.—CONDY *v.* MITCHELL (1877), 37 L. T. 766 ; 26 W. R. 269, C. A.

1638. Use of partnership assets for own business.]—T. & M., carrying on business in partnership at C., W., & A., T. managing the works, etc., at C., & M. at the other places, in Oct. 1861, agreed that the partnership should be dissolved on Oct. 31, & that the businesses, if not sold on or before that day, should be kept up & maintained for the benefit of the partners until a sale. The memorandum of agreement (*inter alia*) provided for the taking of the accounts, a sale of the property, goodwill, & existing contracts, etc., & that two persons named should be receivers, etc., under the control of the partners. Notice of the dissolution was published in the *Gazette*, etc. Subsequently M. refused to approve of a draft conveyance of the partnership property, which included the goodwill, to the receivers on trust for sale, & a dispute arose between the partners. The bill alleged that M. was carrying on business on his own account ; & the ct., in the terms of the prayer, restrained him from using the partnership property on his own account, & directed a sale of the works, etc., & goodwill, & ordered certain accounts to be taken.—TURNER *v.* MAJOR (1862), 3 Giff. 442 ; 5 L. T. 600 ; 8 Jur. N. S. 909 ; 10 W. R. 243 ; 66 E. R. 483.

Annotation :—**Refd.** *Re* David & Matthews, [1899] 1 Ch. 378.

1639. Drawings out of capital on account of profits—Pending action for dissolution.]—By the partnership arts. the partners were allowed to draw a fixed sum quarterly out of net profits, with a proviso that, if at the end of the year the net profits should not have amounted to the sum drawn, each of the partners should be debited in the partnership accounts with, & should at the end of the partnership repay to the co-partnership, the difference between the amount of the sums received in respect of such quarterly payment & the sum he would have been entitled to receive as his share of net profits. The partnership for the first two years proved a dead loss, & the drawings, consequently, came out of the capital. Pltf. wished for an immediate dissolution, but deft. wished to carry on the partnership a little longer. Pltf. commenced an action for dissolution, & applied for an interim injunction to restrain deft. from drawing out of the capital until the hearing : —*Held :* the drawing out of capital was, notwithstanding the proviso for repayment at the end of the partnership, such misconduct within the partnership arts. as justified the ct. in granting the injunction, but pltf. also must undertake not to draw out of capital.—LEMANN *v.* BERGER (1876), 34 L. T. 235.

Part VI.—Dissolution.

SECT. 1.—OTHERWISE THAN BY THE COURT.

SUB-SECT. 1.—NOTICE BY PARTNER.

See Partnership Act, 1890 (c. 39), ss. 26, 32.

1640. Partnership for indefinite period—Necessity for notice.]—(1) Partnership without any provision as to its duration may be determined without previous notice, subject to the accounts, to wind up the concern.

(2) Partnership without any stipulation as to the proportions, the partners entitled in equal moieties.—PEACOCK *v.* PEACOCK (1809), 16 Ves. 49 ; 33 E. R. 902, L. C.

Annotations :—As to (1) **Apld.** Heath *v.* Sansom (1832), 4 B. & Ad. 172. **Refd.** Fairburn *v.* Pearson (1850), 2 Mac. & G. 144. *As to* (2) **Refd.** Webster *v.* Bray (1849), 7 Hare, 159 ; Warner *v.* Smith (1863), 1 De G. J. & Sm. 337.

1641. —— ——.]—A partnership, without arts., & for an indefinite period, may be dissolved by any partner at any time, without previous notice ; subject to the engagements of the partnership : but the existence of engagements with third persons

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PART VI. SECT. 1, SUB-SECT. 1.

a. *Partnership for indefinite period.*]—*Held :* a partnership for an indefinite term is determinable by notice.—KELLY *v.* TUCKER (1907), 5 C. L. R. 1.—**AUS.**

b. *Provision for determination without notice at end of first year—If business unsatisfactory.*]—Pltf. & deft. entered into a co-partnership for five years under a written agreement, containing

Sect. 1.—*Otherwise than by the court: Sub-sects.* 1

cannot prevent the right of dissolution as among themselves. The consequence of the dissolution of partnership, where there are no arts., prescribing the terms, is a general sale & account of the joint property: one or more partners therefore cannot insist on taking the share of another at a valuation; or, that he shall remove his proportion from the premises, thereby securing the good-will, partner, after dissolution of the partnership continuing to trade with the joint property, must account for the profits. Lease of premises, where a partnership trade was carried on, renewed by one partner in his own name clandestinely, a trust for the partnership; to be accounted for as joint property.

No partner can derive a particular advantage by choosing an unseasonable moment for dissolution (GRANT, M.R.).—FEATHERSTONHAUGH *v.* FENWICK (1810), 17 Ves. 298; 34 E. R. 115.

Annotations:—**Apld.** Rigden *v.* Pierce (1822), 6 Madd. 353; Cook *v.* Collingridge (1823), Jac. 607. **Consd.** Willett *v.* Blanford (1842), 1 Hare, 253; Blisset *v.* Daniel (1853), 10 Hare, 493. **Expld.** Cassels *v.* Stewart (1881), 6 App. Cas. 64. **Consd.** Stevenson *v.* Akt. Für Cartonnagen Industrie, [1918] A. C. 239. **Refd.** Heath *v.* Sansom (1832), 4 B. & Ad. 172; Portlock *v.* Gardner (1842), 11 L. J. Ch. 313; Darby *v.* Darby (1856), 3 Drew. 495; Wedderburn *v.* Wedderburn (1856), 22 Beav. 84; Neilson *v.* Mossend Iron Co. (1886), 11 App. Cas. 298. **Mentd.** *Re* Biss, Biss *v.* Biss, [1903] 2 Ch. 40.

1642. —— ——.] — CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY, No. 51, *ante*.

1643. —— ——.]—LITTLEWOOD *v.* CALDWELL, No. 1603, *ante*.

1644. —— ——.]—HEATH *v.* SANSOM, No. 648, *ante*.

1645. —— **Partnership at will—Solicitors.**]—ROBERTS *v.* EBERHARDT, No. 1512, *ante*.

1646. Partnership for fixed term—Continuance beyond term—Necessity for notice.]—(1) When partners carry on business under a deed of partnership, if they continue it after the period fixed for its duration, they will, in the absence of any other agreement, be held to continue it upon the terms of the original deed, & in the event of dispute the business will be wound up under its provisions.

(2) If a partnership is carried on beyond the term fixed for its duration, it can only be dissolved by special notice, & in its absence no notice to dissolve will be implied.—PARSONS *v.* HAYWARD (1862), 4 De G. F. & J. 474; 31 L. J. Ch. 666; 6 L. T. 628; 26 J. P. 484; 8 Jur. N. S. 924; 10 W. R. 654; 45 E. R. 1267, L. C.

Annotation:—*Generally*, **Refd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1.

1647. —— —— **Notice in general terms—Though special notice in articles.**]—CLARK *v.* LEACH, No. 273, *ante*.

1648. Determinable by mutual arrangement—Notice by one partner—Ineffectual.]—By Partnership Act, 1890 (c. 39), s. 26 (1), where "no fixed term" has been agreed upon for the duration of the partnership, any partner may determine it at any time by notice.

By Partnership Act, 1890 (c. 39), s. 32, "subject to any agreement between the partners," a partnership "for an undefined time" may be dissolved by notice.

An agreement of partnership was entered into between two persons by which it was provided that the partnership should be terminated "by mutual arrangement only":—*Held:* one of the partners could not determine the partnership by notice against the will of the other partner.—MOSS *v.* ELPHICK, [1910] 1 K. B. 846; 79 L. J. K. B. 631; 102 L. T. 639, C. A.

1649. Notice in terms of articles—Right to countermand.]—Pltf. & deft. carried on the business of surgeons as partners under arts. of partnership, which provided (*inter alia*) that "in case either of the partners should be desirous of retiring, & should give twelve calendar months' notice in writing of such his desire to the other partner, the continuing partner should have the option of becoming the purchaser of the share of the retiring partner, for a sum equal to two years' purchase of the share of said retiring partner in the net annual profits of the business, provided such option were exercised within one calendar month from the receipt by him of such notice of retirement"; & they also stipulated that "each of the partners should employ himself assiduously in the business & concerns of the said partnership business, & use his utmost skill, care & diligence to promote & increase the same, & that if either of the partners should commit any breach of any of the covenants & agreements therein contained, & on his part to be respectively observed & performed, then & in any of such cases the other of said partners, if he should think fit, should be at liberty to dissolve said partnership by giving the party offending notice in writing, declaring the partnership to be dissolved & determined." On Aug. 15, 1856, deft. served upon pltf. the proper notice, under the arts., of his intention to retire from the business. Disputes having then arisen as to the conduct of certain portions of the business calculated greatly to reduce the value of the annual profits of the concern, deft., on Sept. 13, 1856, having previously received notice, through his solr., that pltf. intended to exercise the option given him to purchase deft.'s share of the business, under the arts., served upon pltf. notice of a dissolution of the partnership, on the ground of an alleged breach, by pltf., of the stipulations of the arts. Later, on the same day, pltf. served notice, under the arts., of his intention to exercise his option of purchase, in accordance with the intimation he had previously given to deft.'s solr:—*Held:* the evidence failing to show an actual violation of any stipulation of the partnership arts. by pltf., deft. was not entitled to a dissolution under the arts., & the partnership business must be continued to be carried on, at whatever inconvenience, till the expiration of the twelve months after service of pltf.'s notice of purchase.—WARDER *v.* STILWELL (1856), 26 L. J. Ch. 373; 28 L. T. O. S. 366; 3 Jur. N. S. 9; 5 W. R. 174.

1650. —— **Expiry of time stipulated—Date of dissolution.**]—By partnership arts., one of three partners might "determine the co-partnership by giving six calendar months' notice"; & in that case, immediately after the expiration of the six calendar months, the assets were to be valued, & after the valuation being made & the result communicated, the partnership "shall, in regard to all the said partners, cease & determine":—*Held:* the partnership was dissolved at the expiration of the six months, & not from the completion of the valuation, though it continued after the six months, for the purpose of winding it up.—GRIFFITHS *v.* BRACEWELL (1865), 35 Beav. 43; 55 E. R. 810.

1651. Service of notice—On all partners.]—Three members of a co., which was unlimited as

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a provision that it should be lawful for deft. to terminate at the end of the first year without any notice, if the business should not prove satisfactory to him:—*Held:* the agreement gave an uncontrolled discretion to deft.—WHITEHEAD *v.* HOWARD (1877), 11 N. S. R. (2 R. & C.), 423.—**CAN.**

c. *Right to give notice—Barred by previous dissolution by death of partner.*]—FRANK *v.* BESWICK (1878), 44 U. C. R. 1.—**CAN.**

to its duration, executed a deed dissolving the co., & left a notice of it at the co.'s office. They then filed a bill, on behalf of themselves & all other members except defts. against the officers of the co., alleging that the co. consisted of upwards of four hundred members, & that pltfs. were ignorant of & had no means of learning their names & residences, & praying that the co. might be declared to be dissolved :—*Held :* all the members ought to have been served with notice of the deed.—WHEELER *v.* VAN WART (1838), 9 Sim. 193 ; 2 Jur. 252 ; 59 E. R. 332.

1652. Invalidation of notice—Accounts irregularly taken.]—STEUART *v.* GLADSTONE, No. 293, *ante*.

1653. Waiver of notice—By subsequent negotiations.]—Deft. B., & other defts., having bought an estate, obtained from the Bishop of Durham a lease for twenty-one years of land adjoining, called the Byers Green Coal Royalty, & commenced working same under the name of the Byers Green Coal co. In Mar. 1839, they signed an agreement that they should be entitled to the land so purchased in equal shares, & also to the Byers Green Royalty, in equal shares ; & that each party should participate in the advantages or losses to be derived from the purchase & the said royalty, etc., & that any money paid for the same estate or royalty, or respecting the winning of any colliery by any of the said parties, should carry interest until the repayment. B. having refused to pay up his calls, to sign a partnership deed, & also to concur in borrowing money, the other partners, in Feb. 1841, served him with a notice that they would no longer continue partners with him, & that he was to consider the partnership between them entirely dissolved, & they offered to pay him back the sum of £850, previously advanced by him, with interest. This sum was not paid, & negotiations afterwards took place between the parties respecting the payment of the sum, & other compensation to B., & as to the terms of the dissolution. A treaty was also entered into by one of the partners, for the purchase of B.'s interest in the colliery. An action having been brought against B. & the other partners on a bill of exchange accepted in the name of the firm, to which deft. B. pleaded *non accepit*, the judge told the jury that the partnership contract was for twenty-one years, & could not be dissolved by the notice :—*Held :* this was a misdirection, the partnership being indefinite ; & the question for the jury was, whether, after it had been dissolved by the notice, the parties came to a new agreement to carry on the concern together as partners.—LAYCOCK *v.* BULMER (1844), 13 L. J. Ex. 156 ; 2 L. T. O. S. 101, 332.

1654. Effect of valid notice—Partner a trespasser—On partnership premises leased by other partner.]—In Sept. 1846, a partnership was entered into between A. & B. the terms of which were never definitively arranged. The business continued to be carried on, in the names of A. & B. in a shop & counting house forming part of a house of which A. was lessee, down to Dec. 25, when A. caused B. to be served with a notice to dissolve the partnership. On Jan. 2, 1847, B. broke & entered the shop & counting house :—*Held :* he was liable in trespass ; his right to the occupation of the premises having ceased with the determination of the partnership.—BENHAM *v.* GRAY (1847), 5 C. B. 138 ; 17 L. J. C. P. 50 ; 10 L. T. O. S. 112 ; 136 E. R. 827.

Annotation :—**Apld.** Pocock *v.* Carter, [1912] 1 Ch. 663.

1655. Withdrawal of notice—Whether permissible—Without consent of partner notified.]—Arts. of partnership between pltf. & deft. provided that either partner should be at liberty to determine the partnership at the end of the first seven years of the term, on giving previous notice to the other partner of his intention to do so. Pltf. having become insane, deft. served on him notice of his intention to determine the partnership at the end of the first seven years of the term :—*Held :* the notice could not be withdrawn without the consent of pltf.

If the first notice put an end to the partnership, it altered the position of the parties ; & how could a man without the consent of the other party say, I will become a partner again ? It is totally impossible that, after a notice of that kind has been given, one party alone could withdraw it, without the consent of the other & enter into a partnership again. In my opinion, there is no such power of withdrawal as is claimed by deft. ; & if the first notice were valid, that notice remains unaffected by the attempt to withdraw it (JESSEL, M.R.).—JONES *v.* LLOYD (1874), L. R. 18 Eq. 265 ; 43 L. J. Ch. 826 ; 30 L. T. 487 ; 22 W. R. 785.

Annotations :—**Mentd.** Wilder *v.* Piggott (1882), 22 Ch. D. 263 ; Porter *v.* Porter (1887), 37 Ch. D. 420 ; Didisheim *v.* London & Westminster Bank, [1900] 2 Ch. 15 ; New York Security & Trust Co. *v.* Keyser, [1901] 1 Ch. 666.

1656. Notice in writing—Sufficiency of—Partnership by deed.]—Where there is a partnership constituted by deed, a notice that it is dissolved signed by the parties, for the purpose of being inserted in the *Gazette*, is sufficient evidence of the dissolution for all purposes against the parties signing it.—DOE d. WAITHMAN *v.* MILES (1816), 1 Stark. 181 ; 4 Camp. 373, N. P.

Annotation :—**Refd.** Pocock *v.* Carter, [1912] 1 Ch. 663.

1657. Unseasonable notice.] — FEATHERSTONHAUGH *v.* FENWICK, No. 917, *ante*.

Notice to lunatic partner.]—*See* LUNACTICS, Vol. XXXIII., pp. 207, 208, Nos. 1129–1131.

SUB-SECT. 2.—TERMINATION OF UNDERTAKING OR ADVENTURE.

See Partnership Act, 1890 (c. 39), ss. 32 (*b*), 38.

1658. Publishing adventure — Publication of specific edition.]—Agreement between the author of a work & a publisher, by which the publisher agreed to publish the work at his own expense & risk & after deducting all charges & expenses, & a percentage on the gross amount of the sale for commission & risk of bad debts, the profits remaining of every edition that should be printed of the work were to be equally divided between the author & publisher :—*Held :* (1) to create a joint adventure between the parties, which the author was at liberty to terminate upon notice to his publisher after the publication of a given edition, it appearing that, at the date of such notice, no fresh expense had been incurred by the publisher in printing advertisements or otherwise, since the publication of that edition ; (2) the circumstance of the publisher having stereotyped the work previously to the publication of the last published edition did not affect the right of the author to terminate the agreement as above.—READE *v.*

Sect. 1.—*Otherwise than by the court: Sub-sects.* 2, 3, 4, 5, 6 & 7.]

BENTLEY (1858), 4 K. & J. 656; 27 L. J. Ch. 254; 30 L. T. O. S. 269; 4 Jur. N. S. 82; 6 W. R. 240; 70 E. R. 273.
Annotation:—**Mentd.** Abrahams *v.* Reiach, [1922] 1 K. B. 477.

SUB-SECT. 3.—DEATH OF PARTNER.

See Partnership Act, 1890 (c. 39), ss. 33 (1), 36 (3).

1659. General rule.]—Arts. of partnership do not survive for the benefit of exors., etc., without an express provision for such purpose. Same as to assignees of a bkpt. Rights, as between the parties in such instances; & through them the rights of their creditors.—PEARCE *v.* CHAMBERLAIN (1750), 2 Ves. Sen. 33; 28 E. R. 23.
Annotation:—**Refd.** Anon. (1856), 2 K. & J. 441.

1660. ——.]—MARJORAM *v.* SAUNDERFORD (1782), Rom. 110, L. C.

——.]—CRAWSHAY *v.* COLLINS, No. 1010, *ante*.

1662. ——.]—VULLIAMY *v.* NOBLE, No. 596, *ante*.

1663. ——.]—CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY, No. 51, *ante*.

1664. ——.]—ROYAL BANK OF SCOTLAND *v.* CHRISTIE, No. 1829, *post*.

1665. ——.]—In an ordinary partnership the presumption is that the interest & the liability of a partner is terminated by his death.—*Re* AGRICULTURIST CATTLE INSURANCE CO., BAIRD'S CASE (1870), 5 Ch. App. 725; 23 L. T. 424; 18 W. R. 1094, L. JJ.
Annotations:—**Refd.** James *v.* Buena Ventura Nitrate Grounds Syndicate, [1896] 1 Ch. 456; Public Trustee *v.* Elder, [1926] Ch. 776.

1666. ——.]—Testator bequeathed the income of his share in a partnership at will to his wife for her life, & after her death he gave his share, to his partner:—*Held:* the partnership determined by testator's death, & even if the bequest could operate as a specific gift, the result was a partnership at will between the partner & the widow which could be determined by either, without the consent of the other.—CRAVEN *v.* CRAVEN (1908), 52 Sol. Jo. 498.

1667. Partnership for fixed term.]—A partnership for a term of years is dissolved by the death of a partner before the term has expired.—GILLESPIE *v.* HAMILTON (1818), 3 Madd. 251; 56 E. R. 501.
Annotation:—**Apld.** Chapman *v.* Beckinton (1842), 3 Q. B. 703.

1668. ——.]—In 1851, A., B. & C. agreed to be partners for five years. Six months afterwards, A. being in difficulties, it was agreed between A., his creditors, & B. & C., that A. should retire, & B. carry on the business for his own behoof & that of A.'s creditors for the period of five years, as agreed on by the arts., & that A. should assign to trustees his separate estate for the benefit of his creditors; & B. agreed to appropriate to the said trustees the share of profits in his business that would have accrued to A. in the event of the partnership having been continued, less £400 a year to be appropriated to A.'s maintenance. A. died two months after:—*Held:* the right of his creditors to a share in the profits thereupon ceased.—CROSBIE *v.* GUION (1857), 23 Beav. 518; 53 E. R. 203.

1669. ——.]—A partnership was entered into between A. & B. for a term of years, subject to a power in A. to determine it by giving three months' notice; & it was provided, that in case of the death of A. before the partnership was fully wound up, his exors. should settle its affairs. A. during the term gave notice to determine, & died before the expiration of the three months:—*Held:* the partnership determined on the death of A.—BELL *v.* NEVIN (1866), 12 Jur. N. S. 935; 15 W. R. 85.

1670. —— **Provision for continuance by executors.**]—LANCASTER *v.* ALLSUP, No. 963, *ante*.

See, also, AGENCY, Vol. I., pp. 541, 691, Nos. 1948, 3005; BANKERS, Vol. III., pp. 303, 304, Nos. 978–981; CONTRACT, Vol. XII., p. 594, No. 4945; MINES, Vol. XXXIV., p. 625, No. 217.

SUB-SECT. 4.—BANKRUPTCY OF PARTNER.

See Partnership Act, 1890 (c. 39), ss. 33 (1), 36 (3).

1671. Dissolution from adjudication.]—The issuing of the commission does nothing, unless he is found bkpt. The adjudication, that he is bkpt., is what severs the partnership. The first act is that declaring him bkpt. (LORD LOUGHBOROUGH, C.).—*Ex p.* SMITH (1800), 5 Ves. 295; 31 E. R. 595, L. C.

Mining partnership.]—*See* MINES, Vol. XXXIV., p. 625, Nos. 214–216.

See, also, BANKRUPTCY, Vol. IV., pp. 394, 395, 431, 455, Nos. 3611, 3891, 4109 *et seq.*

SUB-SECT. 5.—EXECUTION ON PARTNER'S SHARE.

See Partnership Act, 1890 (c. 39), ss. 23, 33 (2).

1672. Whether operating as dissolution.]—Two persons contracted with a railway co. to execute certain works, &, after some progress had been made with the works, a judgment creditor of one of the contractors took in execution his share of the plant & effects, which the sheriff sold & assigned to the other contractor. The other contractor assigned the interest of the firm in the contract, & all the effects & moneys due or to become due in respect of the same, to a third person, by way of security, with power for such assignee to enter on the works & take possession & execute the contract. The assignee some months afterwards took possession of the works & proceeded to complete them. The co. had

PART VI. SECT. 1, SUB-SECT. 3.

1659 i. *General rule.*]—In the absence of special provision, the death of a partner puts an end to a partnership, even though the term provided for has not expired.—WHITNEY *v.* SMALL (1913), 31 O. L. R. 191; 6 O. W. N. 266.—**CAN.**

1659 ii. ——.]—ROYAL BANK OF SCOTLAND *v.* CHRISTIE (1841), 2 Robin App. 118.—**SCOT.**

f. Agreement for continuation.]—A contract of co-partnership provided that in the event of the death of either of the parties, the co-partnership should not come to an end:—*Held:* the partnership was not dissolved by the death of one, but subsisted as a contract of partnership between the surviving partner & the representatives of deceased.—HILL *v.* WYLIE (1865), 3 Macph. (Ct. of Sess.) 541; 37 Sc. Jur. 271.—**SCOT.**

g. Effect on tenancy.]—Where one of two partners lived till his death in a house which formed part of the partnership property, being debited yearly with £20 in the books of the firm, which sum was described as "rent":—*Held:* there was no tenancy in his personal representative, who was properly ejected on the title.—LEE *v.* CRAWFORD (1912), 46 I. L. T. 81.—**IR.**

PART VI. SECT. 1, SUB-SECT. 4.

h. Execution of creditor's deed.]—The execution of a creditor's deed by one partner is a dissolution of the partnership.—DAVIES *v.* BARLOW (1881), 2 N. S. W. L. R. (L.) 66.—**AUS.**

notice of the execution & sale by the sheriff of the property of one contractor, & of the assignment to the other, & by the other to the assignee, & they allowed the works to be continued by the two latter persons respectively, & made payments to them on account. The assignee having, after the insolvency of his assignor, filed his bill against the co. for an account of what was due from them in respect of the contract, & for a declaration that a release executed to the co. by the contractor whose share had been taken & assigned by the sheriff, was fraudulent:—*Held:* (1) the seizure in execution of one partner's share of the plant & effects operated as a dissolution of the partnership; (2) the subsequent prosecution of the works by the other contractor or his assignee, did not necessarily involve any new contract with the co., but was consistent with that theretofore made; (3) the contractor, or his assignee, who without objection from the co. prosecuted the works, could sustain a suit against the co. for payment of what had become due from them in respect of the works done under the contract; (4) a release executed by the partner & contractor whose share of the partnership effects had been taken in execution, was void as against the other contractor & his assignee.—ASPINALL *v.* LONDON & NORTH WESTERN RY. CO. (1853), 11 Hare, 325; 22 L. T. O. S. 75; 1 W. R. 518; 68 E. R. 1299.

1673. —— Charging order.]—BROWN, JANSON & CO. *v.* HUTCHINSON & CO., No. 882, *ante*.

See, also, Part IV., Sect. 6, sub-sect. 2, J. (*b*), *ante*.

SUB-SECT. 6.—PARTNERSHIP BECOMING ILLEGAL.

See Partnership Act, 1890 (c. 39), s. 34.

Alien partner—During war.]—*See* ALIENS, Vol. II., p. 177, Nos. 415, 416.

SUB-SECT. 7.—EXPULSION OF PARTNER.

See Partnership Act, 1890 (c. 39), s. 25.

1674. Right of expelled partner to opportunity of explanation of conduct—Before service of notice of dissolution.]—Partnership arts. contained a general clause, requiring committee meetings to be held for the purpose of determining on the conduct & management of the business, & several other clauses requiring that specified things should only be done at committee meetings. The arts. also contained a power of expulsion by a majority which was absolute in its terms:—*Held:* (1) the power might be exercised without any cause being assigned, & without any previous committee meeting; (2) such power must be exercised *bonâ fide*, & for the benefit of the whole body, & not for the benefit of individual partners; (3) the power was not properly exercised at the exclusive instance of one partner, & in consequence of his representation to the other partners, made without the knowledge & behind the back of the partner who was to be expelled, & without giving to such partner the opportunity of stating his case, & of removing any misunderstanding on the part of his co-partners.—BLISSET *v.* DANIEL (1853), 10 Hare, 493; 1 Eq. Rep. 484; 18 Jur. 122; 1 W. R. 529; 68 E. R. 1022.

Annotations:—As to (2) **Folld.** Wood *v.* Woad (1874), L. R. 9 Exch. 190. **Distd.** Russell *v.* Russell (1880), 14 Ch. D. 471. **Refd.** Coventry *v.* Barclay (1863), 33 Beav. 1; Allhusen *v.* Borries (1867), 15 W. R. 739. *As to* (3) **Folld.** Wood *v.* Woad (1874), L. R. 9 Exch. 190. **Distd.** Cooper *v.* Page (1876), 34 L. T. 90; Green *v.* Howell, [1910] 1 Ch. 495. *Generally*, **Refd.** Parker *v.* McKenna (1874), 10 Ch. App. 107; Steuart *v.* Gladstone (1879), 10 Ch. D. 626; Cruikshank *v.* Sutherland (1922), 92 L. J. Ch. 136. **Mentd.** Simmons, etc. Shareholders in West Devon Great Consols Mines *v.* Phillips (1886), 2 T. L. R. 455; Phillips *v.* Manufacturers' Securities (1917), 86 L. J. Ch. 305.

1675. —— ——.]—Declaration, alleging that pltf. was a member of a mutual insurance society, which insured members against losses to ships entered & insured in the books of the society, on a deposit being made of £5 per cent. on the amount insured; that defts. were the committee of the society, by the rules of which they had the entire control of the funds & affairs of the society, & were to determine on the admission or rejection of ships insured or proposed for insurance; that by another rule, "if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member, by directing the secretary to give such member notice in writing that the committee have excluded such member from the society, &, after the giving of such notice, such member shall be excluded, & have no claim or be responsible for or in respect of any loss or damage happening after such notice"; that pltf., as such member, had entered a ship on the books of the society, & had paid the deposit, & was thereupon entitled to an indemnity for loss happening to the ship; that defts., well knowing the premises, but "wrongfully, collusively, & improperly contriving to deprive pltf. of the benefit of such indemnity, did wrongfully, collusively, & improperly expel pltf. from the society on the alleged ground that his conduct was suspicious, or that he was for some reason unworthy of remaining in the society, without giving pltf., or any person on his behalf, any opportunity whatsoever of being heard before them, & without, in fact, hearing pltf., or any person on his behalf, in defence & vindication of pltf.'s conduct as a member of the society with reference to the said ground of expulsion"; whereby pltf. lost the benefit of an indemnity for damage which his ship subsequently sustained, & was otherwise damnified:—*Held:* the declaration showed no cause of action.

(1) (KELLY, C.B., POLLOCK & AMPHLETT, BB.) on the ground that, assuming the allegations of the declaration to be true, the act of defts. in expelling pltf. without giving him an opportunity of being heard was void; pltf., therefore, still remained a member of the society, & had sustained no damage; (2) (CLEASBY & POLLOCK, BB.) on the ground that the declaration did not sufficiently charge *mala fides*.—WOOD *v.* WOAD (1874), L. R. 9 Exch. 190; 43 L. J. Ex. 153; 30 L. T. 815; 22 W. R. 709; 2 Asp. M. L. C. 289.

Annotations:—As to (1) **Distd.** Cooper *v.* Page (1876), 34 L. T. 90; Russell *v.* Russell (1880), 14 Ch. D. 471. **Refd.** James *v.* Chartered Accountants Institute (1907), 98 L. T. 225; Green *v.* Howell, [1910] 1 Ch. 495; D'Arcy *v.* Adamson (1913), 29 T. L. R. 367. *Generally*, **Mentd.** Lapointe *v.* L'Assocn. de Bienfaisance et de Retraite de la Police de Montreal, [1906] A. C. 535; Cassel *v.* Inglis, [1916] 2 Ch. 211; Weinberger *v.* Inglis, [1919] A. C. 606; R. *v.* Housing Appeal Tribunal, [1920] 3 K. B. 334; R. *v.* Leman Street Police Station, *Ex p.* Vinicoff, R. *v.* Secretary of State for Home Affairs, *Ex p.* Vinicoff (1920), 89 L. J. K. B. 1200.

1676. —— ——.]—STEUART *v.* GLADSTONE, No. 293, *ante*.

PART VI. SECT. 1, SUB-SECT. 7.

k. *Right of expelled partner to opportunity of explanation of conduct—Excessive drinking—Service of notice when incapacitated by drink.*]—WILKIE *v.* WILKIE (No. 2) (1900), 18 N. Z. L. R. 734.—**N.Z.**

l. *Dissolution advertised as by mutual consent—Estoppel.*]—One of two partners having broken a condition in the partnership articles the other verbally

Sect. 1.—*Otherwise than by the court: Sub-sects.* 7 & 8. *Sect.* 2: *Sub-sects.* 1 & 2, *A.*]

1677. —— —— Provision as to arbitration whether conduct justifies expulsion.] — partner is not entitled to spring a notice of dissolution on his co-partner without giving him some preliminary warning of the cause of complaint, & an opportunity of meeting the case alleged against him.

(2) Arts. of partnership provided that a partner might be expelled for breach of certain acts therein specified, & that if any question should arise whether a case had happened to authorise the exercise of this power, such question should be referred to arbn. Defts. served a notice on pltf. to determine the partnership on the ground that he had committed a breach within the expulsion clause, but gave no details of the particular act complained of; pltf. thereupon brought an action to restrain defts. from acting on this notice; defts. moved to stay proceedings & refer all matters in dispute to arbn.:—*Held:* the preliminary question whether or not the notice of expulsion was valid was one more suitable for decision by the ct. than by an arbitrator, & as there was a suggestion of a fraudulent exercise of the power of expulsion, the ct., in the exercise of its discretion, ought not to stay proceedings & enforce a reference.—BARNES *v.* YOUNGS, [1898] 1 Ch. 414; 67 L. J. Ch. 263; 46 W. R. 332; 42 Sol. Jo. 269.

Annotations:—As to (1) **Overd.** Green *v.* Howell, [1910] 1 Ch. 495. *As to* (2) **Apprvd.** Green *v.* Howell, [1910] 1 Ch. 495.

1678. —— —— ——.]—A deed of partnership provided that, in the event of either partner committing any breach of the partnership arts. or any other flagrant breach of his duties as a partner, the other partner might by notice in writing terminate the partnership, provided that if any question should arise whether a case had happened to authorise the exercise of his power it should be determined by arbn., if the offending partner so requested in writing within a given time. Under this clause one partner, without any preliminary warning to his co-partner, served him with a notice of dissolution on the ground that he had committed breaches of certain specified arts. & had also committed a flagrant breach of his duties as a partner:—*Held:* in the absence of *mala fides*, it was not a condition precedent to the validity of the notice that the partner serving the notice should before serving it disclose to his co-partner the causes of complaint against him or give him an opportunity of being heard in his defence, & the notice was valid.—GREEN *v.* HOWELL, [1910] 1 Ch. 495; 79 L. J. Ch. 549; 102 L. T. 347, C. A.

1679. —— —— Breach of specific clause.] — COOPER *v.* PAGE, No. 133, *ante*.

1680. Power to expel—Bonâ fide exercise.]—BLISSET *v.* DANIEL, No. 1674, *ante*.

1681. —— ——.]—WOOD *v.* WOAD, No. 1675, *ante*.

1682. —— Power vested in one partner—By articles.]—Partnership arts. between A. & B. provided that, if the business should not be conducted to the satisfaction of B., he should have power to give notice to A., to determine the partnership; the arts. also contained an arbn. clause providing that any differences in relation to the partnership should be referred to arbn. B. having given notice to A. for the partnership to be determined, A. brought an action against B., alleging various charges of fraud, & claiming that the notice should be declared void, & that B. should be restrained from announcing the dissolution of the partnership, whereupon B. moved that the matters in question should be referred to arbn.:—*Held:* (1) the power to give the notice under the arts. was exercisable by B. at his own will & pleasure; (2) A. having, in the judgment of the ct., failed to establish a *primâ facie* case of fraud, the matters in question should be referred to arbn. according to the arts.—RUSSELL *v.* RUSSELL (1880), 14 Ch. D. 471; 49 L. J. Ch. 268; 42 L. T. 112.

Annotations:—As to (2) **Apprvd.** Walmsley *v.* White (1892), 67 L. T. 433. **Refd.** Vawdrey *v.* Simpson, [1896] 1 Ch. 166; Kelly *v.* National Soc. of Operative Printers (1915), 113 L. T. 1055; Cassel *v.* Inglis, [1916] 2 Ch. 211. *Generally*, **Refd.** Belfield *v.* Bourne, [1894] 1 Ch. 521; Green *v.* Howell, [1910] 1 Ch. 495. **Mentd.** Minifie *v.* Ry. Passengers Assce. (1881), 44 L. T. 552; Lapointe *v.* L'Assocn. de Bienfaisance et de Retraite de la Police de Montreal, [1906] A. C. 535; R. *v.* Appeal Tribunal (1920), 89 L. J. K. B. 1133; R. *v.* Leman Street Police Station, *Ex p.* Venicoff, [1920] 3 K. B. 72; Metropolitan Tunnel & Public Works *v.* L. Elec. Ry., [1926] Ch. 371.

1683. —— Irregularities in accounts.] — The failure of one partner to enter in his accounts partnership moneys received by him is, of itself & independent of any provisions in the arts. of partnership, a sufficient ground for the other partner dissolving.

By arts. of a partnership for a term, each partner was to keep proper books of account & to enter all his receipts, & in default the other might dissolve the partnership. One partner had made small omissions in seventeen instances, which, in the aggregate, amounted to £9 10*s.*:—*Held:* this justified the other in dissolving the partnership.—CHEESMAN *v.* PRICE (1865), 35 Beav. 142; 55 E. R. 849.

1684. Expulsion for dishonesty—Conviction for dishonesty.]—Arts. of partnership provided that in the event of either of the junior partners being "addicted to scandalous conduct detrimental to the partnership business," or being guilty of "any flagrant breach of the duties of a partner," the senior partner might give the offending partner six days' notice of expulsion from the partnership. One of the junior partners having been convicted by a police magistrate of travelling without a ticket with intent to avoid payment, & fined the full penalty, the senior partner served him with notice of expulsion. On motion by the junior partner for an *interim* injunction to restrain his expulsion:—*Held:* as pltf. had been convicted of dishonesty, the notice of expulsion was justified, & under the circumstances the ct. declined to interfere by interlocutory injunction.—CARMICHAEL *v.* EVANS, [1904] 1 Ch. 486; 73 L. J. Ch. 329; 90 L. T. 573; 20 T. L. R. 267.

1685. Notice of expulsion—Validity of—Question for court.]—BARNES *v.* YOUNGS, No. 1677, *ante*.

1686. —— By one partner—Subsequent concurrence by others.] — SMITH *v.* MULES, No. 904, *ante*.

1687. —— Avoidance of notice & restraint of proceedings.]—W. & C. entered into co-partnership for a term of twenty-one years in the trade of millstone makers, C. being besides cashier of the firm. Disputes of old standing existed between the partners at the commencement of the co-partnership & ill temper was exhibited on frequent occasions between them afterwards. Deft. C. notified him that he must leave the firm & to avoid publicity he consented to an immediate dissolution which was advertised as a dissolution by mutual consent:—*Held:* the action of defts. in advertising that the dissolution was by mutual consent did not preclude them from showing that it took place in consequence of misconduct of the retiring partner.—O'KEEFE *v.* CURRAN (1889), 17 S. C. R. 596.—CAN.

ultimately, & within a year from the commencement of the partnership term, took proceedings to determine the co-partnership by notice under the expulsion clause, upon the ground of pltf. W.'s alleged violations of the partnership arts. in six particular items, which were specified in a notice to pltf., dated in Mar. 1871. Pltf. filed his bill to restrain deft. from proceeding further with that notice, & to have such notice declared void. Deft. afterwards took proceedings under the arbn. clause, & pltf. amended his bill for the purpose of restraining these latter proceedings also. The particular alleged violations were explained away upon the evidence as entire mistakes on deft.'s part attributable to the previous state of feeling existing between the partners:—*Held:* (1) pltf. W. was entitled to have the notice of dissolution declared void, & all proceedings upon such notice restrained; (2) deft. must be restrained from proceeding under the arbn. clause.—WITT *v.* CORCORAN (1872), 21 W. R. 47.

1688. Article for dissolution on misconduct—Partnership for term—Inapplicable after term.]—CLARK *v.* LEACH, No. 273, *ante*.

1689. Expulsion stayed—Pending inquiry.]—Where solrs. had entered into partnership upon the terms that either party might dissolve the partnership in the event of inattention to business or other misconduct on the part of the other partner, & one of them having availed himself of such provision, & excluded the other from the office on a bill filed by the excluded partner:—*Held:* an issue was properly directed to try the fact of inattention to business, & that in the meantime the continuing partner ought to be restrained by injunction from excluding his co-partner from the business.—MINGAYE *v.* WILKINS (1848), 11 L. T. O. S. 41, L. C.

SUB-SECT. 8.—OTHER CASES.

1690. Animus between parties.]—PEARCE *v.* LINDSAY (1860), 3 De G. J. & Sm. 139; 46 E. R. 591, L. C. & L. JJ.

1691. Determinable on specified event.]—By arts. of partnership, it was stipulated that, in the event of such severe illness as should oblige deft. to quit India for more than one year, the books should be made up to the end of the partnership year, & a valuation should be made of the stock. Deft. became an incurable lunatic on his way to India. He arrived there in 1841, & was sent back:—*Held:* this art. contemplated a dissolution; according to the fair meaning of the art., the event had happened, & his partners were entitled to a dissolution as from the end of the partnership year 1842, & not, as contended by defts., from the decree.—BAGSHAW *v.* PARKER (1847), 10 Beav. 532; 50 E. R. 686.

SECT. 2.—BY THE COURT.

SUB-SECT. 1.—COURTS HAVING JURISDICTION.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 56 (1) (*b*); Chancery of Lancaster Act, 1890 (c. 23), s. 3; County Courts Act, 1888 (c. 43), s. 67 (7); Lunacy Acts, 1890 (c. 5), s. 119, 1891 (c. 65), s. 27 (1), 1922 (c. 60), s. 2 (8).

SUB-SECT. 2.—ACTION FOR DISSOLUTION.

A. In General.

1692. In what cases action will lie—Partnership at will.]—Bill by a partner under a parol agreement charging misconduct in the other partner, & praying a dissolution, account & injunction from executing securities in the name of the firm: demurrer to the prayer for a dissolution, because there was no writing between them, overruled.—MASTER *v.* KIRTON (1796), 3 Ves. 74; 30 E. R. 901, L. C.

1693. —— Action for dissolution by executors of deceased partner—Agreement for executors to continue business in event of death of partner—Rights of surviving partner.]—DOWNS *v.* COLLINS, No. 962, *ante*.

1694. Necessity for naming all parties.]—A bill cannot be filed by partners on behalf of themselves & all other partners who are not defts., against the remaining partners, for a dissolution. The names of those who wish the dissolution must be set forth.—WILSON *v.* CHESTER (1831), 1 L. J. Ch. 126.

1695. Power of court on dissolution—To order inquiry—Partnership terms disputed.]—In an action for dissolution of partnership, pltfs. by their statement of claim alleged that they & deft. had agreed to take a lease of certain premises & to enter into partnership; that draft arts. of partnership were considered & approved by pltfs. & deft. at an interview on a day named, subject to their being finally revised by deft.'s solr.; that the draft arts. had not yet been revised, nor the arts. executed; that, although the draft arts. were only

PART VI. SECT. 1, SUB-SECT. 8.

m. *Agreement between partners for one to purchase assets of partnership.*]—L. & T. who were partners, entered into an agreement, that each should tender for the partnership assets & that the highest tenderer should become the purchaser & take possession upon payment. T. who was the highest tenderer refused to complete:—*Held:* the partnership was dissolved.—LOVERIDGE *v.* TAYLOR (1896), 17 N. S. W. L. R. 50; 12 N. S. W. W. N. 170.—**AUS.**

n. *Assignment of interest in business.*]—A partnership for a definite term, which has not expired, can be put an end to by the voluntary assignment by one of the partners of his interest in the business, at his own instance or at the instance of his assignee, against the will of the other partner.—WESTBROOK *v.* WHEELER, WHEELER *v.* WESTBROOK (1894), 25 O. R. 559.—**CAN.**

o. *Change in membership of firm.*]—BANK OF TORONTO *v.* NIXON (1879), 4 A. R. 346.—**CAN.**

p. ——.]—Any change in the membership of a partnership dissolves such partnership.—STANDARD BANK *v.* WENTZEL & LOMBARD, [1904] T. S. 828.—**S. AF.**

q. *Agreement for dissolution only by deed.*]—When it was provided by a partnership deed, that the dissolution should only be by deed:—*Held:* this provision was complied with by a general submission to arbn. of all matters in difference between the partners, & an award (both under seal) that all the partnership effects should be vested in A. as a trustee, to wind up the concern.—HUTCHINSON *v.* WHITFIELD (1830), Hayes, 78.—**IR.**

PART VI. SECT. 2, SUB-SECT. 2.—A.

r. *Dissolution as from service of writ.*]—Service of a writ asking for a decree of dissolution of a partnership at will is a sufficient notice of dissolution & the partnership is dissolved from the date of such service.—MCCOMB *v.* MCCAIG, [1920] 1 W. W. R. 508.—**CAN.**

t. ——.]—PHILLIPS *v.* MELVILLE, [1921] N. Z. L. R. 571.—**N.Z.**

a. *Necessity to determine all questions.*]—When a partnership is wound up by the ct., all questions arising between the partners out of the partnership transactions should be disposed of in the winding-up suit.—LALBHAI VALLABHBHAI *v.* KAVASJI NANABHAI (1871), 8 Bom. O. C. 209.—**IND.**

b. *Power of court on dissolution—To allow partner to buy out others.*]—In a suit for dissolution of partnership, the ct. refused to incorporate in the order a provision allowing one of the partners to buy out the shares of the others at a valuation.—STONE *v.* M'LAUGHLIN (1914), 14 S. R. N. S. W. 146.—**AUS.**

c. *Costs—Out of assets—Assets insufficient.*]—The costs of a partnership suit are paid out of the assets. Where

Sect. 2.—By the court: Sub-sect. 2, A. & B

settled subject to revision, the terms of the arrangement between pltfs. & deft. as therein provided were definitely agreed upon at the interview; that deft. had not intimated any objection to the terms of the arts.; that it was soon afterwards agreed that certain sums should be brought in by pltfs. & deft.; that they had proceeded with the partnership undertaking, & the deft. had taken an active part in it, but that he had not contributed his share, & notice had been given him to withdraw from the undertaking. Deft., in his statement of defence, admitted that he had agreed to enter into partnership as alleged, & added, "Deft. denies that the terms of the arrangement between himself & pltfs. were definitely agreed upon as alleged":—*Held:* there should be a decree for dissolution, with an inquiry, if desired by deft., as to the terms of the arrangement for partnership.—THORP *v.* HOLDSWORTH (1876), 3 Ch. D. 637; 45 L. J. Ch. 406; 3 Char. Pr. Cas. 87.

Annotations:—**Mentd.** Byrd *v.* Nunn (1877), 37 L. T. 585; Tildesley *v.* Harper (1878), 10 Ch. D. 393.

1696. Form of action—Alternate claims—For dissolution or rescission.]—BAGOT *v.* EASTON, No. 1280, *ante*.

1697. Date of dissolution—Date of commencement of action.]—A partnership at will held dissolved as from the date of the filing of a bill which prayed for its dissolution.—SHEPHERD *v.* (1864), 33 Beav. 577; 55 E. R. 492.

1698. —— ——.]—UNSWORTH *v.* JORDAN, [1896] W. N. 2.

1699. Costs—By whom or from what funds payable.]—When a dissolution of partnership is caused by an act of God, the costs after the hearing will be paid out of the partnership property. The costs up to the hearing will be paid out of the partnership property or by each party according to circumstances.—ROWLANDS *v.* EVANS, WILLIAMS *v.* ROWLANDS (1866), 14 W. R. 882.

B. Reference to Arbitration.

See, generally, ARBITRATION, Vol. II., pp. 332 *et seq.*

1700. Power of arbitrator—To award dissolution—Construction of arbitration clause.]—If two partners refer all matters in difference between them, the arbitrator may dissolve the partnership.—GREEN *v.* WARING (1764), 1 Wm. Bl. 475; 96 E. R. 275.

1701. —— —— ——.]—In a bill for the dissolution of a partnership at will carried on upon the terms of an indenture after the expiration of the period fixed by the indenture pltf. alleged that disputes had arisen between himself & deft., his partner, & prayed for a dissolution of the partnership, the realisation of the assets, & the appointment of a receiver. Deft. put in a plea stating that one of the clauses of the indenture provided that in case any difference should at any time during the partnership, or after the expiration thereof, arise between the partners, the same should be referred to arbn., & neither of the partners should proceed against the other at law or in equity until the reference, & that the award should be made a rule of the Ct. of Q. B. The plea was overruled on the grounds that the clause did not contemplate the entire dissolution of the partnership, which could not be considered as a matter in dispute; & that much of what was prayed by the bill was *dehors* the arbn. clause.—WOOD *v.* ROBSON (1867), 15 W. R. 756.

Annotation:—**Refd.** Donnchy *v.* Jolly (1874), 22 W. R. 449.

1702. —— —— ——.]—The arts. of partnership entered into between pltf. & deft. provided that, if, during the continuance of the partnership, or at any time afterwards, any difference should arise between the partners in regard to the construction of any of the arts., or to any division, act, or thing made or done in pursuance thereof, or to any other matter or thing relating to the partnership or the affairs thereof, such difference should be referred to arbn. During the continuance of the partnership pltf. commenced an action against deft. for dissolution of the partnership on the ground that deft. had misappropriated partnership moneys & otherwise acted in breach of the partnership arts. Deft. thereupon applied for & obtained an order under Arbitration Act, 1889 (c. 49), s. 4, that the action should be stayed & the matters in difference referred to arbn.:—*Held:* (1) the arbn. clause in the arts. on its true construction was sufficient to cover a question of dissolution; &, on a reference under that clause, the arbitrators could, if they thought fit, award a dissolution; (2) the judge of the ct. below had nevertheless a discretion to grant or to refuse the application for an order to stay the action; & the Ct. of Appeal would not ordinarily interfere with the exercise of such discretion.—WALMSLEY *v.* WHITE (1892), 67 L. T. 433; 40 W. R. 675; 36 Sol. Jo. 646, C. A.

Annotations:—*As to* (1) **Apld.** Belfield *v.* Bourne, [1894] 1 Ch. 521. **Folld.** Vawdrey *v.* Simpson, [1896] 1 Ch. 166. *As to* (2) **Folld.** Vawdrey *v.* Simpson, [1896] 1 Ch. 166. **Mentd.** Bristol Corpn. *v.* Aird, [1913] A. C. 241.

1703. —— —— ——.]—The arbn. clause in partnership arts. provided for the reference to arbn. of any difference between the partners as to the construction of any of the arts., "or as to any division, act or thing to be made or done in pursuance thereof, or to any other matter or thing relating to the partnership or the affairs thereof," but made no express provision for the reference to arbn. of any question as to the return of the premium paid as the consideration for the partnership. In a dissolution action by one of the partners against the other, pltf. claimed (*inter alia*) a return of the premium he had paid to deft.; & deft. moved to stay all proceedings in the action & to refer the matters in dispute to arbn.:—*Held:* the arbitrators would have power, under a reference, to award a dissolution of the partnership, & therefore the proper terms of such dis-

the assets are insufficient for the payment of costs then the deficiency must be borne by the partners in proportion to their share of the profits.—CURRAN *v.* CAREY (1887), 4 Man. L. R. 450.—**CAN.**

d. ——.]—In a suit for dissolution of partnership a deft. who is indebted to the partnership cannot have his costs of suit paid out of the partnership assets unless he first makes good to the assets the sum which is found due from him.—REED *v.* SIMPSON (1909), 29 N. Z. L. R. 798.—**N.Z.**

e. —— *Dissolution due to misconduct of one partner.*]—Where an action for dissolution of partnership has been rendered necessary by the negligence or misconduct of one of the partners, that partner will be ordered to pay the costs up to trial so far as they have been occasioned by his misconduct.—GAY *v.* PERRY (1905), 25 N. Z. L. R. 285.—**N.Z.**

Misconduct in winding up.]—Where, on the dissolution of a partnership between pltf. & deft., it was agreed that deft. should wind up the concern, & pltf. having demanded a statement of account, deft. rendered an untrue & imperfect one, whereupon pltf. brought this action for a winding up, claiming that deft. was indebted to him on account of partnership assets received, which deft. denied, & pltf. succeeded:—*Held:* deft. must pay the costs of the suit.—CARMICHAEL *v.* SHARP (1882), 1 O. R. 381.—**CAN.**

PART VI. SECT. 2, SUB-SECT. 2.—B.

g. *Matter outside arbitration clause in partnership—Bar to arbitration.*]—It appearing that after the dissolution of the partnership deft. persisted in

solution, including if necessary the return of the premium; & consequently the proceedings in the action ought to be stayed.—BELFIELD *v.* BOURNE, [1894] 1 Ch. 521; 63 L. J. Ch. 104; 69 L. T. 786; 42 W. R. 189; 38 Sol. Jo. 81; 8 R. 61.

1704. —— —— ——.]—A. & B. in Aug. 1894, agreed by their arts. of partnership to refer all disputes arising during or in the winding-up of the partnership to two arbitrators or their umpire. The business, a small pottery business, turned out a failure, &, disputes having arisen, A. in Jan. 1895, brought an action to wind up the partnership. On motion by deft. B.:—*Held:* the partners having agreed that a dispute such as the present should be referred to arbn., the ct. would not interfere; therefore there must be an order staying further proceedings in the action, & referring the matter to arbn.—DENTON *v.* LEGGE (1895), 72 L. T. 626; 11 T. L. R. 267; 13 R. 388.

1705. —— —— **Partnership articles alleged to be wholly violated.**]—The arbn. clauses commonly inserted in partnership arts. apply only to questions arising upon the construction of the arts. & to matters of internal dispute thereunder, & not to a case where it is charged that the partnership arts. have been wholly broken through, & where a dissolution is sought on that ground.

Arts. of partnership contained a clause providing for the reference to arbn. of all disputes & questions respecting the construction of the arts., the accounts & transactions of the partnership, & all matters relating to the partnership. A bill was filed by one of the partners against his co-partners, charging misconduct amounting to fraud, & praying for a dissolution of the partnership, an injunction & a receiver. On a motion to stay the proceedings in a suit, under the provisions of the arts. & C. L. P. Act, 1854 (c. 125), s. 11:—*Held:* assuming the charges in the bill to be true, the matter in dispute was not within the provisions of the arbn. clause, & the motion must be refused, with costs.

Semble: the *onus* of proof that an arbitrator could not give effectual relief, lies on the person proceeding otherwise than by arbn.—COOK *v.* CATCHPOLE (1864), 34 L. J. Ch. 60; 11 L. T. 264; 10 Jur. N. S. 1068; 13 W. R. 42.

1706. —— —— **Charges of fraud against partner.**]—COOK *v.* CATCHPOLE, No. 1705, *ante*.

1707. —— —— ——.]—The indorsement of a writ in an action between partners claimed to have the partnership accounts taken, & an injunction to restrain deft. from dealing with certain shares in a limited co., & other assets of the partnership. Pltf. delivered a statement of claim which alleged various breaches of the partnership arts. & misconduct on the part of deft., & claimed a dissolution, the return of a premium paid by pltf. to deft., a receiver, & damages, in addition to the relief claimed by the writ. The partnership arts. contained an arbn. clause. Deft. moved to strike out the statement of claim as irregular:—*Held:* the statement of claim was not an alteration, modification, or extension of the claim made by the indorsement of the writ, & was not within R. S. C., 1883, Ord. 20, r. 4, & must be struck out as irregular.—CAVE *v.* CREW (1893), 62 L. J. Ch. 530; 68 L. T. 254; 41 W. R. 359; 3 R. 401.

Annotation:—**Mentd.** A.-G. *v.* West Ham Corpn. (1910), 74 J. P. 196.

1708. —— ——.]—Where arts. of partnership contain a clause referring all matters in difference between the partners to arbn., the arbitrators have no power to decide whether or not the partnership shall be dissolved, & the ct. cannot give them that power, the question whether or not the partnership ought to be dissolved being one for the consideration of the ct.

Pltf. commenced an action against deft., claiming to have an account taken of the dealings between them under their arts. of partnership, & to have the affairs of the partnership wound up. Deft. then moved that all further proceedings in the action might be stayed, & that in pursuance of the partnership arts. the doubts, differences, or disputes between pltf. & deft. touching the arts. of partnership or the construction thereof, or any clause or thing therein contained, or any account, valuation, or division of assets, debts, or liabilities, to be made as therein mentioned, or any other thing in any wise relating thereto, or concerning the partnership business or the affairs thereof or the rights, duties, or liabilities of either pltf. or deft. in connection therewith, might be referred, as prescribed by such arts., to two arbitrators or their umpire:—*Held:* the motion must stand until the trial of the action.—JOPLIN *v.* POSTLETHWAITE (1889), 61 L. T. 629, C. A.

Annotations:—**Folld.** Turnell *v.* Sanderson (1891), 60 L. J. Ch. 703. **Expld.** Walmsley *v.* White (1892), 67 L. T. 433. **Expld. & Distd.** Wood *v.* Lillies (1892), 61 L. J. Ch. 158. **Apld.** Vawdrey *v.* Simpson, [1896] 1 Ch. 166. **Mentd.** Bristol Corpn. *v.* Aird, [1913] A. C. 241.

1709. —— ——.]—Under arts. of partnership it was provided that the partnership was to continue for twenty-one years, & that if any difference arose between the parties in regard to the construction of any of the arts., or to any division, act, or thing to be done in pursuance thereof, or to any other matter or thing relating to the partnership, or the affairs thereof, such difference should be referred to arbn. One of the partners brought an action before the expiration of the term of twenty-one years for the dissolution of the partnership, on the ground that it could not be carried on at a profit. The other partner denied that the business could not be carried on at a profit, & moved that, pursuant to Arbitration Act, 1889 (c. 49), s. 4, the proceedings should be stayed, on the ground that the matters in difference should be referred to arbn. under the arbn. clause:—*Held:* the question whether the partnership should be dissolved or not was not a question which could be referred to arbn. under the arbn. clause.—TURNELL *v.* SANDERSON (1891), 60 L. J. Ch. 703; 64 L. T. 654.

1710. —— —— **Subject to discretion of court—Exercise of discretion not subject to review.**]—WALMSLEY *v.* WHITE, No. 1702, *ante*.

1711. —— —— ——.]—Where arts. of partnership contain a clause referring all matters in difference between the partners to arbn., an arbitrator has power to decide whether or not the partnership shall be dissolved, & to award a dissolution, though the judge has full discretion to determine, on a motion to stay proceedings under Arbitration Act, 1889 (c. 49), s. 4, whether the matters in dispute shall be tried out in the action or referred to arbn.—VAWDREY *v.* SIMPSON, [1896] 1 Ch. 166; 44 W. R. 123; 40 Sol. Jo. 98; *sub nom.* VAUDREY *v.* SIMPSON, 65 L. J. Ch. 369.

Annotation:—**Folld.** Machin *v.* Bennett, [1900] W. N. 146.

1712. —— ——.]—MACHIN *v.* BENNETT, [1900] W. N. 146.

1713. —— **To determine validity of notice of dissolution.**]—In 1868 C. was admitted by purchase into partnership with A. & B., a firm of solrs., for

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carrying on the business, a motion to refer to arbn. was refused, such conduct of defts. not coming within the section of the partnership deed which provided that all disputes relating to the partnership business arising between the partners should be referred to arbn.—DENNEHY *v.* JOLLY (1874), 22 W. R. 448.—IR.

Sect. 2.—*By the court: Sub-sect.* 2, *B.; sub-sect.* 3, *A., B., C.* (*a*) *&* (*b*) *i. & ii., & D.*]

a term of fifteen years. It was provided by the arts. that if at any time any dispute or difference of opinion should arise between the partners relative to any clause, matter, or thing therein contained, or to the conduct of any of the partners, or upon any other point whatever, the same should be referred to arbn. On June 17, 1873, A. & B. served C. with notice, alleging that he had committed divers breaches of the arts., & in particular had neglected to keep proper accounts & to make proper entries of business, & declaring the partnership dissolved & determined from the date of serving the notice, under a power contained in the arts. C. refused to admit the validity of this notice of dissolution, & told his partners that he should submit the question of the validity of the notice to arbn. On July 1, A. & B. filed their bill for a partnership account on the footing of a dissolution from the time of serving the notice, & on the same day C. served them with notice requiring them to refer to arbn. all questions that had arisen relative to the notice of dissolution. On motion by C.:—*Held:* he was entitled to an order staying proceedings, in the suit, pursuant to C. L. P. Act, 1854 (c. 125), in order that the questions as to the validity of the notice of dissolution might be determined by arbn.—PLEWS *v.* BAKER (1873), L. R. 16 Eq. 564; 43 L. J. Ch. 212.

Annotations:—**Distd.** Joplin *v.* Postlethwaite (1889), 61 L. T. 629. **Refd.** Law *v.* Garrett (1878), 8 Ch. D. 26; Miniffe *v.* Ry. Passengers Assce. (1881), 44 L. T. 552; Compagnie Du Senegal *v.* Woods (1883), 53 L. J. Ch. 166.

1714. Obligation to direct dissolution.]—If an arbitrator be appointed to arbitrate a certain measure contemplated between two parties, as a dissolution of partnership, he is not necessarily bound to direct that the partnership shall be dissolved.—SIMMONDS *v.* SWAINE (1809), 1 Taunt. 549; 127 E. R. 947.

Annotation:—**Mentd.** Wrightson *v.* Bywater (1838), 6 Dowl. 359.

Return of premium.]—*See* No. 1703, *ante*, No.

SUB-SECT. 3.—GROUNDS FOR DISSOLUTION.

A. Lunacy.

See LUNATICS, Vol. XXXIII., pp. 206 *et seq.*

Costs of action on ground of lunacy.]—*See* LUNATICS, Vol. XXXIII., p. 244, No. 1647.

B. Incapacity.

See Partnership Act, 1890 (c. 39), s. 35 (*b*).

1715. Incapacity of partner to perform duties.]—SADLER *v.* LEE, No. 443, *ante*.

1716. —— Partial recovery before hearing—Stay of proceedings—With liberty to apply.]—A. having been rendered incapable of performing his partnership duties, his partner filed a bill against him for a dissolution. Afterwards & before the hearing, A.'s health improved:—*Held:* there was not sufficient ground for dissolving the partnership, & all proceedings were stayed, with liberty to apply.—WHITWELL *v.* ARTHUR (1865), 35 Beav. 140; 55 E. R. 848.

C. Conduct Prejudicial to Partnership.

(*a*) *In General.*

See Partnership Act, 1890 (c. 39), s. 35 (*d*).

1717. Conduct of partners rendering continuance of partnership impossible.]—WATERS *v.* TAYLOR, No. 1599, *ante*.

1718. ——.]—WATTS *v.* SPOTTISWOODE (1843), 1 L. T. O. S. 336.

1719. ——.]—A partnership for ten years dissolved by decree of the ct. at the end of three years, the relations between the partners being such that it could not be continued with advantage to either party.—LEARY *v.* SHOUT (1864), 33 Beav. 582; 55 E. R. 494.

1720. —— Violent & lasting dissension.]—DE BERENGER *v.* HAMMEL (1829), cited in Bythewood & Jarman's Conveyancing Precedents, Vol. VII., 3rd ed., p. 83.

Annotation:—**Folld.** Baxter *v.* West (1860), 1 Drew. & Sm. 173.

1721. —— Mutual confidence destroyed.]—This ct. will dissolve a partnership before the expiration of the term, where the circumstances have so changed, & the conduct of the parties is such, as to render it impossible to carry it on without injury to all the partners.

The ct. dissolved a partnership entered into for a term of years, when, without any breach of the partnership arts., circumstances had so altered that it could not be carried on upon the footing originally contemplated, & the confidence mutually reposed having ceased, & given place to mistrust, so that it was apparent that the partnership could not go on without mutual injury.

No party is entitled to act improperly & then to say that the conduct of the partners & their feelings towards each other are such that the partnership cannot continue (ROMILLY, M.R.).—HARRISON *v.* TENNANT (1856), 21 Beav. 482; 52 E. R. 945.

Annotation:—**Distd.** Leary *v.* Shout (1864), 33 Beav. 582.

1722. —— ——.]—BAXTER *v.* WEST, No. 224, *ante*.

1723. —— Ill feeling between partners.]—Partnership dissolved, on the ground that the ill feeling between the partners rendered it impossible that the business could be successfully or beneficially conducted.—WATNEY *v.* WELLS (1861), 30 Beav. 56; 54 E. R. 810.

1724. —— ——.]—Pltf. & deft. entered into partnership as solrs. for a term of seven years, pltf. paying a premium of £800. Deft., before entering into the partnership, knew that the pltf. was inexperienced & incompetent in his profession, & assigned that reason for requiring the amount of premium which was paid. After the expiration of two years deft. complained that pltf.'s incompetence was injurious to the business, & called on him to dissolve the partnership; & pltf. thereupon filed a bill praying for a dissolution, & for a return of a proportionate part of the premium:—*Held:* pltf. was entitled to the return

PART VI. SECT. 2, SUB-SECT. 3.—B.

h. *Some partners alien enemies.*]—The fact that some members of a partnership are alien enemies is sufficient to dissolve the partnership.—*Re* LIEBERMANN, BELLSTEDT & Co., [1916] C. P.D. 5.—**S. AF.**

k. *Incapacity from illness.*]—A partner's incapacity for reason of illness substantially to perform his duties under the agreement of partnership is a ground for dissolution.—PELUNSKY *v.* PASTOLL, [1920] W. L. D. 32.—**S. AF.**

PART VI. SECT. 2, SUB-SECT. 3.—C. (a).

1717 i. *Conduct of partners rendering continuance of partnership impossible.*]—The ct. will order dissolution of partnership on the ground of such mutual incompatibility of temper of the partners as to imperil, if not make impossible, the successful carrying on of the partnership business.—KNIGHT *v.* BELL (1887), 13 V. L. R. 878.—**AUS.**

1721 i. —— *Mutual confidence destroyed.*]—SCHURINK *v.* SCHURINK (1895), 2 O. R. 46.—**S. AF.**

l. —— *Gross negligence.*]—CURTIS *v.* CURTIS & BEART, [1909] T. H. 141.—**S. AF.**

of a part of the premium proportionate to the unexpired portion of the term.

In every partnership, & especially in one requiring so much of mutual confidence as a partnership between two solrs., such a state of feeling may arise & exist between the partners as to render it impossible that the partnership can continue with advantage to either (LORD CAIRNS, C.)—ATWOOD *v.* MAUDE (1868), 3 Ch. App. 369; *sub nom.* ATTWOOD *v.* MAUDE, 16 W. R. 665, L. C. & L. J.

Annotations :—**Consd.** Wilson *v.* Johnstone (1873), L. R. 16 Eq. 606. **Apld.** Rooke *v.* Nisbet (1881), 50 L. J. Ch. 588; Belfield *v.* Bourne, [1894] 1 Ch. 521. **Mentd.** Whincup *v.* Hughes (1871), L. R. 6 C. P. 78.

(*b*) *Misconduct of One Partner.*

i. *In relation to Third Parties.*

Misconduct as ground for dissolution.]—*See* Partnership Act, 1890 (c. 39), s. 35 (*c*).

1725. What misconduct will be good ground for dissolution—By member of firm of solicitors—Fraudulent dealings with trust funds.]—A partnership between two solrs. for their joint lives may be dissolved *instanter*, if one of the parties fraudulently sells out trust funds & applies the produce to his own use.—ESSELL *v.* HAYWARD (1860), 30 Beav. 158; 29 L. J. Ch. 806; 2 L. T. 500; 24 J. P. 819; 6 Jur. N. S. 690; 8 W. R. 593; E. R. 849.

·]—*See, further*, SOLICITORS.

1726. —— By member of commercial firm—Immoral conduct—Immorality effecting essence of partnership.]—Immoral conduct on the part of a partner in a firm of bankers is not a sufficient ground for a dissolution as to that partner, although the arts. of partnership contained a clause for dissolution in case any of the partners should do any act to the discredit or injury of the co. partnership. *Semble :* it would have been otherwise if the immorality of one partner had affected the essence of the partnership.—SNOW *v.* MILFORD (1868), 18 L. T. 142; 16 W. R. 554.

—— —— **Travelling without a ticket with intent to defraud.**]—*See* No. 1684, *ante*.

1727. —— By member of firm of dentists—Issue of puffing advertisement as director of a company.]—One of the parties to a partnership deed between dentists was, as a director of the American Dental Institute, Ltd., a party to self-puffing advertisements of the co. in which it was alleged (*inter alia*) that among other advantages the instruments of the co. were always sterilised before use, & that a trained lady nurse was always present at operations so as to prevent any possibility of scandal between an operator & a lady patient :—*Held :* the partner had been guilty of professional misconduct within the meaning of the partnership deed which entitled the other partner to determine the partnership.—CLIFFORD *v.* TIMMS, [1908] A. C. 12; 77 L. J. Ch. 91; 98 L. T. 64; 24 T. L. R. 112; 52 Sol. Jo. 92, H. L.

Annotation :—**Mentd.** Bird *v.* Koop (1918), 118 L. T. 633.

ii. *In relation to Co-Partner.*

See Partnership Act, 1890 (c. 39), s. 35 (*d*).

1728. Trifling misconduct—Unnecessarily large advances of capital.]—GOODMAN *v.* WHITCOMB, No. 1483, *ante*.

1729. —— Improper exchanges of partnership furniture.]—GOODMAN *v.* WHITCOMB, No. 1483, *ante*.

1730. —— Failure to keep books in partnership counting house.]—GOODMAN *v.* WHITCOMB, No. 1483, *ante*.

1731. Violation of articles—Must be substantial.]—MARSHALL *v.* COLMAN, No. 1582, *ante*.

1732. —— ——.]—LOSCOMBE *v.* RUSSELL, No. 1298, *ante*.

1733. —— ——.]—The ct. will not decree a dissolution of partnership, unless it be shown that deft. has substantially failed in the performance of his part of the partnership agreement; it is not the office of a ct. of equity to enter into the consideration of mere partnership squabbles.—WRAY *v.* HUTCHINSON (1834), 2 My. & K. 235; 39 E. R. 934, L. C.

Annotations :—**Mentd.** Milligan *v.* Mitchell (1836), 1 My. & Cr. 433; Ranger *v.* G. W. Ry. (1843), 13 Sim. 368; Bateman *v.* Margerison (1848), 6 Hare, 496.

1734. —— ——.]—This ct. will not dissolve a partnership on the ground of a small infraction of the arts. of co-partnership.

Arts. of partnership provided that if either of the partners should give guarantees without consent, the other might dissolve on giving notice. One of the partners, in the course of eight years, gave a guarantee for £52, & the other gave notice to dissolve :—*Held :* this alone was not, in equity, a sufficient ground for a dissolution.—ANDERSON *v.* ANDERSON (1857), 25 Beav. 190 : 53 E. R. 609.

1735. Partner raising money for own use on firm's credit.]—MARSHALL *v.* COLMAN, No. 1582, *ante*.

1736. Act inconsistent with partnership duty—Rendering impossible continuance of partnership.]—SMITH *v.* JEYES, No. 249, *ante*.

1737. Who may sue for dissolution—Partner guilty of misconduct.]—HARRISON *v.* TENNANT, No. 1721, *ante*.

1738. Costs of action—Up to time of hearing—Liability of defendant.]—If a partner neglects a business which he covenanted to manage for a salary of £200 a year out of the profits, & a suit is instituted for a dissolution of the partnership, a decree will be made, & the ct. will not compel him to pay the costs up to the hearing, but any neglect or breach of covenant by such partner may be considered in taking the accounts.—HAWKINS *v.* PARSONS (1862), 31 L. J. Ch. 479; 8 Jur. N. S. 452; 10 W. R. 377.

Annotation :—**Refd.** Parsons *v.* Hayward (1862), 8 Jur. N. S. 474.

D. Partnership Business carried on at a Loss.

See Partnership Act, 1890 (c. 39), s. 35 (*e*).

1739. Impossibility of continuing at profit—Without further capital—Each partner having contributed his share.]—This ct. has jurisdiction to dissolve a partnership of which the business cannot be carried on at a profit without further capital, each partner having contributed his share of capital; & it is not necessary to show that the concern is embarrassed.—JENNINGS *v.* BADDELEY (1856), 3 K. & J. 78; 3 Jur. N. S. 108; 69 E. R. 1029.

Annotations :—**Consd.** *Re* Suburban Hotel Co. (1867), 2 Ch. App. 737. **Refd.** *Re* Bristol Joint-Stock Bank (1890), 38 W. R. 574.

PART VI. SECT. 2, SUB-SECT. 3.—C. (b) i.

m. *What misconduct will be good ground for dissolution—Adultery of partner with wife of co-partner.*]—ABBOTT *v.* CRUMP (1870), 5 B. L. R. 109.—**IND.**

PART VI. SECT. 2, SUB-SECT. 3.—C. (b) ii.

n. *Continuing to employ dismissed manager.*]—Articles of co-partnership provided that a manager of the business should be appointed by a majority of the co-partners & subject to their control; & a manager was accordingly appointed, who was subsequently dismissed by a majority, but remained, nevertheless, in the management, at the request of another partner :—*Held :* this was such misconduct in such partner as entitled the others to a dissolution.—NEWTON *v.* DORAN (1852), 1 Gr. 590.—**CAN.**

Sect. 2.—*By the court: Sub-sect.* 3, *D., E. & F. Sect.* 3: *Sub-sects.* 1 & 2.]

1740. —— Necessity for proof of embarrassment.]—JENNINGS *v.* BADDELEY, No. 1739, *ante.*

1741. ——.]—If the purposes of a partnership cannot be carried into effect with any reasonable prospect of profit, the ct. can, & does, dissolve the partnership (COTTEN, L.J.).—WILSON *v.* CHURCH (1879), 13 Ch. D. 1; 41 L. T. 50, C. A.; *on appeal, sub nom.* NATIONAL BOLIVIAN NAVIGATION CO. *v.* WILSON (1880), 5 App. Cas. 176, H. L.

Annotations:—**Refd.** Wilson *v.* Church (1911), 106 L. T. 31. **Mentd.** Smith *v.* Anderson (1880), 15 Ch. D. 247; Collingham *v.* Sloper, Foreign American & General Investments Trust Co. *v.* Sloper, Foreign American & General Investments Trust Co. *v.* Sloper, [1893] 2 Ch. 96; Royal Bank of Canada *v.* R., [1913] A. C. 283; Sinclair *v.* Brougham, [1914] A. C. 398.

1742. —— Loss attributable to special circumstances.]—(1) By Partnership Act, 1890 (c. 39), s. 35 (*e*), the ct. may decree a dissolution of partnership when the business can only be carried on at a loss:—*Held:* this means that there must be a practical impossibility of profit, & if there are special circumstances to which the loss can be attributed, the ct. cannot infer impossibility of profit. Under Partnership Act, 1890 (c. 39), s. 40 (*b*), which provides for the return of the premium, paid by a partner on entering the partnership, if the partnership is dissolved before the expiration of the term, unless the partnership has been dissolved by an agreement containing no provision for the return of the premium, the agreement may be contained in the arts. of partnership themselves.—HANDYSIDE *v.* CAMPBELL (1901), 17 T. L. R. 623.

E. Failure of Object.

1743. Impossibility of continuance according to intent & meaning of articles.]—The ct. will dissolve a partnership where it appears that the business cannot be carried on according to the true intent & meaning of the arts. of co-partnership, although one partner objects to the dissolution.—BARING *v.* DIX (1786), 1 Cox, Eq. Cas. 213; 29 E. R. 1134.

Annotations:—**Apld.** Jennings *v.* Baddeley (1856), 3 K. & J. 78. **Apprvd.** *Re* Suburban Hotel Co. (1867), 2 Ch. App. 737. **Apld.** *Re* German Date Coffee Co. (1882), 20 Ch. D. 169. **Consd.** *Re* Bristol Joint Stock Bank (1890), 44 Ch. D. 703.

1744. ——.]—In 1914, a co. was incorporated to amalgamate & carry on two businesses formerly carried on independently by W. & R. respectively. The co. was registered as a private co., W. & R. being the sole shareholders & each of them was appointed a director for life. Although W. held the larger number of shares, yet each held an equal number of shares of the class which alone entitled the holder to a vote. The arts. provided that there should be no casting vote; that one director should form a quorum; & that if any dispute should arise consequent whereon inability to pass a directors' resolution would result, the matter should be referred to arbn. The arbitrators or their umpire were to communicate the award to the secretary to be entered in the minute book, & it was to be equivalent to a resolution duly passed by the board of directors. There was, however, no provision in the arts. that in the general management of the co. all disputes between the directors should go to arbn. In June, 1915, a difference arose between the two directors, which was referred to arbn. resulting in an award to which R. declined to give effect. R. commenced & had not discontinued an action against W., charging him with fraud in relation to the formation of the co. As neither W. nor R. would speak to the other of them, a third party had to intervene for the purpose of transacting the business of the co., which nevertheless made a considerable profit.

A petition was presented by W. to wind up the co. on the ground that a complete deadlock having arisen in the management of its affairs, & it was no longer possible to carry out the essential purposes of the co., its whole substructure was gone, & it was "just & equitable that the co. should be wound up" within Companies (Consolidation) Act, 1908 (c. 69), s. 129:—*Held:* in the case of a partnership such a state of things as was disclosed in the present case would clearly afford ground for a dissolution of partnership; & circumstances, which would justify the dissolution of a partnership, were circumstances that should induce the ct. to exercise its jurisdiction & order the winding-up of what was in substance a partnership in the guise of a private co.; the business of the co. having been brought to a complete deadlock, it was "just & equitable that the co. should be wound up."—*Re* YENIDJE TOBACCO CO., LTD., [1916] 2 Ch. 426; 86 L. J. Ch. 1; 115 L. T. 530; 32 T. L. R. 709; 60 Sol. Jo. 707; [1916] H. B. R. 140, C. A.

Annotation:—**Refd.** Loch *v.* Blackwood, [1924] A. C. 783.

F. Where Dissolution Just and Equitable.

See Partnership Act, 1890 (c. 39), s. 35 (*f*).

1745. "Partnership squabbles."] — WRAY *v.* HUTCHINSON, No. 1733, *ante.*

1746. Business brought to state of deadlock.]—*Re* YENIDJE TOBACCO CO., LTD., No. 1744, *ante.*

SECT. 3.—RETURN OF PREMIUM.

SUB-SECT. 1.—IN GENERAL.

See Partnership Act, 1890 (c. 39), s. 40.

1747. Jurisdiction of court to order.]—AIREY *v.* BORHAM, No. 933, *ante.*

1748. ——.]—Where a partnership is determined prematurely, if the incoming partner has paid a premium he is in all cases entitled to have a proportionate part of the premium returned, except, (*a*) where there has been actual or implied release or waiver of the right to it; or, (*b*), where there has been actual or implied release of the right to be a partner, including such a deliberate & serious breach of the partnership contract as may be considered equivalent to a repudiation of it altogether. Mere conduct entitling the other partner to a dissolution is not sufficient, inasmuch as this ct. does not fine for immorality or even dishonesty in the abstract.—WILSON *v.* JOHNSTONE (1873), L. R. 16 Eq. 606; 42 L. J. Ch. 668; 29 L. T. 93.

Annotation:—**Consd.** Brewer *v.* Yorke (1882), 46 L. T. 289.

PART VI. SECT. 2, SUB-SECT. 3.—D.

1741 i. *Impossibility of continuing at profit.*]—Judgment pronounced directing the dissolution of a partnership, where there had been heavy losses, & it was impossible to believe that a continuance of the business would result in anything but disaster.—KENNEDY *v.* ERIKSON (Man.) (1910), 13 W. L. R. 602.—**CAN.**

o. —— *Contract to give partner management for life—No bar.*]—COWASJEE NANABHOY *v.* LALBHOY VULLUBHOY (1876), I. L. R. 1 Bom. 468; 26 W. R. 78; L. R. 3 Ind. App. 200.—**IND.**

PART VI. SECT. 2, SUB-SECT. 3.—F.

p. *Unfair dissolution not forced on partner.*]—Cts. are greatly disinclined to interfere in partnership matters, unless a dissolution is prayed, but this rule should not be extended to force pltf. to submit to an unfair dissolution, as a means of obtaining any redress.—LE ROY *v.* HERRENSCHMIDT (1876), 2 V. L. R. 189.—**AUS.**

1749. ——.]—(1) Where pltf., who entered into a partnership for a long term of years & paid a premium, of which in certain events, that did not happen, he was to have a proportion returned to him, obtained judgment for a dissolution & an order for accounts & inquiries, & after the accounts had been prosecuted, asked, by summons, for a direction that he was entitled to be credited with a sum as for return of premium :—*Held :* though it had the power to make an addition to the judgment, yet as pltf. knew all the facts at the time when it was pronounced, had present to his mind the question whether he was or not entitled to any such return, & came to the conclusion that he was not, this was not a case in which the relief asked for should be granted, & dismissed the summons with costs. (2) In partnership cases relief is given by directing a return of premium as for partial failure of the consideration, but such relief ought not to be granted without the leave of the ct. after decree made declaring the partnership dissolved, & directing the usual accounts to be taken ; & leave ought not to be given unless the circumstances are such as would have authorised the ct. to give leave to bring a supplemental action.—EDMONDS *v.* ROBINSON (1885), 29 Ch. D. 170 ; 52 L. T. 339 ; 33 W. R. 471 ; *sub nom.* EDMUNDS *v.* ROBINSON, 54 L. J. Ch. 586.

1750. Principle on which relief founded.]—FREELAND *v.* STANSFELD, No. 1463, *ante*.

1751. ——.]—Y. & Z., solrs., entered into a partnership, which commenced in Jan. 1853, for the term of fourteen years. By the arts. it was agreed that Z. should pay a premium of £600, & that he should receive a moiety of the annual profits, & it was guaranteed that he should receive not less than £300 a year during the first three years. It was also agreed that Y. should not be bound to take as active a part in the business as his partner, & that if either Y. or Z. should neglect or refuse to attend to the business, either should be at liberty to dissolve the partnership by notice. In Sept. 1859, Z. wrote to Y. giving him notice of dissolution, in consequence of his continued absence from the office, & neglect & breach of the arts. of partnership. Y. instituted a suit against Z. for an account, which was not resisted by deft., but he claimed a return of a part of the premium, which pltf. resisted :—*Held :* as there had been a failure of the consideration on which the premium was paid, deft. was entitled to receive back part of the premium on the dissolution of the partnership ; but, in estimating the amount, the circumstances of deft. receiving £300 a year for the first three years of the partnership, & having been introduced to a connection, where to be considered ; & deft. was awarded £100.—BULLOCK *v.* CROCKETT (1862), 3 Giff. 507 ; 5 L. T. 822 ; 8 Jur. N. S. 502 ; 66 E. R. 509.

Annotation :—**Refd.** Mackenna *v.* Parkes (1866), 15 L. T. 500.

1752. ——.]—EDMONDS *v.* ROBINSON, No. 1749,

——.]—A. & B. were partners in a firm carrying on business as auctioneers & surveyors. A., without the knowledge or authority of his partner, entered into an agreement with pltf.'s, a father & son, by which the son was to become an articled pupil to the firm, & an indenture of apprenticeship was drawn up by the terms of which, in consideration of the payment of a premium, the son was to become the pupil of B. The indenture was never signed by A. or B., & B. was ignorant of its existence. The premium was duly paid by pltfs. to A., & by him handed over to B. in bank notes to be paid into the firm's banking account without any statement as to whence it came. B. took the money thinking that it was money due to the firm in connection with some partnership transaction. Subsequently the partnership was dissolved & the business wound up. In an action by pltfs. against B. for a return of the premium upon the ground that there had been a total failure of the consideration for which it was paid :—*Held :* the pltfs. were entitled to recover the money.—COVELL *v.* SCAMELL (1910), 103 L. T. 535, D. C.

SUB-SECT. 2.—IN WHAT CASES ORDERED.

See Partnership Act, 1890 (c. 39), s. 40.

1754. Dissolution due to bankruptcy—Of partner paying premium — On petition of payee.] — A., being an attorney, prevails upon B. to enter into partnership with him for the term of five years, for which he is to pay £1,050 but before fourteen months are expired A. sues out a commission of bkpt. against B. which puts an end to the partnership :—*Held :* a fraud on the part of A. & he was decreed to repay part of the premium which had already been advanced, & to deliver up a bond given by B. for securing the remainder.—HAMIL *v.* STOKES (1817), Dan. 20 ; 4 Price, 161 ; Wils. Ex. 39 ; 146 E. R. 426, Ex. Ch.

Annotation :—**Apld.** Freeland *v.* Stansfeld (1854), 2 Sm. & G. 479.

1755. —— Bankruptcy of recipient partner—Right of trustee to remaining instalments of premium.]—A sole trader having agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of eighteen years, & having become bkpt. five months after the commencement of the partnership, when only one instalment was due, his assignees are entitled, at the respective periods, to receive the remaining instalments.—AKHURST *v.* JACKSON (1818), 1 Swan. 85 ; 1 Wils. Ch. 47 ; 36 E. R. 308.

Annotations :—**Apld.** Atwood *v.* Maude (1868), 3 Ch. App. 369. **Refd.** Bury *v.* Allen (1845), 1 Coll. 589 ; Burdon *v.* Barkus (1862), 4 De G. F. & J. 42.

1756. —— —— Bankrupt insolvent at time of articles.] — FREELAND *v.* STANSFELD, No. 1463, *ante*.

1757. Dissolution due to misconduct.] — BURY *v.* ALLEN, No. 1775, *post*.

1758. ——.]—(1) Where there is no provision in partnership arts. for a return of a part of the premium, & the parties dissolve by mutual consent & unconditionally, on bill filed subsequently, the ct. will not order a return of any portion.

(2) Misconduct, in the absence of an agreement to dissolve, is a ground for adverse dissolution & a return of the premium.

(3) Where there is an unconditional dissolution by agreement it is not competent to either party to enter into the question of previous conduct.—LEE *v.* PAGE (1861), 30 L. J. Ch. 857 ; 7 Jur. N. S. 768 ; 9 W. R. 754.

Annotations :—*As to* (1) **Distd.** Wilson *v.* Johnstone (1873), L. R. 16 Eq. 606. **Consd.** Belfield *v.* Bourne, [1894] 1 Ch. 521. **Refd.** Atwood *v.* Maude (1868), 3 Ch. App. 369. *As to* (3) **Consd.** Belfield *v.* Bourne, [1894] 1 Ch. 521.

1759. ——.]—When a partnership is dissolved before its natural expiration in consequence of the misconduct of a partner who has paid a premium, he is not entitled to a return of any part of the premium ; &, in such a case, if the premium agreed upon has not been actually paid before the dissolution, the partner who has agreed to pay it will be ordered to pay the whole of it, notwithstanding

Sect. 3.—*Return of premium: Sub-sects.* 2 & 3, *A. B. Sect.* 4.]

the dissolution.—BLUCK *v.* CAPSTICK (1879), 12 Ch. D. 863; 48 L. J. Ch. 766; 41 L. T. 215; 28 W. R. 75.

Annotation:—**Refd.** Brewer *v.* Yorke (1882), 46 L. T. 289.

1760. —— Both partners equally guilty.]—Deft. agreed to pay £1,000 for a share in a partnership for fourteen years. The partners disagreed, & the partnership was dissolved by the ct., with the assent of both the partners. There being faults on both sides, the ct. directed a due proportion of the premium to be returned.—ASTLE *v.* WRIGHT (1856), 23 Beav. 77; 25 L. J. Ch. 864; 28 L. T. O. S. 134; 2 Jur. N. S. 849; 4 W. R. 764; 53 E. R. 30.

Annotations:—**Distd.** Lee *v.* Page (1861), 30 L. J. Ch. 857. **Apld.** Mackenna *v.* Parkes (1866), 15 L. T. 500; Atwood *v.* Maude (1868), 3 Ch. App. 369. **Refd.** Belfield *v.* Bourne, [1894] 1 Ch. 521.

—— **Misconduct amounting to waiver of right to partnership.**]—WILSON *v.* JOHNSTONE, No. 1748, *ante.*

1762. —— Unsubstantiated allegations made in action for dissolution.]—(1) Mere incompetence in a partner, however great, is not a bar to the return of any part of the premium paid by him, unless such incompetence has caused damage or injury, when it may be taken into account in determining how much of the premium shall be returned.

(2) Mere delay by one partner in furnishing further capital according to arts. of partnership is not a ground for rescinding the partnership contract, or, in case of dissolution, for depriving the partner of the right to a return of the premium paid by him on entering into partnership.

Where one partner, who has paid a premium on entering into partnership, commenced an action for dissolution, & the other partner immediately afterwards commenced a cross-action for dissolution, & the first partner then filed affidavits in his action containing imputations of misconduct against the other partner, which he did not sustain, & one decree for dissolution was made in both actions, which were practically one litigation:—*Held:* the making of the imputations was not such misconduct as to disentitle the party making them to a return of his premium.—BREWER *v.* YORKE (1882), 46 L. T. 289, C. A.

1763. —— Delay in furnishing capital—In accordance with articles.]—BREWER *v.* YORKE, No. 1762, *ante.*

1764. —— Neglect of business—Impossibility of continuing business.]—By arts. of partnership pltf. & deft. agreed to enter into partnership for a certain term from a certain date, unless the same should be previously determined under the provisions thereinafter contained. Pltf. was to pay to deft. a premium of £300. Either party might retire from the firm at the end of any year of the partnership term upon giving to the other partner previous notice, & in such case the other partner was to be at liberty to purchase the share of the retiring partner upon giving to him notice at any time before the determination of the partnership by reason of the first-mentioned notice. If either party should commit a wilful breach of the arts., or act contrary to the good faith which ought to be observed between partners, or should become incapable to take his part in the management of the business, the other partner might expel him by one calendar month's notice in writing, & the partner giving such notice might also buy the share of the expelled partner. There was no provision for returning the premium. Deft. gave notice to pltf. to dissolve the partnership, alleging that pltf. neglected the business to such an extent that dissolution was necessary. Pltf. brought an action claiming a return of the premium paid by him:—*Held:* as pltf. had behaved in such a way that the partnership business could no longer be carried on, he could not claim a return of the premium.—YATES *v.* COUSINS (1889), 60 L. T. 535.

1765. Dissolution by agreement containing no provisions for return.]—LEE *v.* PAGE, No. 1758, *ante.*

1766. —— Contained in partnership articles.]—HANDYSIDE *v.* CAMPBELL, No. 1742, *ante.*

1767. Dissolution by death—Provision in articles for return of premium.]—Where it was provided by the arts. of partnership that, if the profits of the partnership within twelve months should not amount to £1,000, the return of the premium of £500 brought in by the partner who survived should be made to him, the other partner having died within that time; on bill filed by the surviving partner against the administrator of deceased partner, such return of premium was decreed to be paid out of the amount received under the before-mentioned policies of insurance, this being in priority to the other debts of the intestate.—ANDREWES *v.* JONES (1865), 12 L. T. 229.

1768. —— Partner mortally diseased at date of partnership—Fact concealed from co-partner.]—P., a medical practitioner, took M., another medical practitioner, into partnership, in consideration of a premium, P. agreeing to give his personal attention to the business for three years, & to introduce M. to his patients. At the date of the contract, P. was, as he well knew, suffering from a mortal disease, which fact was concealed from M. He died a few months afterwards, & a very limited introduction took place. Upon bill by M., praying the usual partnership accounts, & seeking relief in respect of bills given for the unpaid premium, the ct. restrained deft. from suing on the bills, & directed the usual partnership accounts, with a declaration that pltf. was entitled to be remitted a reasonable portion of the premium.—MACKENNA *v.* PARKES (1866), 36 L. J. Ch. 366; 15 L. T. 500; 15 W. R. 217.

1769. ——.]—A solr. who had received a premium on taking an articled clerk died during the term of the arts.:—*Held:* his estate was not liable for the return of any part of the premium.—FERNS *v.* CARR (1885), 28 Ch. D. 409; 54 L. J. Ch. 478; 52 L. T. 348; 49 J. P. 503; 33 W. R. 363; 1 T. L. R. 220.

Annotation:—**Distd.** Covell *v.* Scamell (1910), 103 L. T. 535.

1770. Dissolution on account of incompetence of partner—Premium taken with knowledge of incompetence.]—ATWOOD *v.* MAUDE, No. 1724, *ante.*

1771. —— Incompetence causing damage.]—BREWER *v.* YORKE, No. 1762, *ante.*

1772. Dissolution by notice in accordance with articles—Retiring partner setting up similar business in adjoining premises.]—Upon the dissolution of a partnership under notice as provided in the partnership arts., if there has been neither misconduct nor breach of the arts. on the part of the partner so giving notice, the price originally paid by the continuing partner for his share in the goodwill will not be returned to him, although the goodwill may have become valueless, & the business have suffered by the retiring partner setting up a similar business in his own name, & on the adjoining premises.—BOND *v.* MILBOURN (1871), 20 W. R. 197.

Annotations:—**Consd.** Rooke *v.* Nisbet (1881), 50 L. J. Ch. 588. **Apld.** Yates *v.* Cousins (1889), 60 L. T. 535.

1773. ——.]—ROOKE *v.* NISBET, No. 1780, *post.*

1774. Where right to return waived.]—WILSON *v.* JOHNSTONE, No. 1748, *ante.*

SUB-SECT. 3.—AMOUNT RETURNABLE.

A. In General.

See Partnership Act, 1890 (c. 39), s. 40.

1775. Part proportionate to unexpired period of partnership.]—A. agrees to take B. into partnership with him for fourteen years, in consideration of a premium of £2,500, one half of which is to be paid at the signing of the arts., & the other half at the time of the execution of a deed of partnership to be founded on the arts. The arts. are signed, the first instalment of the premium is paid, & the parties enter into partnership. After the lapse of a few months, A., under considerable provocation from B., excludes B. from the partnership. The connection is not renewed, the deed is not executed, nor is the second instalment paid; but there is a formal dissolution of the partnership on a certain day. A. afterwards becomes bkpt.:—*Held:* in the accounts to be taken between A.'s assignees & B., the latter is to be credited with the whole amount of premium, but to be debited with the unpaid instalment, & with an additional portion of premium, calculated with reference to the actual duration of the partnership; also, B. is entitled, without prejudice to any question, to enter a claim for the whole premium under the bkpcy.

One of two partners may have a demand against the other for compensation in the nature of unliquidated damages, & enforceable in equity only.

As to the case *Ex p. Broome* (1811), 1 Rose, 69, also cited at the bar, I suppose that there a proof in competition with the joint creditors, if any, or to their prejudice directly or indirectly, must have been considered inadmissible; but I am not satisfied that it was LORD ELDON'S meaning, that, if there was to be any proof at all for the purpose of a dividend, the proof could be otherwise than upon an equal footing as to dividends with the proofs of the general body of separate creditors, supposing the rights of the joint creditors out of the question (KNIGHT BRUCE, V.-C.).

Suppose the case of an act of fraud, or culpable negligence, or wilful default, by a partner during the partnership, to the damage of its property or interests, in breach of his duty to the partnership: whether at law compellable, or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect (KNIGHT BRUCE, V.-C.).—BURY *v.* ALLEN (1845), 1 Coll. 589; 63 E. R. 556.

Annotations:—**Apld.** Mackenna *v.* Parkes (1866), 15 L. T. 500; Atwood *v.* Maude (1868), 3 Ch. App. 369. **Refd.** Burdon *v.* Barkus (1862), 4 De G. F. & J. 42.

1776. ——.]—FREELAND *v.* STANSFELD, No. 1463, *ante*.

1777. ——.]—ATWOOD *v.* MAUDE, No. 1724, *ante*.

1778. ——.]—Pltf. & deft. became partners for ten years, pltf. paying the deft. a premium of £1,000. A quarrel occurred at the end of eight years, in which both parties were held to be in the wrong, & a dissolution took place:—*Held:* pltf. was entitled to a return of £200 of the premium.—PEASE *v.* HEWITT (1862), 31 Beav. 22; 7 L. T. 11; 8 Jur. N. S. 1166; 10 W. R. 535; 54 E. R. 1045.

1779. ——.]—WILSON *v.* JOHNSTONE, No. 1748, *ante*.

1780. ——.]—Pltf. & deft. entered into partnership as solrs. for a term of twelve years, "the partnership to be determinable at the option of either partner" by giving three months' notice; & pltf. to have the option of increasing his share in the profits of the business upon payment to deft. of £600. Pltf. paid the premium of £600. Afterwards deft. dissolved the partnership by giving a notice as provided by the arts.:—*Held:* pltf. was entitled to the return of a proportionate part of the premium.—ROOKE *v.* NISBET (1881), 50 L. J. Ch. 588; *sub nom.* DAW *v.* ROOKE, ROOKE *v.* NISBET, 29 W. R. 842.

1781. Consideration affecting decision—Benefits received by plaintiff.]—On considering the matter very fully, it is quite clear that the amount of premium is not clearly calculated upon the full extent of all the terms of the partnership. There is also a considerable advantage, which pltf. has obtained. He has obtained a footing in a large & prosperous & populous town, & has probably made himself known to a considerable extent. He has also probably made himself known very much among the customers of deft. It is impossible for me to come to a satisfactory conclusion upon that subject, & I have adopted a sort of broad mode of solving the question, & I am of opinion that one half of the premium out to be paid to pltf., & no more (ROMILLY, M.R.).—JAUNCEY *v.* KNOWLES (1859), 29 L. J. Ch. 95; 1 L. T. 116; 8 W. R. 69, L. C.

1782. —— ——.]—BULLOCK *v.* CROCKETT, No. 1751, *ante*.

1783. —— ——.]—BREWER *v.* YORKE, No. 1762, *ante*.

1784. Return of whole premium—Dissolution of partnership on receipt of premium.]—FEATHERSTONHAUGH *v.* TURNER, No. 1872, *post*.

B. By What Tribunal assessed.

1785. Arbitrators.]—If A. & B. in consideration of a sum of money paid by one to the other enter into partnership & covenant in case of a dissolution of the partnership to submit all matters relating thereto to arbn., the arbitrators are not thereby authorised to determine whether any part of the sum of money which was the consideration of the partnership should be refunded:—*Semble:* no action can be maintained for refusing to nominate an arbitrator in pursuance of a covenant to refer matters to arbn.—TATTERSALL *v.* GROOTE (1800), 2 Bos. & P. 131; 126 E. R. 1197.

Annotations:—**Expld. & Distd.** Belfield *v.* Bourne, [1894] 1 Ch. 521. **Refd.** Freeland *v.* Stansfeld (1854), 2 Sm. & G. 479. **Mentd.** Livingston *v.* Ralli (1855), 5 E. & B. 132; Scott *v.* Avery (1856), 2 Jur. N. S. 815.

1786. ——.]—BELFIELD *v.* BOURNE, No. 1703, *ante*.

Compare Sect. 2, sub-sect. 2, B., *ante*.

1787. High Court—Whether subject to review by Court of Appeal.]—The terms of dissolution in such a case as to return of premium & other matters are within the discretion of the judge, & his conclusions will not be interfered with by the Ct. of Appeal except on very sufficient grounds.—LYON *v.* TWEDDELL (1881), 17 Ch. D. 529; 50 L. J. Ch. 571; 44 L. T. 785; 45 J. P. 680; 29 W. R. 689, C. A.

Annotation:—**Consd.** Belfield *v.* Bourne, [1894] 1 Ch. 521.

SECT. 4.—NOTICE OF DISSOLUTION.

1788. Necessity for notice.]—When partners dissolve their partnership it is incumbent on them to publish the dissolution in the *Gazette*, or they will be all liable to an action at suit of creditor who did not know of the dissolution, & delivered goods to one thinking he was dealing with all.—GORHAM *v.* THOMPSON (1791), Peake, 60; 170 E. R. 78, N. P.

Sect. 4.—*Notice of dissolution. Sects.* 5 & 6: *Sub-sect.* 1, *A. & B.*]

1789. ——.]—When partners dissolve their partnership, they should send notice to all persons who have trusted them as partners; a notice in the *Gazette* is not sufficient to discharge them as against those persons who have not seen it.—GRAHAM *v.* HOPE (1792), Peake, 208; 170 E. R. 131, N. P.

1790. ——.]—A dissolution of partnership took place, but was not advertised, nor notice given to the customers. The retiring partner's name continued in the firm. After the dissolution, pltf., believing deft. was a member of the firm, had transactions with the continuing members. Pltf. sued deft. for his liability as a partner in the firm; the jury found a verdict for deft., & the ct. refused a new trial, or leave to appeal.—KEMP *v.* COVINGTON (1857), 28 L. T. O. S. 289.

1791. What constitutes notice — Notice in Gazette.]—GORHAM *v.* THOMPSON, No. 1788, *ante.*

1792. —— To old customers—Notice in Gazette.]—GRAHAM *v.* HOPE, No. 1789, *ante.*

1793. —— —— ——.]—An advertisement of the dissolution of a partnership in the *London Gazette* is not *per se* notice to parties having had dealings with the firm, resident abroad; but to fix them with a knowledge of the fact, express notice must be given to them.—ETIEVANT *v.* LYON (1829), 8 L. J. O. S. C. P. 3.

1794. —— —— ——.]—*Re* HODGSON, BECKETT *v.* RAMSDALE, No. 593, *ante.*

1795. —— —— **Change in printed cheques—Notice of change in partners of banking firm.**]—A change of partners in a banking-house is sufficiently notified to the customers of the house, by a change in the printed cheques.—BARFOOT *v.* GOODALL (1811), 3 Camp. 147; 170 E. R. 1336, N. P.

1796. —— —— **Circular letter.**] — M'IVER *v.* HUMBLE, No. 564, *ante.*

1797. —— —— ——.]—A written notice of the dissolution of a partnership reciting the dissolution, & signed by the parties in order to its insertion in the *Gazette*, may be read in evidence to prove notice of the dissolution, although it has not been stamped. Proof of the insertion of such notice although but once in a newspaper taken in by the party sought to be affected by the notice & left at his house in the usual course, is evidence to be left to a jury, without strict proof that the paper ever reached the party. But the most usual & prudent course in such cases is to give notice by a circular letter.—JENKINS *v.* BLIZARD (1816), 1 Stark. 418, N. P.

1798. —— —— **Customer's knowledge of partner's intention to dissolve—Onus of proof of abandonment of intention.**]—A. knows that an intention between B. & C. to dissolve their partnership is in the course of execution; if A. afterwards insist upon the continuance of the partnership, it lies upon him to show that the intention has been abandoned.—PATERSON *v.* ZACHARIAH & ARNOLD (1815), 1 Stark. 71, N. P.

1799. —— —— **Notice in newspaper taken by customer.**]—JENKINS *v.* BLIZARD, No. 1797, *ante.*

1800. —— —— ——.]—*Semble:* a partnership firm may protect themselves from liability to pay bills accepted by one in the name of all the firm by notice by public advertisement in newspapers, proved to have been received by the payee & indorsees, that the partnership is dissolved; although the dissolution has not appeared in the *Gazette*; & that even where the partnership is not for a definite & limited period, or might be dissolved at pleasure, but is for a stipulated continuing term, dissoluble only on certain conditions, which have not been performed; so that it is doubtful whether the partnership continued to exist in point of law or not, & there was no special contract among themselves, that the firm was not to be liable for the acts of individual partners.—ROOTH *v.* QUIN & JANNEY (1819), 7 Price, 193; 146 E. R. 944.

Annotation:—**Mentd.** Perham *v.* Raynall (1824), 9 Moore, C. P. 566.

1801. —— —— ——.]—HART *v.* ALEXANDER, No. 587, *ante.*

1802. —— **To person not having previously dealt with firm—Notice in Gazette.**]—A notice in the *Gazette* of the dissolution of a partnership, is sufficient notice to the world, at least as against those who have had no previous dealings with the firm; so that they cannot sue both parties on a security, given by one in the name of both, after notice in the *Gazette*, in the partnership name, of the dissolution.—GODFREY *v.* TURNBULL (1795), 1 Esp. 371; 170 E. R. 388; *sub nom.* GODFREY *v.* MACAULEY, Peake, 209, n., N. P.

See Partnership Act, 1890 (c. 39), s. 36 (2).

1803. Admissibility of copy of advertisement—Necessity for stamping—Advertisement of agreement to dissolve.]—To prove the dissolution of a partnership, the copy of the advertisement inserted in the *Gazette*, by which the parties agreed to dissolve the partnership is not evidence unless it is stamped; for it is offered in evidence as an agreement, & so should have an agreement stamp.—MAY *v.* SMITH (1795), 1 Esp. 282; 170 E. R. 358, N. P.

1804. —— —— **Advertised notice of dissolution.**]—JENKINS *v.* BLIZARD, No. 1797, *ante.*

See, further, REVENUE.

1805. Concurrence of parties in procuring advertisement of notice—Jurisdiction of court to order.]—In a decree for the dissolution of a partnership, deft. was ordered to concur in procuring the insertion of notice of dissolution in the *London Gazette*.—TROUGHTON *v.* HUNTER (1854), 18 Beav. 470; 52 E. R. 185.

Annotation:—**Apld.** Hendry *v.* Turner (1886), 32 Ch. D. 355.

1806. ——.]—The ct. has jurisdiction to compel a retiring partner to sign a notice of dissolution for the *Gazette* in an action in which no other specified relief is claimed.—HENDRY *v.* TURNER (1886), 32 Ch. D. 355; 55 L. J. Ch. 562; 54 L. T. 292; 34 W. R. 513; 2 T. L. R. 591.

1806a. Notice by one partner to another.]—ALCOCK *v.* TAYLOR, No. 263, *ante.*

SECT. 5.—DISSOLUTION AS AFFECTING THIRD PARTIES.

See Part IV., Sect. 3, *ante.*

SECT. 6.—WINDING UP.

SUB-SECT. 1.—CONTINUATION OF PARTNERSHIP.

A. In General.

See Partnership Act, 1890 (c. 39), s. 38.

1807. For purposes of winding up.]—BEAK *v.* BEAK, No. 1351, *ante.*

1808. ——.]—CRAWSHAY *v.* COLLINS, No. 1010, *ante.*

q. *For purposes of unexpired contract.*]—NASH *v.* MUIRHEAD (1909), 26 S. C. 26; 19 C. T. R. 64.—S. AF.

1809. ——.]—CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY, No. 51, *ante*.

1810. ——.]—There are, necessarily, things to be done preparatory to the commencement of a partnership, & matters necessary to be done after its termination, for the purpose of winding it up. These are not to be excluded in the consideration of the partnership dealings & transactions.

Where the partnership business is in one sense at an end, still you have not therefore put an end to the joint transactions. They must necessarily be carried on for the purpose of winding up the concern & everything belonging to it (LORD LANGDALE, M.R.).—CRUIKSHANK *v.* M'VICAR (1844), 8 Beav. 106; 14 L. J. Ch. 41; 4 L. T. O. S. 170; 50 E. R. 42.

1811. For purposes of unexpired contract—Commission note given to partners.]—Deft. in Aug. 1911, gave a commission note to S. & R., who were in partnership as theatrical agents, authorising them to act as her agents & business managers for five years with the option of a further five years, & agreeing to pay a commission of 10 per cent. on all salaried work undertaken by her. S. & R. dissolved partnership in July, 1912:—*Held:* the commission note did not entitle them to claim commission in respect of engagements on salaries obtained by deft. after the dissolution of their partnership.—SALES *v.* CRISPI (1913), 29 T. L. R. 491.

1812. Clause as to purchase of deceased partner's share—Whether operative.]—Where a partnership, the term of which has expired, is continued only for the purpose of winding up the business of the partnership, a clause providing for the purchase by a surviving partner of a deceased partner's share is no longer binding.—MYERS *v.* MYERS (1891), 60 L. J. Ch. 311.

B. Authority of Partner.

1813. Continued for purposes of winding up.]—BUTCHART *v.* DRESSER, No. 677, *ante*.

1814. To receive debts of firm—& give receipt.]—Payment to one of two partners of a partnership debt, after they had appointed a third person to collect the debts, & with notice of such appointment, held good.—PORTER *v.* TAYLOR (1817), 6 M. & S. 156; 105 E. R. 1201; *previous proceedings, sub nom.* BRISTOW & PORTER *v.* TAYLOR, 2 Stark. 50, N. P.

Annotation:—**Apprvd.** Nottidge *v.* Prichard (1834), 2 Cl. & Fin. 379.

1815. —— ——.]—If A. & B. being partners, dissolve their partnership, & in the deed of dissolution it be stipulated that A. shall receive all debts due to the firm, & afterwards C., a debtor of the firm accept a bill of exchange drawn by B., for the amount of the debt due to the firm:—*Held:* this stipulation in the deed of dissolution is no defence to an action by B. against C. on this bill of exhange.

Either partner, after a dissolution of partnership, may receive debts due to the firm, notwithstanding such a stipulation in the deed of dissolution; &, after a dissolution of partnership, either partner may give a release to a debtor of the firm.—KING *v.* SMITH (1829), 4 C. & P. 108, N. P.

1816. Completion of unfinished transaction.]—DICKSON *v.* NATIONAL BANK OF SCOTLAND, No. 1820, *post*.

1817. Authority of partner authorised to wind up—To give receipt.]—If A. & B. are in partnership & C. owes them a sum of money on the partnership account, a receipt for this given by A. upon setting off a private debt due from himself to C. will be a bar to an action by A. & B. against C. for the debt due to the partnership; but if after a dissolution of partnership between A. & B. & a notice in the *Gazette* that all debts due to the partnership shall be paid to B., A. collusively gives C. a receipt for the debt, dated anterior to the dissolution of the partnership, the receipt is void, & an action may still be maintained against C. for the debt, in the names of A. & B.—HENDERSON & SMITH *v.* WILD (1811), 2 Camp. 561; 170 E. R. 1252, N. P.

1818. —— **To give credit in account—No direction to appropriate.**]—Two solrs. in partnership had a bill of costs & disbursements against a client; one of the partners, after the dissolution of the partnership, continued to be the solr. of the client, & received his rents, out of which he retained the amount of the partnership debt; & he stated that he did so on the understanding that the debtor should have credit for the sum so retained, & that he considered that debt to have been satisfied by the moneys retained; but no account had been settled between him & the debtor, nor had he specific directions to appropriate the moneys retained to the payment of the partnership debt:—*Held:* as against the other partner, the debt to the partnership was not to be considered as satisfied.—NOTTIDGE *v.* PRICHARD (1834), 2 Cl. & Fin. 379; 8 Bli. N. S. 493; 6 E. R. 1197, H. L.; *affg.* S. C. *sub nom.* PRITCHARD *v.* DRAPER (1831), 1 Russ. & M. 191, L. C.

Annotations:—**Refd.** Parker *v.* Morrell (1848), 2 Ph. 453; Piercy *v.* Fynney (1871), L. R. 12 Eq. 69.

1819. —— **To mortgage—Deposit of security with bank with power of sale.**]—BUTCHART *v.* DRESSER, No. 677, *ante*.

1820. ——.]—A sum forming part of a trust estate was deposited with a bank on a consignation receipt, bearing that the money was received from the truster's exors., & was to be repayable on the signature of a legal firm, who were the law agents to the trust. The firm was subsequently dissolved; & some years afterwards, B., one of the former partners, indorsed the receipt with the firm name, & uplifted & embezzled the money. In an action against the bank at the instance of the beneficiaries under the trust for payment of the sum deposited:—*Held:* as the uplifting of the deposit was necessary, either "to wind up the affairs of the partnership," or "to complete transactions begun but unfinished at the time of the dissolution" of the firm, within Partnership Act, 1890 (c. 39), s. 38, B. was entitled to adhibit the firm's signature, & the bank was warranted in paying over the money deposited; & action

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PART VI. SECT. 6, SUB-SECT. 1.—B.

1813 i. *Continued for purposes of winding up.*]—HAEE *v.* PEOPLE'S BANK OF HALIFAX (1903), 23 C. L. T. 157; 2 N. B. Eq. Rep. 433.—**CAN.**

1813 ii. ——.]—The power of partners, as such, with regard to partnership obligations remains after dissolution for the purpose of the beneficial winding up of the partnership affairs.—SEALY *v.* STEPHENSON, [1923] 3 D. L. R. 18; 32 B. C. R. 187; [1923] 2 W. W. R. 465.—**CAN.**

1813 iii. ——.]—MADRAS ADMINISTRATOR-GENERAL *v.* MADRAS OFFICIAL ASSIGNEE (1909), I. L. R. 32 Mad. 462.—**IND.**

r. *To purchase property.*]—VINEBERG *v.* ANDERSON (1890), 6 Man. L. R. 335.—**CAN.**

t. *To sell goods.*]—G. & A., who were in partnership, purchased some wheat for their business, but, not being of the required quality, it was not used by them. After dissolution, G. to meet existing demands against the partnership, & to convert the assets into money for the benefit of the partners, *bonâ fide* sold the wheat for value to pltf., who was aware of the dissolution:—*Held:* the sale was valid.—MURPHY *v.* YEOMANS (1878), 29 C. P. 421.—**CAN.**

a. *To assign judgment.*]—*Qu.:* can one member of a partnership after dissolution assign a judgment obtained by the firm.—HOCKIN *v.* WHELLAMS (1890), 6 Man. L. R. 521.—**CAN.**

b. *Authority of partner authorised to*

Sect. 6.—*Winding up: Sub-sect.* 1, *B. & C.; sub-sect.* 2, *A.*]

dismissed as irrelevant.—DICKSON *v.* NATIONAL BANK OF SCOTLAND, [1917] S. C. (H. L.) 50, H. L.

1821. —— ——.] — *Re* CLOUGH, BRADFORD COMMERCIAL BANKING CO. *v.* CURE, No. 679, *ante*.

1822. —— ——.]—*Re* BOURNE, BOURNE *v.* BOURNE, No. 680, *ante*.

1823. —— **To indorse bills of exchange—Power given by retired partner to continuing partner—By parol.**]—A retired partner may give authority by parol to a continuing partner to indorse bills in the partnership name, after the dissolution of the partnership.

Where the retired partner stated that he left the assets & securities of the firm in the hands of the continuing partner, for the purpose of winding up the concern, & that he had no objection to his using the partnership name:—*Held:* the jury were justified in finding that the continuing partner had authority to indorse promissory notes, so left in his hands in the partnership name.—SMITH *v.* WINTER (1838), 4 M. & W. 454; 1 Horn & H. 384; 8 L. J. Ex. 34; 150 E. R. 1507.

Annotations:—**Reld.** Kearsley *v.* Cole (1846), 16 L. J. Ex. 115. **Mentd.** Bateson *v.* Gosling (1871), L. R. 7 C. P. 9; Phillips *v.* Foxall (1872), L. R. 7 Q. B. 666.

—— ——.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 101, 102, Nos. 711–713.

1824. To bind firm by admission of liability.]—BROWN *v.* MACALLUM & WORLEY, No. 295, *ante*.

·.]—*See* EVIDENCE, Vol. XXII., pp. 89, 90, 139, Nos. 589, 590, 1143.

Authority of surviving partner appointed executor—To continue same trade.]—*See* EXECUTORS, Vol. XXIV., pp. 559, 560, No. 5992.

C. Liability of Partner.

1825. Dissolution not a discharge of liability.]—A general dissolution of partnership between A. & B. does not operate to discharge A. from his responsibility for the subsequent conduct of B. in respect of the engagements of the partnership with third persons, made prior to the dissolution. If A. & B., as partners, engage in a speculation with C., A. is answerable to C. in respect of the dealings of B. in the joint speculation.—AULT *v.* GOODRICH (1828), 4 Russ. 430; 38 E. R. 867.

Annotations:—**Apld.** Way *v.* Bassett (1845), 5 Hare, 55; Butchart *v.* Dresser (1853), 10 Hare, 453. **Refd.** Tatam *v.* Williams (1844), 3 Hare, 347.

1826. Undertaking by one partner to pay all debts—Breach of trust before dissolution.]—One of two partners applied trust money in the trade with the privity of the other partner; afterwards they separated, & the partnership effects were assigned over to the first, who took on him the debts:—*Held:* to be no payment in discharge of the other partner, but both were liable to make good the trust money.—SMITH *v.* JAMESON (1794), 5 Term Rep. 601; 101 E. R. 336.

1827. ——.]—Where a firm of solrs., having moneys in their hands belonging to a client, dissolve partnership, & he subsequently demands the money of one partner, who by an arrangement between themselves had undertaken to pay it, that is not such a dealing as to discharge the liability of the other partner, assuming that the client knew of the dissolution & arrangement.—*Re* HINDMARSH (1860), 1 Drew. & Sm. 129; 1 L. T. 475; 8 W. R. 203; 62 E. R. 327.

Annotations:—**Reld.** Watson *v.* Woodman (1875), L. R. 20 Eq. 721; *Re* Friend, Friend *v.* Friend (1897), 66 L. J. Ch. 737; North American Land & Timber Co. *v.* Watkins, [1904] 1 Ch. 242. **Mentd.** Burdick *v.* Garrick (1870), 5 Ch. App. 233; Bean *v.* Wade (1885), 2 T. L. R. 157; Cheese *v.* Keen, [1908] 1 Ch. 245; Henry *v.* Hammond (1913), 108 L. T. 729.

1828. Money recoverable by bankruptcy law.]—Where a debt is due to a partnership, the mere circumstance of one of the partners taking a security in his own name alone from the debtor, does not affect either the rights or the liabilities of the partnership. Accordingly, where a partner, a dissolution of the partnership being in contemplation, took a warrant of attorney in his own name from one of the debtors to the firm, & afterwards received sums on account, the other partner, who survived him, was held liable to the assignees of the debtor for the sums so received, they having been paid under circumstances which gave the assignees a right to recover them under the bkpt. law.—BIGGS *v.* FELLOWS (1828), 8 B. & C. 402; 2 Man. & Ry. K. B. 450; Dan. Ll. 121; 6 L. J. O. S. K. B. 357; 108 E. R. 1092.

1829. Partnership dissolved by death of one partner—Advances secured on land of dead partner—Liability of estate.]—(1) A partnership composed of three persons A., B., & C. gave a joint & several bond to a bank, to cover advances to be made to them by the bank on a cash credit; & in that bond, two estates held by A. were specially named as part securities for these advances. A. died:—*Held:* by his death the partnership was dissolved, & the security, so far as his estates were concerned, was no further continued; no arrangement between the surviving partners, or between them & the bank, for the purpose of settling the general accounts, being capable of affecting that security.

(2) After the death of A. the bank continued as before its dealings with the partnership, then constituted by B. & C., & at a certain period, payments made to the bank entirely balanced the debt due to it at the time of A.'s death:—*Held:* the separate liability of A.'s estates was thereby discharged.—ROYAL BANK OF SCOTLAND *v.* CHRISTIE (1841), 8 Cl. & Fin. 214; 8 E. R. 84, H. L.

Annotation:—*As to* (2) **Refd.** Dooley *v.* Lloyds Bank, [1912] A. C. 756.

1830. —— **Advances secured on bond of partnership—Account continued—Appropriation of payments.**] — ROYAL BANK OF SCOTLAND *v.* CHRISTIE, No. 1829, *ante*.

See, generally, CONTRACT, Vol. XII., pp. 474–493.

Liability to indorsee of bill of exchange.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 101, 102, Nos. 711–713.

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wind up—To state & settle an account.]—An authority to a member of a dissolved partnership, to wind up the concern, close the books, & collect the debts, authorises the party to state, & settle an account.—LUCKIE *v.* FORSYTH (1846), 3 Jo. & Lat. 388.—**IR.**

PART VI. SECT. 6, SUB-SECT. 1.—C.

c. *Contracts of firm still binding.*]—The dissolution of a firm does not affect the duty of each partner to perform a contract which has still to be completed on the firm's part, & the firm continues to exist for the purpose of such contract.—DAVIS *v.* FIRMAN (1902), 28 V. L. R. 53.—**AUS.**

d. *Lease entered into after dissolution.*]—A lease entered into by a partner for his individual benefit after dissolution of the firm but before sale of its assets must not necessarily be held to be for the benefit of the partnership; especially will it not be so held where the dissolution has been effected at the instance of the partner.—MAH KONG DOON *v.* MAH CAP DOON (Alta.), [1918] 1 W. W. R. 610; 39 D. L. R. 234.—**CAN.**

e. *Partnership dissolved by death of one partner—Liability of estate for losses.*]—*Held:* heirs, being also next of kin, who had been parties to the continuing of the business of deceased with his assets & those of his partner, were precluded from objecting to payment by the estate of the losses incurred in continuing the business.—LOVELL *v.* GIBSON (1872), 19 Gr. 280.—**CAN.**

Acknowledgment of debt.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 355, 390, Nos. 385, 710–712.

SUB-SECT. 2.—DISTRIBUTION OF PROFITS MADE AFTER DISSOLUTION.

A. Right of Outgoing Partner or His Estate.

See Partnership Act, 1890 (c. 39), s. 39.

1831. Apart from agreement between partners.]—FEATHERSTONHAUGH *v.* FENWICK, No 917, *ante*.

1832. —— Dissolution by death.] — Profits accrued after the death of one partner are joint property.—HAMMOND *v.* DOUGLAS (1800), 5 Ves. 539; 31 E. R. 726, L. C.

Annotations:—**Apprvd.** Crawshay *v.* Collins (1808), 15 Ves. 218. **Reld.** Lewis *v.* Langdon (1835), 7 Sim. 421; *Re* David & Matthews, [1899] 1 Ch. 378.

1833. —— ——.]—BROWN *v.* DE TASTET, No. 930, *ante*.

1834. —— ——.]—AMBLER *v.* BOLTON, No. 1355, *ante*.

1835. —— ——.]—A partnership business was, after the death of one of the partners, carried on for a further period under the management of pltf., who was one of the surviving partners. At the end of that period an order of the ct. was made which declared that the partnership had, in the opinion of the ct., been dissolved by the death of deceased partner, & directed pltf. to commence an action for the winding up of the partnership business: In the course of this action a question arose as to the rights of the parties in respect of profits earned during the above mentioned period: —*Held:* the legal personal representatives of deceased partner were entitled in respect of any profits earned by the surviving partners, during the period in question, which were attributable to the user of any partnership assets, to a share thereof proportionate to his share in the total assets of the firm at the date of the dissolution of the partnership; & inquiries must be made for the purpose of ascertaining whether any &, if so, what part of those profits, after deducting such sum as should, after inquiry, be certified to be proper to be allowed to pltf. in respect of his personal supervision & management of the business during the period, had been earned during the period by the surviving partners otherwise than by the user of the partnership assets including goodwill.—MANLEY *v.* SARTORI, [1927] 1 Ch. 157.

—— Dissolution by outbreak of war—Some partners alien enemies.]—*See* ALIENS, Vol. II., p. 177, No. 416.

1836. —— Dissolution on bankruptcy.]—CRAWSHAY *v.* COLLINS, No. 1010, *ante*.

1837. —— Profits of office held by outgoing partner.]—COLLIER *v.* CHADWICK (1886), 31 Sol. Jo. 27, C. A.

Annotation:—**Mentd.** Vernon *v.* Hallam (1886), 34 Ch. D. 748.

1838. Agreement between parties—For purchase of share.]—An indenture recited, that A. & B., in May 1813, had entered into a contract with the Comrs. for Victualling the Navy, to supply His Majesty's ships with sea provisions & victualling stores, & that the said A. & B., in Sept. 1813, had mutually agreed to dissolve the co-partnership entered into by them as aforesaid, for carrying on the business of the said contract, & all other contracts, entered into with the comrs. by B. or A., & in which they, or either of them, were in anywise interested or concerned, & all other co-partnerships whatsoever subsisting between them; & upon the treaty for such dissolution, it was agreed that the share of B. in the property belonging to the co-partnership should be estimated at £50,000 & be taken by A. at that sum:—*Held:* by this deed, the contracts in which B. had been originally separately interested, were constituted as between A. & B. partnership contracts, & consequently, A. was entitled by the deed to receive all sums due to B., in respect of those contracts, at the time of the execution of the deed. By the deed, B. for himself, his heirs, exors., & administrators, covenanted that, for & notwithstanding any act done by him (B.), it should be lawful for A. to receive the money, debts, & premises thereby assigned, without any let, suit, interruption, or denial of B., his exors., or administrators, or any person claiming under him or them.—BELCHER *v.* SIKES (1828), 8 B. & C. 185; 6 L. J. O. S. K. B. 314; 108 E. R. 1012.

1839. —— ——.]—VYSE *v.* FOSTER, No. 1161, *ante*.

1840. —— For goodwill to belong to remaining partners—General assets debited to new firm.]—The estate of deceased partner is entitled to participate in the goodwill of a business, which does not belong to the surviving partners, except by express agreement.

By partnership arts., on the death of a partner, the survivors were entitled to the goodwill. A., a partner, died in 1801, having appointed his co-partners exors. They continued the trade, having made out an account, from which it appeared that the assets, consisting nearly wholly of outstanding debts, were £496,000, the liabilities £410,000, & the surplus £85,900, of which A.'s share was £55,000. The survivors carried this to the credit of the deceased partner's account, & they paid the amount with interest to the *cestuis que trust* as they respectively came of age. In 1831 the children claimed to participate in the profits of the subsequent trading, which, in the thirty years, had amounted to £308,000, on the ground that their capital had been employed therein. At the hearing, inquiries were directed with a view to charge them. But, on the master's report, the ct. having come to the conclusion that at the testator's death the surplus was merely nominal, that the business, to wind up, was insolvent, & that the subsequent profits were attributable to goodwill & the personal exertions & capital of the surviving partners:—*Held:* pltfs. were not entitled to participate in the profits, so far as those profits were attributable to the goodwill & connection in trade of the old firm, & their share in that portion of the profits in which they would be entitled to participate could not

PART VI. SECT. 6, SUB-SECT. 2.—A.

1832 i. *Apart from agreement between partners—Dissolution by death.*]—*Held:* where a testator directed his exors. to value his interest in certain partnership assets & to permit such sum to remain in the partnership for five years, this did not preclude the beneficiaries of his estate from claiming all appreciation in the value of such assets during such five years.—*Re* PATERSON (1913), 24 O. W. R. 752; 4 O. W. N. 1435; 11 D. L. R. 825.—**CAN.**

1832 ii. —— ——.]—JAMIESON & TRUSTS & GUARANTEE CO. *v.* JAMIESON (1921), 65 D. L. R. 68; 63 S. C. R. 188; [1922] 2 W. W. R. 194.—**CAN.**

1832 iii. —— ——.]—Where on the death of one partner the surviving partner continued the business:—*Held:* he was liable to give to the representatives of deceased partner a share in the profits of the business which may have accrued subsequent to the death of deceased partner.—MAHOMED KAMEL, ETC. *v.* HAJI HEDAYETULLA (1921), I. L. R. 48 Calc. 906.—**IND.**

1838 i. *Agreement between parties—For purchase of share.*]—CARVELL *v.* AITKEN (P. E. I.) (1912), 10 E. L. R. 432; 2 D. L. R. 709.—**CAN.**

1838 ii. —— ——.]—DE RENZ *v.* DE RENZ, [1924] N. Z. L. R. 1065.—**N.Z.**

Sect. 6.—*Winding up: Sub-sect.* 2, *A., B.* (*a*) *&* (*b*), *C.; sub-sect.* 3, *A. & B.* (*a*).]

be estimated higher than the interest already paid.

There are three classes of cases frequently occurring where the liability exists of accounting for the profits made in the carrying on of a trade, by the use of capital belonging to the estate of a deceased person. The first class I refer to is that of surviving partners, who, after the partnership has been dissolved by the death of one partner, continue the trade with the capital composed wholly or in part of the estate of the deceased partner. The rule applicable to such a case is . . . that the profits are matters arising from capital & that consequently they belong to the persons to whom the capital belongs. . . . The third class of cases . . . is the mixed case where the surviving partners are also the legal personal representatives of the deceased partner. The liability to account in this case, does not necessarily proceed on the ground of misconduct but involves a consideration of the circumstances of each particular case (ROMILLY, M.R.).—WEDDERBURN *v.* WEDDERBURN (1856), 22 Beav. 84; 25 L. J. Ch. 710; 28 L. T. O. S. 4; 2 Jur. N. S. 674; 52 E. R. 1039.

Annotations:—**Refd.** Clements *v.* Hall (1858), 27 L. J. Ch. 350, n.; Clark *v.* Leach (1863), 1 De G. J. & Sm. 409; Vyse *v.* Foster (1872), 8 Ch. App. 315, n.

1841. —— To share remission of dues—Right of assignee.]—Upon the dissolution of a partnership between one G. & resp., a deed was entered into to settle the rights of the parties. It contained a clause to the effect that, should resp. succeed in obtaining from the Govt. a remission, in whole or in part, of an amount due from the firm for "timber dues," secured by a bond, he should account for, & pay to G., one half of the amount so remitted. The Govt., upon the application of resp., subsequently remitted upon the bond an excess of rents paid by the firm:—*Held:* applt., as assignee of G., was entitled under the agreement to have the benefit of this remission.—BURSTALL *v.* BAPTIST (1873), 21 W. R. 485, P. C.

1842. —— Implied covenant to carry on business—Until outgoing parties paid off.]—MITCHELL *v.* FOSTER (1897), 41 Sol. Jo. 226.

B. Assessment of Outgoing Partner's Share.

(*a*) *In General.*

See Partnership Act, 1890 (c. 39), ss. 42–44.

1843. Express agreement.]—Upon a dissolution of partnership between A. & B. it was agreed that, until A. should be provided for, B. should allow him a third of the profits. B. afterwards formed a partnership with C. & carried into it the stock of A. & B.; a commission issued against A. & B.:—*Held:* (1) after the satisfaction of the creditors of B. & C. the joint effects of B. & C. were the separate property of B., & not the joint property of A. & B.

(2) Under that agreement A. was a partner with B. as to a third of his interest but was not a partner with B. & C.—*Re* SLYTH, *Ex p.* BARROW (1815), 2 Rose, 252, L. C.

Annotation:—**Refd.** Lovegrove *v.* Nelson (1834), 3 My. & K. 1.

1844. —— Construction of dissolution deed—Items chargeable to profit & loss.]—GEER *v.* GEER (1900), 44 Sol. Jo. 450.

1845. Apart from express agreement—General rule.]—Where a surviving partner has carried on the partnership business without withdrawing from the concern the capital or share of deceased partner, there is no absolute rule that, in taking the subsequent accounts of the partnership dealings, as between the surviving & the estate of deceased partner, the division of the profits shall be determined by the aliquot shares of the several partners in the business in their joint lifetime, or by the amount of the agreed capital which they were respectively to supply, or by the actual amount of the capital belonging to the surviving & the estate of deceased partner respectively; but the principle of division may be affected by considerations of the source of the profit, the nature of the business, & the other circumstances of the case.

By arts. of partnership A. & B. agreed to become partners for twenty-one years, & to take the profits in the proportion of seven-tenths to A. & three-tenths to B., in case of A.'s death during the term B. was to carry on the business, for the residue of the term, with A.'s exor.'s, who should be entitled to one-third of the profits, & B. to two-thirds; B. paying to the exors. so much money as A.'s share of the capital exceeded one-third, to be ascertained by appraisement. On the death of A. during the term, B., who was his exor., carried on trade with the whole of testator's capital, & without following out the provisions of the arts., accounting, however, to A.'s estate for one-third of the profits, & paying 5 per cent. upon the excess of A.'s capital:—*Held:* B. was liable to account for the profits of the business since A.'s death.

In such a case there is no universal rule as to the proportion of profits to which the estate of deceased partner is entitled; & the ct. will not decide upon such proportion without a previous inquiry as to the nature of the trade, the amount of capital employed, the state of the accounts at the death of the testator, & the conduct of the business afterwards.—WILLETT *v.* BLANFORD (1842), 1 Hare, 253; 11 L. J. Ch. 182; 6 Jur. 274; 66 E. R. 1027.

Annotations:—**Apld.** Simpson *v.* Chapman (1853), 4 De G. M. & G. 154. **Consd.** Wedderburn *v.* Wedderburn (1856), 22 Beav. 84. **Apld.** Yates *v.* Finn (1880), 13 Ch. D. 839. **Refd.** Portlock *v.* Gardner (1842), 1 Hare, 594; Vyse *v.* Foster (1874), L. R. 7 H. L. 318.

1846. —— Aliquot share.]—COOK *v.* COLLINGRIDGE, No. 1286, *ante.*

1847. —— ——.]—CRAWSHAY *v.* COLLINS, No. 1010, *ante.*

1848. —— —— According to division of profits during partnership.]—WATNEY *v.* WELLS, No. 1197, *ante.*

1849. —— —— According to proportion of capital employed.]—YATES *v.* FINN, No. 284, *ante.*

1850. —— —— According to share in assets on dissolution.]—MANLEY *v.* SARTORI, No. 1835, *ante.*

(*b*) *Inquiry by Court.*

See Partnership Act, 1890 (c. 39), ss. 42–44.

1851. What matters considered—Profits made by application of capital at date of dissolution.]—CRAWSHAY *v.* COLLINS, No. 1010, *ante.*

1852. —— ——.] — FEATHERSTONHAUGH *v.* FENWICK, No. 917, *ante.*

1853. —— Profits made by application of other funds.]—CRAWSHAY *v.* COLLINS, No. 1010, *ante.*

1854. —— ——.] — FEATHERSTONHAUGH *v.* FENWICK, No. 917, *ante.*

1855. —— Nature of the trade.]—WILLETT *v.* BLANFORD, No. 1845, *ante.*

1856. —— ——.]—SIMPSON *v.* CHAPMAN, No. 1242, *ante.*

1857. —— Amount of capital employed.]—WILLETT *v.* BLANFORD, No. 1845, *ante.*

1858. —— ——.]—SIMPSON *v.* CHAPMAN, No. 1242. *ante.*

1859. —— **Conduct of parties.**]—WILLETT *v.* BLANFORD, No. 1845, *ante.*

1860. —— ——.]—SIMPSON *v.* CHAPMAN, No. 1242, *ante.*

1861. —— **State of accounts at dissolution.**]—WILLETT *v.* BLANFORD, No. 1845, *ante.*

1862. —— ——.]—SIMPSON *v.* CHAPMAN, No. 1242, *ante.*

1863. —— **Skill & industry of individual partners.**]—SIMPSON *v* CHAPMAN, No. 1242, *ante.*

1864. —— **Whether profits attributable to capital or other sources.**]—SIMPSON *v.* CHAPMAN, No. 1242, *ante.*

1865. —— **Profits earned by surviving partners—Otherwise than by user of partnership assets—Including goodwill.**]—MANLEY *v.* SARTORI, No. 1835, *ante.*

C. Surviving Partner Executor or Trustee for Deceased Partner.

See EXECUTORS, Vol. XXIV., pp. 690, 691, 700, 701, Nos. 7164–7169, 7261.

SUB-SECT. 3.—SALE.

A. In General.

1866. Necessity for sale—Where no terms prescribed by articles.]—FEATHERSTONHAUGH *v.* FENWICK, No. 917, *ante.*

1867. —— **Articles stipulating for division of partnership property.**]—Where arts. stipulate for a division of the partnership property at the end of the partnership a sale is intended.—RIGDEN *v.* PIERCE (1822), 6 Madd. 353; 56 E. R. 1126.

1868. —— **Embarrassed state of partnership business.**]—The affairs of a partnership being embarrassed & daily growing worse, the ct., on motion, appointed a person to sell the business & wind up the affairs of the partnership.—BAILEY *v.* FORD (1843), 13 Sim. 495; 12 L. J. Ch. 482; 1 L. T. O. S. 286; 60 E. R. 192.

Annotations:—**Consd.** *Re* Suburban Hotel Co. (1867), 2 Ch. App. 737. **Apld.** Jennings *v.* Baddeley (1886), 3 K. & J. 78.

1869. Right of each partner to demand sale—No agreement to take on valuation.]—CRAGG *v.* FORD, No. 327, *ante.*

1870. ——.]—BURDON *v.* BARKUS, No. 268, *ante.*

Mining partnerships.]—*See* MINES, Vol. XXXIV., pp. 638, 639, Nos. 363–370.

1871. What property may be sold—Decree for sale several years after dissolution.]—Where a partnership is dissolved, &, after the dissolution, one of the partners, without the consent of the other, continues in possession of the partnership effects, & carries on the same business on the same premises, in the course of which the specific effects that belonged to the partnership are, in whole or in part, consumed, & replaced by others; the effects, which are found on the premises, & with which the business is carried on at the date of a decree, declaring the partnership to have been dissolved before the institution of the suit, are not to be treated as property of the partnership.

The Vice-Chancellor has directed all the property to be sold, which was in the house in Clifford Street at the time when the decree was pronounced, several years after the dissolution of the partnership, as if all the property which at the time of the decree, existed in the house, was, without inquiry, to be considered as partnership property. It [decree] must be varied, by directing the master to take an account of the particulars of the partnership property which were in the house in Clifford Street at the time of the dissolution, & of the value of the property at that time; & to inquire whether any part of that property still remains in the house (LORD LYNDHURST, C.).—NEROT *v.* BURNAND (1827), 4 Russ. 247; 6 L. J. O. S. Ch. 81; 38 E. R. 798, L. C.; *affd. sub nom.* BURNAND *v.* NEROT (1828), 2 Bli. N. S. 215, H. L.

Annotation:—**Refd.** Heath *v.* Sansom (1832), 4 B. & Ad. 172.

See Partnership Act, 1890 (c. 39), s. 39.

1872. Share to be bought by surviving partner or sold to third party—Refusal of survivor to buy or admit third party.]—A surgeon sold one fifth of his business & entered into partnership with the purchaser for such term as they should mutually agree to continue. The arts. provided that, in the event of the death of a partner, the survivor might purchase his share & interest in the business, but if he should decline, it should be sold to any other person. The purchaser died at the end of fifteen months, & the surviving partner declined either to purchase or to admit a purchaser into the business. He was charged with the value of deceased partner's share & interest.

This partnership having been entered into . . . in consideration of £800. . . . I think it was not in the power of [one partner] to dissolve it the next day & keep the £800 in his pocket. This ct. would have interfered, & though he might have put an end to the partnership he would have been compelled to repay the consideration (ROMILLY, M.R.).—FEATHERSTONHAUGH *v.* TURNER (1858), 25 Beav. 382, 28 L. J. Ch. 812; 53 E. R. 683.

Annotations:—**Apld.** Burdon *v.* Barkus (1862), 4 De G. F. & J. 42. **Consd.** Rooke *v.* Nisbet (1881), 50 L. J. Ch. 588.

1873. Particulars of sale—Right of partner to carry on business in own name.]—Upon the decease of one partner, a decree was made for the sale of the business as a going concern, & it was proposed to sell to any purchaser "the right to hold himself out as the successor of the firm of S. J. & Sons":—*Held:* the particulars of sale ought to explain that the surviving partner, W. J., had still a right to carry on the same business in the same town in his own name.—JOHNSON *v.* HELLELEY (1864), 34 Beav. 63; 5 New Rep. 4; 34 L. J. Ch. 32; 11 L. T. 295; 10 Jur. N. S. 1041; 13 W. R. 38; 55 E. R. 556; *affd.*, 3 De G. J. & Sm. 446; 5 New Rep. 211; 34 L. J. Ch. 179; 11 L. T. 581; 13 W. R. 220, L. JJ.

Annotations:—**Consd.** Trego *v.* Hunt, [1896] A. C. 7; Jennings *v.* Jennings, [1898] 1 Ch. 378. **Refd.** Walker *v.* Mottram (1881), 19 Ch. D. 355; Pearson *v.* Pearson (1884), 27 Ch. D. 145; Page *v.* Ratliffe (1896), 74 L. T. 343; *Re* David & Matthews, [1899] 1 Ch. 378; Gillingham *v.* Beddow, [1900] 2 Ch. 242.

Sale by executrix of deceased partner.]—*See* EXECUTORS, Vol. XXIV., pp. 586, 587, No. 6206.

B. Sale by Order of the Court.

(a) When Order Made.

1874. Inquiry whether sale for benefit of parties.]—CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY, No. 51, *ante.*

PART VI. SECT. 6, SUB-SECT. 3.—A.

1870 i. *Right of each partner to demand sale.*]—In the absence of any agreement to the contrary, each partner has a right upon dissolution of the partnership to have the partnership property sold, & where the property is land the ct. will not decree a partition unless the partners agree.—REDWOOD *v.* REDWOOD (1908), 28 N. Z. L. R. 260.—**N.Z.**

1870 ii. ——.]—STEWART *v.* SIMPSON (1835), 14 Sh. (Ct. of Sess.) 72; 11 Fac. Coll. 49.—**SCOT.**

1870 iii. ——.]—ELLERY *v.* IMHOF, [1904] T. H 170.—**S. AF.**

1. What property may be sold—Unexpired lease of partnership property.]—ZWICKER *v.* ROCKWELL (N. S.), [1923] 2 D. L. R. 335.—**CAN.**

Sect. 6.—*Winding up: Sub-sect.* 3, *B.* (*a*) & (*b*); *sub-sects.* 4 & 5.]

1875. ——.]—An order was made directing a reference to the chief clerk whether it would be for the benefit of the estate of deceased partner that the partnership property should be sold by public auction, or whether a valuation which had been made in a former suit should be adopted. A large portion of the capital of deceased partner remained in the business. The estate of deceased partner claimed to be entitled to profits made subsequent to the date of the valuation. The chief clerk refused to go into the question of subsequent profits, & reported in favour of the valuation in preference to a sale:—*Held:* the chief clerk had acted within the scope of his authority, & had come to a reasonable conclusion.—BLYTH *v.* BLYTH (1861), 4 L. T. 536, L. C.

1876. Solvent partner having option to take share of bankrupt partner—Whether fraud on bankruptcy laws—Power of court to order sale.]—WILSON *v.* GREENWOOD (1818), 1 Swan. 471; 1 Wils. Ch. 223; 36 E. R. 469, L. C.

Annotations:—**Expld.** Whitmore *v.* Mason (1861), 2 John. & H. 204. **Apld.** Collins *v.* Barker, [1893] 1 Ch. 578. **Refd.** Francis *v.* Spittle (1840), 9 L. J. Ch. 230; *Re* Fernandes, *Ex p.* Hope (1844), 3 Mont. D. & De. G. 720; Hall *v.* Hall (1850), 3 Mac. & G. 79; Tibbits *v.* Phillips (1853), 10 Hare, 355. **Mentd.** Knight *v.* Browne (1861), 30 L. J. Ch. 649; Mackintosh *v.* Pogose, [1895] 1 Ch. 505; *Re* Johnson Johnson, *Ex p.* Matthews & Wilkinson, [1904] 1 K. B. 134; *Re* Wombwell (1921), 37 T. L. R. 625.

-.]—*See, also,* BANKRUPTCY, Vol. V., pp. 658, 659, Nos. 5865–5868.

1877. Agreement for dissolution & sale—Refusal of one partner to perform agreement.]—TURNER *v.* MAJOR, No. 1638, *ante.*

1878. Provision for division of partnership property—Incapable of literal execution.]—COOK *v.* COLLINGRIDGE, No. 1286, *ante.*

1879. Whether before actual dissolution.]—In a suit to wind up a partnership, the ct. will not, on motion before decree, order a sale of the partnership effects, unless the partnership is actually & clearly dissolved.—BROADWOOD *v.* GODING (1835), 5 L. J. Ch. 96.

1880. Whether before decree for dissolution—Delay entailing great loss—No opposition to order.]—Where there is evidence in a suit for the dissolution of a partnership, that a great loss will ensue if the property, the subject of the partnership, is not realised at once, the ct. will before decree, in the absence of opposition by deft., order a sale.—HEATH *v.* FISHER (1868), 38 L. J. Ch. 14; 19 L. T. 805; 17 W. R. 69.

1881. Discretion of court—Holder of larger share submitting proposals for purchase.]—SYERS *v.* SYERS, No. 46, *ante.*

1882. Form of order—Request for inquiry as to best means of selling assets—Sale with judge's approbation.]—In an action for the dissolution of a partnership an order by consent was asked for, including, amongst other inquiries, an inquiry "in what manner & upon what terms & conditions the partnership assets might be sold most beneficially for all parties interested therein":—*Held:* the proper order was one for sale of the assets with the judge's approbation.—CLASS *v.* MARSHALL (1885), 33 W. R. 409.

Annotation:—**Folld.** Page *v.* Slade (1885), 54 L. J. Ch. 1131.

1883. —— —— ——.]—In an action for dissolution of parnership judgment by consent was asked for, & included an inquiry in what manner the partnership assets might be most beneficially sold:—*Held:* the inquiry should be omitted, & there should be substituted a direction for sale with the judge's approbation.—PAGE *v.* SLADE (1885), 54 L. J. Ch. 1131; 52 L. T. 961; 33 W. R. 701.

(*b*) *Conduct of Sale.*

1884. To whom given—Plaintiff in dissolution suit—Though agreement to contrary.]—Pltf. in a cause held entitled to the conduct of the sale of partnership property, although, according to the contract, if performed without suit, he might not have been entitled to interfere in the sale.—DALE *v.* HAMILTON (1853), 10 Hare, App. I, vii.; 68 E. R. 1116.

1885. Given to independent party—Plaintiff advertising sale—Injunction.]—When a sale has been directed by the ct., & the conduct of it given to one party, no other party has a right to interfere in any way in the sale without the leave of the ct. Thus, where the ct. directed a sale & gave the conduct of it to an independent solr., both pltf. & deft. having liberty to bid, pltf. was restrained by injunction from issuing & circulating advertisements that the sale was about to take place.—DEAN *v.* WILSON (1878), 10 Ch. D. 136; 48 L. J. Ch. 148; 27 W. R. 377.

1886. Who may bid—Solvent partner.]—WILSON *v.* GREENWOOD (1819), 10 Sim. 101, n.; 59 E. R. 551, L. C.

SUB-SECT. 4.—VALUATION.

1887. Valuation by court—Where sale impossible—Emoluments of office.]—SMITH *v.* MULES, No. 904, *ante.*

1888. —— —— **Contract not assignable.**]—AMBLER *v.* BOLTON, No. 1355, *ante.*

1889. —— **Agreement for valuation—No provision for umpire.**]—DINHAM *v.* BRADFORD, No. 1135, *ante.*

1890. Agreement for valuation—Specific performance.]—A. & B., being in partnership as distillers, came to an agreement whereby B. was to buy out A., & it was agreed that if B. should, during A.'s life, be desirous of retiring, he should give notice, & A. should then have an option of repurchase, on the terms that within six months after notice by A. the premises, goodwill, stock-in-trade, & all such of the subsisting contracts as A. should be willing to take, should be valued "in the usual way" by two valuers, one to be named by A. the other by B., or by the umpire of the two valuers. B. gave notice of his intention to retire, whereupon A. gave notice of his intention to repurchase; & two valuers were appointed; but after the appointment B. refused to allow his valuer to proceed with the valuation:—*Held:* there was no contract between the parties which the ct. could specifically enforce.—VICKERS *v.* VICKERS (1867), L. R. 4 Eq. 529; 36 L. J. Ch. 946.

Annotations:—**Mentd.** Richardson *v.* Smith (1870), 5 Ch. App. 649, n.; Smith *v.* Peters (1875), L. R. 20 Eq. 511; Loftus *v.* Roberts (1902), 18 T. L. R. 532.

1891. —— **According to partnership account—Deceased partner's estate not bound by partnership books.**]—Arts. of partnership provided that the share of a deceased partner in the assets of the partnership should be ascertained by reference to the annual account made up on Apr. 30 next after

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PART VI. SECT. 6, SUB-SECT. 3.—B. (b).

g. Re-opening biddings.]—The rules which permit the practice of re-opening biddings upon the sale of properties by order of ct., do not include cases where it clearly appears that no appreciable advantage will result to the parties intended to be benefited by it.—BENNETT *v.* MCKAY (1880), 6 Nfld. L. R. 241.—**NFLD.**

the death :—*Held :* in the absence of evidence of any uniform usage to the contrary, the assets should be taken at their fair value to the firm at the date of the account, & not at their value as appearing in the books of the partnership.—CRUIKSHANK *v.* SUTHERLAND (1922), 92 L. J. Ch. 136 ; 128 L. T. 449, H. L.

1892. What are subjects of valuation—Name of firm.]—BANKS *v.* GIBSON, No. 1618, *ante*.

—— **Goodwill.**]—*See* TRADE & TRADE UNIONS.

SUB-SECT. 5.—APPLICATION OF ASSETS REALISED.

See Partnership Act, 1890 (c. 39), s. 44.

1893. General rule.]—Partners have an interest in a residue, only after adjusting equities & drawing out principal.—BENNETT *v.* GOUDE (1853), 21 L. T. O. S. 237.

1894. ——.]—At the outbreak of war on Aug. 4, 1914, three German subjects were carrying on, in co-partnership with F., their English partner, the business of merchants in London under the style of A. O. M. & Co. Under the partnership arts. F. was the managing partner in London, & on the dissolution by the declaration of war he carried on the business & collected the assets with the view of liquidation. No accounts had been taken between the partners since Dec. 31, 1913. F. died in 1920, & the deft. was his legal personal representative. By an order of the Board of Trade dated Apr. 1, 1924, it was ordered that all the property, rights, & interests of the three German partners in the assets of the firm in respect of any claim against the English partner, or his estate, should vest in pltf., who should take all necessary proceedings to collect what might be due to the German partners. In an action by pltf. as custodian of enemy property with the object of winding up the partnership he claimed an account against deft. of all dealings between the German partners & the English partner, including all dealings with the partnership assets since the dissolution, payment ot what should be found due, & an inquiry of what the partnership property consisted. The German partners were not added as pltfs. in the action :—*Held :* in the absence of the German partners as parties to the action no such relief as was asked could be granted, & the action failed.

I conceive the following to be a correct summary of the legal relations of partners in a dissolved partnership. Where assets are collected & got in, no partner has any definite share or interest therein, his right is merely to have the assets so collected applied in discharging the liabilities of the partnership firm & to receive his share of any surplus there may be when the liquidation has been completed ; & further, there can be no relationship of debtor & creditor between partners unless & until the accounts have been finally taken & a balance has been ascertained to be due from each one to the others. Nor is any partner entitled to an account from his co-partners except upon the footing that, in accordance with the implied obligation arising under the contract of partnership, he will himself account & submit to be charged with any balance found to be due from him (EVE, J.).—PUBLIC TRUSTEE *v.* ELDER, [1926] Ch. 266 ; 95 L. J. Ch. 519 ; 134 L. T. 347 ; *affd.*, [1926] Ch. 776 , C. A.

1895. Fund in court—Right of partners to share of capital & interest—Equal division of remainder.]—WATNEY *v.* WELLS, No. 1197, *ante*.

1896. Profits added as accretions to capital—Method of distribution.]—Where in keeping their accounts partners had treated their respective shares of the declared or estimated profits of each year as accretions to their respective capitals :—*Held :* (1) the profits of the year ending with the dissolution of the firm could not be so treated ; (2) the surplus assets should be distributed by paying to each partner his claims in respect of capital standing to his credit at the dissolution. The residue or deficiency will be profits or losses, in either case divisible in the agreed proportions. The ratable application of the surplus assets in payment of capital claims must be subject to the liability to contribution to make up a deficiency, & to the claim of any of the partners against the entire assets to answer it.—BINNEY *v.* MUTRIE (1886), 12 App. Cas. 160 ; 36 W. R. 129, P. C.

Annotations :—As to (2) **Refd.** Sheppard *v.* Scinde, Punjaub & Delhi Ry. (1887), 56 L. J. Ch. 866 ; *Re* Bridgewater Navigation Co. (1888), 39 Ch. D. 1.

1897. Replacement of excess of drawings by one partner.]—ROSS *v.* WHITE, No. 1413, *ante*.

1898. Priorities—Repayment of capital with preferential rights.]—Pltf. & deft. had been partners under arts. providing that the business should be carried on " for the mutual & common benefit of the partners, & risk of profit & loss in equal shares." Deft.'s capital was to be £1,500 ; pltf.'s, £750. The capital of each partner to carry interest at 5 per cent., to be allowed yearly before making up the accounts. Sums brought in by either partner above those amounts to bear interest at the same rate, payable before any other interest, & to be withdrawable at three months' notice. The partners were to be at liberty to draw certain specified sums on account of their shares of profits. The remainder of each partner's share of profits to be added to his capital, & bear interest at 5 per cent. to be paid before division of net profits. On dissolution, after payment of debts, " the remaining capital, stock, moneys, & credits belonging to the said partnership shall be divided, or received or taken by the said partners according to their respective shares or interests therein." On dissolution, the capital standing to pltf.'s credit was not much increased ; that of deft. greatly so, partly by accumulation of profits, & partly by cash brought in by him. After payment of debts, the assets were insufficient to replace the two capitals in full :—*Held :* the assets, after payment of debts, ought to be applied first in repaying to deft., with interest, the additional capital brought in by him in cash, & the residue ought to be divided between the partners in proportion to their capitals.—

PART VI. SECT 6, SUB-SECT. 5.

1893 i. *General rule.*]—Where partnership moneys are paid to a person who is a creditor both of the firm & of one of the partners individually they must be applied in the first place to the liquidation of the indebtedness of the partnership.—KIRK *v.* INGRAHAM (1915), 48 N. S. R. 493.—**CAN.**

h. *To what expenses applied—Salary of clerk—Guilty of misconduct.*]—NEWTON *v.* DORAN (1852), 3 Gr. 353.—**CAN.**

k. —— *Rent for use of building.*]—CAMPBELL *v.* MUMFORD (1892), 40 N. S. R. 37.—**CAN.**

l. —— *" Stock in trade "—Machinery.*]—CAMPBELL *v.* MUMFORD (1892), 40 N. S. R. 37.—**CAN.**

m. —— *Remuneration of partner—Extra services—Apart from special contract.*]—If the business of winding up a partnership concern is apportioned between the partners & each undertakes to perform the share allotted to him, one of them cannot afterwards claim to be paid salary or other remuneration merely for the reason that his share of the work has been more laborious or difficult than that performed by his co-partner, in the absence of any express agreement to that effect, or one to be implied from the conduct of the parties.—LIGGETT *v.* HAMILTON (1895), 24 S. C. R. 665.—**CAN.**

Services in winding up.]—The firm of J. B. & co. was dissolved by the death of J. B. :—*Held :* W. J. B., one of the sons of deceased, & a partner in the business, was not

Sect. 6.—*Winding up: Sub-sects.* 5, 6 & 7. *Parts VII. & VIII.*]

WOOD *v.* SCOLES (1866), 1 Ch. App. 369; 35 L. J. Ch. 547; 14 L. T. 470; 12 Jur. N. S. 555; 14 W. R. 621, L. JJ.

Annotations:—**Apld.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1; *Re* Aldridge, Aldridge *v.* Aldridge (1894), 70 L. T. 724. **Refd.** Nowell *v.* Nowell (1869), L. R. 7 Eq. 538.

1899. —— Administratrix of deceased partner—& creditors of old partnership.]—Three persons carried on business in partnership without any arts. of partnership. The profits were divided between them in equal shares. After the death of one of them the survivors continued to carry on the business, retaining in it, without any authority, the deceased partner's share of the capital, & dividing the profits of the business between themselves equally. They afterwards filed a liquidation petition. There were still some joint debts of the partnership of the three remaining unpaid:—*Held:* the administratrix of deceased partner could not prove in the liquidation in competition with his creditors in respect of his share of the capital.—*Re* BLYTHE, *Ex p.* BLYTHE (1881), 16 Ch. D. 620; 29 W. R. 900.

1900. —— Partners making special payments in respect of debts.]—CHAPMAN *v.* HAYWARD (1886), 2 T. L. R. 758.

1901. —— Payment of partnership liabilities—Before payment to infant partner.]—LOVELL & CHRISTMAS *v.* BEAUCHAMP, No. 218, *ante.*

1902. Remedy of partner—Asset received by co-partner—Action for account—Application of Statute of Limitations.] — GOPALA CHETTY *v.* VIJAYARAGHAVACHARIAR, No. 1377, *ante.*

1903. Advantages of publicity—No right to continuing share—On ground of payment of expenses from partnership funds.]—MORISON *v.* MOAT, No. 1580, *ante.*

Proof in bankruptcy of late partner.] — *See* BANKRUPTCY, Vol. IV., p. 468, No. 4215.

SUB-SECT. 6.—LIABILITY FOR LOSSES.

See Partnership Act, 1890 (c. 39), s. 44.

1904. Who are liable—Where one partner an infant—Effect of disclaimer.]—In a suit in which a decree for a dissolution & an account of an unsuccessful partnership was made, the chief clerk had certified that one of the partners, an infant, was entitled to a salary under the partnership agreement; but that his share of the partnership capital, which was unpaid, was irrecoverable. Subsequently the infant, who, previously to the date of the certificate, had attained his majority, moved to stay all further proceedings in the cause as against him, on his disaffirming the agreement for the partnership, & disclaiming all interest under it. That motion was refused; but on the cause coming on for further consideration, on a question affecting the proportion which each of the partners was to contribute towards the partnership losses:—*Held:* (1) the share of the infant partner was irrecoverable as an asset of the partnership; (2) the debts & liabilities, with the exception of the infant's salary, must be paid out of the certified assets; (3) the infant disclaiming his salary, it was not to be paid to him.—WRIGHT *v.* TANNER (1869), 20 L. T. 427.

1905. —— Representatives of deceased partner.]—McCLEAN *v.* KENNARD, No. 1162, *ante.*

1906. How liability assessed — According to agreed shares.]—BINNEY *v.* MUTRIE, No. 1896, *ante.*

1907. —— Unequal contributions of capital—Agreement that profits should be divided equally—Partnership Act, 1890 (c. 39), s. 44.]—G., M. & W. went into partnership under a parol agreement that the capital of the business should be contributed by them, in certain unequal shares, but that profits should be divided equally. Upon a dissolution, after satisfying all liabilities to creditors & the advances of two of the partners, the assets were insufficient to make good the capital. A considerably larger sum was due in respect of capital to G. than to M.:—*Held:* having regard to above sect., the true principle of division of assets was for each partner to be treated as liable to contribute an equal third share of the deficiency, & then to apply the assets in paying to each partner ratably what was due to him in respect of capital.—GARNER *v.* MURRAY, [1904] 1 Ch. 57; 73 L. J. Ch. 66; 89 L. T. 665; 52 W. R. 208; 48 Sol. Jo. 51.

SUB-SECT. 7.—GOODWILL.

See TRADE & TRADE UNIONS.

Part VII.—Limited Partnership.

See, generally, Limited Partnerships Act, 1907 (c. 24); Companies (Consolidation Act), 1908 (c. 69), ss. 267–273; Limited Partnerships Rules, 1907; Limited Partnership (Winding Up) Rules, 1909.

1908. Application for winding-up order—By limited partner—General partner acting prejudicially to interests of business.]—Where a limited partnership was being carried on at a loss, & the general partner, who had made several drawings on account of profits, refused, without any sufficient reason, to sign the annual general account under which drawings in excess of profits would be repayable, & otherwise acted in a way calculated prejudicially

entitled to remuneration for his services in winding up the business of the firm.—BUTLER'S TRUSTEES *v.* BUTLER (1896), 29 N. S. R. (17 R. & G.) 145.—**CAN.**

o. —— —— ——.]—LIVINGSTON *v.* LIVINGSTON (1914), 7 O. W. N. 406; 20 D. L. R. 960; 32 O. L. R. 440.—**CAN.**

p. *Agreement as to distribution.*]—TOWN *v.* KELLY (Man.) (1913), 24 W. L. R. 541.—**CAN.**

q. ——.]—GORDON *v.* HOPGOOD (P. E. I.) (1913), 13 E. L. R. 69; *affd.*, 13 E. L. R. 379.—**CAN.**

r. —— *Failure to observe.*]—*Re* FOX, BRUNKER *v.* FOX (1915), 49 I. L. T. 224.—**IR.**

t. *Priorities — Arrears of rent.*]—MANSFIELD *v.* CLARK (1921), 21 S. R. N. S. W. 680; 38 N. S. W. W. N. 180.—**AUS.**

a. —— *Right of partners to return of capital brought in—Fourth partner contributing no capital.*]—HALL *v.* ANTROBUS (N. S.) (1909), 6 E. L. R. 507.—**CAN.**

PART VII.

b. *Winding up—Discretion of court.*]—Petition for the nomination of a liquidator for a limited partnership:—*Held:* the appointment of a liquidator was in the discretion of the ct.—SORIGNET *v.* HENRY, 23 C. L. T. 118.—**CAN.**

c. —— ——.]—*Held:* although it was competent for the ct. to appoint a judicial factor to wind up a limited partnership, the averments of parties showed that questions as to the liability of the limited partner were likely to

to affect the carrying on of the business :—*Held :* the limited partner was entitled to a winding-up order.—*Re* HUGHES & Co., [1911] 1 Ch. 342 ; 80 L. J. Ch. 262 ; 104 L. T. 410.

1909. Winding up — Costs — Set-off.] — Where a limited partner was joined as resp. to a petition to wind up & did not oppose, & his costs were ordered to be paid out of the assets of the limited partnership, & he was subsequently placed on the list of contributories & incurred costs payable to the liquidator on an application to have his name removed from such list :—*Held :* the liquidator could not set off such two sets of costs one against the other, because the costs of the winding up stand on different footing from other costs, as being incurred for the benefit of everybody concerned.—*Re* BEER, BREWER & BOWMAN (1915), 113 L. T. 990 ; 59 Sol. Jo. 510.

Part VIII.—Charitable and Other Associations Not Amounting to Partnership.

1910. Clubs.]—I had thought, but without much consideration, at the Assizes, that these sort of institutions were of such a nature as to come under the same view as a partnership, & that the same incidents might be extended to them ; that where there were a body of gentlemen forming a club, & meeting together for one common object, what one did in respect of the society bound the others, if he had been requested & had consented to act for them. Several cases have been cited in the course of the argument, which do not apply, with the exception of one of them, to societies of this nature. Trading assocns. stand on a very different footing. Where persons engage in a community of profit & loss as partners, one partner has the right of property for the whole ; so, any of the partners has a right, in any ordinary transactions, unless the contrary be clearly shown, to bind the partnership by a credit ; he might accept a bill of exchange in the name of the firm, & as between the firm & strangers the partnership would be bound, although there might be an understanding in the firm that he was not to accept. It appears to me that this case must stand upon the ground on which deft. put it, as a case between principal & agent (LORD ABINGER, C.B.).—FLEMYNG *v.* HECTOR (1836), 2 M. & W. 172 ; 2 Gale, 180 ; 6 L. J. Ex. 43 ; 150 E. R. 716.

Annotations :—**Refd.** Wise *v.* Perpetual Trustee Co., [1903] A. C. 139. **Mentd.** Tredwen *v.* Bourne (1840), 6 M. & W. 461 ; Todd *v.* Emly (1841), 7 M. & W. 427 ; Barnett *v.* Lambert (1846), 15 M. & W. 489 ; Cockerell *v.* Aucompte (1857), 2 C. B. N. S. 440 ; De Vries *v.* Corner (1865), 13 L. T. 636 ; Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362.

.]—*See, also,* CLUBS, Vol. VIII., p. 505, pp. 526–527, Nos. 1–3, 142–148.

1911. Friendly societies.]—The members of a benefit society raised a joint stock fund, portions of which were from time to time advanced to members of the society, by way of loan, at 5 per cent. interest : the sums so advanced were put up to competition among the members, & the members who bid highest obtained the loan. Deft., a member of the society, having bid £15 17*s.* 6*d.* for a loan of £80, the £15 17*s.* 6*d.* to be paid in addition to 5 per cent. interest on the £80 :—*Held :* the transaction was not usurious.

The judge who tried the cause thought that there had been no loan, but merely an advance of partnership funds in which deft. was interested in common with the other members of the society. A motion has been made for a new trial on the ground of misdirection ; but we think the case

arise, & it was more expedient that the partnership should be wound up by the ct.—MUIRHEAD *v.* BORLAND, [1925] S. C. 474.—**SCOT.**

d. ——.]—In Ireland, no rules have been framed under Limited Partnerships Act, 1907 (c. 24), but a limited partnership in Ireland can be wound up under the Cos. (Consolidation) Act, 1908 (c. 69), & rules made thereunder in 1910.—*Re* RODGER & LIMITED PARTNERSHIPS ACT, 1907 (1911), cited in Halsbury's Laws of England, Vol. XXII., p. 113.—**IR.**

e. ——.]—The law of the colony regulating limited liability partnerships clearly contemplates trading cos. such as mining cos. being declared insolvent as well as individuals.—*Re* NEWFOUNDLAND INSOLVENCY MINING COS. (1875), 6 Nfld. L. R. 94.—**NFLD.**

f. *Liability as general partner—Intermeddling.*] — Where defts. are charged as general partners, having become so liable by intermeddling, it is not necessary for the pltf. to show that the limited partnership was regularly formed under the statute.—DAVIS *v.* BOWES (1857), 15 U. C. R. 280.—**CAN.**

g. —— ——.]—Where a special partner has once rendered himself liable as a general partner, by interference, he continues so liable, & is not relieved after he has ceased to intermeddle.—HUTCHISON *v.* BOWES (1857), 15 U. C. R. 156.—**CAN.**

h. —— ——.]—The special partners elected a board of directors to advise the general partner, the members of which board interfered in the transaction of the business of the firm, especially during the absence of the sole general partner in England :—*Held :* the members of the board became liable for the debts of the firm.—WHITTEMORE *v.* MACDONELL (1857), 6 C. P. 547.—**CAN.**

k. —— *By consent.*]—PATTERSON *v.* HOLLAND (1858), 6 Gr. 414.—**CAN.**

l. —— *Election of creditor to look to directors.*]—COLEMAN *v.* BELLHOUSE (1859), 9 C. P. 31.—**CAN.**

m. —— *No check put on general partner.*]—A special partnership may be turned into a general partnership by neither partner attempting to put a check on the partnership transactions entered into by the other.—CONNOR *v.* MCKAY (1882), 1 N. Z. L. R. 169.—**N.Z.**

n. *Formation of limited partnership—Contribution of special partner—Must be in cash.*]—Special partners are required to contribute actual cash payments to the capital of the firm, & if any false statement be made in the certificate filed, all the partners are to be liable for the debts of the firm. One of the special partners paid by bills of exchange the sum specified in the certificate as cash :—*Held :* the special partners became, in consequence, liable for the debts of the firm.—WHITTEMORE *v.* MACDONELL (1857), 6 C. P. 547.—**CAN.**

o. —— —— ——.]—Under 12 Vict. c. 75, ss. 2, 4, the money to be contributed by the special partners must be actually paid in cash, or they will be liable as general partners.—WATTS *v.* TAFT (1858), 16 U. C. R. 256.—**CAN.**

p. —— —— ——.]—A. & B. formed a limited partnership, A. to be the general partner, & B. the special, contributing £750. B. held A.'s notes for that sum, which he gave up to A. by way of payment :—*Held :* not a payment in money.—BENEDICT *v.* VAN ALLEN (1859), 17 U. C. R. 234.—**CAN.**

q. —— *Transfer of sum to capital account.*]—*Re* BUTRUILLE'S ESTATE (Alta.) (1922), 66 D. L. R. 745.—**CAN.**

r. —— *Recording certificate.*] — SLINGSBY MANUFACTURING CO. *v.* GELLER (1907), 17 Man. L. R. 120.—**CAN.**

PART VIII.

t. *Co-operative association—Return of deposit.*]—SMILES *v.* HEAD (1894), 15 N. S. W. L. R. (L.) 493 ; 11 N. S. W. W. N. 97.—**AUS.**

a. —— *Liability of members.*]—Defts. (other than C.) & others signed a certificate of their intention to become incorporated as a co-operative assocn. under R. S. O. 1877, c. 158. They failed, however, to fulfil the requirements of the Act, & never actually became a corpn. under it. In the meanwhile pltf. supplied defts. & other intended members of the assocn. with certain goods, & now sued the former for the balance due in respect

was properly left to the jury. The question was, whether the transaction was a loan of money or a dealing with the partnership fund. If it was a loan it was usurious. We think it was a dealing with the partnership fund, in which deft. had an interest in common with the other members of the society, & that it was not a loan (TINDAL, C.J.). —SILVER *v.* BARNES (1839), 6 Bing. N. C. 180; 8 Scott, 300; 9 L. J. C. P. 118; 133 E. R. 71.

Annotations:—**Apld.** Burbidge *v.* Cotton (1851), 5 De G. & Sm. 17. **Refd.** Cutbill *v.* Kingdom (1847), 1 Exch. 494; Bear *v.* Bromley (1852), 18 Q. B. 271; Hope *v.* Meek (1855), 10 Exch. 829; *Re* Lead Co.'s Workmen's Fund Soc., Lowes *v.* Governor & Co., for Smelting down Lead with Pit & Sea Coal, [1904] 2 Ch. 196.

——.]—*See, also,* FRIENDLY SOCIETIES, Vol. XXV., p. 290, Nos. 11–14.

1912. Provisional committee of projected company.]—The provisional committee of a projected railway are not partners.—NEVINS *v.* HENDERSON (1848), 5 Ry. & Can. Cas. 684; 12 J. P. Jo. 802; *sub nom.* NEWINS *v.* HENDERSON, 12 L. T. O. S. 354, Ex. Ch.

1913. ——.]—A body of persons, associated to form a co., which ultimately turns out to be abortive. . . . The transactions . . . are not entire, as in the case of a partnership, but rather a series of transactions affecting only the parties severally acting therein, & for which the members of the body are . . . liable piecemeal. They are not partners nor are they agents for each other with respect to all matters properly done for the formation of the co. Each in law is liable only for his own acts, whether express or implied. A., B., & C. may be liable to the engineer; D., E. & F. to the parliamentary agent; G. & H. to the advertising agent; & so on. . . . (LORD CRANWORTH, V.-C.).—*Re* HARBOROUGH & WATLINGTON RY. CO. & WOLVERHAMPTON, WALSALL, LEICESTER, PETERBOROUGH, NORWICH & GREAT YARMOUTH JUNCTION RY. CO. (1850), 16 L. T. O. S. 297.

1914. Trade protection society.]—By the rules of a society "for the protection of trade" the professed object of which was to watch the progress of measures through Parliament affecting the trade interests, & to protect its members from the practices of the fraudulent & dishonest, the committee had the appointment of the printer & stationer, to be elected from among the members of the society; & to the committee was to be referred the defraying of the expenses, & the applying & disposing of the moneys of the society. & it was also provided by the rules, that the sum of £10 should be left in the secretary's hands to meet the current expenses; but that all orders for the payment of money should be drawn by the secretary upon the treasurer at a committee meeting. Pltf. was appointed printer & stationer to the society, & shortly afterwards paid his subscription. Defts., who were members of the committee, passed the resolutions for the orders for printing & stationery which were supplied by pltf.:—*Held:* pltf. was not precluded by the rules from suing defts., as the rules did not create a partnership between the members of the society; & it was not to be inferred from the rules that pltf. looked to the fund, & not to the parties who gave the orders.—CALDICOTT *v.* GRIFFITHS (1853), 8 Exch. 898; 1 C. L. R. 715; 23 L. J. Ex. 54; 17 J. P. 601; 155 E. R. 1618.

1915. Partnership with transferable shares.]—(1) When a partnership is constituted of several hundred persons, & the deed stipulates that any partner may transfer his shares, the transferee must be held to stand in the place of the transferor; otherwise every transferee, on his becoming a partner, must have an account taken of the partnership dealings, & transactions, so as between himself & his co-partners, to have the co. wound up to the date of his transfer.

(2) The principles of an ordinary partnership do not apply to cases of partnership where there are transferable shares.—*Re* PENNANT & CRAIGWEN CONSOLIDATED LEAD MINING CO., MAYHEW'S CASE (1854), 5 De G. M. & G. 837; 24 L. J. Ch. 353; 24 L. T. O. S. 150; 1 Jur. N. S. 566; 3 W. R. 95; 43 E. R. 1095, L. C. & L. JJ.

Annotations:—**Apld.** Taylor *v.* Ifill (1863), 8 L. T. 148. **Refd.** *Re* Great Cambrian Mining & Quarrying Co., *Ex p.* Hawkins (1856), 2 Jur. N. S. 85; *Re* Royal British Bank, *Ex p.* Walton, *Ex p.* Hue (1857), 26 L. J. Ch. 545.

1916. Political association.] — There is no partnership privity between the parties subscribing to a political assocn.; nor does the fact of subscribing confer any authority upon the person who manages it to make them responsible for an illegal act done by the manager.—WIGAN CASE (1869), 1 O'M. & H. 188; 21 L. T. 122.

Annotations:—**Mentd.** King's Lynn Case (1869), 1 O'M. & H. 206; Barnstaple Case (1874), 2 O'M. & H. 105; Taunton Case (1874), 2 O'M. & H. 66.

1917. Voluntary society.]—Upon the sale of land belonging to a co. of the nature of a voluntary society, with no rules or provisions as to the disposition of its property:—*Held:* the members of the co. for the time being were entitled to divide the proceeds in equal shares.—BROWN *v.* DALE (1878), 9 Ch. D. 78; 27 W. R. 149.

1918. Building societies.]—This is not a joint stock co., still less is it a common law partnership (LORD SELBORNE, C.).—BROWNLIE *v.* RUSSELL (1883), 8 App. Cas. 235; 48 L. T. 881; 47 J. P. 757, H. L.

Annotations:—**Consd.** Buckle *v.* Lordonny (1887), 56 L. J. Ch. 437. **Refd.** Cunliffe, Brooks *v.* Blackburn & District Benefit Bldg. Soc. (1884), 54 L. J. Ch. 376; Tosh *v.* North British Bldg. Soc. (1886), 11 App. Cas. 489; *Re* Middlesborough, Redcar & Saltburn, etc. Bldg. Soc. (1889), 58 L. J. Ch. 771; King *v.* Rawlings (1890), 54 J. P. 613; *Re* Sunderland 36th Universal Bldg. Soc. (1890), 24 Q. B. D. 394; *Re* Britannia Permanent Benefit Bldg. Soc. (1891), 65 L. T. 196; Durham & Northumberland Working Men's Permanent Bldg. Soc. *v.* Davidson (1892), 61 L. J. Q. B. 473; London Provident Bldg. Soc. *v.* Morgan, [1893] 2 Q. B. 266; Barnard *v.* Tomson, [1894] 1 Ch. 374; *Re* West London & General Permanent Benefit Bldg. Soc., [1894] 2 Ch. 352; *Re* Ambition Investment Bldg. Soc. (1895), 73 L. T. 508; Kemp *v.* Wright, [1895] 1 Ch. 121; Sixth West Kent Mutual Bldg. Soc. *v.* Hills, [1899] 2 Ch. 60; *Re* Counties Conservative Permanent Benefit Bldg. Soc., Davis *v.* Norton, [1900] 2 Ch. 819.

1919. ——.]—Building societies are not governed by the doctrine of partnership, but by the doctrine of principal & agent, all the members being principals & the directors their agents. Therefore all members of a society not registered under the Building Societies Act, 1874 (c. 42) are liable to contribute towards the payment of the ordinary creditors of the society & there is no difference in this respect between advanced & unadvanced members. Unless the rules or the terms of their mtges. expressly exonerate them from liability, advanced members cannot redeem without contributing to ordinary debts. In the absence of any contract by the rules or otherwise to that effect advanced members are not liable to make any further contribution to the losses of the unadvanced.—*Re* WEST LONDON & GENERAL PER-

thereof:—*Held:* pltf. was entitled to judgment against defts. as partners; but as to C., who came into the arrangement at a later date than the others, only as to goods supplied after such later date.—SEIFFERT *v.* IRVING (1887), 15 O. R. 173.—**CAN.**

1914 i. *Trade protection society.*]—OTTAWA LUMBERMEN'S CREDIT BUREAU *v.* SWAN, [1923] 4 D. L. R. 1157; 53 O. L. R. 135.—**CAN.**

b. *Band.*]—DEMARCHI *v.* SPARTARI (B. C.) (1914), 27 W. L. R. 152.—**CAN.**

MANENT BENEFIT BUILDING SOCIETY, [1894] 2 Ch. 352; 63 L. J. Ch. 506; 70 L T. 796; 42 W. R. 535; 10 T. L. R. 280; 38 Sol. Jo. 273; 8 R. 764.

1920. Religious association.]—An assocn. having for its object not the acquisition of gain but the spiritual & mental improvement of its members is not a "co-partnership" within the term as used in Larceny Act, 1868 (c. 116), s. 1. Consequently a member of such an assocn. who was embezzled moneys belonging to it cannot be convicted under the above-mentioned Act of embezzling the moneys of a "co-partnership."—R. *v.* ROBSON (1885), 16 Q. B. D. 137; 55 L. J. M. C. 55; 53 L. T. 823; 50 J. P. 488; 34 W. R. 276; 15 Cox, C. C. 772, C. C. R.

Part IX.—Bankruptcy Proceedings.

NOTE.—*The following volume, page & number references are to* BANKRUPTCY, Vols. IV. & V.

Bankruptcy of firm or partner generally.]—*See* Vol. IV., pp. 420 *et seq.*

Act of bankruptcy—Fraudulent conveyance of partnership property.]—*See* Vol. IV., p. 56, No. 479.

Failure to comply with summons or notice.]—*See* Vol. IV., p. 89, No. 804.

Service of summons or notice.]—*See* Vol. IV., p. 98, No. 887.

The petition—Who may petition.]—*See* Vol. IV., p. 113, No. 1018.

—— **In respect of what debts.**]—*See* Vol. IV., p. 114, Nos. 1033, 1035, 1039.

The trustee—Mode of appointment.]—*See* Vol. IV., p. 208, No. 1921.

Proof of debts.]—*See* Vol. IV., p. 246, Nos. 2330–2331.

Mutual credit & set-off.]—*See* Vol. IV., pp. 389, 390, 391, 394, Nos. 3563–3565, 3569, 3570, 3577, 3578, 3581, 3611.

Priority of debts.]—*See* Vol. IV., pp. 483, 484, Nos. 4343–4357.

Property available for distribution amongst creditors.]—*See* Vol. V., pp. 649, 658, 711–719, 756, 784–786, 942, Nos. 5807, 5865–5868, 6218–6260, 6511, 6726–6737, 7710.

Actions by trustee.]—*See* Vol. V., p. 984, No. 8051.

Composition deed.]—*See* Vol. V., p. 1137, No. 9241.

PART PERFORMANCE.

See CONTRACT; LANDLORD AND TENANT; SALE OF LAND; SPECIFIC PERFORMANCE.

PARTY AND PARTY COSTS.

See PRACTICE AND PROCEDURE; SOLICITORS.

PARTY-WALLS.

See BOUNDARIES, FENCES AND PARTY-WALLS.

PASSAGE BROKERS.

See SHIPPING AND NAVIGATION.

PASSAGE COURT.

See ADMIRALTY; COURTS; INTERPLEADER.

PASSENGERS.

See CARRIERS; NEGLIGENCE; RAILWAYS AND CANALS; SHIPPING AND NAVIGATION.

PASSING-OFF.

See MISREPRESENTATION AND FRAUD; TRADE MARKS, TRADE NAMES, AND DESIGNS.

PASSIVE TRUST.

See TRUSTS AND TRUSTEES.

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PATENTS AND INVENTIONS.

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Part I.—Definitions.

SECT. 1.—"PATENT."

Statutory definition.]—*See* Patents & Designs Act, 1907 (c. 29), s. 93.

1. Letters patent included in Statute of Monopolies—Defect in specification capable of amendment by disclaimer.]—The proviso contained in Statute of Monopolies, 1623 (c. 3), s. 6, which exempts letters patent for new inventions from the operation of the Act is to be construed as including in the exemption letters patent for new inventions which by reason of some defect in the specification capable of amendment by disclaimer, cannot for the time being & until the necessary disclaimer has been filed, be enforced.—PECK & CO. *v.* HINDES, LTD. (1898), 67 L. J. Q. B. 272; 14 T. L. R. 164; 15 R. P. C. 113.

2. Nature of patentee's right—Exclusive user.]—What is the right which a patentee has or patentees have? . . . The tenth is that letters patent do not give the patentee any right to use the invention—they do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all; only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way, & using a particular invention (LORD HERSCHELL, C.).—STEERS *v.* ROGERS, [1893] A. C. 232; 62 L. J. Ch. 671; 68 L. T. 726; 1 R. 173; 10 R. P. C. 245, H. L.

Annotations:—**Consd.** Heyl-Dia *v.* Edmunds (1899), 81 L. T. 579. **Distd.** Diamond Coal Cutting Co. *v.* Mining

PART I. SECT. 1.

a. *Statutory definition.*]—By Patents Acts, 1903–1909, s. 4, the term "patent" is defined to mean, except where otherwise clearly intended, "letters patent for an invention granted in the Commonwealth":—*Held*: words "in the Commonwealth" in that definition are geographical, &, the definition includes patents granted under a State Act as well as those granted under the Commonwealth Act.—WESTRALIAN POWELL WOOD PROCESS, LTD. *v.* R. (1921), 29 C. L. R. 458.—**AUS.**

Sect. 1.—"*Patent.*" *Sects.* 2 & 3. *Parts II. III. Sect.* 1.]

Appliances Co. (1915), 85 L. J. Ch. 232. **Refd.** *National Soc. for Distribution of Electricity by Secondary Generators v. Gibbs, [1899] 2 Ch. 289; Edwards v. Picard, 2 K. B. 903; Re Heath's Patent (1912), 56 Sol. Jo. 538.*

3. —— ——.]—The right which the owner of a patented chattel has under his letters patent *of making & using the patented chattel & licencing others to use the same is a right of an incorporeal* nature. It is a chose in action, at any rate not in possession, distinct from the right of property in the chattel itself, & incapable of seizure under a distress for rent.—BRITISH MUTOSCOPE & BIOGRAPH CO., LTD. *v.* HOMER, [1901] 1 Ch. 671; 70 L. J. Ch. 279; 84 L. T. 26; 49 W. R. 277; 17 T. L. R. 213; 18 R. P. C. 177.

Annotations:—**Consd.** *Edwards v. Picard, [1909] 2 K. B. 903.* **Refd.** *National Phonograph Co. of Australia v. Menck, [1911] A. C. 336.* **Mentd.** *Barker v. Stickney, [1918] 2 K. B. 356.*

4. —— **Chose in action.**]—BRITISH MUTOSCOPE & BIOGRAPH CO., LTD. *v.* HOMER, No. 3, *ante.*

5. —— ——.]—Now, what is the right of the patentee? It is a chose in action, created by the exercise of the Royal Prerogative, & entirely distinct from the right of property in a chattel created under it; & the patentee's right under the patent, being a chose in action, cannot be taken under a *fi. fa.*, or *levari facias*, since it has no locality, & therefore cannot be found upon the premises (VAUGHAN WILLIAMS, L.J.).—EDWARDS & CO. *v.* PICARD, [1909] 2 K. B. 903; 78 L. J. K. B. 1108; 101 L. T. 416; 25 T. L. R. 815, C. A.

6. —— ——.]—Patent rights being choses in action, the ct. has jurisdiction under Trustee Act, 1893 (c. 53), s. 35, to make an order vesting them in such person as the ct may appoint.—*Re* HEATH'S PATENT (1912), 56 Sol. Jo. 538; 29 R. P. C. 389.

Compare COPYRIGHT, Vol. XIII., pp. 199, 200, Nos. 344–352.

Equitable execution—Profits of patent.]—*See* EXECUTION, Vol. XXI., pp. 669, 670, No. 2492.

Distinguished from monopoly.]—*See* Sect. 2, *post.*

SECT. 2.—"MONOPOLY."

See Statute of Monopolies, 1623 (c. 3).

7. "Patent" & "Monopoly" distinguished.] MONOPOLIES (1684), 10 2 Show. 366; 90 E. R.

:—**Refd.** *Merchant's Adventurers v. Rebow (1686), Comb. 53.* **Mentd.** *Omichund v. Barker (1744), Willes, 538; Rogers v. Rajendro Dutt (1860), 8 Moo. Ind. App. 103.*

SECT. 3.—"PATENTEE."

See Patents & Designs Act, 1919 (c. 80), s. 19.

8. Patents & Designs Act, 1907 (c. 29), s. 93.] An application was made on Oct. 27, 1909, by G., the grantee of letters patent No. [illegible] of 1903, for leave to amend [illegible] specification & by substituting for two claims relating respectively to a special form of capsule, & to a special means of removing the capsule, a claim for a combination of the two elements in one piece. The application was opposed by the Goldy Stopper Syndicate, on the grounds *(a)* that the application was bad *ab initio* inasmuch as the appct. was not the patentee" within Patents & Designs Act, 1907 (c. 29), s. 21 (1), & the Goldy Stopper co., who were purchasers of the patent from G. under an agreement of sale, were necessary parties to the application; *(b)* that the amendment would make the specification claim a substantially different invention from the invention originally claimed, & on the further grounds that it would make the specification ambiguous & defective, & that the original invention was wholly included in Forastieri's Specification, No. 26528 of 1901:—*Held:* (1) upon the proper construction of the agreement of sale the Goldy Stopper co. had an equitable interest in the patent & ought to have been joined, but that, inasmuch as the purchase-money had not been paid within the time stipulated & time was of the essence of the contract, such interest had now reverted to the original grantee; the application was not bad *ab initio*, but only defective for want of parties & that the proper parties were now before the ct.; (2) looking at the unamended specification as a whole, the combination was clearly indicated therein, & no different invention was therefore claimed in the specification as amended; & the opponents failed also on the other grounds of opposition.

With regard to the meaning of "patentee," I can find no clear decision as to what is the true meaning of the definition of "patentee" in above sect. 93, namely, "the person for the time being entitled to the benefit of a patent." The words must, of course, be read as meaning "person or persons," & after careful consideration I do not think they ought to be confined merely to the person or persons holding beneficial interests. I think a wider construction is necessary, & that they should be held to include any one who can lawfully claim, by any act or assurance known to the law, an actual interest in, or right to, the monopoly granted (COMPTROLLER-GENERAL).

I have come to the conclusion that where two [illegible] ately & independently, these two features were intended to be used in combination, & would in fact be so used & so constructed by any competent workman, that in such a case, a combination claim can subsequently be substituted by amendment. . . . If this is correct, *a fortiori* the claim may be allowed where there is any claim in the original specification which by any legitimate construction may be held to comprise the two factors in combination (COMPTROLLER-GENERAL).—*Re* GOLTSTEIN'S APPLICATION (1910), 27 R. P. C. 289.

Part II.—Capacity to Obtain Letters Patent.

See Patents & Designs Act, 1907 (c. 29), s. 1; & Part V., Sect. 1, *post*.

9. Who may obtain—Alien.]—*Re* VAN DE POELE'S PATENT (1889), 7 R. P. C. 69.

—— ——.]—*See, also*, ALIENS, Vol. II., pp. 177, 178, Nos. 90–92, 417.

—— **Infants.**]—*See* Patents & Designs Act, 1907 (c. 29), s. 83.

—— **Lunatics.**]—*See* Patents & Designs Act, 1907 (c. 29), s. 83.

10. Who may not obtain—Member of official commission—Patent embodying result of official investigation.]—If an invention becomes, without fraud, known to the public, no subsequent patent can be granted for it. It is not necessary that it should have been used by the public, as well as known to the public. Where a report, on a particular subject, is made to a public office, by referees specially appointed under an Act of Parliament to inquire into & report on such subject, the knowledge contained in that report being fully possessed by the referees, it must, from that moment, be treated as absolutely the property of the public & as being publicly known, although, in fact, the report was not formally published till some days afterwards. If the knowledge thus obtained in the course of the discharge of his duty by one referee, was by his communication of it to his colleagues, possessed by all the referees, the moment they became possessed of it, it became public property & they had no power whatever to agree among themselves to treat its communication as confidential, nor would their doing so enable one of their number to take out a patent in regard to it.—PATTERSON *v.* GAS LIGHT & COKE CO. (1877), 3 App. Cas. 239; 47 L. J. Ch. 402; 38 L. T. 303; 26 W. R. 482, H. L.

Annotations:—**Refd.** Lister *v.* Norton (1886), 3 R. P. C. 199; Edison & Swan Electric Light Co. *v.* Woodhouse & Rawson (1887), 3 T. L. R. 327; Harris *v.* Rothwell (1887), 35 Ch. D. 416; Humpherson *v.* Syer (1887), 4 R. P. C. 407; Partington *v.* Hartlepools Pulp & Paper Co. (1895), 12 R. P. C. 295; British United Shoe Machinery Co. *v.* Collier (1908), 25 T. L. R. 74. **Mentd.** Nant-Y-Glo & Blaina Ironworks Co. *v.* Grave (1878), 12 Ch. D. 738.

11. —— Personal representative.]—(1) The communication, made in England by one British subject to another, of an invention does not make the person to whom the communication is made the first & true inventor, within Statute of Monopolies, 1623 (c. 3), so as to enable him to take out letters patent for the invention.

(2) The legal personal representative of a person who has made an invention, but not taken out letters patent for it, cannot take out such letters patent.—MARSDEN *v.* SAVILLE STREET CO. (1878), 3 Ex. D. 203; 26 W. R. 784; *sub nom.* DALTON *v.* SAVILLE-STREET FOUNDRY & ENGINEERING CO., 39 L. T. 97, C. A.

Annotation:—*As to* (1) **Distd.** Pilkington *v.* Yeakley Vacuum Hammer Co. (1901), 18 R. P. C. 459.

See, now, Patents & Designs Act, 1907 (c. 29), s. 43.

12. Trustee for alien enemy.]—(1) It being objected, that a specification, enrolled pursuant to a patent for an invention, contained French terms: —*Held:* an inventor of a machine is not tied down to make such a specification, as by words only, would enable a skilful mechanic to make the machine, but he is allowed to call in aid the drawings that he may annex to the specification; & if by a comparison of the words & the drawings, the one will explain the other sufficiently to enable a skilful mechanic to perform the work, such a specification is sufficient.

(2) If a servant, while in the employ of his master, makes an invention, that invention belongs to the servant & not to the master; but *semble:* if the master employs a skilful person for the express purpose of inventing, the inventions made by him will so much belong to the master, as to enable him to take out a patent for them.

(3) *Qu.:* if a patent be taken out by a British subject, on a secret trust, to hold it for the benefit of the real inventor, the patent stating that the patentee has obtained the invention from a certain foreigner; whether, if such inventor, for whom it is held, be an alien enemy at the time, that will annul the patent, without its being necessary to sue out a *sci. fa.* for its repeal.—BLOXAM *v.* ELSEE (1825), 1 C. & P. 558; 1 Carp. Pat. Cas. 434; Ry. & M. 187, N. P.; *subsequent proceedings* (1827), 6 B. & C. 169.

Annotations:—*As to* (1) **Refd.** Neilson *v.* Harford (1841), 8 M. & W. 806; Palmer *v.* Wagstaff (1854), 9 Exch. 494. *As to* (2) **Refd.** Allen *v.* Rawson (1845), 1 C. B. 551. *As to* (3) **Refd.** Beard *v.* Egerton (1846), 3 C. B. 97. *Generally*, **Refd.** Ward *v.* Hill (1903), 20 R. P. C. 189. **Mentd.** Slatterie *v.* Pooley (1840), 6 M. & W. 664.

Suspension of patents of alien enemies—On outbreak of hostilities.]—*See* ALIENS, Vol. II., p. 148, Nos. 212, 213.

International & colonial agreements.]—*See* Part XVI., *post*.

Part III.—"True and First Inventor."

SECT. 1.—IN GENERAL.

See Statute of Monopolies, 1623 (c. 3), s. 6; Patents & Designs Act, 1907 (c. 29), s. 93.

13. Person entitled to patent.]—(1) A person, to be entitled to a patent for an invention, must be the first & true inventor; & there must not be any public use thereof by himself or others, prior to the granting of the patent.

(2) Trials of an incomplete invention, by way of experiment, are not evidence of "prior use" for the purpose of invalidating a patent. Prior use, for that purpose, means public use & exercise of the invention. Evidence of the existence of a completed invention, once in public use, although abandoned or the use long discontinued but not altogether lost sight of, is sufficient to invalidate a patent subsequently granted for the same invention.

(3) On the trial of an issue "whether an invention described in a patent is not the original

PART II.

b. *Who may obtain—How far residence in Canada necessary.*]—DRIGGS *v.* BAND (1856), 13 U. C. R. 642.—**CAN.**

PART III. SECT. 1.

13 i. *Person entitled to patent.*]—A patent must be declared null & void, if it be not established that the patentee is the sole & only inventor of the thing patented, or if it be not established that such patentee is the first inventor. —RITCHIE *v.* JOLLY (1861), 12 L. C. R. 49.—**CAN.**

Sect. 1.—In general.]

invention of the patentee" :—*Held:* it was an erroneous direction in law to the jury to charge them that the evidence of prior public use, to invalidate the patent, must show that "the use was continued to the time when the patent was granted; not to the very exact period, but that it must have been known & used as a useful thing at the time."—HOUSEHILL COAL & IRON CO. *v.* NEILSON (1843), 9 Cl. & Fin. 788; 1 Web. Pat. Cas. 673, 718, n.; 8 E. R. 616, H. L.

Annotations:—As to (1) **Consd.** Stead *v.* Williams (1844), 3 L. T. O. S. 262. **Refd.** United Telephone Co. *v.* Harrison, Cox, Walker (1882), 46 L. T. 620. *As to* (2) **Refd.** Betts *v.* Menzies (1862), 10 H. L. Cas. 118; Tangye *v.* Stott (1866), 14 W. R. 386. *Generally*, **Refd.** Hill *v.* Evans (1862), 4 De G. F. & J. 288; Neilson *v.* Betts (1871), L. R. 5 H. L. 1; Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531; Badische Anilin und Soda Fabrik *v.* Levinstein (1883), 24 Ch. D. 156; Easterbrook *v.* G. W. Ry. (1886), Griffin's Patent Cases (1884–1886), 81; Harris *v.* Rothwell (1887), 35 Ch. D. 416; Edison & Swan Electric Light Co. *v.* Holland (1889), 6 R. P. C. 243.

14. Meaning of "true & first invention"—Necessity for novelty in every part.]—(1) The specification intended to teach the public, must fully disclose the secret, & contain nothing materially false or defective.

(2) Any material alteration must be stated.

(3) Specification insufficient if information must be derived from other sources. If additions be requisite, the specification is insufficient.

(4) The insertion of more things than requisite a fatal defect.

(5) Anything material & new, & an improvement in the trade, will support a patent. The alteration must be such as leads to a material improvement. If new, the question of materiality & utility arises.—R. *v.* ARKWRIGHT (1785), Dav. Pat. Cas. 61; 1 Web. Pat. Cas. 64; 1 Carp. Pat. Cas. 53; Printed Case, Folio London 1785; Bull N. P. 76c.

Annotations:—As to (1) **Apld.** Morgan *v.* Seaward (1836), 1 Web. Pat. Cas. 170. **Refd.** Neilson *v.* Harford (1841), 8 M. & W. 806; Thomas *v.* Welch (1866), L. R. 1 C. P. 192. *As to* (5) **Apld.** Hill *v.* Thompson (1818), 1 Web. Pat. Cas. 239. **Refd.** Hills *v.* Evans (1862), 4 De G. F. & J. 288.

—— ——.]—TENNANT *v.* ——, No. 21, *post.*

16. —— ——.]—(1) If one of several things claimed be not new, or an improvement, the patent is void.

(2) Whether an improvement is trifling & insignificant or not, is a question for the jury.

(3) The publicly making & selling an article, though there be no demand or use for it, will vitiate a subsequent patent.

(4) There is a material distinction between applying a new contrivance to an old object, & an old contrivance to a new object.

(5) The application of an old wheel to railroads, is not the subject-matter of a patent.

(6) The simple use of a known thing, not a subject-matter.

The law on the subject is this: that you cannot have a patent for applying a well known thing which might be applied to fifty thousand different purposes, for applying it to an operation which is exactly analogous to what was done before (LORD ABINGER, C.B.).—LOSH *v.* HAGUE (1838), 1 Web. Pat. Cas. 202.

Annotations:—As to (1) **Refd.** Booth *v.* Kennard (1856), 5 W. R. 85; Edison & Swan Electric Light Co. *v.* Woodhouse (1887), 3 T. L. R. 367. *As to* (6) **Apld.** R. *v.* Cutler (1847), Macr. 124; Tetley *v.* Easton (1857), 2 C. B. N. S. 706. **Distd.** Morgan *v.* Windover (1887), 3 T. L. R. 748. **Consd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. *Generally*, **Refd.** Brook & Hirst *v.* Aston (1859), 5 Jur. N. S. 1025.

—— ——.]—(1) Pltfs. therefore are bound to show that each of those eight several distinct heads into which they have divided their process, is new & of public utility (TINDAL, C.J.).

(2) The jury have decided that there is no novelty in the alleged invention, nor any new combination, & that there is no novelty in the process but an improvement only. . . . The verdict ought to be entered for deft. (TINDAL, C.J.).—GIBSON *v.* BRAND (1842), 4 Man. & G. 179; 4 Scott, N. R. 844; 11 L. J. C. P. 177; 134 E. R. 74.

—— **Originator of idea.**]—JONES *v.* PEARCE (1832), 1 Web. Pat. Cas. 122; 1 Carp. Pat. Cas. 524.

Annotations:—**Consd.** Stead *v.* Williams (1843), 2 Web. Pat. Cas. 126; Murray *v* Clayton (1872), 7 Ch. App. 570. **Refd.** Minter *v.* Williams (1835), 1 Har. & W. 585; Carpenter *v.* Smith (1842), 9 M. & W. 300; Household Coal & Iron Co. *v.* Neilson (1843), 9 Cl. & Fin. 788; Heath *v.* Smith (1854), 3 E. & B. 256; Tangye *v.* Stott (1866), 14 W. R. 386; Wright *v.* Hitchcock (1870), L. R. 5 Exch. 37.

19. —— **Idea borrowed from source open to public.**]—Question whether pltf. is true & first inventor or not depends on whether he borrowed invention from a service open to the public.—WALTON *v.* POTTER (1841), 1 Web. Pat. Cas. 585; 1 Goodeve's Patent Cases, 488; *subsequent proceedings*, 3 Man. & G. 411.

Annotations:—**Apld.** Thorn *v.* Worthing Skating Rink Co. (1876), 6 Ch. D. 415, n. **Refd.** Betts *v.* Walker (1849), 14 Jur. 647; Bateman *v.* Gray (1853), Macr. 93; Hill *v.* Evans (1862), 4 De G. F. & J. 288; Edison & Swan Electric Light Co. *v.* Woodhouse (1886), Griffin's Patent Cases (1884–1886), 90.

20. —— ——.]—(1) A party who derives his information from foreign countries may be the true inventor, for the purpose of obtaining a patent: but if he derives his information either from books or from oral communication in this country which had been given to the public, or which some person had given to him, or from some common stock of knowledge in this country, he is not the true inventor, & not entitled to a patent.

(2) Where it appears that the same information as that contained in pltf.'s specification is also contained in scientific books which had been published to the world long before the date of the patent, in order to prove that pltf. is not the true inventor, it is necessary to bring home to him the fact of his having seen these publications; &, in the absence of such evidence, it is a question for the jury whether he derived his knowledge from some stock of knowledge common in this country.

(3) The invention of paving with wood is a new manufacture, so as to be the subject matter of a patent.

(4) A private gentleman, before the date of the patent, had the vestibule of his house paved with wood, so as to form a road for carriages:—*Held:*

13 ii. ——.]—To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere.—SMITH *v.* GOLDIE (1882), 9 S. C. R. 46.—**CAN.**

c. *Meaning of "true & first inventor"—Idea borrowed from other sources.*]—Where one who says he is the inventor of anything has had an opportunity to hear of it from other sources, & especially where delay has occurred on his part in patenting his invention, his claim that he is a true inventor ought to be carefully weighed.—AMERICAN DUNLOP TIRE CO. *v.* GOOLD BICYCLE CO., LTD. (1899), 6 Exch. C. R. 223.—**CAN.**

d. —— ——.]—That "first inventor" within Patent Act means not the first discoverer of the thing or the first to conceive the same, but the first to

if that was substantially the same pavement as pltf.'s, there had been a public use of it before the date of the patent, so as to avoid the patent; & that whether it had been used by one or more persons made no difference.

(5) Now as to its being publicly known in this country, I take it that there is a great difference between the knowledge of it as a thing that would answer, & was in use, & the knowledge of it as a mere experiment that had been found to be a failure & thrown aside. If you are dealing with an article of merchandise, or with an article of ordinary use, if a person has had a scheme in his head & has carried it out, but after a trial has thrown it aside, & the thing is forgotten & gone by, then another person reintroducing it may within the meaning of this Act be the inventor & first user of it so as to justify a patent (CRESSWELL, J.).—STEAD *v.* WILLIAMS (1843), 2 Web. Pat. Cas. 126; 2 L. T. O. S. 34, 99; *subsequent proceedings* (1844), 7 Man. & G. 818.

Annotations:—*As to* (1) **Apld.** Stead *v.* Anderson (1846), 2 Web. Pat. Cas. 147. **Consd.** Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531. **Refd.** Plimpton *v.* Spiller (1877), 6 Ch. D. 412. *As to* (4) **Expld.** Stead *v.* Anderson (1847), 4 C. B. 806.

21. —— Idea suggested by another person.]—TENNANT *v.* —— (1802), 1 Web. Pat. Cas. 125, n.; Dav. Pat. Cas. 429; 1 Carp. Pat. Cas. 177.

Annotations:—**Consd.** Hill *v.* Thompson (1818), 8 Taunt. 375. **Refd.** Robertson *v.* Purdey (1907), 23 T. L. R. 343.

22. —— ——.]—MARSDEN *v.* SAVILLE STREET CO., No. 11, *ante*.

23. ——.]—*Re* EADIE'S APPLICATION (1885), Griffin's Patent Cases (1884–1886), 279.

24. —— Idea taken from book.]—R. *v.* ARKWRIGHT, No. 14, *ante*.

25. —— ——.]—In order to establish the validity of a patent for improvement or discovery, it should state in substance what is set out in detail in the specification, & if it be taken out for more than is strictly the inventor's own addition, or improvement, or for discovery, when it is merely addition or improvement it is bad, & such invention must be both new & useful, & the discovery not confined to the knowledge of the party making it, & must be accurately described in the specification, which, if it seek to cover more than is actually new & useful vitiates the patent. Therefore, where pltf., having obtained a patent for "The invention of certain improvements in the smelting & working of iron," in the specification described the improvements to consist of various processes by which iron contained in slags or cinders might be extracted, & by the admixture of mine rubbish, be converted into bar iron, & that by the further application of lime, subsequently to the operation of the blast furnace, the quality called "cold short" might be prevented; & then having described the combinations & proportions of materials to be used, the patentee declared that he had discovered that lime would prevent the "cold short" in iron, & render it more tough when cold; it having been proved at the trial, that iron had before been extracted from slags, & that the application of lime had been previously discovered to remedy the "cold short" & that defts. had not worked according to pltf.'s combinations, proportions & processes:—*Held:* (1) the patent was void, the invention not being new & useful; & there had been no infringement by defts.

(2) As to the work so often referred to, if in substance it informs the public of what the specification in the patent professes to do, this will undoubtedly be the first discovery; as in *R.* v. *Arkwright*, No. 14, *ante*, it was agreed, that a book produced, printed & published previous to the patent, constituted the discovery so as to negative invention by the patentee (DALLAS, J.).—HILL *v.* THOMPSON (1818), 8 Taunt. 375; 2 Moore, C. P. 424; 1 Web. Pat. Cas. 239; 1 Carp. Pat. Cas. 381; 129 E. R. 427.

Annotations:—*As to* (1) **Apld.** Brunton *v.* Hawkes (1821), 4 B. & Ald. 541; Campion *v.* Benyon (1821), 6 Moore, C. P. 71. **Refd.** Morgan *v.* Seaward (1837), 2 M. & W. 544; Bovill *v.* Goodier (1866), 35 Beav. 427. *As to* (2) **Refd.** Bovill *v.* Finch (1870), L. R. 5 C. P. 523. *Generally*, **Refd.** Bloxam *v.* Elsee (1825), 1 C. & P. 558.

26. —— ——.]—(1) If the patentee has taken the invention from an old book he is not the true & first inventor.

(2) If the invention may have been borrowed from a prior specification, the patent is invalid.—MUNTZ *v.* FOSTER (1844), 2 Web. Pat. Cas. 96.

Annotations:—*As to* (2) **Refd.** Hills *v.* Evans (1862), 4 De G. F. & J. 288. *Generally*, **Refd.** Edison & Swan Electric Light Co. *v.* Woodhouse (1887), 3 T. L. R. 367; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 431.

27. —— ——.]—STEAD *v.* WILLIAMS, No. 20, *ante*.

28. —— Publisher.]—The publisher is the true & first inventor within Statute of Monopolies, 1623 (c. 3).—DOLLAND *v.* —— (1766), 1 Web. Pat. Cas. 43; 1 Carp. Pat. Cas. 28.

Annotations:—**Consd.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463; Hill *v.* Thompson & Forman (1818), 2 Moore, C. P. 424. **Refd.** Vickers *v.* Siddell (1890), 7 R. P. C. 292.

29. —— ——.]—FORSYTH *v.* RIVIERE (1819), 1 Carp. Pat. Cas. 401; 1 Web. Pat. Cas. 97.

30. —— ——.]—MINTER *v.* WELLS, No. 42, *post*.

31. —— ——.]—GIBSON *v.* BRAND, No. 17, *ante*.

32. —— ——.]—(1) The rule, that the application to a substance of a process which has been previously applied to an analogous substance cannot be the subject of a patent, does not hold where the process is a chemical process.

(2) The man who discovers the method of supplying the market with a substance is the inventor of that substance within the meaning of the patent laws.

(3) The ct. in the exercise of its discretion will refuse to consider the questions arising on the construction of the specification of a patent, until the evidence on the whole of the case has been heard.—YOUNG *v.* FERNIE (1864), 4 Giff. 577; 4 New Rep. 218; 10 L. T. 861; 10 Jur. N. S. 926; 12 W. R. 901; 66 E. R. 836; *on appeal, sub nom.* FERNIE *v.* YOUNG (1866), L. R. 1 H. L. 63, H. L.

Annotations:—*Generally*, **Mentd.** Langmead *v.* Maple (1865), 13 W. R. 469; Ryves *v.* A.-G. (1868), 19 L. T. 217; Roskell *v.* Whitworth (1870), 5 Ch. App. 459; *Re* Simpson, *Ex p.* Morgan (1876), 2 Ch. D. 72; Sugden *v.* St. Leonards (1876), 1 P. D. 154; Krehl *v.* Burrell (1878), 10 Ch. D. 420; MacAndrew *v.* Barker (1878), 37 L. T. 810; Dollman *v.* Jones (1879), 12 Ch. 553; *Re* Harrison, *Ex p.* Butters (1880), 14 Ch. D. 265.

Importer—Invention in use abroad.]—*See* Sect. 3, *post*.

33. —— Whether mode of discovery material—Accidental discovery.]—CRANE *v.* PRICE, No. 315, *post*.

34. —— Whether discoverer of principle included.]—MINTER *v.* WELLS, No. 42, *post*.

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publish the same, such inventor, however, must be the true inventor & must not have borrowed the idea from anybody else.—GERRARD WIRE TYING MACHINES CO., LTD. OF CANADA *v.* CARY MANUFACTURING CO., [1926] 3 D. L. R. 374; [1926] Exch. C. R. 170.—**CAN.**

e. —— *Time taken to perfect invention—Invention meanwhile given to public by another.*]—CANADIAN RAYBESTOS CO., LTD. *v.* BRAKE SERVICE CORPN., [1926] Exch. C. R. 187; [1926] 3 D. L. R. 497.—**CAN.**

Sect. 1.—*In general. Sect.* 2 : *Sub-sects.* 1 & 2.]

35. —— ——.]—ELIAS *v.* GROVESEND TIN-PLATE CO., No. 367, *post.*

36. —— —— **Principle discarded as useless.**]—STEAD *v.* WILLIAMS, No. 20, *ante.*

37. —— **Simultaneous discovery by several persons.**]—CORNISH & SIEVIER *v.* KEENE & NICKELS, No. 481, *post.*

38. ——.]—A patentee of "Improvements in points & crossings for tramways," brought an action against deft. co. alleging infringement. Defts. denied infringement, & alleged that the patent was bad on the grounds (*inter alia*), that the invention did not possess utility, that pltf. was not the first & true inventor, & that the invention had been anticipated :—*Held :* (1) the invention was not useful ; (2) subject to the question of anticipation, pltf. was the first & true inventor ; (3) there had been anticipation ; (4) defts. had not infringed, the action must be dismissed with costs.—WINBY *v.* MANCHESTER, ETC. STEAM TRAMWAYS CO. (1890), 8 R. P. C. 61.

39. ——.]—Pltf. K. sought in this action (*inter alia*) a declaration that Letters Patent No. 166184 of 1918, the complete specification of which was accepted on July 14, 1921, subject to a reference under Patents & Designs Acts, 1907 (c. 29), & 1919 (c. 80), s. 7 (4), to letters patent No. 6320 of 1911 granted to Le Grand, & to a reference (under Patents & Designs Acts, 1907 (c. 29), & 1919 (c. 80), s. 8 (2), to the Letters Patent No. 139230 granted to Handley Page, were valid. The invention was for the placing at the extreme end of the fuselage behind the rudder & tail planes of an aeroplane a tail-gun pit with accommodation for guns & gunners, & the main features of the aeroplanes were that it was much larger than the aeroplanes then in general use in this country having a totally enclosed fuselage with a gangway 6 feet high down the centre which would enable a man to walk from the extreme nose to the extreme tail of the machine. Defts. contended that K. was not the first & true inventor, but that C. had suggested the idea to him, that there had been a prior grant to Handley Page (Letters Patent 139230), as the first of the six claiming clauses in K.'s Specification was the only material claim, the others being dependent & subsidiary to that claim, & that that was for a provision in an aeroplane of a tail-gun pit capable of accommodating a gunner & gun mounting which was the idea patented by Handley Page. Pltfs. alleged that it was a claim for the idea of a tail-gun pit combined with the method of constructing an aeroplane capable of putting that idea to practical use & especially capable of maintaining stability in flight with a moving to & from the extremity of the tail :—*Held :* the essential feature of the patented invention was the provision of an aeroplane with a tail-gun ; K. was not the first & true inventor of the tail-gun pit, & the patent not being one for working out the details from which it would be possible to build an aeroplane in which a tail-gun pit could be used, it was therefore unnecessary to determine whether there was proper subject-matter, a question which, however, was open to great doubt ; further, assuming this was a combination patent for putting in a tail-gun pit, & for details of construction of an aeroplane by which that idea was to be carried out, there was no evidence of any user by defts. of any such invention ; therefore the claim for a declaration of validity failed.—ROWLAND & KENNEDY *v.* AIR COUNCIL (1925), 42 R. P. C. 433.

Effect of prior user.]—*See* Part IV., Sect. 2, sub-sect. 2, B., *post.*

SECT. 2.—AS BETWEEN MASTER AND SERVANT.

SUB-SECT. 1.—RIGHTS OF MASTER.

40. When master entitled to benefit of invention—Servant employed for express purpose of inventing.]—BLOXAM *v.* ELSEE, No. 12, *ante.*

41. —— —— **Employment in research.**]—E. was a chemist & nothing else ; that is, he took no part in the commercial business of the firm, but devoted himself to the work in the laboratory. . . . For all purposes, except that of being the first & true inventor, he was the agent of his employers. His labours were theirs, he worked in their laboratory & with their materials, as well as with their assistance, & the benefits of his discovery, morally & legally, belonged to them (KEKEWICH, J.).—KURTZ & CO. *v.* SPENCE & SONS (1887), as reported in 5 R. P. C. 161.

Annotation :—**Mentd.** Willoughby *v.* Taylor (1893), 11 R. P. C. 45.

42. —— **Principle of invention suggested by master—& carried out with assistance of servant.**]—The introducer is *primâ facie* the inventor, the person who suggests the principle is the true & first inventor. If S. suggested the principle to M., then he [S.], would be the inventor. If, on the other hand, M. suggested the principle to S., & S. was assisting him, then M. would be the true inventor & S. would be a machine, so to speak, which M. uses for the purpose of enabling him to carry his original conception into effect (ALDERSON, B.).—MINTER *v.* WELLS (1834), 1 Web. Pat. Cas. 127 ; 1 Carp. Pat. Cas. 622 ; *subsequent proceedings*, 1 Cr. M. & R. 505.

Annotations :—**Refd.** Household Coal & Iron Co. *v.* Neilson (1843), 1 Web. Pat. Cas. 673 ; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569.

43. —— —— **Subordinate improvement due to servant.**]—(1) The adoption by an inventor of a suggestion made in the course of experiments, of something calculated more easily to carry his conceptions into effect, does not affect the validity of the patent.

(2) It would be difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent incorporating them taken out by his employer. Each case must depend upon its own merits. But, when we see that the principle & object of the invention are complete without it, I think it is too much that a suggestion of a workman employed in the course of the experiments, of something calculated more easily to carry into effect the conceptions of the inventor, should render patent void (TINDAL, C.J.).—ALLEN *v.* RAWSON (1845), 1 C. B. 551 ; 135 E. R. 656.

Annotations :—*As to* (2) **Apld.** *Re* Smith's Patent (1904), 22 R. P. C. 57. **Refd.** Hatton *v.* Kean (1859), 7 C. B. N. S. 268.

44. —— —— ——.]—In 1903 letters patent were granted to S. for "Improvements in cotton gins & wool burrers." Y. presented a petition for revocation, alleging that S. was not the first & true inventor, & that the patent was obtained in fraud of Y.'s rights. S. had been, before the application for the patent, receiving moneys from Y., & one of the questions between the parties was whether he had been employed by Y. to carry out Y.'s invention, or had received gratuitous payments from Y. whilst engaged in inventing :—*Held :* Y. had employed S. to carry out Y.'s ideas, & the payments were for so doing, & S. had, by the patent, obtained the benefit of that to which Y. was entitled.—*Re* SMITH'S PATENT (1904), 22 R. P. C. 57.

45. —— **Servant in position of trustee for master.**]—The mere existence of a contract of

service, does not, *per se*, disqualify a servant from taking out a patent for an invention made by him during his term of service, even though the invention may relate to subject-matter germane to, & useful for his employers in their business, & that even though the servant may have made use of his employers' time & servants & materials in bringing his invention to completion, & may have allowed his employers to use the invention while in their employment (BYRNE, J.).—WORTHINGTON PUMPING ENGINE CO. *v.* MOORE (1902), 19 T. L. R. 84 ; 20 R. P. C. 41.

Annotations :—**Consd.** Richmond *v.* Wrightson (1904), 22 R. P. C. 25. **Folld.** Hop Extract Co. *v.* Horst (1919), 36 R. P. C. 177.

46. —— ——.]—J. R. & co. were manufacturers of certain machinery to the order of R. W. & co. Deft. was employed by J. R. & co., as draughtsman & designer. Various discussions & interviews took place between the various parties as to overcoming certain difficulties, & a certain machine was designed & made. Deft. applied for a patent for it in his own name, & sometime afterwards informed his employers of his application. Arrangements were then made as to taking out foreign & colonial patents & completing the British grant, J. R. & co. paying the fees. Deft. left the pltfs.' employment, & then claimed to be the inventor of the new machine. Pltfs. brought an action for a declaration as to the foreign & colonial patents, & opposed the sealing of the British patent. The law officer when hearing the opposition suggested that the issue as to the British patent should be included in the action & the pleadings were amended by consent accordingly. At the trial there was conflicting evidence as to who the original inventor was. An application was made during the trial to add R. W. & co. as co-pltfs., which application was granted :—*Held :* under the circumstances no injustice would be done by adding R. W. & co. as pltfs., & the pleadings were amended accordingly. A declaration was made that deft. was trustee of all the patents for the invention for J. R. & co., & R. W. & co.—RICHMOND & CO., LTD. *v.* WRIGHTSON (1904), 22 R. P. C. 25.

47. —— ——.]—F. was in the employ of pltf. co., first as a workman & then as the manager of the department for moulding cylinders for phonograph records. Whilst in such employ, he & the general manager of pltf. co. took out in their own names two patents, relating to such mouldings, for inventions made wholly or partly by deft. F. The patents were taken out through the patent agent of the co., & the co. paid all the expenses of taking them out. The general manager did not claim, & admittedly had not, any beneficial interest in the patents, & had assigned his share to pltf. co. The co. claimed that deft. F. was a trustee for them of his interest in the patents, but this deft. denied, & the co. brought an action against F. & against a co. with which he was connected & to which it was alleged he had granted a licence, for a declaration that he was a trustee, & for other relief :—*Held :* deft. F. was employed to do his best by his skill, knowledge, & inventive powers to improve the manufacture of the cylinders, & made the inventions in the execution of his duty, receiving suggestions from the general manager, &, on the facts as to the taking out of the particular patents, & apart from any general inference to be drawn as to his duty to the co., F. was a trustee for the co.—EDISONIA, LTD. *v.* FORSE (1908), 25 R. P. C. 546.

Annotations :—**Refd.** British Reinforced Concrete Engineering Co. *v.* Lind (1917), 86 L. J. Ch. 486 ; Mellor *v.* Beardmore (1926), 43 R. P. C. 361.

48. —— ——.]—An assistant engineer to pltf. co., whose duty it was to design the best method of carrying out certain work of the co., discovered in the course of his employment a method by which his employers could more effectually carry out the work. For this invention he obtained a patent, & claimed to retain the benefit of it for his own use :—*Held :* the terms of his particular employment imposed upon him an obligation to produce the best design he could, & he was a trustee of the patent for pltf. co.—BRITISH REINFORCED CONCRETE ENGINEERING CO. *v.* LIND (1917), 86 L. J. Ch. 468 ; 116 L. T. 243 ; 33 T. L. R. 170 ; 34 R. P. C. 101.

Annotation :—**Refd.** Mellor *v.* Beardmore (1926), 43 R. P. C. 361.

49. —— ——.]—HOP EXTRACT CO., LTD. *v.* HORST (1919), 36 R. P. C. 177.

50. ——.]—A calico printer is entitled, after having discharged his head colourman, to the book in which that servant has entered the processes for mixing colours during his service, although many of the processes were the invention of the head colourman himself.—MAKEPEACE *v.* JACKSON (1813), 4 Taunt. 770 ; 128 E. R. 534.

SUB-SECT. 2.—RIGHTS OF SERVANT.

51. Whether servant entitled to benefit of invention.]—BARBER *v.* WALDUCK (1823), cited in 1 C. & P. at p. 567 ; 1 Carp. Pat. Cas. p. 438 ; *sub nom.* BARKER & HARRIS *v.* SHAW, 1 Web. Pat. Cas. 126.

52. ——.]—BLOXAM *v.* ELSEE, No. 12, *ante*.

53. ——.]—The mere fact of his being the superintendent of the signalling department did not prevent him inventing & patenting a new signalling apparatus. If he obtained a patent it would not belong to the co., but to himself (JESSEL, M.R.).—SAXBY *v.* GLOUCESTER WAGON CO. (1882), Griffin's Patent Cases (1887), 54, C. A. ; *on appeal* (1883), Griffin's Patent Cases (1887), p. 56, H. L.

Annotations :—**Mentd.** Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424 ; Acetylene Illuminating Co. *v.* United Alkali Co. (1904), 20 R. P. C. 161.

54. ——.]—An employer is not necessarily entitled to the benefit of an invention made by his servant.—*Re* HEALD'S PATENTS (1891), 8 R. P. C. 429.

Annotation :—**Refd.** Mellor *v.* Beardmore (1926), 43 R. P. C. 361.

55. —— **Question of fact.**]—*Re* SMITH'S PATENT (1904), 22 R. P. C. 57.

56. —— **Invention made in employer's time—& at employer's expense.**]—W. presented a petition for revocation of a patent granted to M. & N. in 1898, on the ground that he was the first & true inventor, & they had obtained the grant in fraud of his rights. W. was a workman in the employment of a co. of which M. & N. were

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PART III. SECT. 2, SUB-SECT. 2.

51 i. *Whether servant entitled to benefit of invention.*]—Pltf., having been employed by defts. expressly to make or improve a machine, could not claim to be the inventor as against them.—BONATHAN *v.* BOWMANVILLE FURNITURE MANUFACTURING CO. (1871), 31 U. C. R. 413.—**CAN.**

51 ii. ——.]—Where a skilled person is employed to make experiments the result of his labours belong to his employer, & the adoption & use of the invention by the employer is no infringement where the invention has been patented by the employee.—FOX *v.* MCKAY (1864), 5 Nfld. L. R. 35.—**NFLD.**

f. —— *Implied undertaking by master to pay for use of invention.*]—MELLOR *v.* BEARDMORE (WILLIAM) & CO., LTD. (1926), 43 R. P. C. 361.—**SCOT.**

Sect. 2.—*As between master and servant: Sub-sect.* 2. *Sect.* 3.]

directors. M. had asked W. to invent a tap which would, by the introduction of steam into cold water, give hot, warm, or cold water as required. W. worked up the invention, made the drawings & models & perfected the tap in all details. M. paid him £10 for overtime work on the models:—*Held:* M. & N. were not the first & true inventors; W. was the first & true inventor; the patent must be revoked; & M. & N. had obtained the invention from W., & had obtained the grant of the patent in fraud of the right of W. —*Re* MARSHALL & NAYLOR'S PATENT (1900), 17 R. P. C. 553.

Annotations:—**Refd.** Edisonia *v.* Forse (1908), 25 R. P. C. 546; British Reinforced Concrete Engineering Co. *v.* Lind (1917), 86 L. J. Ch. 486; Mellor *v.* Beardmore (1926), 43 R. P. C. 361.

57. —— —— ——.]—WORTHINGTON PUMPING ENGINE CO. *v.* MOORE, No. 45, *ante*.

58. —— **Invention patented in joint names of master & servant.**]—Pltf., who entered defts.' employ as a tool maker, was given the work, at the beginning of 1897 of endeavouring to make improvements in the existing machinery & plant of defts., & to invent new appliances. Some of the improvements & appliances invented by him were patented in the joint names of pltf. & defts., while others were not made the subject of letters patent. In Mar. 1902, defts. dismissed pltf. from their service, & he then claimed £1,428 15*s.* in respect of said inventions & improvements under an agreement with defts. for his remuneration, or, alternatively, an account of profits made by defts. by the sale & use of the invented machines & payment to him of a moiety of such profits when ascertained. Defts., while denying liability, were willing to give a bonus in respect of said matters, &, in addition to having paid £50 to pltf., they brought £200 into ct. The jury found, that pltf. was entitled to £260 in addition to the £50, which he had already received in respect of his interest in the patents; that he was entitled to nothing for the improvements which had not been patented. —PASHLEY *v.* LINOTYPE CO., LTD. (1903), 20 R. P. C. 633.

SECT. 3.—INVENTION COMMUNICATED FROM ABROAD.

59. Importer of process worked abroad — Whether true & first inventor.]—DARCY *v.* ALLIN, No. 436, *post*.

60. —— ——.] — IPSWICH CLOTHWORKERS' CASE, No. 437, *post*.

61. —— ——.] — CALTHORPE'S ADMINISTRATORS *v.* WAYMANS (1676), 3 Keb. 710; 84 E. R. 966.

62. —— ——.] — EDGEBERRY *v.* STEPHENS (1693), Holt, K. B. 475; 2 Salk. 447; 1 Carp. Pat. Cas. 35; Dav. Pat. Cas. 36; 1 Web. Pat. Cas. 35; 90 E. R. 1162.

Annotations:—**Consd.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463. **Apld.** Beard *v.* Egerton (1846), 3 C. B. 97. **Refd.** Chappell *v.* Purday (1845), 14 M. & W. 303; Jefferys *v.* Boosey (1854), 4 H. L. Cas. 815.

63. —— ——.]—The "public use & exercise" of an invention, which prevents it from being considered a novelty, is a use in public, so as to come to the knowledge of others than the inventor, as contradistinguished from the use of it by himself in private; & does not mean a use by the public generally.

Where an improved lock, for which pltf. has a patent, had previously been used by an individual on a gate adjoining a public road, for several years, & several dozens of a similar lock had been made at Birmingham from a pattern received from America, & sent abroad:—*Held:* this constituted such a public use & exercise of the invention as to avoid the patent.—CARPENTER *v.* SMITH (1842), 9 M. & W. 300; 11 L. J. Ex. 213; 1 Web. Pat. Cas. 540; 152 E. R. 127.

Annotations:—**Consd.** Household Coal & Iron Co. *v.* Neilson (1843), 9 Cl. & Fin. 788; Heath *v.* Smith (1854), 3 E. & B. 256; Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194. **Apld.** Betts *v.* Neilson (1868), 3 Ch. App. 429. **Consd.** Gill *v.* Coutts & Cutler (1895), 13 R. P. C. 136. **Refd.** Stead *v.* Williams (1844), 7 Man. & G. 818; Tangye *v.* Stott (1866), 14 W. R. 386; Elias *v.* Grovesend Tinplate Co. (1890), 7 R. P. C. 455.

64. —— ——.]—(1) The user which will vitiate letters patent must be public, & not by way of experiment.

(2) The old article must have the same properties as the patent article, & have been known & in use.

(3) If a user be limited & abandoned, the question will be, whether it was not by way of experiment.

(4) The tests of a new manufacture. The specification must give the best mode known to the inventor, & must not mislead.

(5) The want of utility not admissible under the plea denying the invention to be a new manufacture.

(6) The party obtaining the patent must be the true & first inventor in this country. If he import from a foreign country that "which others at the time of the makng of such letters patent & grants did not use," it will suffice (CRESSWELL, J.

(7) I think that there is a new principle developed, carried out, & embodied in the mode of using that principle, & in availing himself of that which is sufficient to sustain the patent right in this case (CRESSWELL, J.).—WALTON *v.* BATEMAN (1842), 1 Web. Pat. Cas. 613; 1 Goodeve's Patent Cases, 490.

Annotation:—*Generally*, **Refd.** Edison & Swan Electric Light Co. *v.* Woodhouse (1887), 3 T. L. R. 367.

65. —— ——.]—A person who has learnt an invention abroad, & imported it into this country, where it was not understood or known before, is the first & true inventor within Statute of Monopolies, 1623 (c. 23); & that, even though the person be not a meritorious importer, but a mere clerk, servant, or agent to whom the communication is made.—BEARD *v.* EGERTON (1846), 3 C. B. 97; 15 L. J. C. P. 270; 7 L. T. O. S. 228; 10 Jur. 643; 136 E. R. 39.

Annotation:—**Refd.** *Re* Avery's Patent (1887), 36 Ch. D. 307.

66. —— ——.]—In case for the infringement of a patent, the declaration alleged that pltf. was the inventor of certain improvements in machinery for covering fibres, applicable in the manufacture of braid & other fabrics; that the Queen had granted him a patent for his invention; & that deft. infringed it. Deft. pleaded that, before the granting of the patent, pltf. represented to Her Majesty, that, in consequence of a communication made to him by a certain foreigner, residing abroad, he, pltf., was in possession of an invention of improvements in machinery for covering fibres, applicable in the manufacture of braid & other

PART III. SECT. 3.

59 i. *Importer of process worked abroad—Whether true & first inventor.*]—A mere importer of an invention which has been patented for some years previously in the United States by some other parties is not an inventor or discoverer thereof under Patent Act, 1869.—WOODRUFF *v.* MOSELY (1875), 19 L. C. J. 169.—**CAN.**

fabrics; that Her Majesty, believing, & confiding in the truth, & acting upon the suggestion so made by pltf. as aforesaid, & in consideration thereof, granted the letters patent in the declaration mentioned; & that such representation was false; whereby the letters patent were null & void:—*Held:* pltf. was entitled to a verdict on the issue joined on the plea, without any proof that the invention was communicated to him by a foreigner residing abroad, as alleged in the petition recited in the specification, a party availing himself of information from abroad, being an inventor, within the meaning of Statute of Monopolies, 1623 (c. 3), s. 6.—NICKELS *v.* ROSS (1849), 8 C. B. 679; 13 L. T. O. S. 467; 137 E. R. 674.

Annotations:—**Apld.** *Re* Avery's Patent (1887), 36 Ch. D. 307. **Refd.** Smith *v.* Neale (1857), 2 C. B. N. S. 67.

67. —— ——.]—(1) Where a patent is taken out as for an original invention, the subject of the patent being in fact a communication from a British subject resident abroad, the patent is void.

(2) *Semble:* an agent in this country of an inventor abroad receiving a confidential communication of an invention, not in a practically useful state, may take out a patent for his own benefit, if he, pursuing the idea thus thrown out, discovers a practical way of carrying it into effect.—MILLIGAN *v.* MARSH (1856), 2 Jur. N. S. 1083; *subsequent proceedings, sub nom.* MARSH *v.* MILLIGAN (1857), 3 Jur. N. S. 979.

Annotation:—*As to* (1) **Dbtd.** *Re* Avery's Patent (1887), 36 Ch. D. 307.

—In a suit to restrain the infringement of a patent dated Aug. 25, 1865, relating to roller skates, deft. set up the defence of want of novelty under the following circumstances. Pltf. took out an American patent for a similar invention in the year 1863, & a copy of the claim in the American specification appeared in the Comrs. of Patents Journal published in England on Feb. 6, 1863, & the claim, together with a short description of the invention, also appeared in an American publication called the "Scientific American" of Jan. 24, 1863, a copy of which was received in the library of the Patent Office in Feb. 1863. One of the drawings in the American specification appeared in a book published in America by Messrs. Jewitt, a copy of which was received in the library of the Patent Office on July 20, 1865, & placed in one of the private rooms attached to the library, but it was accidentally omitted to be entered in the list of books, & there was no evidence that the book had ever been seen by any of the public prior to Mar. 1875. Deft. alleged that an ordinary skilled workman could make pltf.'s invention from the notice which appeared in the "Scientific American" together with the drawing in Messrs. Jewitt's book, though not from the letterpress alone, & that the patent was therefore invalid:—*Held:* (1) the drawing in Messrs. Jewitt's book had not, before the date of pltf.'s English patent, become part of the common stock of public knowledge in England so as to be a sufficient prior publication to avoid pltf.'s patent; (2) the letterpress & drawing together did not afford a sufficient description to enable a workman of ordinary skill to make the patented invention & therefore that, even if there had been a prior publication of Messrs. Jewitt's book, pltf.'s patent would nevertheless be valid.

(3) As I understand, shortly after the passing of the statute [of Monopolies, 1623 (c. 3)], the question arose whether a man could be called a first & true inventor who, in the popular sense, had never invented anything, but who, having learned abroad (that is, out of the realm, in a foreign country, because it has been decided that Scotland is within the realm for this purpose) that somebody else had invented something, quietly copied the invention, & brought it over to this country, & then took out a patent. As I said before, in the popular sense he had invented nothing. But it was decided . . . that he was a first & true inventor within the statute, if the invention, being in other respects novel & useful, was not previously known in this country (JESSEL, M.R.).

(4) The specifications . . . is not addressed to people who are ignorant of the subject-matter. It is addressed to people who know something about it. But there are various kinds of people know something about it. If it is a mechanical invention . . . you have first of all scientific mechanicians of the first class, eminent engineers: then you have scientific mechanicians of the second class, managers of great manufactories, great employers of labour, persons who have studied mechanics—not to the same extent as the first class, the scientific engineers, but still to a great extent . . . & in this class I should include foremen, being men of superior intelligence, who like their masters would be capable of invention, & like the scientific engineers would be able to find out what was meant even from slight hints, & still more from imperfect descriptions, & would be able to supplement, so as to succeed even from a defective description, & even more than that, would be able to correct an erroneous description. . . . The other class consists of the ordinary workman, using that amount of skill & intelligence which is fairly to be expected from him. . . . Now, as I understand, to be a good specification it must be intelligible to the third class I have mentioned, & that is the result of the law (JESSEL, M.R.).—PLIMPTON *v.* MALCOLMSON (1876), 3 Ch. D. 531; 45 L. J. Ch. 505; 34 L. T. 340; Goodeve's Patent Cases, 374; *previous proceedings, sub nom.* PLYMPTON *v.* MALCOLMSON (1875), L. R. 20 Eq. 37.

Annotations:—*As to* (1) **Apld.** Plimpton *v.* Spiller (1877), 6 Ch. D. 412. **Consd.** Otto *v.* Steel (1885), 31 Ch. D. 241. **Distd.** Harris *v.* Rothwell (1887), 35 Ch. D. 416. **Apld.** Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569. **Refd.** Croysdale *v.* Fisher (1884), Griffin's Patent Cases (1884–1886), 73; Guilbert-Martin *v.* Kerr & Jubb (1886), 3 T. L. R. 87. *As to* (2) **Consd.** *Re* Lewis & Stirckler's Patent (1896), 14 R. P. C. 24. **Refd.** Edge *v.* Niccolls, [1911] 1 Ch. 5. *As to* (3) **Distd.** Dalton *v.* Saville-Street Foundry & Engineering Co. (1878), 39 L. T. 97. **Apld.** *Re* Avery's Patent (1887), 36 Ch. D. 307. *As to* (4) **Refd.** Thorn *v.* Worthing Skating Rink Co. (1876), 6 Ch. D. 415, n.; Edison & Swan Electric Light Co. *v.* Holland (1889), 6 R. P. C. 243; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co. (1919), 36 R. P. C. 95; Wallace *v.* Tullis Russell (1921), 39 R. P. C. 3. *Generally,* **Refd.** Wegmann *v.* Corcoran, Witt (1878), 39 L. T. 563; Coles *v.* Baylis, Lewis (1886), 3 R. P. C. 178; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1924), 41 R. P. C. 241.

69. —— ——.]—*Re* ABEL'S APPLICATION (1876), Johnson's Patentee's Manuel, 169.

70. —— ——.]—*Re* EDMUNDS' PATENT (1886), Griffin's Patent Cases (1884–1886), 281.

Annotations:—**Consd.** *Re* Higgins' Patent (1891), 9 R. P. C. 74; *Re* McNeil's Application (1907), 24 R. P. C. 680. **Refd.** *Re* Gascoigne's Patent (1909), 27 R. P. C. 78.

71. —— ——.]—*Re* LAKE'S PATENT (1888), 5 R. P. C. 415.

72. What is "abroad"—Scotland.]—Found a good objection to a Scottish patent that, previous to its being granted, the art was known & practised in England.—ROEBUCK *v.* STIRLING & SON (1774), 8 Cl. & Fin. 446, n.; 1 Web. Pat. Cas. 45; 8 E. R. 174, H. L.

Annotation:—**Apld.** Brown *v.* Annandale (1842), 8 Cl. & Fin. 437.

73. —— ——.]—(1) It is essential to the validity of a Scottish patent that the invention or

Sect. 3.—*Invention communicated from abroad. Part IV. Sect.* 1: *Sub-sects.* 1 & 2.]

improvement for which it is granted should be new in England as well as in Scotland.

Accordingly, evidence of the use of an invention in England previous to the date of a patent for it in Scotland, is admissible, & sufficient to make the patent void; *et vice versâ*.

(2) *Semble:* the use of an invention in any of the colonies abroad would invalidate subsequent letters patent.—BROWN *v.* ANNANDALE (1842), 8 Cl. & Fin. 437; 1 Web. Pat. Cas. 433; 8 E. R. 170, H. L.

Annotation:—*As to* (1) **Consd.** Rolls *v.* Isaacs (1881), 19 Ch. D. 268.

74. —— Colonies.]—BROWN *v.* ANNANDALE, No. 73, *ante*.

75. —— ——.]—The district of Natal is a British colony with a separate govt., under a Governor appointed by the Crown; & a law has been passed by the Legislative Council of Natal, providing for the granting, in the colony, of patents for inventions:—*Held:* the validity of letters patent under the Great Seal for licence to use an invention in the United Kingdom of Great Britain & Ireland, the Channel Islands, & the Isle of Man, would not be impeached by the fact, if proved, of prior use of the invention in Natal.—ROLLS *v.* ISAACS (1881), 19 Ch. D. 268; 51 L. J. Ch. 170; 45 L. T. 704; 30 W. R. 243.

76. What amounts to communication—Question of fact.]—STEAD *v.* WILLIAMS, No. 20, *ante*.

77. —— Oral communication within realm by agent of foreigner resident abroad.]—PILKINGTON *v.* YEAKLEY VACUUM HAMMER CO. (1901), 18 R. P. C. 459, C. A.

78. —— ——.]—*Re* JAMESON'S PATENT (1902), 19 R. P. C. 246.

79. Sufficiency of communication.]—Though the grantee of a patent for an invention communicated to him by a foreigner resident abroad is only bound to tell the public all that he himself knows, yet, if the original inventor has not told him enough to enable him so to describe the invention as that it can be constructed by the aid only of the specification, the patent will be invalid.—WEGMANN *v.* CORCORAN (1879), 13 Ch. D. 65; 41 L. T. 358; 28 W. R. 331, C. A.

Annotation:—**Refd.** Badische Anilin und Soda Fabrik *v.* Levinstein (1885), 29 Ch. D. 366.

Part IV.—Subject-Matter of Patent.

SECT. 1.—WHAT CONSTITUTES SUBJECT-MATTER.

SUB-SECT. 1.—IN GENERAL.

See Statute of Monopolies, 1623 (c. 3), s. 5; & Patents & Designs Act, 1907 (c. 29), s. 93.

80. Subject-matter at common law—"New trade" or "engine tending to the furtherance of trade."]—DARCY *v.* ALLIN, No. 436, *post*.

81. —— "New invention" or "new trade."]—IPSWICH CLOTHWORKERS' CASE, No. 437, *post*.

82. Subject-matter under statute—New "art."]—A grant of the sole use of a new invented art, & this is good, being indulged for the encouragement of ingenuity; but this is tied up by Statute of Monopolies, 1623 (c. 3), s. 6, to the term of fourteen years; for after that time it is presumed to be a known trade, & to have spread itself among the people (PARKE, C.J.).—MITCHEL *v.* REYNOLDS (1713), 1 P. Wms. 181; 10 Mod. Rep. 130; 24 E. R. 347.

Annotations:—**Refd.** Mouchell *v.* Cubitt (1907), 24 R. P. C. 194. **Mentd.** Shelton *v.* Sire (1719), 11 Mod. Rep. 310; Chesman *v.* Nainby (1726), 2 Stra. 739; Cheesman *v.* Ramby (1728), Fortes. Rep. 297; Gunmakers' Co. *v.* Fell (1742), Willes, 384; Low *v.* Peers (1770), Wilm. 364; Davis *v.* Mason (1793), 5 Term Rep. 118; Gale *v.* Reed (1806), 8 East, 80; Hayward *v.* Young (1818), 2 Chit. 407; Homer *v.* Ashford (1825), 3 Bing. 322; Wickens *v.* Evans (1829), 3 Y. & J. 318; Horner *v.* Graves (1831), 7 Bing. 735; Young *v.* Timmins (1831), 1 Cr. & J. 331; Keppel *v.* Bailey (1834), 2 My. & K. 517; Hitchcock *v.* Coker (1837), 6 Ad. & El. 438; Wallis *v.* Day (1837), 2 M. & W. 273; Ward *v.* Byrne (1839), 5 M. & W. 548; Mallan *v.* May (1843), 11 M. & W. 653; Tallis *v.* Tallis (1853), 1 E. & B. 391; Dendy *v.* Henderson (1855), 11 Exch. 194; Catt *v.* Tourle (1869), 4 Ch. App. 654; Wilkinson *v.* Wilkinson (1871), L. R. 12 Eq. 604; Gravely *v.* Barnard (1874), L. R. 18 Eq. 518; Collins *v.* Locke (1879), 4 App. Cas. 674; Rousillon *v.* Rousillon (1880), 14 Ch. D. 351; Davies *v.* Davies (1887), 36 Ch. D. 359; Clegg *v.* Hands (1889), 44 Ch. D. 506, n.; Mogul S.S. Co. *v.* McGregor, Gow (1889), 23 Q. B. D. 598; Badische Anilin und Soda Fabrik *v.* Schott, Segner, [1892] 3 Ch. 447; Nordenfelt *v.* Maxim Nordenfelt Guns & Ammunition Co., [1894] A. C. 535; Kruse *v.* Johnson, [1898] 2 Q. B. 91; Robinson *v.* Heuer (1898), 67 L. J. Ch. 644; Haynes *v.* Doman [1899] 2 Ch. 13; *Re* Hollis' Hospital Trustees & Hague's Contract (1899), 47 W. R. 691; Dowden *v.* Pook, [1904] 1 K. B. 45; *Re* Morgan, Dowson *v.* Davey (1910), 26 T. L. R. 398; North-Western Salt Co. *v.* Electrolytic Alkali Co. (1912), 107 L. T. 439; Neville *v.* Dominion of Canada News Co., [1915] 3 K. B. 556; Morris *v.* Saxelby, [1916] 1 A. C. 688; Horwood *v.* Millar's Timber & Trading Co., [1917] 1 K. B. 305; Rodriquez *v.* Speyer, [1919] A. C. 59; Hepworth Manufacturing Co. *v.* Ryott, [1920] 1 Ch. 1.

83. Apparatus admitting of greatest improvements.]—Patent for "an improved application of air to produce heat in fires, forges, & furnaces where bellows or other blowing apparatus are required." The specification stated, that a blast or current of air was to be produced by bellows or other blowing apparatus, in the ordinary way, & passed from the bellows into an air vessel, & through that vessel, by means of a tube, into the fire, forge, or furnace. The vessel was to be air tight, except as to the apertures for the admission & emission of air, &, during the continuance of the blast was to be kept heated to a considerable temperature. It would be better that the temperature should be kept at a red heat, or nearly so; but so high a temperature was not absolutely necessary, to produce a beneficial effect. The air vessel might be of iron, or other materials; the size would depend upon the blast, & on the heat to be produced. "The form or shape of the vessel or receptacle is immaterial to the effect, & may be adapted to the local circumstances or situation." Defts., in their fourth plea, set out the above specification, & then pleaded that pltf. did not, "by the said instrument in writing, particularly describe & ascertain the nature of his supposed invention, & in what manner the same was to be performed":—*Held:* (1) the title of the patent was good, & was sufficiently explained by the specification; (2) pltfs., in this specification, had not merely claimed a principle, but a machine

PART IV. SECT. 1, SUB-SECT. 1.

g. *Subject-matter under statute—"Composition of matter."*]—The words "composition of matter" in Patent Act, s. 7, include all composite articles, whether they be the result of chemical union or of mechanical mixture, & the latter may therefore be the subject-matter of a patent.—ELECTRIC FIRE PROOFING CO. *v.* ELECTRIC FIRE-PROOFING CO. OF CANADA (1907), Q. R. 31 S. C. 34.—**CAN.**

h. *Apparatus not reduced to practical shape.*]—In order to prove an "invention" capable of being patented under

embodying a principle; (3) it is the province of the ct. to construe all written documents, as soon as the surrounding circumstances, if any, or the technical or mercantile language in which they may be couched, shall have been ascertained as facts by the jury. The ct., therefore, & not the jury, is to construe the meaning of the specification; (4) a specification, to be valid, must be such as would enable a competent workman fairly following it out, without invention or addition, to produce the machine for which the patent is taken out; (5) the meaning of the words in the specification, "the form or shape of the vessel or receptacle is immaterial to the effect," was, that provided the air in the air vessel were raised to a sufficient temperature, a beneficial effect on the furnace would be produced, whatever might be the manner of applying the heat to the air vessel; &, the jury having found that the description would enable a competent workman to make such an air vessel as should produce a beneficial effect, the specification was good, & the patent might be supported.—NEILSON *v.* HARFORD (1841), 8 M. & W. 806; 1 Web. Pat. Cas. 331; 11 L. J. Ex. 20; 151 E. R. 1266.

Annotations:—As to (1) **Refd.** Stead *v.* Williams (1844), 2 Web. Pat. Cas. 137. *As to* (2) **Consd.** Ticket Punch Register Co. *v.* Colley's Patents (1895), 12 R. P. C. 171; Pneumatic Tyre Co. & Dunlop Pneumatic Tyre Co. *v.* Tubeless Pneumatic Tyre & Capon Heaton (1898), 14 T. L. R. 341. *As to* (3) **Apld.** Allen *v.* Rawson (1845), 1 C. B. 551; Hill *v.* Evans (1862), 4 De G. F. & J. 288. Betts *v.* Menzies (1862), 10 H. L. Cas. 118. **Refd.** Beard *v.* Egerton (1849), 8 C. B. 165; Hills *v.* London Gas Light Co. (1860), 5 H. & N. 312; Edison & Swan United Electric Light Co. *v.* Holland (1888), 4 T. L. R. 686. *As to* (4) **Refd.** Cook *v.* Pearce (1844), 13 L. J. Q. B. 189. *Generally*, **Refd.** Crane *v.* Price (1842), 12 L. J. C. P. 81; Millengen *v.* Picken (1845), 1 C. B. 799; Unwin *v.* Heath (1855), 5 H. L. Cas. 505; Simpson *v.* Holliday (1865), 13 W. R. 577. **Mentd.** Hull *v.* Bolland (1856), 27 L. T. O. S. 221; Berwick *v.* Horsfall (1858), 4 C. B. N. S. 450; Peek *v.* North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Lewis *v.* G. W. Ry. (1877), 47 L. J. Q. B. 131; *Re* North Western Rubber Co. & Hüttenbach, [1908] 2 K. B. 907.

84. Apparatus giving no beneficial result without further experiment.]—NEILSON *v.* HARFORD, No. 83, *ante*.

—— **"Any manner of new manufacture."**]—*See* Sub-sect. 2, *post*.

85. Delay in patenting article—After complete workable machine made.]—(1) If the inventor of a machine lend it to another in order to have its qualities tested, & that other use it for some weeks in a public workroom; this is not giving the invention such publicity as to deprive the inventor of his right to obtain letters patent therefor it.

(2) A machine does not cease to be the subject of a patent, merely because of the length of time during which the inventor may keep it by him, after it has been made a complete workable machine.—BENTLEY *v.* FLEMING (1844), 1 Car. & Kir. 587; 4 L. T. O. S. 95, N. P.; *subsequent proceedings* (1845), 1 C. B. 479.

Annotation:—As to (1) **Refd.** *Re* Newall, Elliot & Glass (1858), 4 C. B. N. S. 269.

86. Substitution of material never before used for particular purpose.]—In construing a specification, it is not competent to the inventor to pray in aid the provisional specification in order to explain or enlarge the meaning of the complete specification. *Qu.:* whether the application in the construction of a known machine of a material never before used for that purpose, for instance, iron instead of timber in the construction of floating-docks, can properly be the subject of a patent.—MACKELCAN *v.* RENNIE (1862), 13 C. B. N. S. 52; 143 E. R. 21.

87. Apparatus contrary to public policy.]—The question, however, arises whether, quite apart from sect. 75 [of Patents & Designs Act, 1907 (c. 29)], the Crown in the exercise of its prerogative could possibly be expected to exercise its discretion to grant a patent for an article designed as an apparatus for the prevention of conception . . . I think these are not articles for which, whether the specification be amended or not, the Crown can be expected to exercise its discretion by way of granting a patent (SIR THOMAS INSKIP, S.-G.).—*Re* A. & H.'s APPLICATION (1927), 44 R. P. C. 298.

SUB-SECT. 2.—"MANNER OF NEW MANUFACTURE."

See Statute of Monopolies, 1623 (c. 3), s. 5; & Patents & Designs Act, 1907 (c. 29), s. 93.

88. Question for jury.]—Prior to the date of pltf.'s patent granted to him in 1843, madder dye had been obtained from fresh madder by the application of hot water, but there still remained in the dye vats a residuum called "spent madder," which was known to contain some colouring matter, but which had never been extracted from it, & the "spent madder" was consequently thrown away as useless. Some time prior to pltf.'s patent a process was discovered, which, by the application of hot water & acid to fresh madder, produced a dye called garancine, which possessed different properties to the old madder dye. This process extracted the whole of the colouring matter from the fresh madder. Pltf. by his patent, claimed the application of this process to "spent madder," whereby he obtained garancine; & the "spent madder" thereby became of much value:—*Held:* as "spent madder" might be in its nature & properties the same as or different from "fresh madder" it did not follow, as matter of law, that pltf.'s patent was void; but it was a question of fact for the jury, whether pltf.'s invention was a new manufacture of garancine.

If, therefore, the patent be good, it must be on account of the old continuance being applied to a new object, under such circumstances as to support the patent. Now "spent madder" might be a very different thing from "fresh madder," in its properties chemical & otherwise. Or it might be in effect the same thing as "fresh madder," in its properties chemical & otherwise, with the difference only that part of its colouring matter had been already extracted (PATTERSON, J.).—STEINER *v.* HEALD (1851), 6 Exch. 607; 20 L. J. Ex. 410; 17 L. T. O. S. 131; 17 Jur. 875; 155 E. R. 686, Ex. Ch.

*Annotations:—***Refd.** Holmes *v.* L. & N. W. Ry. (1852), Macr. 4; Booth *v.* Kennard (1856), 1 H. & N. 527; Brook & Hirst *v.* Aston (1859), 5 Jur. N. S. 1025.

89. How determined.]—WALTON *v.* BATEMAN, No. 64, *ante*.

90. Includes both mechanical & chemical discoveries.]—(1) A patent was granted to A. for a new invented method of using an old engine in a more beneficial manner than was before known. The specification stated that the method consisted of certain principles, & described the mode of applying those principles to the purposes of the invention, & an Act of Parliament reciting the patent to have been for the making & vending

Canadian Patent Act, s. 7, it is not sufficient to show that the alleged inventor thought of a process in his own mind, if he did not reduce it to a practical shape, or test it by experiments for that purpose.—PERMUTIT Co. *v.* BORROWMAN (1926), 95 L. J. P. C. 164; [1926] 4 D. L. R. 285.—**CAN.**

Sect. 1.—*What constitutes subject-matter: Sub-sects.* 2 & 3, *A.*]

certain engines by him invented, extended to A. for a longer term than fourteen years, the privilege of making, constructing & selling the engines. *Qu.:* whether, under these circumstances, the patent right was valid.

(2) Mechanical & chemical discoveries all come within the description of manufactures; & it is no objection to either of them that the articles of which they are composed were known & were in use before, provided the compound article which is the object of the invention is new (BULLER, J.).

(3) That which is the subject of a patent, ought to be specified, & it ought to be that which is vendible, otherwise it cannot be a manufacture (HEATH, J.).

(4) The word "manufacture" in the Statute [Statute of Monopolies, 1623 (c. 3)] was of extensive signification, it applied not only to things made, but to the practice of making, to principles carried into practice in a new manner, to new results of principles carried into practice (EYRE, C.J.).

(5) It can scarcely be supposed that a workman capable of constructing a fire engine would not be capable of making such additions to it as should be necessary to enable him to execute that which the specification requires him to do. . . . Can it be imagined that he would be so stupid as not to be able to execute this improvement, with the assistance of these plain directions? If any man could for a moment imagine that this was possible, I observe that this difficulty is put an end to, because the jury have found that a workman can execute this improvement in consequence of the specification (EYRE, C.J.).—BOULTON *v.* BULL (1795), 2 Hy. Bl. 463; 1 Carp. Pat. Cas. 117; 126 E. R. 651.

Annotations:—As to (1) **Refd.** Cambridge & Oxford Universities *v.* Richardson (1802), 6 Ves. 689. *As to* (4) **Consd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. **Refd.** Gibson *v.* Braud (1842), 4 Man. & G. 179; Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 T. L. R. 294. *Generally*, **Refd.** Harmer *v.* Plane (1807), 14 Ves. 130; Hill *v.* Thompson (1817), 3 Mer. 622; Jupe *v.* Pratt (1836), 1 Web. Pat. Cas. 144; Neilson *v.* Harford (1841), 1 Web. Pat. Cas. 331; Cook *v.* Pearce (1843), 8 Q. B. 1044. **Mentd.** Brown *v.* Annandale (1842), 8 Cl. & Fin. 437.

91. Must be vendible.] — BOULTON *v.* BULL, No. 90, *ante.*

92. ——.]—R. *v.* WHEELER, No. 149, *post.*

93. ——.] — CORNISH & SIEVIER *v.* KEENE & NICKELS, No. 481, *post.*

94. Must be associated with commerce & trade.]—I think, therefore, we must start with the assumption that an invention within the meaning of Patents & Designs Act, 1907 (c. 29), is an invention for a manner of new manufacture that is in some way associated with commerce & trade. It is quite plain that that does not merely mean that it must be a product. A manner of new manufacture may be a thing newly made, or a substance which, if made before, is improved in its manufacture, or, quite apart from that, it may be a machine or a process that can be used in making something that is, or may be, of commercial value (SIR STANLEY BUCKMASTER, S.-G.).—*Re* C. & W.'s APPLICATION (1914), 31 R. P. C. 235.

95. Whether process of making included.]—BOULTON *v.* BULL, No. 90, *ante.*

96. ——.]—R. *v.* WHEELER, No. 149, *post.*

97. ——.]—(1) The object of the 5 & 6 Will. 4, c. 83, was only to permit a disclaimer to amend the specification of a patent, by removing from it something superfluous, but not to allow the introduction of that which would convert a description, in itself unintelligible or impracticable, into a practicable description of a useful invention. The words "not being such a disclaimer as shall extend the exclusive right," do not mean in the ordinary sense of the word "extend," merely adding to or enlarging the original specification, but are also intended to describe, so confining & restricting its expressions as substantially to amount to a statement of something new.

(2) It is not every useful discovery that can be made the subject of a patent, but the words "new manufacture," in Statute of Monopolies, 1623 (c. 3), will comprehend not only a production, but the means of producing it.

R. took out a patent for "Improvements in embossing & finishing woven fabrics, & in the machinery & apparatus employed therein." In his specification he said, "I employ a roller of metal, wood, or other suitable material, & groove, flute, engrave, mill, or otherwise indent upon it any desired design"; he caused this roller to revolve with a bowl at unequal velocities, moving the fabric transversely when fed into the machine, & by these means he proposed to calender or finish, & to emboss the fabric by one process instead of two, as then practised. He afterwards entered a "disclaimer," in which he disclaimed the words in the title, "& in the machinery or apparatus employed therein," disclaimed the word "wood" from the description of the roller, & restricted the grooves or flutes on the roller to those of a circular kind. Any other grooves would not only not produce the desired effect on the fabric but would destroy it:—*Held:* (3) the original specification read with the disclaimer did not describe anything which could properly be the subject of a patent such as he had taken out.

If we look at this patent, & inquire whether there is an improvement in embossing or finishing woven fabrics contained in this amended specification, I am bound to say, that having regard to existing knowledge at the time, I think there is no such improvement as amounts to a new manufacture, because this mode of producing a brilliant gloss upon the surface was perfectly well known; the operation of the differential velocity was also perfectly well known; that the same thing had been thought of for the purposes of producing a pattern was also perfectly well known (LORD WESTBURY, C.).

(4) The disclaimer here extended the exclusive right, & so had done what the statute did not intend to allow, & consequently was bad, & the patent could not be supported.—RALSTON *v.* SMITH (1865), 11 H. L. Cas. 223; 20 C. B. N. S. 28; 35 L. J. C. P. 49; 13 L. T. 1; 11 E. R. 1318, H. L.

Annotations:—As to (1) **Consd.** *Re* Alsop's Patent, [1906] 1 Ch. 85; *Re* Stahlwerk Becker Akt. Patent, [1917] 2 Ch. 272. *As to* (2) **Folld.** Chamberlain & Hookham *v.* Bradford Corpn. (1903), 20 R. P. C. 673. *As to* (3) **Distd.** Edison & Swan Electric Light Co. *v.* Woodhouse & Rawson (1887), 3 T. L. R. 327. **Apld.** *Re* British Thomson-Houston Co.'s Patent (1919), 89 L. J. Ch. 194. **Refd.** Wegmann *v.* Corcoran (1879), 13 Ch. D. 65. *Generally*, **Refd.** Acetylene Illuminating Co. *v.* United Alkali Co. (1905), 22 R. P. C. 145.

98. —— **Something that is or may be of commercial value.**] — *Re* C. & W.'s APPLICATION, No. 94, *ante.*

99. What amounts to—Substance newly made or improved in manufacture.]—*Re* C. & W.'s APPLICATION, No. 94, *ante.*

100. —— **New system or method must be employed—Paving with wood.**]—STEAD *v.* WILLIAMS, No. 20, *ante.*

101. —— —— **Construction of caisson.**] — BUSH *v.* FOX, No. 616, *post.*

102. —— —— Correspondence cards.] — *Re* JOHNSON'S APPLICATION (1901), 19 R. P. C. 56.
Annotation :—**Apld.** *Re* Ward's Appln. (1911), 29 R. P. C. 79.

103. —— —— Blank space for folding newspaper.] — *Re* COOPER'S APPLICATION (1901), 19 R. P. C. 53.
Annotations :—**Consd.** *Re* Ward's Appln. (1911), 29 R. P. C. 79. **Folld.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

104. —— —— Indexing.] — *Re* WARD'S APPLICATION (1911), 29 R. P. C. 79.
Annotation :—**Consd.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

105. —— —— Extracting lead from human bodies.]—*Re* C. & W.'s APPLICATION, No. 94, *ante*.

106. —— —— Musical notation.] — *Re* C.'s APPLICATION (1919), 37 R. P. C. 247.
Annotation :—**Consd.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

107. —— —— Camouflage.]—*Re* T.'s APPLICATION (1919), 37 R. P. C. 109.

108. —— —— Defence & attack against submarines.] — *Re* F.'s APPLICATION (1920), 37 R. P. C. 112.

109. —— —— Operating high compression internal combustion engine.] — *Re* D. Co.'s APPLICATION (1921), 38 R. P. C. 397.

110. —— —— Enriching atmosphere round plants.]—*Re* B. R.'s APPLICATION (1923), 40 R. P. C 469.

111. —— —— Utilising impure & exhaust gases.]—*Re* A. R.'s APPLICATION (1923), 40 R. P. C. 467.

112. —— —— Selection of contents of side of gramophone record.]—*Re* S.'s APPLICATION (1923), 40 R. P. C. 461.
Annotation :—**Refd.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

113. —— —— Indication on odometer.]—*Re* A. E. W.'s APPLICATION (1924), 41 R. P. C. 529.

114. —— —— Arrangement of well-known objects—Buoys.]—In order to determine that [*i.e.* whether the arrangement in question is an invention], I turn to Patents & Designs Act, 1907 (c. 29), s. 93, & find that "invention" means "any manner of new manufacture the subject of letters patent," & that it also includes an "alleged invention." . . . I cannot see that it is an invention that involves any manner of new manufacture at all. It is nothing but an arrangement of well known forms of signals so that the position of any one of such signals may be known by a number painted on its face (SIR STANLEY BUCKMASTER, S.-G.).—*Re* W.'s APPLICATION (1914), 31 R. P. C. 141.
Annotation :—**Refd.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

115. —— —— —— To facilitate reference.]—*Re* W. R.'s APPLICATION (1924), 41 R. P. C. 216.
Annotation :—**Consd.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

Apparatus for icing cakes.]
Re D. A. & K.'s APPLICATION (1925), 43 R. P. C. 154.

SUB-SECT. 3.—"INVENTION."

A. In General.

Statutory definition.]—*See* Patents & Designs Act, 1907 (c. 39), s. 93.

117. Invention & discovery distinguished.]—(1) Pltf., an electrician, took out, in 1878, a patent for "Improvements in obtaining light by Electricity, & in conveying, distributing, measuring, & regulating the electric current for the same, & in the means or appliances employed therein." He subsequently disclaimed his claims in respect of measuring, conveying, distributing, & regulating by means of the electrometer, & only claimed in respect of an invention for keeping the electromotive force of the electric current in the mains constant by means of the employment of Planté's secondary batteries, in combination with dynamos, & in conjunction with a regulator :—*Held :* pltf.'s invention was novel ; but his patent, as amended, was invalid upon the grounds (*a*) that the original patent was granted for an invention different from that for which he claimed protection after the disclaimers, (*b*) that it was not, in 1878, useful for the main purpose for which it was designated, viz., the practical lighting of large districts, & (*c*) that the specification was insufficient to enable an electrician, of ordinary competence & skill in 1878, to carry it out without further experiments & invention.

(2) An invention is not the same thing as a discovery. When Volta discovered the effect of an electric current from his battery on a frog's leg he made a great discovery, but no patentable invention. Again, a man who discovers that a known machine can produce effects which no one before him knew could be produced by it, may make a great & useful discovery ; but if he does no more, his discovery is not a patentable invention. A patentee must make some addition, not only to knowledge, but to previously known inventions, & must so use his knowledge & ingenuity as to produce either a new & useful thing or result, or a new & useful method of producing an old thing or result.—LANE FOX *v.* KENSINGTON & KNIGHTSBRIDGE ELECTRIC LIGHTING CO., [1892] 3 Ch. 424 ; 67 L. T. 440 ; 8 T. L. R. 798 ; 9 R. P. C. 413, C. A.
Annotations :—*As to* (1) **Refd.** *Re* Alsop's Patent (1907), 24 R. P. C. 733 ; Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239 ; Higginson & Arundel *v.* Pyman (1926), 43 R. P. C. 291. *As to* (2) **Apld.** Moser *v.* Marsden (1893), 9 T. L. R. 584 ; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429 ; Acetylene Illuminating Co. *v.* United Alkali Co. (1904), 22 R. P. C. 145 ; Jandus Arc Lamp & Electric Co. *v.* Arc Lamps (1905), 21 T. L. R. 308 ; *Re* Deutsche Gasglühlicht Akt. Appln. (1908), 26 R. P. C. 101 ; Benton & Stone *v.* Denston (1925), 42 R. P. C. 284. **Refd.** Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569 ; Mouchel *v.* Coignet (1907), 24 R. P. C. 229 ; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95.

118. ——.] — Invention & discovery are different things. You may discover that a thing which you know very well is useful for another purpose. As I understand the law that is not an invention. You may so apply your judgment as to employ old materials for new & useful purposes ; but you cannot have a patent for that. . . . To take old tools & apply them to new purposes may be a new discovery, but it is not a new patentable invention ; you must, as I understand the law, by the use of inventive faculties arrive at what is, within the patent law, a new manufacture (BUCKLEY, J.).—CASE *v.* CRESSY (1900), 17 R. P. C. 255 ; *affd.* (1901), 18 R. P. C. 417, C. A.
Annotation :—**Refd.** Hill *v.* Thomas (1907), 24 R. P. C. 415.

119. ——.] — A patent was granted to R. for improvements in means for repairing pneumatic tyres, consisting of using a strip of canvas with a piece of india rubber attached thereto, adapted to be fixed round the outside of a damaged pneumatic tyre, & to have its ends gripped between the outer cover & the rim. An action having been brought for infringement of this patent, deft., in addition to denying infringement, alleged want of novelty & want of subject matter :—

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 3, *A., B. & C.* (*a*) *&* (*b*).]

Held: the patentee had not suggested anything new in the particular article which he had patented, & failed on subject matter & on novelty.

The difference between discovery & invention is very familiar. Discovery adds to the amount of human knowledge. . . . Invention also adds to human knowledge, but not merely by disclosing something. Invention necessarily involves also the suggestion of an act to be done & it must be an act which results in a new product or a new result or a new process, or a new combination for producing an old product or an old result (BUCKLEY, J.).—REYNOLDS *v.* HERBERT SMITH & CO., LTD. (1902), 20 R. P. C. 123; *affd.* (1903), 20 R. P. C. 410, C. A.

Annotation:— **Apld.** Mouchel *v.* Colgnet (1907), 24 R. P. C. 229.

120. ——.]—The owners of a patent for "Improvements in electricity meters, parts of which improvements are applicable to dynamo electric generators & motors," sued the Mayor, etc. of Bradford for infringement. Defts. pleaded non-infringement, & alleged that the patent was invalid by reason of insufficiency, want of utility, prior publication, & disconformity:—*Held:* defts. had not infringed.

It is not every useful discovery which will constitute a patentable invention, & to tell a man who has been in the habit of using magnets of various forms for various purposes that one particular form has a useful property which was unknown to him before is not in any sense to invent a new manufacture (LORD DAVEY).

The question in every case is, in what consists the originality . . . of the patented invention? If that includes the discovery . . . of a new principle as well as the means of carrying it into effect, an infringer is not entitled to take the principle although he uses somewhat different machinery for the application of it to a practical purpose (LORD DAVEY).—CHAMBERLAIN & HOOKHAM, LTD. *v.* BRADFORD CORPN. (1903), 20 R. P. C. 673, H. L.

Annotations:—**Refd.** British United Shoe Machinery Co. *v.* Simon Collier (1908), 25 T. L. R. 74; Crosfield *v.* Techno-Chemical Laboratories (1913), 29 T. L. R. 378; Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239.

121. ——.]—You cannot take out a patent for the discovery that ferro-cemented piles will resist percussion strains; the only thing you can take out a patent for, in such a matter, would be a pile of a particular form, so as to get the benefit of that new truth which is thus so first "discovered" (FARWELL, L.J.).—MOUCHEL *v.* COIGNET (1907), 24 R. P. C. 229, C. A.

B. Necessity for.

See Sect. 2, *post.*

C. Existence of "Invention."

(a) In General.

122. Question of fact.]—VICKERS, SONS & CO. *v.* SIDDELL, No. 910, *post.*

123. ——.]—LYON *v.* GODDARD, No. 561, *post.*

124. Improved process.]—It would not be sufficient to destroy the patent to show, that learned persons in their studies had foreseen, or had found out this discovery, that is afterwards made public, or that a man in his private warehouse had by various experiments endeavoured to discover it & failed, & had given it up. But if . . . the thing which is now sought to be protected by the patent has been used, & for a considerable period, & used so far to the benefit of the public as to be sold to any body that thought proper to purchase it of those who made it, then it becomes a material question, whether such mode of user is not in your judgment a public using of the article, of the process, or of the invention, before the letters patent were granted (TINDAL, C.J.).—GIBSON *v.* BRAND (1841), 1 Web. Pat. Cas. 627.

125. New material to produce known article.]—Pltf. obtained a patent for the use of animal fibre, by preference Russian wool, or wool of a coarse texture, in the manufacture of artificial hair to be made up as ladies' headdresses, & for upholstery, & other like purposes. Upon bill filed to restrain an infringement of the patent:—*Held:* the specification was too extensive; even the use of a new material to produce a known article could not be the subject of a patent unless some invention & ingenuity were displayed in the adaptation; in this case a prior use of wool for the same purpose was proved by the evidence, & the bill must be dismissed with costs.—RUSHTON *v.* CRAWLEY (1870), L. R. 10 Eq. 522.

Annotations:—**Refd.** Rollins *v.* Hinks (1872), L. R. 13 Eq. 355; Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239.

126. New use of known product.]—*Re* A. F.'s APPLICATION (1913), 31 R. P. C. 58.

Annotation:—**Refd.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

127. Alleged invention nothing more than fundamental principle.]—A patent was granted for "Improvement in clocks, tell-tales, alarums & the like." The first claim was as follows. "In a gravity clock having the driving pinion of the clockwork engaging a vertical rack down which the clock in working falls, the addition of a weight to the clock, the clock together with the weight being so balanced & guided that practically the entire weight of the clock & supplementary weight act at the point of contact of the pinion on the vertical rack substantially as described." A further patent for "Improvements relating to clocks" was applied for by the same inventor after the complete specification of the first patent had been lodged, but before it had been accepted. The first claim of the second patent was as follows: "In a gravity clock of the kind claimed in specification of letters Patent No. 23,149 of 1910 arranging or disposing the additional weight, or providing means, so that the centre of gravity of the additional weight & clock is substantially in the same plane as the driving pinion for the clockwork mechanism & the vertical rack substantially as hereinbefore described." In an action for infringement of both patents defts. alleged (*inter alia*) want of novelty, utility & subject-matter:—*Held:* infringement being admitted & proved, as regards the first patent (*a*) the suggestion to add such

PART IV. SECT. 1, SUB-SECT. 3.—C. (a).

k. *General rule.*]—A patent must be for a thing invented, as well as new & useful; a process which any skilful mechanic or chemist would suggest when required, or the result of judgment & skill in the selection & adaptation of materials, is no invention.—*Re* ALLAN & REED (1888), 14 Q. L. R. 126.—**CAN.**

122 i. *Question of fact.*]—SMITH *v.* MUTCHMORE (1862), 11 C. P. 458.—**CAN.**

122 ii. ——.]—KEMP *v.* CHOWN & CO. (1902), 7 Exch. C. R. 306; 22 C. L. T. 89.—**CAN.**

122 iii. ——.]—An invention is not capable of exact definition & is always a question of fact.—WRIGHT & CORSON *v.* BRAKE SERVICE, LTD., [1925] Exch. C. R. 127.—**CAN.**

1. *Solution of problem hitherto thought insoluble.*]—The Comr. of Patents should not refuse to accept an application & specification in respect of an alleged invention that is said to solve a problem which hitherto has been thought to be insoluble, merely

additional weight as might be necessary to the clock was nothing more than a recognition & statement of the most fundamental principle or axiom in the designing of any clock; (*b*) the alleged element of invention consisting in the direction so to balance & guide the clock that the total weight should act at the point of contact of the pinion on the rack was only recognising & insisting on an obvious addition of efficiency familiar to any clock designer with ordinary mechanical knowledge & experience; (*c*) the alleged element of invention consisting in the balancing & guiding by means of a column other than & additional to that containing the rack was quite insufficient for the purpose & produced no appreciable advantage so far as time-keeping was concerned; & as regards the second patent, (*d*) the legal result of the patent having been applied for after the date of the lodging of the complete specification of the first patent but before its acceptance was the same as if such complete specification had been accepted before the date of application for the second patent; (*e*) the alleged element of invention consisting in bringing the centre of gravity of the weighted clock into the plane of the rack & driving pinions was merely a correction of an obvious defect in the machine described in the first specification & could not be considered an invention; & both patents were invalid for want of subject-matter.—BLOXHAM *v.* KEE-LESS CLOCK CO. (1922), 39 R. P. C. 195.

128. Alleged invention merely matter of design.]—SAFVEANS AKTIE BOLAG *v.* FORD MOTOR CO. (ENGLAND), LTD. (1926), 44 R. P. C. 49.

(*b*) *Matter for Consideration.*

129. Mode of invention—Accident or design.]—LIARDET *v.* JOHNSON (1778), 1 Web. Pat. Cas. 53; 1 Carp. Pat. Cas. 35; Bull. N. P. 76 b; *subsequent proceedings* (1780), 1 Y. & C. Ch. Cas. 527, n.

Annotations:—**Mentd.** Harmar *v.* Playne (1809), 11 East, 101; Lewis *v.* Marling (1829), 8 L. J. O. S. K. B. 46; Morgan *v.* Seaward (1836), 1 Web. Pat. Cas. 170.

130. —— ——.]—CRANE *v.* PRICE, No. 315, *post.*

131. —— ——.]—An invention is none the less an invention because it required but small inventive powers to enable him to do it (BRAMWELL, L.J.).—HAYWARD *v.* HAMILTON (1881), Griffin's Patent Cases (1884–1886), 115, C. A.

Annotations:—**Distd.** Blakey *v.* Latham (1889), 5 T. L. R. 301. **Consd.** Williams *v.* Nye (1890), 7 R. P. C. 62; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569. **Refd.** Reynolds *v.* Amos (1886), Griffin's Patent Cases (1884–1886) 201; Thomson *v.* American Braided Wire Co. (1889), 6 R. P. C. 518; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 431; Hill *v.* Thomas (1907), 24 R. P. C. 415.

132. —— **Degree of labour & amount of expense involved.**]—CRANE *v.* PRICE, No. 315, *post.*

133. Commercial utility.]—If, within a short time of the first manufacture & sale of an article of commerce, protected by letters patent, such article commands a ready & extensive market, that fact, which is proof of utility, must also be accepted as evidence—not conclusive, but cogent —of novelty.—EHRLICH *v.* IHLEE (1888), 4 T. L. R. 337; 5 R. P. C. 198; *affd.*, 5 R. P. C. 437, C. A.

Annotations:—**Refd.** Gadd *v.* Manchester Corpn. (1892), 67 L. T. 569; Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 11 T. L. R. 345; Shrewsbury & Talbot S. T. Cab Co. *v.* Sterckx (1895), 12 T. L. R. 122; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre & Automatic Valve Co. (1899), 16 R. P. C. 50, 531.

134. ——.]—LONGBOTTOM *v.* SHAW (1891), 8 R. P. C. 333, H. L.

Annotation:—**Mentd.** Mandleberg *v.* Morley (1895), 64 L. J. Ch. 245.

135. ——.]—RIEKMANN *v.* THIERRY, No. 372, *post.*

136. ——.]—THERMOS, LTD. *v.* ISOLA, LTD., No. 377, *post.*

137. Existence of long unsatisfied demand.]—Where there has been for some time a long unsatisfied demand, & then suddenly an article springs into existence & satisfies it, the length of time during which the demand has remained uncomplied with is matter from which it may be inferred that it is ingenuity alone which has enabled the inventor to surmount that obstacle which otherwise would seem, from the mere existence of the long unsatisfied demand, to have existed somewhere or in some shape. But it may be that the demand itself is quite new, & that the novelty of the demand has produced immediately, & without any operation of ingenuity, an obvious article to satisfy it.—GOSNELL *v.* BISHOP (1888), 4 T. L. R. 397; 5 R. P. C. 151, C. A.

Annotations:—**Consd.** Auster *v.* Perfecta Motor Equipments (1924), 41 R. P. C. 482. **Refd.** British Thomson-Houston Co. *v.* Charlesworth, Peebles (1924), 41 R. P. C. 241.

138. ——.]—TAYLOR & SCOTT *v.* ANNAND & NORTHERN PRESS & ENGINEERING CO., LTD. (1900), 18 R. P. C. 53, H. L.

Annotations:—**Consd.** Benton & Stone *v.* Denston (1925), 42 R. P. C. 284. **Refd.** Van Berkel *v.* Simpson (1906), 24 R. P. C. 117.

139. ——.]—A patent was granted to B. for improvements relating to the extraction of dust from carpets, etc. The owners of the patent brought an action for infringement against the S. co., the L. co. & J. S. who was the secretary & manager of, &, as pltfs. alleged, a shareholder in the S. co. Defts. denied infringement & set up the invalidity of the patent. In the course of the trial the action was dismissed against the L. co. with costs:—*Held:* according to the true construction of the specification the patent was for an instrument to carry out a particular process, & was valid; & the S. co. had infringed, & an injunction was granted against them; but no case had been made out against J. S., & the action was dismissed as against him with costs.

Although utility & novelty are two distinct things, still the fact of utility, when it takes the shape of a sudden & great success for a newly produced article, is some evidence of the novelty of the means or process by which that so useful article was produced. If it had not required invention of a sort, it might be well said that the world would long before have discovered what it then found it wanted so much (FARWELL, J.).—BRITISH VACUUM CLEANER CO., LTD. *v.* SUCTION CLEANERS, LTD. (1904), 21 R. P. C. 303.

because the alleged invention is very similar to a contrivance intended to effect the same object which was patented in the Commonwealth many years ago.—CALDWELL *v.* PATENTS COMR. (1916), 22 C. L. R. 187.—**AUS.**

m. *Must be more than mere use of known device.*]—Where a process was not a mere use of known devices without any inventive exertion of the mind:—*Held:* a patent ought not to be granted.—HENRY BERRY & CO., PROPERTY, LTD. *v.* POTTER (1924), 35 C. L. R. 132; 31 Argus L. R. 4.—**AUS.**

PART IV. SECT. 1, SUB-SECT. 3.—C. (b).

133 i. *Commercial utility.*]—AMERICAN ARCH CO. *v.* CANUCK SUPPLY CO., LTD., [1924] 3 D. L. R. 567; 30 R. L. N. S. 449.—**CAN.**

133 ii. ——.]—Where a patent has been adopted & imitated by other makers because it remedies certain defects in the previously existing cup-headed & other roofing-nails, which defects have been recognised as existing for some considerable time, & have not been overcome by other makers, these facts are sufficient to show that there has been on the part of the patentee such an exercise of the inventive faculty as justifies the grant of a patent.—STOKES *v.* DAVENPORT & SON (1893), 11 N. Z. L. R. 321.—**N.Z.**

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 3, *C.* (*b*); *sub-sect.* 4, *A.*]

140. ——.]—That invention was required appears from this, that, although there was a demand for a machine such as pltfs.', & attempts had been made to produce one, no person prior to the production of pltfs.' machine had been thoroughly successful in those attempts (ROMER, L.J.).—GAMMONS *v.* BATTERSBY (1904), 21 R. P. C. 322, C. A.

Annotations :—**Refd.** British United Shoe Machinery Co. *v.* Thompson (1904), 22 R. P. C. 175; Gammons *v.* Singer Manufacturing Co. (1905), 22 R. P. C. 452.

141. ——.]—A patent was granted for improvements in or relating to safety devices or lifeguards for motor vehicles." One of the claims was for "a guard for a motor vehicle consisting of a frame or the like carried along the side of the vehicle & crossing the path of the rear wheels at a slight inclination, substantially as & for the purpose described." At the trial of an action for infringement of the patent, the only defences raised were want of novelty & of subject-matter:—*Held:* the evidence did not establish a want long unsatisfied & the patent was invalid for want of subject-matter.—BONNARD *v.* LONDON GENERAL OMNIBUS CO., LTD. (1920), 38 R. P. C. 1, H. L.

Annotation :—**Consd.** Bowen *v.* Pearson (1924), 42 R. P. C. 101.

142. ——.]—A patent was granted for "improvements in or relating to the wind or weather screens of motor cars & other vehicles." Claim 1 of the specification as amended, was as follows: "In wind screens for the back seats of side entrance motor & other vehicles the employment of screen mountings or supports, comprising pairs of jointed & inwardly-folding arms arranged to extend & collapse or fold in a horizontal plane & which admit of the adjustment or transposition of the screen & its supports by an occupant of the seat protected by said screen, substantially as herein described." Claim 3 was for the use of lock-action joints in connecting the screen to its supports. In an action for infringement, pltfs. alleged (*inter alia*) that the patent had been held valid in a prior action. Defts. admitted infringement of claims 1, 5 & 6, but denied infringement of claim 3, & alleged (*inter alia*) that the patent was invalid for want of subject-matter, & that the alleged invention claimed was a mere selection among possible alternatives, & a selection made for the first time on the amendment of the specification. They also alleged that the grantee was not the true & first inventor, & that the alleged invention had been made by a workman employed by the grantee:—*Held:* pltfs.' device was useful, & had satisfied a long-standing demand; it required some ingenuity for its production; the grantee had not made a mere selection among possible alternatives; the defence of want of subject-matter failed; that claims 1, 5 & 6 were valid; that claim 3 had not been infringed; & that the grantee was the true & first inventor.—AUSTER, LTD. *v.* PERFECTA MOTOR EQUIPMENTS, LTD. (1924), 41 R. P. C. 482.

143. Smallness or simplicity of invention—No bar to patent right.]—A claim for a patent for improvements in the mode of doing something by a known process, is sufficient to entitle claimant to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered & improved by discoveries not known at the time of the claim, so long as it remains identical with regard to improvements claimed, & their application.

The jury found that "the sending of signals to intermediate stations" was a new invention of the patentees & had been adopted by defts. There was a distinct claim in the specification for this improvement, & the method of carrying it into effect was pointed out:—*Held:* this was the proper subject of a patent; & the idea & method being obvious & simple did not make any difference.—ELECTRIC TELEGRAPH CO. *v.* BRETT (1851), 10 C. B. 838; 20 L. J. C. P. 123; 17 L. T. O. S. 107; 15 Jur. 579; 138 E. R. 331.

Annotation :—**Refd.** Unwin *v.* Heath (1855), 5 H. L. Cas. 505.

144. —— ——.]—RIEKMANN *v.* THIERRY, No. 372, *post.*

145. —— ——.]—PARKER & SMITH *v.* SATCHWELL & CO., LTD., No. 304, *post.*

146. —— ——.]—HAYWARD *v.* HAMILTON, No. 131, *ante.*

147. —— ——.]—Pltfs. were the registered proprietors of letters patent granted for an invention of "improvements in tin openers," relating to tin openers of the kind in which a toothed member rotates round the side of the tin & drags with it a cutter operating on the top of the tin; & the invention provided for a laterally extending part associated with the toothed member, adapted to project over the edge of the tin & to rest on the top thereof. In an action for infringement of the patent deft. alleged that the patent was invalid on the grounds of anticipation, want of subject-matter, want of utility & insufficiency, & at the trial relied particularly on a specification of S. as an anticipation:—*Held:* of the two alleged anticipations, one specification did not contain any similarity to pltfs.' invention, & S. was a mere paper anticipation, it contained no suggestion that it was desirable to have a laterally extending portion at or near the toothed wheel for the purpose described in pltfs.' specification, there was no evidence that it had ever been used, it would not perform the functions of pltfs.' invention, the knife was fixed in an entirely different manner from that shown by pltfs.' specification; the invention was useful; the description & claims in the specification were plain & free from ambiguity; the invention was not obvious, & a patent for an invention, however simple, if it was not obvious & not a mere workshop improvement on a well known tool, should be supported; & the defts. had infringed.—GIUSTI PATENTS & ENGINEERING WORKS, LTD. *v.* REES (1923), 40 R. P. C. 206.

Annotation :—**Distd.** Shaw *v.* Burnet (1924), 41 R. P. C. 432.

148. Absence of mechanical difficulty.]—PLACE *v.* BLACKBURN LOOM & WEAVING MACHINERY MAKING CO., LTD. (1912), 29 R. P. C. 587.

Novelty.]—*See* Sect. 2, *post.*

SUB-SECT. 4.—DISCOVERY AND APPLICATION OF PRINCIPLES.

A. In General.

149. General rule—Discovery of principle not patentable.]—Patent for "a new or improved

143 i *Smallness or simplicity of invention—No bar to patent right.*]—SMITH *v.* BALL (1861), 21 U. C. R. 122.—**CAN.**

143 ii. —— ——.]—The simplicity of an invention is no reason why a patent therefor should not be protected.—POWELL *v.* BEGLEY (1867), 13 Gr. 381.—**CAN.**

143 iii. —— ——.]—SUMMERS *v.* ABELL (1869), 15 Gr. 532.—**CAN.**

143 iv. —— ——.]—WHITE *v.* BERTRAMS, LTD. (1897), 14 R. P. C. 735.—**SCOT.**

PART IV. SECT. 1, SUB-SECT. 4.—A.

149 i. *General rule—Discovery of principle not patentable.*]—There is no presumption in law in favour of the validity of a patent; & a patent for a principle & not a process is void.—*Re* ALLAN & REED (1888), 14 Q. L. R. 126.—**CAN.**

method of drying & preparing malt." In the specification it was stated, that the invention consisted in exposing malt previously made to a very high degree of heat: but it did not describe any new machine invented for that purpose; nor the state, whether moist or dry, in which the malt was originally to be taken for the purpose of being subjected to the process; nor the utmost degree of heat which might be safely used; nor the length of time to be employed; nor the exact criterion by which it might be known when the process was accomplished:—*Held:* (1) the patent was void; the specification was not sufficiently precise; & the patent appeared to be for a different thing from that mentioned in the specification; (2) as the word malt was here not to be taken in its usual sense, viz. of an article used in the brewing, but only in the colouring of beer, in the patent here it was necessary to have stated the purpose to which the prepared malt was to be applied, & to have said that it was obtained for a new method of drying & preparing malt to be used in the colouring of beer.

(3) *Qu.:* whether a patent can be good if obtained for a mere process to be carried on by known implements or elements acting upon known substances; inasmuch as the word "manufacture," in Statute of Monopolies, 1623 (c. 3), seems rather to be confined either to some new article or to some new instrument, or part of an instrument, to be used in making an article previously well known, & at all events no merely philosophical or abstract principle can answer to that word, or be the subject of a patent.

The word "manufactures" has been generally understood to denote either a thing made, which is useful for its own sake, & vendible as such, as a medicine, a stove, a telescope, & many others (ABBOTT, C.J.).—R. *v.* WHEELER (1819), 2 B. & Ald. 345; 1 Carp. Pat. Cas. 394; 106 E. R. 392.

Annotations:—As to (1) **Apld.** Morgan *v.* Seaward (1836), 1 Web. Pat. Cas. 170. **Distd.** Neilson *v.* Harford (1841), 8 M. & W. 806. **Consd.** Cook *v.* Pearce (1844), 8 Q. B. 1054. **Apld.** Stevens *v.* Keating (1848), 2 Exch. 772. *As to* (3) **Apld.** Crane *v.* Price (1842), 4 Man. & G. 580; Gibson *v.* Brand (1842), 4 Man. & G. 179; Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194. **Refd.** Murray *v.* Clayton (1872), 20 W. R. 649.

150. —— ——.]—(1) Novelty is the price paid to the public by a patentee for his monopoly. If the invention has been previously in use, the patent is void, although the patentee was not aware of such prior use.

(2) A patent cannot be granted for a principle.—GITTINS *v.* SYMES (1854), Macr. 300.

151. —— ——.]—(1) Where there is a principle first applied in a machine capable of carrying it into effect, the ct. looks more narrowly at those who carry out the same principle, & say they do it by a different mode, & look to see whether, in effect, although the mode is not exactly the same, it is only a colourable difference (COTTON, L.J.).

(2) A patent for a principle in one sense of the word cannot of course be taken out. Patents, instead of being beneficial to the public & beneficial to the patentees, would be intolerable nuisances if a man could patent a principle & exclude everybody from attaining the same end when they seize the idea which has actuated him (LINDLEY, L.J.).—AUTOMATIC WEIGHING MACHINE CO. *v.* KNIGHT (1889), 5 T. L. R. 359; 6 R. P. C. 297, C. A.

Annotations:—As to (2) **Consd.** Ticket Punch Register Co. *v.* Colley's Patent (1895), 12 R. P. C. 171; Pneumatic Tyre Co. & Dunlop Pneumatic Tyre Co. *v.* Tubeless Pneumatic Tyre & Capon Heaton (1898), 14 T. L. R. 341. *Generally*, **Refd.** Higginson & Arundel *v.* Pyman, Same *v.* Same (1926), 43 R. P. C. 291.

152. —— ——.]—In 1893 letters patent were granted to M. for "improvements in the method of producing the explosive mixture in hydrocarbon engines." The specification claimed "the method of producing the explosive mixture in hydrocarbon engines, consisting in sucking liquid hydrocarbon by the air sucked by the working piston, substantially as described"; & "the method of producing the explosive mixture in hydrocarbon-engines, consisting in sucking liquid hydrocarbon out of a nozzle." The owners of the patent having brought an action for infringement, deft. denied infringement & alleged the invalidity of the patent on the grounds of want of novelty, want of utility, want of subject-matter. Pltfs. contended that the claim was substantially for the use of the apparatus described:—*Held:* the claim was for a method & not for a machine, & the references to the drawings were for the purpose of illustration only & not by way of restriction; unless the patent was for a method defined & illustrated by reference to any nozzle, etc., it was bad for want of subject-matter.—BRITISH MOTOR TRACTION CO., LTD. *v.* FRISWELL (1901), 18 R. P. C. 497.

153. —— —— **Unless coupled with discovery of mode of putting principle into practice.**]—BOULTON *v.* BULL (1795), 2 Hy. Bl. 463; 1 Carp. Pat. Cas. 117; 126 E. R. 651.

Annotations:—**Apld.** Neilson *v.* Harford (1841), 1 Web. Pat. Cas. 331. **Consd.** Gibson *v.* Brand (1842), 4 Man. & G. 179; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. **Refd.** Oxford & Cambridge Universities *v.* Richardson (1802), 6 Ves. 689; Jupe *v.* Pratt (1836), 1 Web. Pat. Cas. 144; Cook *v.* Pearce (1843), 8 Q. B. 1044; Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 T. L. R. 294. **Mentd.** Harmer *v.* Plane (1807), 14 Ves. 130; Brown *v.* Annandale (1842), 8 Cl. & Fin. 437.

154. —— —— ——.]—A patent was granted by the Crown for fourteen years to A. for his "method of lessening the consumption of steam & fuel in fire engines"; the specification stated that the "method consisted of the following principles" (describing the mode in which those principles were applied to the purposes of the invention); afterwards an Act of Parliament was passed to extend the patentee's term, the title of which was An Act for Vesting the Sole Property, etc. "of certain Steam Engines called Fire Engines, of his Invention," etc.; & after reciting that the patent was "for making & vending certain engines by him invented for lessening the consumption of steam & fuel in fire engines," etc., it granted him the sole right of "making & selling the said engines":—*Held:* (1) the invention was the subject of a patent, &, the patentee having in his specification described his invention, the patentee's right under the patent & Act of Parliament was valid.

(2) I am inclined . . . to think that a patent cannot be granted for a mere principle; but I think that, although in words the privilege granted is to exercise a method of making or doing anything, yet if that thing is to be made or done by a manufacture, & the mode of making that manufacture is described, it then becomes in effect . . . not a patent for a mere principle, but for a manufacture for the thing so made, & not merely for the principle upon which it is made (GROSE, J.).

This is not a patent for a mere principle, but for the working & making of a new manufacture within the words & meaning of the statute [Statute of Monopolies, 1623 (c. 3)] (GROSE, J.).—HORNBLOWER *v.* BOULTON (1799), 8 Term Rep. 95; Dav. Pat. Cas. 221; 1 Carp. Pat. Cas. 156; 101 E. R. 1285.

Annotation:—As to (2) **Apld.** R. *v.* Wheeler (1819), 2 B. & Ald. 345.

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 4, *A. & B.* (*a*).]

155. —— —— ——.]—MINTER *v.* WELLS, No. 42, *ante*.

156. —— —— ——.]—JUPE *v.* PRATT (1837), Goodeve's Patent Cases, 274; 1 Web. Pat. Cas. 145.

Annotations:—**Apld.** Badische Anilin und Soda Fabrik *v.* Levinstein (1883), 24 Ch. D. 156. **Consd.** Edison & Swan United Electric Light Co. *v.* Holland (1888), 4 T. L. R. 686. **Apld.** Chamberlain & Hookham *v.* Bradford Corpn. (1903), 20 R. P. C. 673. **Consd.** British United Shoe Machinery Co. *v.* Collier (1908), 25 T. L. R. 74. **Apld.** Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239. **Refd.** Easterbrook *v.* G. W. Ry. (1886), Griffin's Patent Cases (1887), 81; Automatic Weighing Machine Co. *v.* Knight (1889), 6 R. P. C. 297; Pneumatic Tyre Co. & Dunlop Pneumatic Tyre Co. *v.* Tubeless Pneumatic Tyre & Capon Heaton (1898), 14 T. L. R. 341.

157. —— —— ——.]—NEILSON *v.* HARFORD, No. 83, *ante*.

158. —— —— ——.]—WALTON *v.* BATEMAN, No. 64, *ante*.

159. —— —— ——.]—(1) A. obtained a patent for an improvement in packing hydraulic & other machines, by means of a lining of soft metal, & thereby of rendering certain parts of such machines air & fluid tight. B. afterwards discovered that soft metal had the property of diminishing friction, & of preventing the evolution of heat when applied to the surfaces in contact of machines in rapid motion & subject to pressure, & he embodied the application of that discovery to machines in a patent:—*Held:* the application of the soft metal by B. differed essentially from that of A.; & B.'s patent was new.

I think the discovery of the person under whom pltf. [A.] claims, is not merely a discovery of a new principle, but of a new principle embodied in a new machine. Then that being so, if pltf. [A.] claims a patent for that new principle embodied in a new machine . . . that patent is perfectly good (PARKE, B.).

(2) Had it not been for the title of this patent, by which pltf. [A.] appears to me to confine his invention to bearings, there would be strong reason to contend that he applied it also to cases in which rods or bars were to slide. But, reading it in conjunction with the title, I think pltf.'s [A.] patent does not extend so far, & consequently that it is not void upon that ground (PARKE, B.).—NEWTON *v.* VAUCHER (1852), 6 Exch. 859; 21 L. J. Ex. 305; 155 E. R. 794.

Annotation:—*As to* (1) **Refd.** Maxim-Nordenfelt Guns & Ammunition Co. & Hiram Stevens Maxim *v.* Anderson (1897), 13 T. L. R. 262.

160. —— —— ——.]—A patent cannot be granted for a principle; to be patented it must be embodied in some machine or manufacture which is the only subject of a patent.—CROSSLEY *v.* POTTER (1853), Macr. 240.

161. —— —— ——.]—CANNINGTON *v.* NUTTALL, No. 320, *post*.

162. —— —— ——.]—(1) The discoverer of a new principle or idea as regards any art or manufacture who shows a mode of carrying it into practice, as by a machine, may patent the combination of principle & mode, although the idea or the machine would not alone be the proper subject of a patent.

(2) Although it is *primâ facie* evidence of want of utility that the patentee does not make & vend his machine, evidence of non-user & non-sale is not sufficient to prove want of utility if immediately afterwards the patentee has improved upon his machine & made & vended the improved machine.

(3) Where want of novelty in a patented invention is set up, & the alleged anticipation is in writing alone, *e.g.*, the specification of another person's prior patent, no existence of a prior machine being shown, the interpretation of the prior writing is for the ct., & it is not sufficient to establish want of novelty to show that, if a machine had been made by a person who had read that writing & such machine had been used, something in it would by user have been an anticipation; but it must be shown that a person conversant with such matters would, on reading the writing, find in such writing alone a reasonably clear description of the impeached invention.

(4) There should be a benevolent interpretation of specifications. What does that mean? I think, as I have explained elsewhere, it means this: when the judges are convinced that there is a genuine, great, & important invention, which, as in some cases, one might almost say, produces a revolution in a given art or manufacture, the judges are not to be astute to find defects in the specifications; but, on the contrary, if it is possible, consistently with the ordinary rules of construction, to put such a construction on the patent as will support it. They are to prefer that construction to another which might possibly commend itself to their minds if the patent was of little worth & of very little importance. That has been carried out over & over again, not only by the Lord Chancellor on appeal, but by the House of Lords. There is, if I may say so, & I think there ought to be, a bias, as between two different constructions, in favour of the real improvement & genuine invention, to adopt that construction which supports an invention. Beyond that I think the rule ought not to go; but that is what I understand is the meaning of "a benevolent construction" (JESSEL, M.R.).—OTTO *v.* LINFORD (1882), 46 L. T. 35; Goodeve's Patent Cases, 343, C. A.

Annotations:—*As to* (1) **Consd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. *As to* (3) **Apld.** Ellington *v.* Clark, Bunnett (1887), 58 L. T. 40; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 11 T. L. R. 345; Shrewsbury & Talbot S. T Cab. Co. *v.* Storckx (1895), 12 T. L. R. 122; *Re* Lewis & Stirckler's Patent (1896), 14 R. P. C. 24; Taylor & Scott *v.* Annand & Northern Press & Engineering Co. (1899), 16 R. P. C. 547; Metropolitan Vickers Electrical Co. *v.* British Thomson-Houston Co. (1925), 43 R. P. C. 76. *As to* (4) **Consd.** Thomson *v.* American Braided Wire Co. (1889), 5 R. P. C. 113. **Apld.** True & Variable Electric Lamp Syndicate *v.* Bryant Trading Syndicate (1908), 25 R. P. C. 461. *Generally*, **Mentd.** Otto *v.* Steel, Otto *v.* Sterne (1886), Griffin's Patent Cases (1887), 179.

163. —— —— ——.]—In an action to restrain the infringement of a patent for producing colouring matters for dyeing & printing by means of a chemical process, described in the specification. As to validity:—*Held:* a man cannot have a patent for a principle alone, but may have one for a principle coupled with a process by which the principle may be carried into effect; he can only claim to wash out his process by means of materials known at the date of the patent; he cannot claim the use of materials discovered subsequently, & his specification will be construed with regard to this consideration.—BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN (1883), 24 Ch. D. 156; 52 L. J. Ch. 704; 48 L. T. 822; 31 W. R. 913; *on appeal* (1885), 29 Ch. D. 366, C. A.; (1887), 12 App. Cas. 710, H. L.

Annotations:—**Refd.** Easterbrook *v.* G. W. Ry. (1885), 2 R. P. C. 201; Haslam Foundry & Engineering Co. *v.* Hall (1887), 4 T. L. R. 154; Kurtz *v.* Spence (1887), 58 L. T. 438; Cole *v.* Saqui & Lawrence (1888), 40 Ch. D. 132; Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 T. L. R. 294; Vickers *v.* Siddell (1890), 7 R. P. C. 292; Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424; Atkins & Applegarth *v.* Castner-Kellner Alkali Co. (1901), 18 R. P. C. 281; Osram Lamp Works *v* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369. **Mentd.** Malan *v.* Young (1889), 6 T. L. R. 38; *Re* Martindale, [1894] 3 Ch. 193; Scott *v.* Scott, [1913] A. C. 417.

164. —— —— ——.]—MOUCHEL *v.* COIGNET, No. 121, *ante*.

165. —— —— ——.]—The mere statement that a claim is to a method of test or observation is not decisive, provided that the method claimed necessitates the use of novel combinations or constructions of apparatus, & that the tests or observations can be regarded as applicable in guiding & controlling manufacturing processes; but, in cases where there is no novel combination or construction of apparatus, a mere claim to a method for using a known combination or apparatus for a purpose which is not in itself a manufacturing process is not properly patentable.—*Re* W. L.'S APPLICATION (1924), 41 R. P. C. 617.

166. What amounts to claim to a principle.]—NEILSON *v.* HARFORD, No. 83, *ante*.

B. Process of Utilising Principle.

(a) In General.

167. General rule — Patentable.] — HALL *v.* BOOT (1822), 1 Web. Pat. Cas. 100.

Annotations :—**Refd.** Losh *v.* Hague (1838), 1 Web. Pat. Cas. 202; Crane *v.* Price (1842), 4 Man. & G. 580; Brook & Hirst *v.* Aston (1859), 5 Jur. N. S. 1025.

168. —— ——.]—LOSH *v.* HAGUE, No. 16, *ante*.

169. —— ——.]—CRANE *v.* PRICE, No. 315, *post*.

170. —— ——.]—Where two specifications, or different dates, relating to the same external objects, contain terms of art, though the expressions used in both are identical, their construction cannot be declared to be the same without the meaning & use of the terms of art employed therein being first ascertained by evidence, & being shown to be the same at the date of both the specifications.

An antecedent specification declaring a principle, but not disclosing a practical mode of obtaining a result, is not to be held to be an anticipation of a subsequent specification relating to the same matter which does disclose a practicable mode of producing the result. If the latter specification alone supplies that practicable mode, it forms the groundwork for a valid patent.

D. in 1804 took out a patent for making "a new article of trade, which I denominate Albion Metal, & which I apply" to various purposes, such as the facings of cisterns, coffin furniture, "& other things which are required to be made of a flexible," etc., substance. D. stated in his specification the principle of his invention, & that he proposed to unite lead & tin by pressure, but he did not state the exact proportions of the two metals, nor give with precision the mode by which they were to be combined. It did not appear that the patent had been acted on. In 1849 B. took out a patent for "A new manufacture of capsules, & of a material to be employed therein, & for other purposes." The new material was to be composed of lead & tin combined. B. specified the proportions of the two metals, gave the details of the mode of working in order to combine them, & did not claim the production of the new material except according to the directions he had given for its production :—*Held :* (1) this was not a case in which the ct. looking at the two instruments, could determine the validity of the latter patent as a matter of construction only; evidence must be resorted to; (2) it was apparent that the earlier patent only stated a principle, & the latter patent, as it did not claim the discovery of the principle, but only a new mode of carrying it into effect, was valid.—BETTS *v.* MENZIES (1862), 10 H. L. Cas. 117; 31 L. J. Q. B. 233; 7 L. T. 110; 9 Jur. N. S. 29; 11 W. R. 1; 11 E. R. 970, H. L.; *revsg.* (1860), 1 E. & E. 1020, Ex. Ch.; *subsequent proceedings*, 1 New Rep. 87.

Annotations :—*As to* (2) **Apld.** Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1924), 41 R. P. C. 241. **Refd.** Neilson *v.* Betts (1871), L. R. 5 H. L. 1; Patterson *v.* Gaslight & Coke Co. (1877), 3 App. Cas. 239; Otto *v.* Linford (1882), 46 L. T. 35; Harris *v.* Rothwell (1887), 35 Ch. D. 416; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre Co. & Automatic Valve Co. (1899), 16 R. P. C. 50; Higginson & Arundel *v.* Pyman (1926), 43 R. P. C. 291. *Generally*, **Refd.** Newall *v.* Elliott & Glass (1861), 4 New Rep. 429; Saxby *v.* Gloucester Wagon Co. (1883), Griffin's Patent Cases (1887), 54. **Mentd.** Betts *v.* Clifford (1860), 1 John. & H. 74; Kennedy *v.* Broun (1863), 13 C. B. N. S. 677; A.-G. *v.* Bradford Canal Proprietors (1866), L. R. 2 Eq. 71.

—.]—If, having a particular purpose in view, a person takes the general principles of mechanics, & applies one or other of them to a manufacture to which it has not before been applied, this is sufficient ground to warrant an application for a patent; assuming such manufacture to be new, desirable, & of public utility.—DANGERFIELD *v.* JONES (1865), 13 L. T. 142; *on appeal*, 14 W. R. 356, L. C.

172. —— ——.]—This was an action for infringement of a patent for phonographs. A large number of claims were made by the specification, claim 1 being "in a phonograph attaching both the recording point & the reproducing point to the same diaphragm, means being provided whereby either of the points may be brought into operative position on the surface of the phonogram." Many of the claims were subsidiary. In a phonograph, at one stage, a single diaphragm was used with a single tool or point for recording & reproducing. Later, two diaphragms were used with separate recording & reproducing points, & a floating weight was applied to give the proper pressure to the reproducing point. The present patentee discovered that the floating weight might also be applied to the recording point & so allow the use of a single diaphragm with both the points on it. Defts. admitted the general utility of the invention & infringement, but they contended that the first claim was a claim for a principle & was too wide, & was not novel, & that certain of the subsidiary claims were invalid for want of subject-matter, utility, & novelty :—*Held :* (1) on the evidence the subsidiary claims were novel in their application to the phonograph & contributed to the general improvement of the machine, & they were valid; (2) the first claim claimed a monopoly of every form of phonograph in which the two points were attached to one diaphragm so that either point could be brought into operation, it was not a claim for a principle, but for a particular arrangement, & was novel & valid.

There remains the question whether the patent is invalidated by the first claim. That claim appears to me to be on the face of it, a claim of monopoly for every form of phonograph in which the two styles are attached to one diaphragm, so that either style can be brought to bear on the cylinder. It is said that such a claim is a claim to monopolise a principle. I think not. It is a claim for a particular arrangement of essential parts of a machine, which arrangement has obvious advantages, but has never before been made practicable, & which has now been found practicable in a way disclosed by the specification (WRIGHT, J.).—EDISON-BELL PHONOGRAPH CORPN., LTD. *v.* SMITH (1894), 11 R. P. C. 148; *affd.*, 10 T. L. R. 522, C. A.

Annotation :—*Generally*, **Refd.** Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95.

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 4, *B.* (*a*), (*b*) & (*c*).]

173. —— ——.]—RIEKMANN *v.* THIERRY, No. 372, *post.*

174. —— ——.]—No doubt the principle ot Bartlett's invention existed also in resps.' tyre, but that is not sufficient. I cannot admit that under our patent laws it is open to any one to appropriate a principle, though of course any particular application of a principle is entitled to legal protection (LORD HALSBURY, C.).—PNEUMATIC TYRE CO., LTD. *v.* TUBELESS PNEUMATIC TYRE & CAPON HEATON, LTD. (1898), 15 T. L. R. 105, H. L.

175. —— ——.]—*BRITISH VACUUM CLEANER CO., LTD. v. SUCTION CLEANERS, LTD., No. 139, ante.*

As to "manufacture" signifying also "process."]—*See* No. 90, *ante.*

(*b*) *New Principle.*

176. Ambit of patent—Protection against other modes of utilising principle.] — JUPE *v.* PRATT (1837), Goodeve's Patent Cases, 274; 1 Web. Pat. Cas. 145.

Annotations:—**Apld.** Badische Anilin und Soda Fabrik *v.* Levinstein (1883), 24 Ch. D. 156. **Consd.** Automatic Weighing Machine Co. *v.* Knight (1889), 6 R. P. C. 297. **Dbtd.** Nobel's Explosives Co. *v.* Anderson (1894), 11 R. P. C. 519. **Apprvd.** Chamberlain & Hookham *v.* Bradford Corpn. (1903), 20 R. P. C. 673. **Refd.** Easterbrook *v.* G. W. Ry. (1886), Griffin's Patent Cases (1884–1886) 81; Edison & Swan United Electric Light Co. *v.* Holland (1888), 4 T. L. R. 686; Pneumatic Tyre Co. & Dunlop Pneumatic Tyre Co. *v.* Tubeless Pneumatic Tyre & Capon Heaton (1898), 14 T. L. R. 341; British United Shoe Machinery Co. *v.* Collier (1908), 25 T. L. R. 74; Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239.

177. —— ——.] — HOUSEHILL COAL & IRON CO. *v.* NEILSON, No. 13, *ante.*

178. —— ——.]—BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN, No. 163, *ante.*

179. —— ——.] — AUTOMATIC WEIGHING MACHINE CO. *v.* KNIGHT, No. 151, *ante.*

180. —— ——.]—(1) According to the dictum of ALDERSON, B., in *Jupe* v. *Pratt*, No. 176, *ante*, if a patentee has invented a new result & has described one method of obtaining that result, he may prevent anybody else from obtaining the same result by any other method. In my opinion that went much too far (KAY, L.J.).

(2) You have a right to know & to take into consideration the state of circumstances existing generally at the time with regard to the subject-matter of the instrument, including, of course, the general knowledge with regard to that subject-matter. If the words of the instrument are doubtful the consideration of those circumstances may lead the ct. to give them one meaning rather than another (ESHER, M.R.).—NOBEL'S EXPLOSIVES CO., LTD. *v.* ANDERSON (1894), 10 T. L. R. 599; 11 R. P. C. 519, C. A.; *affd.* (1895), 11 T. L. R. 266, H. L.

Annotations:—*As to* (2) **Refd.** Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239. *Generally,* **Refd.** Marconi & Marconi's Wireless Telegraph Co. *v.* British Radio-Telegraph & Telephone Co. (1911), 27 T. L. R. 274; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369; Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323.

181. —— ——.]—ASHWORTH *v.* ENGLISH CARD CLOTHING CO. (1903), 20 R. P. C. 790, H. L.

182. —— ——.]—(1) In an action for the infringement of a patent where it is alleged that deft. has taken the "substance" of the invention, the question is to be decided with reference to the existing state of knowledge of the subject at the date of the patent & the operation of the machine in question, & not simply by reading the specification.

(2) Where the merit of the invention consists in the principle which is embodied in it, a machine which carries the same principle into effect by different means may be an infringement, but where the merit lies in a new combination of known features, a machine which produces the same result with the omission of something which is a material element in the patented machine, not a mere detail, will not be held to be an infringement of the patent.—CONSOLIDATED CAR HEATING CO. *v* CAME, [1903] A. C. 509; 72 L. J. P. C. 110; 89 L. T. 224; 19 T. L. R. 692; 20 R. P. C. 745, P. C.

183. —— ——.]—CHAMBERLAIN & HOOKHAM, LTD. *v.* BRADFORD CORPN., No. 120, *ante.*

184. —— ——.]—S. Ltd., who were the proprietors of a patent granted to R. for "Improvements in dumb-bells for physical culture exercises," brought an action for infringement of same & of another patent not relied on at the trial. The invention consisted in a dumb-bell formed in two parts, divided longitudinally, with springs between them. In the provisional specifition the patentee expressly mentioned compressed air springs. The complete specification omitted any mention of them, but the second claim mentioned resilient means of expansion generally. Deft.'s dumb-bell had inflated india-rubber balls between the halves of the dumb-bell at each end. Deft. attacked the validity of the patent on various grounds, & denied infringement: —*Held:* the patentee had sufficiently ascertained & described the nature of his invention, the inference drawn by the Ct. of Appeal from a comparison of the provisional & complete specifications was not a legitimate one, & the patentee had not deliberately excluded air springs from his complete specification; & deft. had infringed.—SANDOW, LTD. *v.* SZALAY (1905), 23 R. P. C. 6, H. L.

See, further, Part XIV., Sect. 1.

(*c*) *Known Principle.*

185. Ambit of patent—Confined to particular means described.]—In an action for the infringement of a patent, pltf.'s specifications alleged that the invention was described by a statement & a drawing annexed, & stated that it consisted in submitting hosiery & similar goods to the finishing process of a press heated by steam, hot water, or other fluid in the manner thereinafter described. The drawing was then described, from which it appeared that the invention consisted of two cast

PART IV. SECT. 1, SUB-SECT. 4.—B. (b).

176 i. *Ambit of patent—Protection against other modes of utilising principle.*]—If a person has discovered a new principle, & invented a mode of carrying it into effect, he may obtain a patent for that principle coupled with the mode of carrying it into effect, & he is thereby protected against persons carrying the principle into effect by other modes.—MINERALS SEPARATION, LTD. *v.* POTTER'S SULPHIDE ORE TREATMENT, LTD. (1909), 8 C. L. R. 779.—**AUS.**

176 ii. —— ——.] — DEFIANCE CHURN CO. *v.* TAIT (1894), 12 N. Z. L. R. 607.—**N.Z.**

n. —— —— *What is process of utilising principle.*]—Whether or not a machine is the reduction to practice of a new process, or whether it is a new instrument for the performance of an old process, is to be determined by the state of the art at the date of the invention, & if it is the former a process may be patentable, though the machine may be new, if the latter, only the machine can be patented.—HOSIERS, LTD. *v.* PENHAMS, LTD., [1925] Exch. C. R. 93.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 4.—B. (c).

185 i. *Ambit of patent—Confined to particular means described.*]—*Re* CAMPBELL'S APPLICATION (1891), 10 N. Z. L. R. 197.—**N.Z.**

iron boxes filled with steam, between the heated surfaces of which hosiery goods were introduced & subjected to pressure produced by hydraulic power. The pressure generally lasted three minutes, & might be produced either by a screw or by hydraulic power. The specification then stated that the patentee was aware that woollen cloths had been pressed by boxes or surfaces heated by steam or water, & that stockings, etc., had been placed between plates of iron heated by fires or ovens; that he did not therefore claim the finishing of such goods by heat generally, but what he did claim was the submitting of hosiery, etc., to the pressure of hot boxes or surfaces heated by steam, water, or other fluid as above described. Deft.'s machine consisted of rollers heated by steam, between which woollen fabrics similar to those of pltf. were introduced & subjected to pressure. The jury found that deft.'s rollers were not a colourable imitation of pltf.'s patent:—*Held:* deft. had not been guilty of an infringement of pltf.'s patent.—BARBER *v.* GRACE (1847), 1 Exch. 339; 17 L. J. Ex. 122; 154 E. R. 144.

Annotations:—**Refd.** Smith *v.* L. & N. W. Ry. (1853), Macr. 188; Smith *v.* L. & N. W. Ry. (1853), Macr. 203.

186. —— ——.]—BOVILL *v.* PIMM & RANDS, No. 1060, *post*.

187. —— ——.]—(1) A patent for an entire combination is not infringed by a different combination, for the same object, of the same elements though important, or of equivalents for them, if not a mere colourable evasion or imitation. *Semble:* in considering the question of colourable evasion, the ct. will look at the novelty of the object of the combination & of the parts combined.

(2) The principle which protects a patentee against the use by others of mechanical equivalents is inapplicable to a case where the whole invention depends entirely on the particular machinery by means of which a well known object is attained.

Pltf., by bill in Chancery, alleged an infringement of his patent. The patent was granted in 1854, & specified a combination of mechanism applicable to spinning mules; & the first claim was for "the novel construction, combination & application of mechanism hereinbefore described, whereby one half of the clutch or catch box, hereinfore described, or any mechanical equivalent therefor, is connected with or acts upon cams or other similar parts of mechanism direct." There were other claims, but in respect of these breaches were not alleged in pltf.'s particulars of breaches. Deft.'s patent, granted in 1860, specified a combination of mechanism which embodied the leading idea of pltf.'s patent, & by which one half of a clutch-box was made to act upon cams direct, & he adopted some of the elements combined by pltf., but he disposed them in a different manner. These were important parts of the prior combination, &, though old mechanical contrivances, were new in respect of the particular mode in which pltf. applied them; & the immediate object of their combination by him was new, viz., to make a clutch-box act on cams direct. The effect brought about by the direct action of the clutch-box on the cams had long previously been produced, but less advantageously, by other contrivances of various kinds. Deft.'s mode of combination effected the common object of each patent in a more beneficial manner than it was or could be effected by the mode of combination specified in pltf.'s patent, & it displayed an equal amount of inventive genius:—*Held:* (3) pltf. was bound by the particulars of breaches delivered, & the principle of Patent Law Amendment Act, 1852 (c. 83), s. 41, was applicable to trials in Chancery, in which particulars of breaches were ordered, as well as to trials at common law; (4) pltf.'s claim was limited to the entire combination claimed, as before described in his specification, & deft.'s combination was not a mere colourable evasion, & there was no infringement.—CURTIS *v.* PLATT (1866), L. R. 1 H. L. 337; 35 L. J. Ch. 852; Goodeve's Patent Cases, 144, H. L.

Annotations:—*As to* (1) **Apld.** Adie *v.* Clark (1876), 3 Ch. D. 134. **Distd.** Proctor *v.* Bennis (1887), 36 Ch. D. 740; Thomson *v.* Moore (1890), 6 R. P. C. 426. **Apld.** Nettlefolds *v.* Reynolds (1892), 9 R. P. C. 270; Ticket Punch Register Co. *v.* Colley's Patents (1895), 12 R. P. C. 171. **Consd.** Akt. Separator *v.* Dairy Outfit Co. (1898), 15 R. P. C. 327. **Distd.** British United Shoe Machinery Co. *v.* Thompson (1905), 22 R. P. C. 177. **Refd.** Murray *v.* Clayton (1873), 21 W. R. 498; Gosnell *v.* Bishop (1888), 4 T. L. R. 397; Jahncke *v.* Bell (1891), 9 R. P. C. 94; Miller & Co. *v.* Clyde Bridge Steel Co. (1892), 9 R. P. C. 470; Presto Gear Case & Components Co. *v.* Simplex Gear Case Co. (1898), 15 R. P. C. 635; Harrison Patents Co. *v.* Nicholson (1908), 25 R. P. C. 393. *As to* (2) **Apld.** Boyd *v.* Horrocks (1889), 6 R. P. C. 152. **Refd.** Badische Anilin und Soda Fabrik *v.* Levinstein (1883), 24 Ch. D. 156. *Generally*, **Refd.** Penn *v.* Bibby (1866), L. R. 1 Eq. 548; Siddell *v.* Vickers (1888), 39 Ch. D. 92.

188. —— ——.]—A patent for a mechanical arrangement whereby a particular operation may be performed for a particular purpose, the parts of the apparatus so arranged not being new in themselves, but thus first combined for that particular purpose, is not infringed by the adoption of the same arrangement or combination of parts for a similar purpose, if the mode of operation is sufficiently distinct, & different in principle from that which was described or claimed in the patent, & the object achieved is also sufficiently distinct or novel & does not form an essential part of the patent.

S. obtained in 1856 a patent for "an arrangement of mechanism by which the points & the signals used on railways should be simultaneously actuated by one movement & in such a manner that the points could not be wrong when the signals were right, nor the signals wrong when the points were right." The invention effected this by connecting the rods & pulleys which worked the signals with the lever which moved the points so that when the signalman pushed or pulled the lever to open or shut the points he must of necessity raise or depress the signal & place it so that it should rightly indicate the position of the points. After describing the invention in all its parts, the specification stated that the claim was for the mechanical arrangement thereinbefore described, whereby "the signals & the points of each line are worked by the motion of a signal lever, or any modification thereof," & it was declared that the inventor did not confine himself to the precise arrangement of the mechanical details, as the same might be varied without departing from the invention. In 1866, C. obtained a patent "for machinery for actuating railway points & signals," the object being "to effect a simultaneous adjustment of points & signals, agreeing together so as to prevent the possibility of accident by collision at railway junctions, & to ensure the efficient working of points & signals in combination." The system employed under C.'s patent was that the normal position of the signals should be at "danger," & they could only be changed to "safety" by the moving of a separate lever; they were not moved by the lever which moved the points. But the lever which moved the signals was connected with the lever which moved the points in such a way that when the line was not open the signal lever was locked, & it could not be moved, consequently the signal could not be changed from danger to safety. But when the point's lever was moved so as to open the line, the

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 4, *B.* (*c*); *sub-sect.* 5, *A.* & *B.*]

signal lever became at the same moment unlocked, & then the signalman might move it & so put the signal to safety. But the line might be opened or closed for shunting, etc., without moving the signal from danger. Thus C.'s invention was in fact one by which any two or more levers might be made to act upon each other & in communication, & not that one lever should act directly at the same moment upon both points & signals. The result, as described in his specification, was that "when one or more sets of levers were moved, such signals (it should have been signal levers) as might be required to be moved in accordance therewith were set at liberty, & all other signal levers which, if moved, would be antagonistic to the position of the points became locked & rendered incapable of motion." C.'s patent was more useful than that of S., but S.'s patent could have been made to effect C.'s result by a slight modification, & the introduction of another lever. The mechanical contrivances employed in the one patent were of course much the same as those used in the other:—*Held:* the working C.'s patent was not an infringement of S.'s patent; the principle of his invention, namely, of simultaneously moving the points & making it possible to move the signal lever, was not equivalent to S.'s principle of simultaneously moving the signals & the points; & C.'s invention was one of practical importance & distinct from that of S.—SAXBY *v.* CLUNES (1874), 43 L. J. Ex. 228, H. L.

189. —— ——.]—DUDGEON *v.* THOMSON, No. 1110, *post.*

190. —— ——.]—Pltfs. were patentees of improvements in machinery for filtering fluids, & brought their action on an allegation that defts. had infringed one of the clauses in their patent. Defts. denied the infringement, & pleaded that pltfs.' patent was bad for want of novelty. At the trial the judge held that pltfs.' invention had not been anticipated, & that defts. had infringed:—*Held:* the judgment of the ct. below, as to pltfs.' patent not being bad for want of novelty, should not be reversed, but defts. had not infringed.

What is the infringement of a combination of elements in a machine? There is not an infringement if you have produced the same results by a different combination of different elements. That is another & a different combination, & is not either an improvement or anything else of the other. It is absolutely & wholly different, if there is a different combination of different elements (BRETT, M.R.).

If any patent is capable of more constructions than one, the general rule would be applied that you would put upon it that construction which makes it a valid patent rather than a construction which renders it invalid (LINDLEY, L.J.).—NEEDHAM & KITE *v.* JOHNSON & CO. (1884), 1 Patent Cases (1884–1886), A.

191. —— ——.]—The patent does not cover y & every machine in which these several parts are combined; but only such combinations as are in form & arrangement practically the same those forms of apparatus, which it spe describes (LORD WATSON).—HOCKING [illegible] & CO., LTD. *v.* HOCKING (FRANKLIN) (1888), 6 R. P. C. 69, H. L.

192. —— ——.]—In 1904 a patent was granted for "Improvements relating to the manufacture of incandescent electric lamps." The improvements consisted in making filaments of pure tungsten by mixing finely divided tungsten, or its compounds, with an organic binding material, forming the filaments from the mixture in the usual manner, & then carbonising them, in some cases after denitration had been effected. The filaments were then raised to a high temperature by passing an electric current through them in an atmosphere of steam and hydrogen, & were rendered uniform or equalised by submitting them to the action of the current in an atmosphere of volatile tungsten compounds in the presence of a large quantity of hydrogen. At the trial of an action for infringement of the patent defts. contended that they did not infringe, in as much as they did not carbonise the filaments, & did not pass an electric current through them, but heated them in an electrically heated furnace, & that they did not use an atmosphere of steam & hydrogen for the removal of the carbon from the filaments, & did not equalise the filaments. Pltfs. contended that the purpose of passing the current through the filaments was only to raise them to a high temperature, & that defts.' heating process was equivalent to pltfs.', that defts. produced steam by the reaction taking place inside the tubes in which the filaments were heated & so in effect used an atmosphere of steam & hydrogen. Defts. contended that the patent was invalid for want of subject-matter & utility, & for insufficiency of directions in the specification; that the idea of making filaments of tungsten was old, & that the only evidence that it was possble to carry out successfully the directions was not to be accepted:—*Held:* the patent was valid & had been infringed.—OSRAM-ROBERTSON LAMP WORKS, LTD. *v.* POPE'S ELECTRIC LAMP CO., LTD. (1917), R. P. C. 369; 34 T. L. R. 24, H.

Infringement.]—*See* Part XIV., Sect. 1, *post.*

SUB-SECT. 5.—IMPROVEMENT ON SOMETHING KNOWN.

A. In General.

193. Whether subject-matter for patent.]—BIRCOT'S CASE (1573), 3 Co. Inst. 184, Ex. Ch.

Annotations:—**Dbtd.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463; Hornblower *v.* Boulton (1799), 8 Term Rep. 95.

PART IV. SECT. 1, SUB-SECT. 5.—A.

193 i. *Whether subject-matter for patent.*]—A party had effected an improvement in fire engines by a new combination of old parts, whereby greater results were obtained:—*Held:* entitled to take out & maintain letters patent for his exclusive right to such improvements.—MUIR *v.* PERRY (1852), 2 L. C. R. 305.—**CAN.**

193 ii. ——.]—The attainment of a better result than had been previously attained constitutes a new result, so as to make an instrument a new invention as distinguished from an improvement of an old & known instrument.—THOMPSON *v.* MOORE (1889), 23 L. R. Ir. 599.—**IR.**

193 iii. ——.]—Where a patent has been obtained for a machine which the patentee subsequently somewhat improves, a subsequent specification claiming the improved machine as a novel combination is bad, though the improvement might be claimed & protected as such.—KINMOND *v.* JACKSON, KINMOND *v.* LAWRIE, 1 C. L. R. 66.—**IND.**

193 iv. ——.]—A new idea, though ingrafted upon an old invention, if distinct from the conception which preceded it, is a patentable improvement.—HAY *v.* AFRICAN GOLD RECOVERY CO. (1896), 3 O. R. 244.—**S. AF.**

193 v. ——.]—A mere carrying forward or new or more extended application of the original thought, a change only in form, proportion or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means, with better results, is not such an invention as will sustain a patent.—WALSH *v.* SHEELEY, [1911] T. P. D. 1.—**S. AF.**

193 vi. ——.]—Any improvement of an existing & known process which is not obvious to a person skilled in the art to which it relates but which involves the exercise of invention is patentable. The alteration must possess novelty & utility.—TESTRUP *v.* CROSFIELD & SONS, LTD., [1913] App. D. 1.—**S. AF.**

194. ——.] — An addition or improvement a good subject-matter.—MORRIS *v.* BRAMSOM (1776), 1 Carp. Pat. Cas. 30 ; 1 Web. Pat. Cas. 51 ; Bull. N. P. 76 c.

Annotations :—**Consd.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463. **Refd.** Hornblower *v.* Boulton (1799), 8 Term Rep. 95.

195. —R. *v.* ARKWRIGHT, No. 14, *ante*.

196. —BOULTON *v.* BULL, No. 90, *ante*.

197. — R. *v.* FUSSELL, R. *v.* DANIELL (1827), Godson on Patents, 2nd ed. 274 ; 1 Carp. Pat. Cas. 449, 453.

Annotation :—**Refd.** Crane *v.* Price (1842), 4 Man. & G. 580.

198. ——.]—HILL *v.* THOMPSON, No. 25, *ante*.

199. ——.]—R. *v.* BYNNER, No. 483, *post*.

200. ——.]—(1) If a patent invention be new & useful an action for an infringement may be maintained though the patentee has never made a machine according to it. But the limited use of an invention must not be excluded from consideration on the question of utility.

(2) If an invention be useful it is the subject of a patent though it be capable of improvement. A patent for an improved machine good, although capable of still further improvement.

(3) The substitution of a mere mechanical equivalent for part of a machine does not constitute a new invention. But it is otherwise if the substituted part be different, & requires science & skill to make it.—ECCLES & BRIERLY *v.* MCGREGOR (1853), Macr. 283.

201. ——.]—LONGBOTTOM *v.* SHAW, No. 134, *ante*.

202. ——.]—MCNAUGHT *v.* DAWSON, No. 499, *post*.

203. —— **Irrespective of utility.**] —MORGAN *v.* SEAWARD, No. 442, *post*.

204. —— **Improvement giving more economical & beneficial enjoyment to public.**]—CRANE *v.* PRICE, No. 315, *post*.

205. —— **Improvement necessitating infringement of existing patent.**]—CRANE *v.* PRICE, No. 315, *post*.

206. —— **Improvement on existing patent.**]—LISTER *v.* LEATHER, No. 278, *post*.

207. —— **Improved result obtained.**] — The owners of a patent for an improved lamp brought an action for infringement. Pltfs. claimed in their specification a combination & subordinate parts. Defts. denied infringement & alleged the invalidity of the patent on the grounds of want of novelty & of anticipation, & also by amendment at the trial, on the ground that the invention was not of such a meritorious character as to be patentable. Previously to the date of pltf.'s invention S. had published the importance of bringing heated air to an incandescent flame, & of heating the gas before it reached the burner. There were differences between pltfs.' lamp & that of defts.', & pltfs. had recently used a burner different from that described in their specification, & more like the defts.' burner :—*Held :* (1) pltfs.' invention was a method of bringing a supply of heated air to a particular point, the middle, of the flame, by which they obtained an improved result, & in a secondary degree of the addition of a cooling current of air round the lamp, & the invention was good subject-matter, & had not been anticipated ; (2) defts. had taken the pith & marrow of the invention, it being immaterial that they might have made improvements.—WENHAM GAS CO., LTD. *v.* CHAMPION GAS LAMP CO. (1891), 9 R. P. C. 49, C. A.

Annotation :—*Generally*, **Refd.** Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239.

B. What Constitutes Improvement.

208. Question of fact.]—LOSH *v.* HAGUE, No. 16, *ante*.

209. Must be improvement for all purposes.]—CORNISH & SIEVIER *v.* KEENE & NICKELS, No. 481, *post*.

210. Anything making machine more effective, useful & valuable.]—Anything which makes a patented machine more effective, useful, or valuable is an "improvement" to that machine, & falls under a covenant to "communicate" & "give the exclusive benefit of" every improvement to a patented machine though such improvement might be used without involving an infringement of the former patent.—HOPKINS *v.* LINOTYPE & MACHINERY, LTD. (1910), 101 L. T. 898 ; 26 T. L. R. 229 ; *sub nom.* LINOTYPE & MACHINERY, LTD. *v.* HOPKINS, 27 R. P. C. 109, H. L.

211. Producing no appreciable advantage.]—BLOXHAM *v.* KEE-LESS CLOCK CO., No. 127, *ante*.

212. Cheapness in production.] —CORNISH & SIEVIER *v.* KEENE & NICKELS, No. 481, *post*.

213. Alteration—Use voluntary & not essential.] —DOBBS *v.* PENN (1849), 3 Exch. 427 ; 13 L. T. O. S. 99 ; 154 E. R. 911.

Annotation :—**Refd.** Booth *v.* Kennard (1856), 5 W. R. 85.

214. ——.]—HALL *v.* BOOT (1822), 1 Web. Pat. Cas 100.

Annotations :—**Refd.** Losh *v.* Hague (1838), 1 Web. Pat. Cas. 202 ; Crane *v.* Price (1842), 4 Man. & G. 580.

215. ——.] — The grantee of a patent for improvements in frames for woven or elastic wire web mattresses brought an action against defts., alleging infringement. Defts. denied the alleged infringement, & alleged the patent to be invalid on the grounds of (*inter alia*) want of subject-matter & anticipation of the alleged invention. The patent claimed a rectangular framework, which was substantially that of the old four post bedstead, & differed from that only (a) in not having any legs or posts, (b) in having the transverse sliding piece on the top of the sides instead of in grooves along the sides, & (c) in having the foot & head raised above instead of being flush with the sides :—*Held :* the alleged invention was not the subject-matter of a patent & had been anticipated.—ROWCLIFFE *v.* LONGFORD WIRE IRON & STEEL CO., LTD. (1887), 4 R. P. C. 281.

Annotation :—**Refd.** Mandleberg *v.* Morley (1895), 64 L. J. Ch. 245.

216. ——.] — In Oct. 1886, S., the grantee of a patent for improvements in pianoforte actions, including an improved method of centering the damper, issued threatening circulars ; & in Sept. 1887, he issued advertisements of a similar nature. On Oct. 12, 1887, pltfs. commenced an action against S., claiming an injunction to restrain such threats as libels & a declaration that the patent was invalid. On Nov. 14, 1887, S. commenced two actions against other persons, alleging infringement of his patent, & claiming the usual relief ; & on Dec. 23, 1887, he delivered a defence & counterclaim, alleging infringement of his patent by pltfs., & claiming the usual relief :—*Held :* the alleged invention was not subject-matter, & had been anticipated. If a person has drawn a picture of a machine without describing it, & published that picture in a book, & that picture was one which any mechanist could understand, & make a machine from that picture alone, then a person cannot take out a patent in respect of a machine substantially the same (BRETT, M.R.).

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 5, *E*

The mere alteration of the position of the centre of a bent lever is not subject-matter for a patent (FRY, L.J.).—HERRBURGER, SCHWANDER ET CIE. *v.* SQUIRE (1889), 6 R. P. C. 194, C. A.

Annotation:—**Mentd.** Colley *v.* Hart (1890), 44 Ch. D. 179.

217. ——.] — SLAZENGER & SONS *v.* FELTHAM & Co. (1889), 5 T. L. R. 364, C. A.

218. ——.] — The owners of a patent for "an improvement in sewing machine shuttles & shuttle drivers" brought an action for infringement. The invention consisted in the insertion of a buffer spring over the horns at both ends of the driver or carrier, in order to prevent the constant clicking noise caused by the shuttle coming against the carrier. Deft., among other objections, alleged that the invention was not new, & was anticipated by S.'s earlier patent for a shuttle carrier, which had a spring at one end of the carrier, & a leather buffer at the other. It appeared that this patent was a failure. Deft.'s evidence was not gone into: —*Held:* there was no patentable invention in putting a second spring in the place of the leather buffer.—DEUTSCHE NAHMASCHINEN FABRIK VORM. WERTHEIM *v.* PFAFF (1890), 7 R. P. C. 251, C. A.

219. ——.]—T., a patentee of improvements in locks, sued K. for infringement. K. alleged the invalidity of the patent for want of novelty & want of subject-matter, & denied that his lock was an infringement. Locks were proved to have been known prior to the date of the patent with a mechanism at the side, similar to pltf.'s, for moving a catch, whereas pltf.'s mechanism was on the face of the lock. Pltf. described his invention to be the making locks without projecting or protruding bolts. Deft.'s lock had projecting bolts:—*Held:* (1) (the whole ct.) there was no infringement; (2) (KAY, L.J.) there was no subject-matter.—TUCKER *v.* KAYE (1891), 8 R P. C. 230, C. A.

220. ——.] — The owner of a patent for an improved manufacture of sheet metal signs, brought an action for infringement & moved for an injunction. Pltf. claimed in effect a mode of making embossed metal by pressing the metal plate between a suitable punch & a yielding support instead of the ordinary matrix. On the motion, which was treated as the trial, defts. gave evidence to show that the use of a yielding substance for the female die or matrix was known & had been used in the case of flexible materials It was admitted that a sheet of metal had, prior to pltf.'s patent, been embossed by the use of hammers & punches applied to the sheet when laid on a soft & elastic bed:—*Held:* the modification of the previous processes by adapting the use of the yielding support to the case of metal sheets was not the subject-matter of an invention. —EMBOSSED METAL PLATE CO., LTD. *v.* SAUPE & BUSCH (1891), 8 R. P. C. 355.

221. ——.] — In 1897 letters patent were granted to B. for "improvements in mineral water bottles." The patentee claimed "in the manufacture of indented glass stoppered bottles for mineral & aerated waters, making the indent of such a shape as will form a curved channel for the passage of the ball instead of the present horizontal one, substantially as & for the purposes herein set forth & described & illustrated by Fig. 2 of the accompanying drawings." The specification alleged that the invention overcame certain disadvantages possessed by bottles having a horizontal indentation. B. having brought an action for infringement of the patent, defts. alleged the invalidity of the same on the grounds (*inter alia*) of want of invention & subject-matter & anticipation by, amongst others, J.'s specification:—*Held:* although some of the alleged advantages of B.'s bottle were to some extent proved, yet there was no invention, but merely adaptive skill & judgment in manufacture, & therefore the patent was invalid for want of subject-matter; even if there was subject-matter, the patent was anticipated by J.'s specification.—BEAVIS *v.* RYLANDS GLASS & ENGINEERING CO., LTD. (1899), 17 R. P. C. 93; *affd.* (1900), 17 R. P. C. 704, C. A.

Annotation:—**Refd.** Parker & Smith *v.* Satchwell (1901), 45 Sol. Jo. 502.

222. ——.]—Letters patent No. 21,333 of 1900 for "improvements in tyre inflator & other nozzles" were granted to A. & others. In an action for infringement deft. contended that the patent was invalid on the grounds (*inter alia*) of want of novelty & of subject-matter. In particular he relied on alleged prior users by A. & L. & prior publication by the specification of S., & want of subject-matter:—*Held:* there was no subject-matter & the patent was invalid.—ATKINSON *v.* BRITTON (1910), 27 R. P. C. 469, C. A.

223. Substitution—Of mechanical equivalent.] -ECCLES & BRIERLY *v.* MCGREGOR, No. 200, *ante.*

224. —— ——.]—In 1911 a patent was granted for "improvements in & relating to rotary engines." In an action for infringement of the patent, defts. denied infringement & alleged that the patent was invalid for want of novelty & subject-matter, & relied, in particular, upon the specification of B., describing a rotary engine with stepped teeth arranged in helical lines. At the trial it was held that defts. had infringed; but that pltfs.' engine did not give any new result, that it was not more economical in the consumption of motive fluid; or more inexpensive to manufacture, or more durable, than B.'s engine; that at the date of the patent smooth blades, such as those in pltfs.' engines, were a known equivalent of the stepped teeth in B.'s engine; & that the patent was invalid for want of subject-matter. The action was dismissed with costs, & a certificate as to some of the particulars of objections was granted. Pltfs. appealed, & at the hearing of the appeal defts. did not contest the allegation of infringement:—*Held:* (1) the patent was invalid for want of subject-matter; (2) (YOUNGER, L.J.) it had been anticipated by the specification of B.'s patent.—BRITISH SPIRO TURBINE, LTD. *v.* SULLIVAN MACHINERY CO. (1921), 38 R. P. C. 326, C. A.

225. ——.]—PARKES *v.* STEVENS, No. 287, *post.*

226. Correction of obvious defect.] — BLOXHAM *v.* KEE-LESS CLOCK CO., No. 127, *ante.*

227. Necessity for materiality.] — R. *v.* ARKWRIGHT, No. 14, *ante.*

228. ——.]—This was an action for infringement of a patent for improvements in the manufacture of wire rings suitable for use in securing elastic tyres on bicycle & other wheels. The claim in effect was for wire rings for use in securing elastic tyres on bicycle & other wheels, in which the joints were made by inserting the two ends of the wire into a longitudinal split tube, & then introducing solder along the split. Defts. alleged that the patent was invalid on the grounds of want of subject-matter & want of novelty. Joints of the kind described by pltf. had been previously used in ordinary wire work for lamps, hats, & other purposes, but not for bicycles. Pltf. contended that there was invention in the application of such joints to bicycle wheels, as in their case

there was a great strain along the wire. Defts.' evidence showed that such joints had been used for centrifugal machines revolving at the rate of one thousand turns a minute:—*Held:* though pltf. had made an improvement on the joints previously used for bicycle wheels, he had not shown the degree of invention necessary to support a patent.—SHAW *v.* BARTON & LOUDON (1895), 12 R. P. C. 282.

229. Necessity for exercise of invention.]—RALSTON *v.* SMITH, No. 97, *ante*.

230. ——.]—This was an action for infringement of an invention of "improvements applicable to trawl nets." The invention consisted in using a beam trawl, which has a square headed net, without the beam, substituting otter boards, otter trawls & beam trawls being the two kinds of trawls used in sea fishing, of a special character, all the ropes being affixed to the centre of the boards instead of to the top & bottom of the tail of the board, & with a metal bracket as a fixed point of attachment, instead of the ropes previously used. There were three claims, for the combination, for the metal bracket, & for the central attachment. Defts. denied infringement, & alleged that the invention was not new or useful or good subject-matter, & that it had been anticipated by prior user:—*Held:* there was no anticipation; pltf.'s improvements required invention, & had sufficient utility, though not great utility, to support a patent, & gave the public a useful choice, & the patent was valid; & as to infringement, defts. had not used the central attachment; &, though metal ropes, if so practically rigid as to be a mechanical equivalent of the metal bracket, might be an infringement, defts. had only used metal ropes of a pliable character, which were not so stiff as some hemp ropes which had been previously used, & had not infringed.—SCOTT *v.* HAMLING & CO., LTD. (1896), 14 R. P. C. 123.

231. ——.]—This was an action for the infringement of four patents:—The first for improvements relating to the base frame of cycle saddles; the second for improvements in the boss on the pillar of the cycle; the third for improved means of adjusting the tilt of the saddle. Defts. denied infringement, & alleged that the patents were invalid on various grounds; No. 1, on the grounds of want of novelty & subject-matter, anticipation, want of utility & insufficiency; No. 2, on the grounds of want of novelty & subject-matter, insufficiency, variance, & anticipation; & No. 3, on the grounds of anticipation, want of subject-matter, variance & prior grant:—*Held:* the first patent was valid, since the words at the end of the first claim, "substantially as described & set forth," limited the claim for use in base frames of a trussed beam to the particular manner described in the specification, &, further, that this patent had been infringed; as to the second patent, figures 8, 9 & 10 were not within the provisional specification, &, further, defts. had not infringed this patent; &, as to the third patent, without deciding the question of validity, defts. had not infringed it.

We think that in dealing with patents for special arrangements of very familiar mechanical means, such as pins, washers, clips or gripping cheeks, nuts, etc., it is necessary to scrutinize the invention claimed with some nicety. By straining the doctrine of mechanical equivalents, a patent for a particular combination of well known appliances for fastening the framing rods of a saddle to a vertical pillar, might be made to cover almost any other combination (SMITH, L.J.).—BROOKS *v.* LAMPLUGH (1897), 15 R. P. C. 33, C. A.; *on appeal* (1898), 16 R. P. C. 41, H. L.

Annotation:—**Apld.** Van Berkel *v.* Simpson (1906), 24 R. P. C. 117.

232. ——.]—BEAVIS *v.* RYLANDS GLASS & ENGINEERING CO., LTD., No. 221, *ante*.

233. ——.]—In 1893, letters patent were granted to M. for an improved pedal for bicycles & other machines; the pedal described was adjustable so as to adapt its width to the required breadth of tread. The complete specification was accepted on Sept. 23, 1893. The patent subsequently became vested in W. On Sept. 25, 1893, W. applied for letters patent, which were also granted, for a new & improved width adjusting pedal for bicycles & velocipedes. W. commenced an action against a co. for infringement of these two patents, & of a third patent, subsequently abandoned. In the course of the trial it was admitted by one of pltfs.' expert witnesses that the alleged infringing pedal did not infringe M.'s patent. As regards W.'s patent, defts. disputed its validity on the ground of want of novelty by reason of anticipation by the specifications of M.'s patent & of several earlier patents:—*Held:* having regard to the alleged anticipations & especially to M.'s specification, there was not sufficient invention to support W.'s patent, & it was invalid for want of novelty.—WATERSON *v.* LLOYD'S (W. A.) CYCLE FITTINGS, LTD. (1899), 16 R. P. C. 277.

234. ——.]—Letters patent having been granted in 1894 for an invention of "improvements in felt handles for velocipedes, golf sticks, & for other articles, & in the manufacture of the handles," the owners of the patent in 1898 brought an action for infringement of the same. The first claim of the specification was "making felt handles for velocipedes, golf sticks, tennis rackets & other articles by first growing a piece of sheet felt longitudinally at intervals, then bending the same & securing the meeting edges together so as to form a felt cylinder grooved from end to end on the outside, which is or is not afterwards reduced towards the ends, all substantially as set forth"; the other claims being claims for the handles "made from sheet felt grooved longitudinally at intervals & bent into a cylinder with the grooves outside, etc." Deft., who sold handles made from sheet felt bent into a cylinder & afterwards grooved longitudinally, denied infringement, & alleged the invalidity of the patent on the grounds (*inter alia*) of want of novelty & want of subject-matter. It appeared that felt handles for the same purposes were old, but had been made out of a solid block of felt by boring & turning the same, & such handles had been grooved. It was alleged that a considerable economy was effected by the use of sheet felt, & a large sale of the patented handles was proved:—*Held:* the

229 i. *Necessity for exercise of invention.*]—A patent was granted to pltf. in respect of improvements. In an action for infringement, the deft. alleged want of proper subject-matter of a patent:—*Held:* although there was an improved result, & the utility was undoubted, ingenuity sufficient to constitute invention had not been shown & the patent was invalid.—WILLMANN *v.* PETERSEN, [1904] S. Q. R. 191.—**AUS.**

229 ii. ——.]—SERVIS RAILROAD TIE PLATE CO. OF CANADA, LTD. *v.* HAMILTON STEEL & IRON CO., LTD. (1904), 8 Exch. C. R. 381.—**CAN.**

229 iii. ——.]—The cts. look with favour upon any slight change whereby an improvement is effected & find invention in it if they can.—MATTICE *v.* BRANDON MACHINE WORKS CO. (1907), 17 Man. L. R. 105.—**CAN.**

229 iv. ——.]—SCHWER *v.* FULHAM & ROBINSON (1910), 11 C. L. R. 249.—**AUS.**

229 v. ——.]—ROSE'S PATENTS CO., LTD. *v.* BRABY & CO., LTD. (1894), 11 R. P. C. 198.—**SCOT.**

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 5, *B.*]

patent was invalid for want both of novelty & invention, &, even if valid, deft. had not infringed, as grooving before bending the felt was of the essence of the invention.—COOPER & CO. (BIRMINGHAM), LTD. *v.* BAEDEKER (1900), 17 R. P. C. 209.

235. ——.]—In 1898 a patent was granted to W. for "improvements in attachments for 'corsets,'" consisting of an abdominal belt composed of two or more parts provided with vertical stiffening ribs, at each side of the top of which were eyelet holes through which safety pins could be fastened to attach the belt to a corset. In 1902 W. commenced an action against a co. for infringing the patent. Defts. denied infringement, & attacked the validity of the patent on the grounds of want of novelty & want of subject-matter. They also alleged various anticipations by divers specifications, & by cases of public manufacture & sale:—*Held:* although pltf. was entitled to the credit of having improved upon articles that were in the market before, & although defts. had distinctly & intentionally copied the alleged invention, yet there was not invention which the ct. could recognise; substantially the same thing had been in the market, either patented or within common knowledge & common use, for some years prior to 1898; & pltf.'s patent was therefore invalid.—WARDROPER *v.* GIBBS, LTD. (1903), 20 R. P. C. 355, C. A.

236. ——.] — The owners of letters patent for "improvements in & relating to electric 'spark-rupturing appliances,'" having brought an action for infringement, defts. relied mainly on want of subject-matter. By the first claim in the specification the patentee claimed: "in a magnetic arc rupturing device, a shield of insulating material located between the surfaces of the electrodes & adjacent conducting surfaces of the device by which the arc is disrupted, as & for the purpose described." The specification stated that the object of the invention was to increase the efficiency & certainty of the operation of the arc rupturing devices by permitting them to be brought very close to the point where the arc might form, & it explained that the insulating material prevented arcs forming at other points, & that an advantage was gained from the near approach of the poles to the electrodes as they enhanced very much the intensity of the field. At the date of the patent magnetic blow-outs for rupturing arcs were well known, & it was well known that close proximity of the magnet was important, but that such proximity increased the risk of sparking to the magnet, that the remedy was insulation, & that material which was an insulator to an electric current was not an insulator to magnetic influence: —*Held:* there was neither novelty or invention, & the patent was invalid for want of subject-matter.—BRITISH THOMSON-HOUSTON CO., LTD. *v.* MANCHESTER CORPN. (1903), 20 R. P. C. 461.

237. ——.]—BAXTER *v.* MARSDEN, No. 496, *post.*

238. ——.]—A patent was granted in 1905 for "improvements in transmission, change speed & reversing gear for automobile vehicles." The improvements consisted in employing a U-shaped locking plate, each arm of which had a tooth capable of engaging at one time in notches in two of the three push rods, thereby preventing those rods being moved by the operating arm by which the third push rod was moved. The locking plate was, in one form of the device, suspended vertically from the axle by means of which it was caused to slide into position & by which the operating arm was rotated, or, in a modification, it was fixed horizontally. An action for infringement of the patent having been brought, it was suggested by defts. at the trial that they were the inventors of the device. It was admitted by defts. that pltf.'s device was an effective simplification of certain previous devices described in specifications that were alleged to be anticipations, but they contended that the essential features of it were described in those specifications. Defts. also admitted that if the patent was valid they had infringed:—*Held:* there was no foundation for the suggestion that defts. were the inventors of pltf.'s device, but the four characteristics of pltf.'s locking plate were not new, either considered separately or in combination, & any departure made by him from what was known before required no exercise of inventive power.—STROUD *v.* HUMBER, LTD. (1906), 24 R. P. C. 141.

239. ——.]—In 1900 letters patent for 'improvements in gaiters or coverings for the legs" were granted to H. The novel feature of the patented article was the method of lacing up. In the action for (*inter alia*) infringement of the patent, defts. alleged anticipation & want of subject-matter against the validity of the patent: —*Held:* there was no invention & the patent was invalid.—HILL *v.* THOMAS & SONS (1907), 24 R. P. C. 415, C. A.

240. ——.]—The owner of a patent for "improvements in skeins of tape & the like" brought an action for infringement against K. & S., who denied infringement, & alleged that the patent was invalid for want of subject-matter. The alleged invention consisted of a skein or coil of tape made in such a way that it could be drawn out without entangling on the inner end being pulled, & to obtain this the tape was wound into a coil, the circumference being pressed to the centre so as to assume an elongated shape & elastic bands slipped round either end:—*Held:* the function & purpose of the elastic bands were in no way different from their function & purpose when used in other ways, & there had been no exercise of the inventive faculty by the patentee.—WEST *v.* KEEVES (JAMES) & SONS, LTD. (1911), 28 R. P. C. 474.

241. ——.]—Pltf., who was the patentee of an invention for "improvements in railway fog signals," brought an action for infringement against defts., who denied infringement, & alleged that the patent was invalid for want of subject-matter. The invention claimed was, in a railway fog or signal holder which has two or more independent detonators fixed together on it side by side, & also has a metal strip to clip the rail, the employment between the detonators of an upwardly projecting rib or partition formed with or fixed to the plate or holder in either of the ways described in the specification so as to prevent the explosion of one detonator blowing the other detonators off the plate or holder:—*Held:* the patent was invalid for want of subject-matter.—LUDLOW *v.* JENKINS (THOMAS) & CO. (1911), 29 R. P. C. 179.

242. ——.]—The owners of a patent for "improvements in pulling-over machines for boots & shoes" brought an action for infringement of the patent. The essence of the invention was that it enabled a person operating a boot making machine to keep the boot in view in a natural position during all the essential parts of the operation, & in particular when adjusting the upper & insole to the right place. Defts. contended that the

patentee had chosen to claim a machine with a particular device, whether provision was made for the disengagement or not, & that a machine without that provision would obviously be useless & the claim was therefore void:—*Held:* the position of the boot in the patented machine was the position in which the hand laster views his work in order to see whether the tip line is correct: that the claim to a "master idea" was a claim to the exclusive right to a point of viewing in connection with a pulling-over machine; while it was true that the patented machine produced better results both in speed & quality than a prior machine, which was alleged to be an anticipation, there was no invention in the idea; there was no subject-matter, & the patent was therefore invalid. —BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* STANDARD ROTARY MACHINE CO., LTD. (1917), 35 R. P. C. 33, H. L.

Annotation:—**Apld.** British United Shoe Machinery Co. *v.* Unique Shoe Co. (1918), 36 R. P. C. 33.

243. ——.]—In 1912 a patent was granted for "improvements in or relating to the processes of making stitch-down boots & shoes, & to machines for lasting the same." The first of the claims was for "A process for permanently securing in lasted condition the upper of the stitch-down boot or shoe that comprises, as a characteristic conforming the upper to the shape of the last by successively presenting various points selected by the operator to a machine having a tool . . . which forces the material of the upper into the angle between the side of the last & the projecting sole margin or between equivalent parts of the shoe & securing each portion of the upper to the sole in lasted position whilst it is held in the angle by the tool by inserting an individual permanent fastner, for example a staple, in the angle through the upper & into the sole at the selected points." In an action for infringement of the patent defts. alleged (*inter alia*) that the patent was invalid for want of novelty & of subject-matter. At the trial it was proved that the effect & desirability of getting the fastening into the angle of the crease were well known, & that practicable permanent fastners in the form of light-wire staples had been used before the date of the patent:—*Held:* the idea comprised in the patent was capable of being described either as the work of a particular machine or as a process apart from any machine, & was not such as to be entitled to exceptional protection; & even if the process claimed by the first claim was confined to the use of the staple-driving tool, the patent was invalid; & the process was not so confined; & if a tool without the characteristic described in the third claim was employed in the process first claimed the process was not practicable by any means specified.—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* UNIQUE SHOE CO. (1918), 36 R. P. C. 33.

244. ——.] — BLOXHAM *v.* KEE-LESS CLOCK CO. (1922), 39 R. P. C. 195.

245. ——.] — Pltfs. were the assignees of a patent for "improvements in warp thread & like selecting & separating mechanism." Claim 1 of the specification was as follows: "in warp thread & like selecting & separating apparatus of the kind herein referred to, & wherein the selector & separator mechanism is operated by mechanical or like power under the control of a feeler acted upon by the separated threads—operating the selector & separator mechanism by a continuously running prime mover & transmitting the motion of the prime mover to the selector & separator mechanism through a mechanical 'make & break' appliance which is subject to the control of the feeler acted upon by the separated threads." Claim 2 was as follows: "warp thread & like selecting & separating apparatus as claimed in claim one, wherein the prime mover is extraneous to the selector carriage." Claim 5 was as follows: "in warp thread & like selecting apparatus as claimed in Claims one, two or three, a sensitive feeler such as pivoted at one end of the selector carriage, extending at its other end across the bulk of the separator guide, & at a point in its length adapted to bear against the trip lever or other part by which the driving connection between the prime mover & the selector & separator mechanism is made or broken, substantially as herein set forth." In an action for the infringement of the patent defts. pleaded want of novelty & subject-matter, prior publication & insufficiency, & non-infringement:—*Held:* (1) in the circumstances defts. were not precluded from disputing the validity of pltfs.' patent; (2) the improvements forming the subject-matter of pltfs.' patent referred to mechanism which formed the subject of the prior patent No. 29477 of 1913 referred to in the specification of pltfs.' patent & not a much larger class of selecting & separating apparatus of which the mechanism covered by the patent of 1913 was only an example & consequently that defts. had not infringed; (3) after the publication of Von Meyenburg's specification & that of defts.' 1915 patent, assuming that the wide construction contended for by pltfs. was given to the specification of the patent in question, there was not in the invention sufficient subject-matter for a patent & the patent was therefore invalid.—WARD BROTHERS (BLACKBURN), LTD. *v.* MOORE & AVERY (BLACKBURN), LTD. (1922), 40 R. P. C. 247, C. A.

246. ——.]—A patent was granted for "improvements in or relating to abdominal supports for medical or surgical purposes." One of the claims was as follows: "an abdominal support for medical or surgical purposes, comprising two substantially triangular rigid metal plates, connected by means of a non-extensible flexible connection extending between two adjacent vertical edges of the plates & forming a hinge about which the said plates can turn." In an action for infringement of the patent defts. alleged (*inter alia*) that the patent was invalid on the grounds of want of novelty & subject-matter. At the trial pltfs. alleged that the need for an abdominal support more efficient than any then in use had been suggested to the patentee by a certain eminent surgeon, & that the patentee, acting on that suggestion, had invented a support that had been of very great use:—*Held:* the alleged invention was a natural & ordinary workshop improvement & development of a well-known type of apparatus, having regard to the requirements made known to the patentee by the surgeon upon whose suggestion he had acted, rather than an invention within the recognised principles of the patent law.—CURTIS (H. E.) & SON, LTD. *v.* HEWARD (R. H.) & CO. (1923), 40 R. P. C. 183, C. A.

247. ——.]—On Mar. 14, 1921, letters patent were granted for "improvements in or relating to devices for supplying lubricating oil to internal combustion engines." The claims were as follows: (*a*) A device for conveying lubricating oil to the crank chamber of an internal combustion engine, comprising a hopper shaped on one side to adapt it to be mounted on the engine, an aperture provided in the side to receive one of the bolts by which it is secured to the engine, a cover for said hopper & a cranked tube issuing from the hopper the vertical axis of the outlet orifice of said tube being offset to a suitable distance from the side of the hopper

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by which it is secured to the engine. (*b*) A form of construction of the device claimed in the preceding claim in which the hopper has the form of a rectangular inverted cone. (*c*) A device for conveying lubricating oil to the crank chamber of an internal combustion engine substantially as described & illustrated. On the same date a design was registered for a filler for supplying lubricating oil to internal combustion engines. The registered design was substantially the same as the illustration of the filler in the specification of the patent. In an action for infringement of the patent & of the design, pltf. complained in particular of the manufacture & sale by defts. of an oil filler constructed in accordance with the invention claimed & in infringement of the copyright in the design. Defts.' filler differed in appearance from the registered design (*inter alia*) in the following respects: it had six sides intead of four, a hinged lid instead of a sliding lid, & holes in the lid, whereas no such holes were shown in the registered design. Defts. contended that there was no infringement, that the patent was invalid for want of novelty & want of subject-matter & that the design was invalid for want of novelty. Pltf. contended that the invalidity of a design could not be raised unless there was a motion to rectify the register:—*Held:* (1) the invention described & claimed embodied two ideas, (*a*) the provision of a filler conveying lubricating oil from a place convenient for the purpose of pouring out the oil to a place inconvenient for that purpose; (*b*) the fixing of such a filler to the engine of a car; both these ideas were well known at the date of the patent; there was nothing novel in pltf.'s invention & nothing calling for more than the application of the most ordinary engineering knowledge; (2) defts. had proved that it was possible to fit a cone-shaped hopper to a car & the provision of a flat sided hopper did not call for any inventive ingenuity.—ROSE *v.* PICKAVANT (J. W.) & Co., LTD. (1923), 40 R. P. C. 320.

248. ——.]—A patent was granted for "improvements in the manufacture of firelighters." The claims were as follows: (*a*) The method of manufacturing firelighters of the description herein referred to according to which the sticks & turnings or the like of which a plurality of firelighters are to be composed, are built up & pressed, then clamped together under pressure, & held clamped during the dipping process & until the combustible mixture into which they are dipped has set, substantially as herein set forth. (*b*) Means for making firelighters of the description herein referred to, constructed & employed in the manner substantially as herein set forth with reference to the accompanying drawing." In an action for infringement of that patent, & of another patent in respect of which notice of discontinuance has been given, pltf. was owner of a half share of the patent. Defts. alleged (*inter alia*) that the claims would cover a machine in which the pressing & clamping means were in one, & that the alleged invention had been anticipated by a certain prior user. It was proved that pltf.'s machine gave a greater output than any means previously in use had done:—*Held:* the claim was for an apparatus substantially the same as that described & illustrated by the drawings; the method & apparatus described & claimed were new & original; they were admittedly useful, & contained sufficient invention to support a patent.—TURNER *v.* BOWMAN (1924), 42 R. P. C. 29.

249. ——.]—A patent was granted for "improvements in & relating to the cutting of metals & the like by the oxy-acetylene process or similar methods." The first claim was for "an oxy-acetylene cutting appliance comprising a jointed frame capable of movement so as to bring its end into any position in a horizontal plane & an oxy-acetylene jet carried by the jointed frame, in combination with a template on former or adjustable guiding member mounted above the oxy-acetylene jet substantially as described." The eighth claim was for "the combinative with the machine according to first claim or second claim of an attachment for allowing the cutter head to be carried round in a circular path of any required size, attachment including a swing member adapted to be turned, for instance, by a worm gear, & carrying a socket member adjustable in a guide to any distance from the turning centre, substantially as described, for example with reference to the accompanying drawings." In an action for infringement defts. denied infringement & alleged that the patent was invalid for want of novelty & subject-matter. Defts.' machine comprised a bifurcated jointed arm, the lower branch of which carried the blowpipe & the upper branch a tracer wheel. The wheel was so mounted that movement of the tracer over any part of a drawing placed on a table mounted between the two branches could be exactly reproduced in the same scale by the blowpipe:—*Held:* pltf.'s patent had not been anticipated, the patentee had exercised ingenuity in avoiding the fouling of the cutter heading & the template & in getting the cut to reproduce exactly the contour of the template, & the patent was valid.—GODFREY *v.* HANCOCK & Co. (ENGINEERS), LTD. (1925), 42 R. P. C. 407.

Invention.]—*See* Sub-sect. 3, *ante.*

250. Necessity for novelty.] — Where letters patent were granted for improvements in apparatus for the manufacture of certain chemical substances, & the jury found that the apparatus was not new, but that the patentee's mode of connecting the parts of that apparatus was new, the ct. directed the verdict to be entered for deft. upon an issue taken upon the novelty of the invention.—GAMBLE *v.* KURTZ (1846), 3 C. B. 425; 7 L. T. O. S. 431; 136 E. R. 170.

251. ——.] — Ladies' mourning bonnet & hat falls having previously been made with the ornamental folds on the outside only, so that when

250 i. *Necessity for novelty.*]—Pltf. introduced into a drum stove, in addition to a spiral flue, which had been previously in use, a centre pipe closed at the sides & open at both bottom & top, as a means of producing a greater amount of heat, & obtained a patent for "the spiral flue in connection with the pipe in the centre": —*Held:* the improvement did not involve any new principle or new combination, & the patent was void.—NORTH *v.* WILLIAMS (1870), 17 Gr. 179. —**CAN.**

250 ii. ——.]—Pltf. had obtained a patent for an improved gearing for driving the cylinder of threshing machines, & the gearing was a considerable improvement; but it appeared that the same gearing had been previously used for other machines, though not before applied to threshing machines:—*Held:* the novelty was not sufficient to sustain the patent.—ABELL *v.* MCPHERSON (1870), 17 Gr. 23; 18 Gr. 437.—**CAN.**

250 iii. ——.]—HILDRETH *v.* MCCORMICK MANUFACTURING CO. (1909), 41 S. C. R. 246.—**CAN.**

250 iv. ——.]—A patent for an alleged invention relating to improvements in portable electric heaters was declared invalid because not a proper subject-matter for letters patent, having regard to the nature of the combination claimed, the state of the art, & common general knowledge at the date of the issue of the patent.—DURABLE ELECTRIC APPLIANCE CO., LTD. *v.* RENFREW ELECTRIC PRODUCTS, LTD., DURABLE ELECTRIC APPLIANCE CO., LTD. *v.* SUPERIOR ELECTRICS, LTD., [1926] 4 D. L. R. 1004; 59 O. L. R. 527.—**CAN.**

turned up a "wrong side" was exposed to view, pltf. introduced & patented an improved mode of making them with the folds on the inner side also, so as to form both sides alike, but there was no novelty in the process of manufacture:—*Held:* this was not a subject for a patent.—WHITE *v.* TOMS (1867), 37 L. J. Ch. 204; 17 L. T. 348.

252. ——.]—(1) The third point raised may be very shortly disposed of. It is that E.'s invention . . . is not commercially useful, & has never been in actual use. If this be so it does not follow necessarily that the patent is bad (NORTH, J.).

(2) I do not stop to consider in detail the various discoveries & inventions & the improvements upon which are the subject of the letters patent now before me. It is sufficient to say that before the date of that patent it was known that if two similar plates or tympans capable of vibrating were placed a short distance apart & were mechanically connected the vibrations caused in one of them by speaking to it would be reproduced in the other. . . . It was also known that by the use of the electric current certain sounds such as musical notes could be transmitted to considerable distances but no mode by which articulate speech could be reproduced at long distances had yet been worked out (NORTH, J.).—UNITED TELEPHONE CO. *v.* BASSANO (1886), 2 T. L. R. 459; Griffin's Patent Cases (1886), 220; 3 R. P. C. 295; *on appeal*, 3 R. P. C. 313, C. A.

253. ——.] — WINBY *v.* MANCHESTER, ETC. STEAM TRAMWAYS CO., No. 38, *ante*.

254. ——.]—COOPER & CO. (BIRMINGHAM), LTD. *v.* BAEDEKER, No. 234, *ante*.

255. ——.] — The patentee of an invention for "improvements in roundabouts" in his complete specification described & claimed certain mechanism consisting of rods & of guides sliding radially on a platform "so as to permit of the "model horses or the like moving either independently or collectively in a radial direction under centrifugal action" substantially as described. An action having been brought against B. & M. by the owners of the patent, deft. B. alleged its invalidity on the grounds (*inter alia*) of want of novelty & disconformity, & denied infringement. M. did not appear at the trial, but had consented to an injunction:—*Held:* the patent was bad for want of novelty, & also for disconformity.—SAVAGE BROTHERS, LTD. *v.* BRINDLE (1900), 17 R. P. C. 228.

256. ——.]—C. was the registered owner of a patent for "improvements in candlesticks," by making the sockets in one piece with fangs projecting above the nozzle to hold candles of different sizes. In the specification there was no provision as to the fixing of the socket on the base or bed of the candlestick, nor was it expressly stated that the socket & fangs should be made in one piece. In the complete specification, but not in the provisional specification, it was provided that small tits cut on the socket piece should overlap & hold the nozzle or grease-catcher. In 1901 C. commenced an action against L., who denied infringement, novelty, & subject-matter, & alleged disconformity & prior publication. It appeared that holders with similar fangs, fitting or standing in common candlesticks, were well known prior to C.'s patent. At the trial it was held that a socket with fangs in one piece was new; that the arrangement of tits for holding the nozzle was merely a method of carrying out the invention, & was therefore rightly added in the complete specification without disconformity; that there had been an infringement by deft.; & that the pltf. was entitled to the relief claimed:—*Held:* the only novelty was in attaching the socket made in one piece directly to the base of the candlestick, & there was no subject-matter.—CARTER *v.* LEYSON (TRADING AS PECKHAM BOX CO.) (1902), 19 R. P. C. 473.

257. ——.]—BRITISH THOMSON-HOUSTON CO., LTD. *v.* MANCHESTER CORPN., No. 236, *ante*.

258. ——.]—In 1899 a patent was granted to pltf. & another for "improved means applicable for use in the production of photoprints." The invention consisted essentially in mounting a cylinder, used in conjunction with an arc light for reproducing architects' & engineers' drawings by photography, upon trunnions, so that it could be placed in a horizontal position. The main defence was want of subject-matter:—*Held:* the invention was new, useful, & had not been anticipated, & it was good subject-matter for a patent.—HALDEN *v.* HALL (B. J.) & CO. (1904), 21 R. P. C. 609.

259. ——.] — BAXTER *v.* MARSDEN, No. 496, *post*.

260. ——.]—STROUD *v.* HUMBER, LTD., No. 238, *ante*.

261. ——.]—ROSE *v.* PICKAVANT (J. W.)& CO., LTD., No. 247, *ante*.

262. ——.]—BRITISH THOMSON-HOUSTON CO., LTD. *v.* CHARLESWORTH, PEEBLES & CO., SAME *v.* BRITISH INSULATED & HELSBY CABLES, LTD., No. 640, *post*.

Novelty.]—*See* Sect. 2, *post*.

263. Necessity for utility.]—R. *v.* ARKWRIGHT, No. 14, *ante*.

264. ——.]—This was an action for infringement of a patent for improvements in apparatus for making gas from coal, & for analogous purposes. Defts. denied infringement, & alleged the invalidity of the patent on various grounds, including anticipation & want of utility & subject-matter. The system in use prior to the patent was one in which the retorts were horizontal, this being required in order that the coal should be of a level at the bottom of the retort, & not too deep, so that there should be room for the heated coal to expand, & for the gases to escape without having to struggle through heated coal. This method required great labour & some skill to charge & discharge the coal, & required several men to do it. Pltfs.' retort was put at an angle approximating to the angle of repose—that is, an angle so that the coal could enter the retort at a certain velocity, & distribute itself at an even layer on the bottom of the retort till it reached the stop, & it then gradually filled up to the right height & sufficiently level. The advantages of this system were that it dispensed with labour, & was cheaper; the charging was automatic, & the discharging was rapidly effected owing to the angle of the retort. Defts. contended at the trial that the patent was anticipated; that the invention, & particularly as described in the Specification, would not work so as to give a practical success, as it would not get a good even layer; that the angle of repose of coke was slightly greater than that of coal; & that, therefore, the double advantage of the automatic charging & quick discharge could not both take place; that the patentee only pointed to an angle of 29 degrees, which would not effect both the purposes of charging & discharging:—*Held:* the invention was good subject-matter of a patent, & had not been anticipated; the objections to the working of the invention failed; & that defts.' apparatus, though they had made modifications of & improvements on the invention, fell within

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the words & spirit of pltfs.' invention.—AUTOMATIC COAL GAS RETORT CO., LTD. *v.* SALFORD CORPN. (1897), 14 R. P. C. 450.

Annotation:—**Refd.** British Thomson-Houston Co. *v.* Naamlooze Vennootschap Pope's Metaaldraadlampenfabriek, British Thomson-Houston Co. *v.* Charlesworth Peebles, British Thomson-Houston Co. *v.* King (1923), 40 R. P. C. 119.

265. ——.]—WINBY *v.* MANCHESTER, ETC. STEAM TRAMWAYS CO., No. 38, *ante*.

266. ——.]—HALDEN *v.* HALL (B. J.) & CO., No. 258, *ante*.

267. ——.]—The patentee of "an improvement in hair nets & the manufacture thereof" claimed by his specification: "(*a*) The improvement in the manufacture of hair nets produced from a continuous length of material, whereby the knotting of the ends of the lengths forming the nets to prevent unravelling is avoided, substantially as herein described. (*b*) A net for the hair having meshes of varying size substantially as & for the purpose stated." In an action for infringement deft. put in issue the validity of this patent, alleging want of subject-matter, want of novelty, & want of utility, & denied that he had infringed: —*Held:* the patent was invalid for want of subject-matter & utility, &, if the patent had been good, the deft. had not infringed.—MARSH *v.* WOLFF (1906), 23 R. P. C. 265.

Utility.]—*See* Sect. 3, *post*.

SUB-SECT. 6.—ADDITIONS.

268. General rule — Patentable.] — MORRIS *v.* BRAMSOM (1776), 1 Carp. Pat. Cas. 30; 1 Web. Pat. Cas. 51; Bull. N. P. 76 c.

Annotations:—**Consd.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463; Hornblower *v.* Boulton (1799), 8 Term Rep. 95.

269. —— ——.]—BOULTON *v.* BULL, No. 90, *ante*.

Patents of addition.]—*See* Patents & Designs Acts, 1907 (c. 29), s. 19; 1919 (c. 80), sched.

SUB-SECT. 7.—NEW COMBINATION OF MATTER ALREADY KNOWN.

A. In General.

270. General rule — Patentable.] — HUDDART *v.* GRIMSHAW (1803), Dav. Pat. Cas. 265; 1 Carp. Pat. Cas. 200; 1 Web. Pat. Cas. 85.

Annotations:—**Refd.** Bateman *v.* Gray (1853), Macr. 93. **Mentd.** Campion *v.* Benyon (1821), 6 Moore, C. P. 71.

PART IV. SECT. 1, SUB-SECT. 7.—A.

270 i. *General rule—Patentable.*]—A patent is good for a combination of old or before-used inventions, as well as for an entirely new one, provided the patentee does not claim it as an invention now in all its parts, but merely for the improvement in the combination.—EMERY *v.* IREDALE, EMERY *v.* HODGE (1861), 11 C. P. 106. —**CAN.**

270 ii. —— ——.]—YATES *v.* GREAT WESTERN RY. CO. (1877), 24 Gr. 495.—**CAN.**

270 iii. —— ——.]—HUNTER *v.* CARRICK (1885), 28 Gr. 489; *revsd.*, 10 A. R. 449; 11 S. C. R. 300.—**CAN.**

270 iv. —— ——.]—MITCHELL *v.* HANCOCK INSPIRATOR CO. (1886), 2 Exch. C. R. 539.—**CAN.**

270 v. —— ——.]—DANSEREAU *v.* BELLEMARE (1888), 16 S. C. R. 180.—**CAN.**

270 vi. —— ——.]—MATTICE *v.* BRANDON MACHINE WORKS CO. (1907), 17 Man. L. R. 105.—**CAN.**

270 vii. —— ——.]—ELECTRIC FIRE-PROOFING CO. *v.* ELECTRIC FIRE-PROOFING CO. OF CANADA (1907), Q. R. 31 S. C. 34.—**CAN.**

270 viii. —— ——.]—DOMINION FENCE CO. *v.* CLINTON WIRE CLOTH CO. (1907), 39 S. C. R. 535.—**CAN.**

270 ix. —— ——.]—UNITED INJECTOR CO. *v.* MORRISON (1913), 24 O. W. R. 608; 4 O. W. N. 1263; 10 D. L. R. 619.—**CAN.**

270 x. —— ——.]—CONCRETE APPLIANCES CO. *v.* ROURKE, MCDONALD, ETC. (1915), 8 W. W. R. 6.—**CAN.**

270 xi. —— ——.]—CANADIAN GENERAL ELECTRIC CO., LTD. *v.* DALYTE ELECTRIC, LTD., [1925] 4 D. L. R. 874.—**CAN.**

270 xii. —— ——.]—WRIGHT & CORSON *v.* BRAKE SERVICE, LTD., [1925] Exch. C. R. 127.—**CAN.**

271. —— ——.]—HILL *v.* THOMPSON, No. 25, *ante*.

272. —— ——.]—(1) If the shearing of cloth from list to list by shears be known, & the shearing it from end to end by means of rotary cutters be also known, & a person construct a machine to shear from list to list by means of rotary cutters; this is a new invention, & will entitle the inventor to maintain a patent for it.

(2) If A. in 1818, take out a patent for improvements in a machine for which J. took out a patent in 1815; it is necessary for A. on the trial of an action for the infringement of his patent, to put in J.'s patent & specification; but it is not material whether a machine made according to the specification of J. would be useful or not, if it be shown that a machine constructed according to A.'s specification would be so.—LEWIS *v.* DAVIS (1829), 3 C. & P. 502; 1 Carp. Pat. Cas. 471; 1 Web. Pat. Cas. 488.

Annotation:—*As to* (2) **Refd.** Crane *v.* Price (1842), 1 Web. Pat. Cas. 393.

273. —— ——.]—MACINTOSH *v.* EVERINGTON (1836), 2 Carp. Pat. Cas. 186.

274. —— ——.]—A new adaptation of old materials, sufficient to ground an injunction against the infraction of a patent.

It is not the use of sulphuric acid & oxymuriate of potash or the tubes, but the discovery of the whole combination, consisting of four substances, described by regular steps in the specification, for which the patent is obtained & the compound is stated definitely enough in the specification. The evidence sufficiently proved the novelty of the adaptation (SHADWELL, V.-C.).—LUKIE *v.* ROBSON (1837), 2 Jur. 201; *sub nom.* LUKEY *v.* ROBSON, 2 Carp. Pat. Cas. 413.

275. —— ——.]—WALTON *v.* POTTER (1841), 3 Man & G. 411; 4 Scott, N. R. 91; 11 L. J. C. P. 138; 1 Goodeve's Patent Cases, 488; 1 Web. Pat. Cas. 585; 133 E. R. 1203.

Annotations:—**Refd.** Bateman *v.* Gray (1853), Macr. 93. **Mentd.** Betts *v.* Walker (1849), 14 Jur. 647; Hill *v.* Evans (1862), 4 De G. F. & J. 288; Thorn *v.* Worthing Skating Rink Co. (1876), 6 Ch. D. 415, n.; Edison & Swan Electric Light Co. *v.* Woodhouse (1886), Griffin's Patent Cases (1887), 90.

276. —— ——.]—(1) Though all the parts of an instrument are old, yet . . . it is competent for the Crown to grant a patent for the combination of old known things if they produce the effect for which the patent is taken out (MARTIN, B.).

(2) The law will not permit a person to take an article that has been patented & to give a substitute in place of it for the purpose of effecting the same end, by the use of equivalents, using the skill & knowledge which he may possess to

270 xiii. —— ——.]—DOWLING *v.* BILLINGTON (1890), 7 R. P. C. 191.—**IR.**

270 xiv. —— ——.]—PIRRIE *v.* YORK STREET FLAX SPINNING CO., LTD. (1894), 11 R. P. C. 429.—**IR.**

270 xv. —— ——.]—VAN BERKEL *v.* BOOTH BROTHERS (1906), 23 R. P. C. 573.—**IR.**

270 xvi. —— ——.]—LAKHPAT RAI *v.* SRI KISHAN DAS (1918), I. L. R. 41 All. 68.—**IND.**

270 xvii. —— ——.]—MORTON *v.* MIDDLETON (1863), 1 Macph. (Ct. of Sess.) 718.—**SCOT.**

270 xviii. —— ——.]—VAN BERKEL *v.* SIMPSON (R. D.), LTD. (1906), 24 R. P. C. 117.—**SCOT.**

270 xix. —— ——.]—LYNCH *v.* PHILLIPS & CO., [1909] S. C. 884; 46 Sc. L. R. 606; [1909] 1 S. L. T. 454.—**SCOT.**

evade the patent (MARTIN, B.).—BATEMAN & MOORE *v.* GRAY (1853), Macr. 93; *on appeal*, 1 C. L. R. 512.

Annotations:—*Generally*, **Mentd.** Crossley *v.* Potter (1853), Macr. 240; Hancock *v.* Noyes (1854), 9 Exch. 388.

277. —— ——.]—(1) A patentee, in his specification, claimed, as his invention, exhausting from millstone cases the dusty air blown through between the grinding surfaces, by a blast of air; being a combination of a blast & an exhaust applied to the working of a mill. The claim was not restricted to any particular mode of creating or applying the blast of air, nor to any particular mode of producing the exhaust; & both blast & exhaust had previously been used separately in working mills:—*Held*: the invention of this combination & application of a blast & an exhaust might be made the subject of a patent.

(2) From the general description, it appeared that the upper stone was fixed & the lower stone was made to rotate; & some advantages were pointed out as resulting from this arrangement. *Qu.*: whether, according to the true construction of the specification, the claim should be limited to the application of a combination of a blast & an exhaust with a mill in which only the lower stone rotates:—*Held*: if the claim be so limited, the use of a new part of the combination, viz. a combination of blast & exhaust, though in connection with a mill in which the upper stone does rotate, may be an infringement of the patent.—BOVILL *v.* KEYWORTH (1857), 7 E. & B. 725; 29 L. T. O. S. 194; 3 Jur. N. S. 817; 5 W. R. 686; 119 E. R. 1413.

Annotations:—*As to* (2) **Refd.** Thomas *v.* Foxwell (1858), 5 Jur. N. S. 37. *Generally*, **Consd.** Bovill *v.* Goodier (1866), 35 Beav. 427. **Mentd.** Bovill *v.* Smith (1868), Griffin's Patent Cases (1884–1886), 49.

278. —— —— **Though each part of combination old.**]—A patent for a combination does not import a claim that each of its parts is new; & the patent may be valid though each part is old:—*Held*: the use of a subordinate part only of a combination may be an infringement of a patent for the combination if the part so used be new & material.

. . . A patent for a combination is not a claim that each part thereof is new. On the contrary each part may be old, & yet a new & useful combination of such old parts may be valid, as has been often decided. Even if the specification contained no disclaimer, it would be a question of construction whether the patent was void. Did it claim as new that which was old? If so, it would be void: but unless that was the true construction of the instrument the patent might be valid. But, where there is either a disclaimer or an acknowledgment that a part is old, all ground for objection is gone . . . the patent for an improvement on an invention already the subject of a patent, if confined to the improvement, is not an infringement of the former patent. The use of the improvement with the former invention, during the existence of the former patent, without license, would be an infringement; but, with license, that also would be lawful, as is in constant experience. . . . The assertion, that all patents for improvements on existing patents must be void, is obviously untenable (LORD CAMPBELL, C.J.).—LISTER *v.* LEATHER (1858), 8 E. & B. 1004; 27 L. J. Q. B. 295; 4 Jur. N. S. 947; 120 E. R. 373, Ex. Ch.

Annotations:—**Folld.** Bovill *v.* Keyworth (1857), 7 E. & B. 725. **Apld.** Saxby *v.* Clunes (1874), 43 L. J. Ex. 228. **Consd.** Harrison *v.* Anderston Foundry Co. (1876), 1 App. Cas. 574; Clark *v.* Adie (1877), 2 App. Cas. 315. **Consd.** British United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631. **Refd.** Thomas *v.* Foxwell (1858), 5 Jur. N. S. 37; Lister *v.* Eastwood (1864), 9 L. T. 766; Parkes *v.* Stevens (1869), 5 Ch. App. 36; Wright *v.* Hitchcock (1870), L. R. 5 Exch. 37; Dunlop Pneumatic Tyre Co. *v.* Moseley (1904), 91 L. T. 40. **Mentd.** Betts *v.* Menzies & Wildey (1860), 6 Jur. N. S. 1290; Harrison *v.* G. N. Ry. (1860), 6 Jur. N. S. 993; Printing & Numerical Registering Co. *v.* Sampson (1875), 32 L. T. 354; Soc. Anon. Des Manufactures De Glaces *v.* Tilghman's Patent Sand Blast Co. (1883), 25 Ch. D. 1.

279. —— —— ——.]—On July 19, 1905, pltfs., the owners of a patent for "improvements in sound magnifying horns, for phonographs & the like," brought an action for infringement of the same. Defts. alleged that the patent was invalid on the ground of want of subject-matter:—*Held*: there was subject-matter, for a patent, the invention had not been anticipated, & defts. had infringed.—GRAMOPHONE & TYPEWRITER, LTD. *v.* ULLMANN (1906), 23 R. P. C. 752.

280. —— ——.]—In a suit for an injunction to restrain the infringement of a patent, the ct. directed four issues to be tried at law, one amongst them being, whether the invention was a new manufacture? The judge at common law, in the course of the trial of the issues, expressed his opinion that a question of law would arise; whether there was upon the facts a sufficiency of invention to warrant the granting of a patent. The judge, nevertheless, went on with the trial, & put two issues to the jury: Is the invention new? & Is it a substantial improvement? The jury found for pltf. in the affirmative upon both issues.

Upon the cause coming back to equity, the Master of the Rolls took up the point of law reserved, without considering the verdict of the jury, &, on the motion of defts., granted a new trial:—*Held*: the judge in equity ought to have considered the verdict of the jury, &, had he done so, the only point of law remaining would have been this—whether a combination of things previously well known which combination could be rightfully denominated a substantial improvement could be the subject of a patent? the answer to which must have been in the affirmative.—SPENCER *v.* JACK (1861), 11 L. T. 242, L. C.

Annotations:—**Apld.** Saxby *v.* Gloucester Waggon Co. (1881), 7 Q. B. D. 305. **Folld.** *Re* Fried Krupp Akt. Application (1908), 25 R. P. C. 809. **Refd.** Thompson *v.* James (1863), 32 Beav. 570. **Mentd.** Young *v.* Fernie (1863), 1 De G. J. & Sm. 353.

281. —— ——.]—(1) If the combination & application of old machinery be new & beneficial, the invention of this combination may be protected by patent.

If there is a patent for a combination, the combination itself is, *ex necessitate*, the novelty; & the combination is also the merit, if it be a merit, which remains to be proved by evidence. So also with regard to the discrimination between what is new & what is old. It is clear that the claim is for a combination, & nothing but a combination, there is no infringement unless the whole combination is used, & it is in that way immaterial whether any or which of the parts are new. If, indeed, it were left open on the specification to the patentee to claim, not merely the combinatioo of all the parts as a whole, but also certain subordinate or subsidiary parts of the combination, on the ground that such subordinate & subsidiary parts are new & material, as it was held a patentee might do in *Lister* v. *Leather*, No. 278, *ante*, then it might be necessary to see that the patentee had carefully distinguished those subordinate or subsidiary parts, & had not left it *in dubio* what claim to parts, in addition

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278 i. —— —— *Though each part of combination old.*]—*Re* LAUERS (OR LAVERS) HEELS PATENT, LTD. (Ont.) (1918), 3 D. L. R. 1.—**CAN.**

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to the claim for combination, he meant to assert (LORD CAIRNS, C.).

(2) In the construction of a specification, it appears to me that it ought not to be subjected to what has been called a benign interpretation or to a strict one. The language should be construed according to its ordinary meaning—the understanding of technical words being of course confined to those who are conversant with the subject-matter of the invention—& if the specification is thus sufficiently intelligible it performs all that is required of it (LORD CHELMSFORD).—HARRISON *v.* ANDERSTON FOUNDRY CO. (1876), 1 App. Cas. 574, H. L.

Annotations:—*As to* (1) **Apld.** Perry *v.* Soc. des Lunetiers (1893), 13 R. P. C. 664. **Consd.** Kynock *v.* Webb (1899), 17 R. P. C. 100. **Apld.** British United Shoe Machinery Co. *v.* Thompson (1905), 22 R. P. C. 177; Harrison Patents Co. *v.* Nicholson (1908), 25 R. P. C. 393; United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 368; British Vacuum Cleaner Co. *v.* L. & S. W. Ry. (1912), 29 R. P. C. 309. **Refd.** Proctor *v.* Bennis (1887), 36 Ch. D. 740; Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 612; Patent Exploitation *v.* Siemens (1904), 21 R. P. C. 541; International Harvester of America *v.* Peacock (1908), 25 R. P. C. 765. **Mentd.** Ellington *v.* Clark (1887), 58 L. T. 40; Leggott *v.* McGeogh (1893), 10 R. P. C. 429. *Generally*, **Refd.** Cartsburn Co. *v.* Sharp (1884), 1 R. P. C. 181; Moore *v.* Bennett (1884), 1 R. P. C. 129; Nordenfelt *v.* Gardner (1884), 1 R. P. C. 61; Hattersley *v.* Hodgson (1906), 23 R. P. C. 192. **Mentd.** Watling *v.* Stevens (1886), 3 R. P. C. 37; Miller *v.* Clyde Bridge Steel Co. (1892), 9 R. P. C. 470; Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323.

282. —— ——.]—You may get in one patent the combination, & you may get all subordinate parts of that combination, so far as you claim to use them for one main purpose, but if you are going to claim a subordinate part, or one of the elements of the combination for a purpose independent of the purpose of the combination, then you have got an extra invention, & it is not all one.—*Re* JONES' PATENT (1885), Griffin's Patent Cases (1884–1886), 265.

283. —— ——.]—The owner of a patent for improvements in winding machines, by which he claimed as his invention not only an entire machine, but also a number of subordinate inventions, brought an action for infringement. Defts. denied infringement, & alleged that the patent was invalid for want of novelty & utility, & also for want of subject-matter. They also alleged prior user & sale by the patentee. It was held at the trial, that the inventions claimed were new & useful & proper subject-matter for a patent, & defts. had infringed. Defts. appealed. In the Ct. of Appeal the only question discussed was that of infringement, & the ct. held that pltf.'s invention was for an improvement in a well known machine for effecting an old object in a better way, that he must be confined to the particular details invented by him, & that defts. had not infringed. Pltf. appealed to the House of Lords:—*Held:* the construction put upon the specification by the Ct. of Appeal was too narrow, the arrangement of pltf., though attaining an old result in a simpler way to an alleged anticipation, was simpler & more direct in its operation & was good subject-matter & novel, & defts. had infringed.—BOYD *v.* HORROCKS (1891), 9 R. P. C. 77, H. L.

Annotations:—**Mentd.** Longbottom *v.* Shaw (1889), 43 Ch. D. 46; Mandleberg *v.* Morley (1895), 64 L. J. Ch. 245.

284. —— ——.]—This was an action for infringement of a patent for an eyelet for boots, etc., made of metal, & coated both above & below the flange with celluloid, so as to provide a permanent facing for the eyelet, which might be of any desired colour. Deft. denied infringement, & admitted at the trial. In the anticipation relied on by deft., lacing hooks were shown, coated with celluloid, & also an eyelet coated on one side; but no such eyelet as pltfs.' had been produced on the market. There was, however, a demand for an eyelet which would stand wear. Pltfs. experimented for six years before arriving at their invention:—*Held:* (1) pltfs.' combination was new; it was admittedly useful, which afforded a presumption of novelty & ingenuity; (2) to constitute anticipation, the essential part of the invention must be found in the anticipation; & the anticipations did not show or lead to the particular combination of pltf.—THIERRY *v.* RICKMANN (1895), 12 R. P. C. 543; *on appeal, sub nom.*

Annotations:—*Generally*, **Refd.** Savage *v.* Harris (1896), 13 R. P. C. 364. **Mentd.** Van Beskel *v.* Simpson (1906), 23 R. P. C. 237.

285. —— ——.]—This was an action for infringement of a patent for fire-proof floors. The invention was for the purpose of constructing concrete floors more expeditiously; it consisted of hollow fireclay lintels resting on the lower flanges of parallel girders; the lintels were flat below; they projected under & covered the lower surface of the flanges; the lintels formed both a continuous ceiling below & also a support for concrete above. The hollows in the lintels formed hollow air spaces both below & above the flanges, which air spaces communicated. The concrete next the girders rested on the flange, & between the girders on the lintels, but when set the lintels were no longer necessary. The floor was light & strong, & the weight was thrown on the girders. The lintels supported the concrete till it was set; secondly, dispensed with all centring; thirdly, protected the lower parts of the girder from fire; & fourthly, formed continuous air passages. Defts. denied infringement, & denied the validity of the patent on various grounds, including anticipation by several prior patents, & want of subject-matter:—*Held:* the patentee had constructed, out of parts which were mostly old, a novel combination, which included a light self-supporting concrete floor, without the usual centring & of considerable utility, & the patent was good subject matter. The appeal was allowed, & judgment was given for pltfs. for an injunction & damages, with a certificate that the validity of the patent had come in question.

It does not take away from the merit of an invention to point out that one of its details is to be found in one obscure specification, & another detail in another, & so on, & to say that all the patentee had to do was to put these together; it is the getting of the idea & the putting together of the idea, with the mechanical means of attaining it, that constitutes invention (RIGBY, L.J.).—FAWCETT *v.* HOMAN (1896), 13 R. P. C. 398; 12 T. L. R. 507.

286. —— ——.]—Pltfs. having sued defts. for infringement of their Patent No. 2562 of 1914, the defence was as to the features infringed, want of novelty, utility, & subject matter. The ct. held that the patent had been infringed & was not invalid on any of the above grounds.

It is no criticism on the validity of a patent for a novel combination that the idea of it appears obvious when grasped, or that separate factors constituting it can, when isolated, be discovered in & extracted from previous specifications.

There was a definite exercise of invention in arriving at the idea of a magazine supporting frame (SARGANT, L.J.).—MERGENTHALER LINOTYPE CO. *v.* INTERTYPE CO., LTD. (1926), 43 R. P. C. 239; 42 T. L. R. 682, C. A.

287. Ambit of protection — Confined to novel parts.]—Under a patent for an arrangement & combination of parts, protection will not be given against the use of any particular part which is not novel. The adaptation of a sliding door to a spherical lamp, sliding doors having previously been applied to cylindrical lamps & to other glazed surfaces, cannot of itself be the subject of a patent.

A person having a patent for improvements in gas lamps, made further improvements in such lamps, & obtained a patent for the subsequent improvements. The specification to the second patent stated that the invention related to the construction of lamps of a class forming the subject of the former patent, & then described the mode of making the improved parts of the lamp :— *Held:* the specification was sufficient.—PARKES *v.* STEVENS (1869), 5 Ch. App. 36; 22 L. T. 635; 18 W. R. 233, L. C.

Annotations :—**Mentd.** Hill *v.* Hibbit (1872), 41 L. J. Ch. 703; Murray *v.* Clayton (1872), 7 Ch. App. 570; Clark *v.* Adie (1875), 10 Ch. App. 667; Harrison *v.* Anderston Foundry Co. (1876), 1 App. Cas. 574.

288. —— Confined to particular mode of combination.]—Upon the construction of a patent :— *Held:* (1) although the patent included matters some of which were new & some old, it might be upheld by limiting the claim, as in *Seed* v. *Higgins*, No. 1063, *post*, to the particular combination in the particular manner described in the specification. (2) The antecedent existence of an invention, not shown to have been brought to any successful result, & which was so far similar, that if subsequent in date to the patent it would have been held a colourable & clumsy imitation for the purpose of effecting the same result, did not invalidate the patent by anticipation.—DAW *v.* ELEY (1867), L. R. 3 Eq. 496; 36 L. J. Ch. 482; 15 L. T. 559.

Annotations :—*As to* (2) **Apld.** Pneumatic Tyre Co. *v.* East London Rubber Co. (1896), 75 L. T. 488. **Refd.** Murray [illegible] 25 Ch. D. 29; Parker *v.* Mort, Lidden (188[illegible] 325; Moss *v.* Malings (1886), 33 Ch. D. 603.

289. —— ——.]—As the only thing that could be patented was the mode of manufacture & the particular mode of combination, it was open to all the rest of the world to exercise their ingenuity in the same way to see if they could not invent some other mode (JAMES, L.J.).—BINNEY *v.* FELDTMAN (1875), Griffin's Patent Cases (1884–1886), 49, C. A.; *affd.* Griffin's Patent Cases (1884–1886), p. 51, H. L.

290. —— ——.]—What the patentee is improving is a ticket-punching apparatus in which the punch is held back, or set fast, & has to be released, & his improvement is in the mode of holding it back, or fastening it back, & then releasing it. The mechanism for holding or fastening the punch back is what he calls the locking device, & is very ingenious. It is so contrived that the punch is held back until it is released by the rising of a pin in it which rising of the pin is caused by the insertion of the ticket. But the fundamental idea of the patentee, & the essence of his invention is, first, to hold back the punch & then to release it, & to do both in a better way than before. . . . His patent really is for the combination of his peculiar device for first locking & then releasing the punch which perforates the ticket. Deft. starts from an entirely different point of view, & arrives at the same end by an essentially different process. Deft. does not lock or hold back his punch at all. His punch is always free to move, although, of course, it cannot make a hole in anything until something in which a hole can be made is put in front of it. It is true that deft. has availed himself of part, & of an important part of pltf.'s invention—viz., the idea of having a movable punch, accompanied by a pin, which is prevented by the ticket from descending when the punch comes down & makes a perforation. If pltf.'s patent was for the combination of a punch & pin made to move together, but so, nevertheless, that the pin should be kept up whilst the punch perforated the ticket, then deft. would have infringed the patent. But it is impossible to construe pltf.'s patent as a patent for this device except in combination with his locking device. Both are essential to his invention, & the combination patented by pltf. has not been taken by deft. (LINDLEY, L.J.).—TICKET PUNCH & REGISTER CO., LTD. *v.* COLLEY'S PATENTS, LTD. (1895), 12 R. P. C. 171; 11 T. L. R. 262, C. A.

Annotation :—**Mentd.** Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System (1896), 13 R. P. C. 301.

291. —— Component parts—So far as directed to principle purpose.]—*Re* JONES' PATENT, No. 282, *ante*.

B. Essentials of Combination.

(*a*) *Novelty.*

292. Necessity for.]—BOULTON *v.* BULL, No. 90, *ante*.

293. ——.]—A patent for improvements in the construction of ships' anchors, windlasses, & chain cables, cannot be supported unless there is novelty in each invention; & therefore, where it turned out that there was no novelty in the construction of the anchors, it was held that the patent was wholly void.

Now, a patent for a machine, each part of which was in use before, but in which the combination of the different parts is new, & a new result produced, is good; because there is a novelty in the combination (ABBOTT, C.J.).—BRUNTON *v.* HAWKES (1821), 4 B. & Ald. 541; 1 Carp. Pat. Cas. 405; 106 E. R. 1034.

Annotations :—**Consd.** Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194. **Refd.** Morgan *v.* Seaward (1837), 2 M. & W. 544; Cook *v.* Pearce (1844), 8 Q. B. 1054; Heath *v.* Unwin (1845), 13 M. & W. 883; Barber *v.* Grace (1847), 17 L. J. Ex. 122; Ormson *v.* Clarke (1863), 14 C. B. N. S. 475; Bovill *v.* Finch (1870), L. R. 5 C. P. 523.

294. ——.]—*Semble:* a combination of two things which in themselves are not new, & which by the combination produce a new thing, will not support a patent, unless the new thing will produce a new result: its being a means of producing a result, which, by other means, could have been before produced, will not be sufficient.—SAUNDERS *v.* ASTON (1832), 3 B. & Ad. 881; 1 Carp. Pat. Cas. 510; 1 L. J. K. B. 265; 110 E. R. 324.

295. ——.]—LISTER *v.* LEATHER, No. 278, *ante*.

PART IV. SECT. 1, SUB-SECT. 7.—B. (a).

292 i. *Necessity for.*]—MAY *v.* HIGGINS (1916), 21 C. L. R. 119.—**AUS.**

292 ii. ——.]—When a pretended invention constitutes neither a new process nor a new combination producing a result unknown before, it is not patentable.—DOMPIERRE *v.* BARIL (1889), 18 R. L. O. S. 597.—**CAN.**

292 iii. ——.]—FLEXLUME SIGN CO. *v.* MACEY SIGN CO. (Ont.), [1924] 4 D. L. R. 49.—**CAN.**

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 7, *B.* (*a*) *&* (*b*).]

296. ——.]—CANNINGTON *v.* NUTTALL, No. 320, *post.*

297. ——.]—Pltf. obtained in 1874 a patent for certain improvements in interlocking apparatus for railway points & signals. Patents had been previously obtained in 1870 & 1871 for inventions of apparatus for similar purposes. In an action for infringement of pltf.'s patent of 1874 by defts., it was admitted by pltf.'s witnesses that, taking the two inventions of 1870 & 1871 together, & discarding all superfluous parts, every element of the patent of 1874 was to be found in one or other of those inventions; & that no new result was obtained by their combination in the patent of 1874 different from that which had been obtained by the previous inventions, but it was contended for pltf. that the combination of the two inventions of 1870 & 1871, effected by pltf.'s invention of 1874, required such an exercise of skill & ingenuity as to constitute the subject of a valid patent. There was, however, evidence, with which the ct. was satisfied, to show that any person of ordinary skill & knowledge of the subject, placing the two inventions of 1870 & 1871 side by side, could effect the combination of the two in a manner similar to that of pltf.'s invention without making any further experiments or obtaining any further information:—*Held:* pltf.'s invention was not of sufficient novelty to constitute the subject of a valid patent.—SAXBY *v.* GLOUCESTER WAGGON CO. (1881), 7 Q. B. D. 305; 50 L. J. Q. B. 577, D. C.; *affd.* (1883), Griffin's Patent Cases (1887) 56, H. L.

Annotation:—**Refd.** Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424.

298. ——.]—PROCTOR *v.* BENNIS, No. 975, *post.*

299. ——.]—But the evidence shows that the Aberdeen machine has never worked successfully; it is inefficient; it wants something. Pltf.'s patent is a combination of the materials of the Aberdeen machine with that something which it wants. . . . I come to the conclusion that pltf.'s patent has not been anticipated, that it is not bad for want of novelty (LORD ESHER, M.R.).—LYON *v.* GODDARD (1893), 9 T. L. R. 546; 10 R. P. C. 334, C. A.; *affd. sub nom.* GODDARD *v.* LYON (1894), 11 R. P. C. 354, H. L.

Annotations:—**Consd.** Benton & Stone *v.* Denston (1925), 42 R. P. C. 284. **Refd.** Case *v.* Cressy (1901), 17 R. P. C. 255; *Re* Alsop's Patent (1907), 24 R. P. C. 733; Hatmaker *v.* Nathan (1917), 34 R. P. C. 317.

300. ——.]—This was an action for the infringement of a patent for waste water closets. The patentee's claim was substantially for a combination of a number of parts, not containing any essential novelty, but producing an effective result, which had procured a ready sale, & was easily adaptable to existing buildings & drains. Deft. pleaded that pltf.'s alleged improvements contained no invention & were anticipated by prior specifications & prior use:—*Held:* pltf.'s invention was not anticipated & following *Hayward* v. *Hamilton*, No. 131, *ante*, as a new commercial article though a combination of old parts, it was good subject-matter.—DUCKETTS, LTD. *v.* WHITEHEAD (1895), 12 R. P. C. 187.

301. ——.]—FAWCETT *v.* HOMAN, No. 285, *ante.*

302. ——.]—Inventors are not required to know or to point out the reasons or causes why beneficial results are produced by the means which they describe & claim as effective, & which are effective in causing them, nor to know or point out all the beneficial effects which may result. In other words, what is invented is the combination, & if that has been invented & is novel nothing more is required but utility for the general purpose which is the indicated object of the invention. Within the limits of that purpose the inventor of the combination need not disclose or prove any particular ground of utility of any particular ingredient: & it seems to me to follow that a person who makes use of the combination within the limits of that purpose cannot escape from the charge of infringement merely because his motives for using the ingredient are different from those of the inventor (WRIGHT, J.).—MAXIM-NORDENFELT GUNS & AMMUNITION CO. & HIRAM STEVENS MAXIM *v.* ANDERSON (1897), 13 T. L. R. 262; *on appeal* (1898), 14 L. R. 487, H. L.

303. ——.]—In 1885, letters patent were granted to A. for "the use of earthenware pipes in place of brickwork or other material in the formation of self-flushing water closets." The claim, as amended, was for "the use of pipes of the above form, constructed of earthenware to form, as hereabove stated & described, a direct communication of the water closet seat with the main drain." The patentee brought an action for infringement, in which defts. alleged (*inter alia*) non-infringement, want of subject-matter, & want of novelty. Pltf. alleged that his invention consisted in a combination of pipes performing a function not performed by the parts separately:—*Held:* the claim was for the use of the pipes in combination, that it was useful, but the patent was invalid for want of subject-matter, since the combination performed no function not performed by the parts separately, which functions so performed were not novel, & even if this were not so, the combination was not novel.—ALLEN *v.* OATES & GREEN, LTD. (1898), 15 R. P. C. 744.

304. ——.]—In 1895 a patent was granted for "an improved device for holding or retaining ladies' hair." The device was a combination of a hinged binder as a means of making a secure foundation for the coiffure, with arms or wings as a means of coiling or arranging the hair so as to form a complete edifice. Pltfs., who in 1898 became the registered proprietors of the patent, in that year commenced large sales of the devices, each mounted for the purpose of sale on a show card, the goods so mounted coming to be known in the trade as pltfs.' In 1900 defts., having been customers of pltfs., themselves offered for sale a similar device mounted in a similar manner, but not made by or for pltfs. Pltfs. brought an action for injunctions to restrain the infringement of their patent & "passing off," with other relief. Defts., at the trial, abandoned their defence as to "passing off," but contended that pltfs.' patent was invalid for want of novelty & lack of invention, & that it had been anticipated by certain prior specifications:—*Held:* the *interim* injunction as to "passing off," which had been granted should made perpetual, with the addition of the words applicable to the expiration of pltfs.' patent; pltfs.' patent was valid as claiming protection for a new & useful combination having the merit of ingenuity & invention, & was not vitiated either by the fact that two of the claims, which were clearly appendant to the "improved device" of the patent, were for old devices, or by the alleged anticipations; defts. had infringed the patent of pltfs., who were therefore also entitled to an injunction restraining infringement & to the usual certificates, as well as to an order for delivery up of the infringing articles & a direction for an

account of profits.—PARKER & SMITH *v.* SATCHWELL & Co., LTD. (1901), 45 Sol. Jo. 502; 18 R. P. C. 299.

Annotation :—**Refd.** True & Variable Electric Lamp Syndicate *v.* Bryant Trading Syndicate (1908), 25 R. P. C. 461.

305. ——.]—In 1895 a patent was granted to J. for "improvements in cyclometers, revolution counters, or indicators." The first claim was as follows :—"In a cyclometer, revolution counter, or indicator the combination, with a chambered support & an actuating shaft, of index rings mounted to revolve on said support & adapted to transmit movement from each of said index rings to the next in order, the hubs of said gear being flattened, spring arms supported within the chamber & bearing upon the opposite flattened faces of said gear hubs, & means for actuating the first of said rings from said actuating shafts." There were four other claims for similar combinations, expressed in more detail & with additional modifications. In 1900 A. W. G., Ltd., presented a petition for revocation of the patent on the grounds of want of novelty & subject-matter :—*Held :* in the first claim the novelty depended on the squaring of the hub & the use of the spring arms in the minor combination which was the subject of the claim, & such combination was not new, useful, & good subject-matter for a patent.—*Re* JUSTICE'S PATENT (1901), 18 R. P. C. 241.

306. ——.]—MARCONI & MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* BRITISH RADIO-TELEGRAPH & TELEPHONE CO., LTD., No. 317, *post*.

307. ——.]—Pltfs. were the owners of a patent for "improvements in sample cards." Claim 1 of the complete specification was as follows :—"A sample card for displaying textile fabrics, comprising a body portion & an embossed panel struck up from the said body portion having a surface forming a replica of a sample of textile material." Claim 2 was as follows :—"A sample card for displaying textile fabrics, comprising a body portion, & an embossed panel struck up from the said body portion having a surface forming a replica of a sample of textile material & sharply defined edges raised above the body portion a distance substantially equalling the thickness of a sample of textile material." Claim 3 was substantially Claim 1 with the addition of the words "& a sample of textile material attached to said sample card." At the trial of an action for infringement of the patent defts. admitted infringement, but alleged that the patent was invalid for want of subject-matter. It was admitted by pltfs. that the striking up of panels & the embossing of the surface representation of the texture of the material were both old, but pltfs. contended that the combination was novel & produced a particular result which was commercially successful :—*Held :* in view of the existing common knowledge at the date of the patent, there was no subject-matter.—SIMPLEX LITHOGRAPH CO. *v.* CAUSTON (SIR JOSEPH) & SONS, LTD. (1921), 38 R. P. C. 403, C. A.

308. ——.] — HIGGINSON & ARUNDEL *v.* BENTLEY & BENTLEY, LTD., No. 636, *post*.

309. What constitutes novelty—Omission of part of old combination.]—A patent claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation. A later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the maundril :—*Held :* the ct., taking the whole of the latter specification together, would infer that the maundril was not to be used, & the latter patent was good.—RUSSELL *v.* COWLEY (1835), 1 Cr. M. & R. 864; 1 Web. Pat. Cas. 465.

Annotations :—**Consd.** Russell *v.* Ledsam (1845), 14 M. & W. 574; Beard *v.* Egerton (1849), 8 C. B. 165; Holmes *v.* L. & N.-W. Ry. (1852), 12 C. B. 831. **Refd.** Brook & Hirst *v.* Aston (1859), 5 Jur. N. S. 1025; Betts *v.* Menzies (1860), 1 E. & E. 1020.

310. —— ——.] — An alteration by subtraction, if it were more than a colourable subtraction, would, as it seems to me, alter the combination. It would not be a combination of the same things; it would be a combination of different things; & if the combination were altered by a material subtraction, I should think it was a new combination. But an alteration by substitution, that is by substitution of one of the material elements of the original combination, must to my mind, be a new combination. The second combination, then, is a combination of different things from the first. There is the taking away of one of the elements, & a material element of the old combination, & a putting in of a new material element which is different from any of the elements of the former.

So long as the specification shows what part of the combination is new, it matters not where in particular it is shown to be so. The new part may be pointed out either in the body of the specification or in one of the claims (LINDLEY, L.J.).—NORDENFELT *v.* GARDNER (1884), Griffin's Patent Cases (1884–1886), 175; 1 R. P. C. 61, C. A.

Annotations :—**Refd.** Proctor *v.* Bennis (1887), 36 Ch. D. 740; Boyd *v.* Horrocks (1891), 9 R. P. C. 77.

311. —— **Ascertained by construction of whole specification.**]—Where a patent is granted for a combination of several things, some of which are old & some new, the question for the jury is whether, taking the specification altogether, that which is claimed as a whole is new; & the imitation by a chemical or mechanical equivalent of a part of the combination, which is both material & new, is an infringement.—NEWTON *v.* GRAND JUNCTION RY. CO. (1846), 5 Exch. 331; 20 L. J. Ex. 427, n.; 155 E. R. 141.

Annotations :—**Consd.** Holmes *v.* L. & N.-W. Ry. (1852), 12 C. B. 831; Lister *v.* Leather (1858), 8 E. & B. 1004; Clark *v.* Adie (1875), 10 Ch. App. 667. **Refd.** Smith *v.* L. & N.-W. Ry. (1853), 2 E. & B. 69; Totley *v.* Easton (1857), 2 C. B. N. S. 706; Betts *v.* De Vitre (1865), 11 Jur. N. S. 9.

312. —— **Whether application of old apparatus to new purpose.**]—BUSH *v.* FOX, No. 616, *post*.

313. —— ——.] — HIGGINSON & ARUNDEL *v.* BENTLEY & BENTLEY, LTD., No. 636, *post*.

314. —— **Increased simplicity & directness.**]—BOYD *v.* HORROCKS, No. 283, *ante*.

(*b*) *Utility*.

315. Necessity for — Production of better or cheaper article.]—It is no objection to the validity of a patent that the invention cannot be used except by means of a former patented invention; especially when the second patentee expressly disclaims any part of such former invention.

We are of the opinion, that if the result produced by . . . a combination is either a new article, or a better article, or a cheaper article, to the public than that produced before by the old method such combination . . . may well become the subject of a patent. . . . There are numerous instances of patents which have been granted where the invention consisted in no more than the use of things already known, the acting with them in a manner already known, the producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public. . . . In point of law, the labour of thought or experiment, & the expenditure

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 7, *B.* (*b*) *&* (*c*).]

of money, are not the essential grounds of consideration upon which the question, whether the invention is or is not the subject-matter of a patent, ought to depend; for if the invention be new & useful to the public, it is not material whether it is the result of long experiments & profound research, or whether of some sudden & lucky thought, or of mere accidental discovery (TINDAL, C.J.).—CRANE *v.* PRICE (1842), 4 Man. & G. 580; 5 Scott, N. R. 338; 12 L. J. C. P. 81; 1 Web. Pat. Cas. 393; 134 E. R. 239.

Annotations:—**Distd.** Steiner *v.* Heald (1849), 2 Car. & Kir. 1022. **Dbtd.** Rushton *v.* Crawley (1870), L. R. 10 Eq. 522. **Consd.** Murray *v.* Clayton (1872), 7 Ch. App. 570. **Expld.** Bamlett *v.* Picksley (1875), Griffin's Patent Cases (1884–1886), 40. **Apld.** Morgan *v.* Windover (1887), 3 T. L. R. 748; Wallace *v.* Tullis Russell (1921), 38 R. P. C. 199. **Refd.** Barber *v.* Grace (1847), 17 L. J. Ex. 122; Booth *v.* Kennard (1857), 26 L. J. Ex. 305; Horton *v.* Mabon (1862), 12 C. B. N. S. 437; Harwood *v.* G. N. Ry. (1865), 11 H. L. Cas. 654; Clark *v.* Adie (1877), 2 App. Cas. 315; Lister *v.* Norton (1886), 3 R. P. C. 199; Vickers *v.* Siddell (1890), 7 R. P. C. 292; Goddard *v.* Lyon (1894), 11 R. P. C. 354; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429; Hatmaker *v.* Nathan (1917), 34 R. P. C. 317; Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239.

316. —— ——.]—Where a machine for which a patent had been granted was shown to produce work more expeditiously, more economically, & of a better quality than any previous machine:—*Held:* the patent could not be invalidated on the ground that the machine was formed by the mere arrangement of common elementary mechanical materials, producing results of the same nature as those previously accomplished by other mechanical arrangements & construction. The public exhibition of a machine in which there are defects, owing to which it proves an entire failure, does not affect the validity of a subsequent patent for a machine, in which, though similar in some of its details to the former, the defects are remedied so as to produce a serviceable machine.

It falls also within the doctrine laid down by LORD ELDON, that there may be a valid patent for a new combination of materials previously in use for the same purpose, or even for a new method of applying such materials (JAMES, L.J.).—MURRAY *v.* CLAYTON (1872), 7 Ch. App. 570; 27 L. T. 110; 20 W. R. 649, L. JJ.

Annotations:—**Consd.** Clark *v.* Adie (1875), 10 Ch. App. 667. **Apld.** Sykes *v.* Howarth (1879), 12 Ch. D. 826. **Consd.** Edison Co. *v.* Holland (1889), 6 R. P. C. 243. **Refd.** Vickers *v.* Siddell (1890), 7 R. P. C. 292; Pneumatic Tyre Co. *v.* East London Rubber Co. (1896), 75 L. T. 488; International Harvester of America *v.* Peacock (1908), 25 R. P. C. 765; Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239; Wallace *v.* Tullis Russell (1921), 38 R. P. C. 199.

317. —— ——.]—No one who borrows the substance of a patented invention can escape the consequences of infringement by making immaterial variations. The question always is whether the infringing apparatus is substantially the same as the apparatus said to have been infringed. Where a patent is for a combination of parts or a process, & the combination or process, besides being itself new, produces new & useful results, every one who produces the same results by using the essential parts of the combination or process is an infringer, even though he has in fact altered the combination or process by omitting some unessential part or step, & substituting another part or step which is in fact equivalent to the part or step he has omitted. To ascertain the essential feature of an invention, the specification must be read & interpreted by the light of what was generally known at the date of the patent.—MARCONI & MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* BRITISH RADIO-TELEGRAPH & TELEPHONE CO., LTD. (1911), 27 T. L. R. 274; 28 R. P. C. 181.

Annotations:—**Refd.** Amalgamated Properties of Rhodesia (1913), Ltd. *v.* Globe & Phœnix Gold Mining Co. (1916), 116 L. T. 111; Follows *v.* Lench (1916), 34 R. P. C. 45; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369.

318. ——.]—Patent granted where neither the material nor the shape of the article to be manufactured, nor the mode of making it was new, but where the three particulars were now usefully combined for the first time.—*Re* MARTIN & HYAMS' PATENT (1855), 25 L. T. O. S. 170; 3 W. R. 433, L. C.

319. ——.]—LISTER *v.* LEATHER, No. 278, *ante*.

320. ——.]—A patent may be sustained though each principle or process in it was previously well known to all persons engaged in the trade to which the patent relates, provided that the mode of combining these processes was new, & produced a beneficial result, & provided also, that the specification claimed not the old processes or any one of them, but only the new combination. A patent was taken out for an improvement in the mode of manufacturing glass. The old mode had been that of putting the materials which were to form the glass in pots placed on sieges, or benches, with the fire underneath, the rising flames of which played around them, & when they became too hot & cracked, they were removed from their position, & the overheated & cracked parts were presented to a current of cooling air, & the molten material was thus, partially at least, saved from waste, & the cracks in the pots were stopped up with a portion of it, & were thus preserved from destruction. The new method consisted in adopting some previous improvements, such as suppressing the fire pots, placing the materials in a tank, etc., to which the patentee laid no claim, & in combining these things with an improved furnace. His invention consisted of forming the sides of the tank or chamber containing the glassmaking materials hollow, in such wise that a current of refrigerating air may circulate & prevent any excessive heating of the sides. which retain or inclose the fused materials. Though all the principles upon which the new method was based were well known, the new form of combining them was shown to make the melting of the materials less subject to danger & less costly in use:—*Held:* (1) this new form of combination, being useful & valuable, constituted a valid ground for a patent; (2) a direction to a jury that, if the combination was new & was useful, the patent could be supported, though each separate process employed in it was previously known, was correct.

Now the only thing that appears to have been regarded by the patentee as a new discovery, apart from the apparatus, was the application of the external air to the sides of the tank. It was a discovery, certainly, but it was a thing for which,

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PART IV. SECT. 1, SUB-SECT. 7.—B. (b).

318 i. *Necessity for.*]—A patent may be sustained though each principle or process in it was previously well known, provided that the mode of combining them be new & produce a beneficial result, & that the specification claims, not the old processes or any of them, but only such new combination.—DION *v.* DUPUIS (1897), Q. R. 12 S. C. 465.—**CAN.**

318 ii. ——.]—GRIFFIN & BRINKERHOFF *v.* TORONTO RY. CO. & POWER (1902), 7 Exch. C. R. 411.—**CAN.**

318 iii. ——.]—*Re* LAVERS (OR LAUERS) HEELS PATENTS, LTD. (Ont.) (1919), 18 Exch. C. R. 199; 43 D. L. R. 1.—**CAN.**

independently of the other apparatus, probably no patent could have been obtained. I may construct an apparatus, & may, in point of fact, make the merit & the benefit of that apparatus depend upon the application of some natural force or property which is perfectly well known; but my invention consists in the construction of the apparatus in such a manner as to bring the natural agency or power to bear upon & effect the object which I desire to effect. . . . The Lord Justice did not observe where the disclaimer begins & he has confounded the introductory part or the reason for the disclaimer with the disclaimer itself. He has taken the preface & the reason given for the thing that was done, as if that preface & that reason had become incorporated into the specification by the operation of the disclaimer. . . . The reason for a disclaimer is no part of the disclaimer itself (LORD WESTBURY). —CANNINGTON *v.* NUTTALL (1871), L. R. 5 H. L. 205; 40 L. J. Ch. 739, H. L.

Annotations:—*As to* (1) **Consd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. **Refd.** *Re* Gaulard & Gibb's Patent (1890), 7 R. P. C. 367; Vickers *v.* Siddell (1890), 7 R. P. C. 292; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569. *As to* (2) **Refd.** Pneumatic Tyre Co. *v.* East London Rubber Co. (1896), 75 L. T. 488.

321. ——.]—MAXIM-NORDENFELT GUNS & AMMUNITION CO. & HIRAM STEVENS MAXIM *v.* ANDERSON, No. 302, *ante*.

322. ——.] — The owners of three patents for improvements in pocket automatic gas lighters commenced an action for infringement. Defts. denied infringement, & alleged that the patents were invalid by reason of being anticipated, of want of subject-matter, of novelty, & of utility. The writ as originally issued alleged infringement of one patent only. Subsequently it was amended by the inclusion of two others. From the statement of claim it appeared that, although pltfs. ultimately became the assignees of all the patents, at the time of the issue of the writ they were not the assignees of the two added under the order giving leave to amend. The particulars of breaches delivered related to articles sold before pltfs. had acquired a title to these two patents, & no amended particulars of breaches were delivered. Pltfs. were not able to bring their particulars of breaches within the first patent. Upon objection being taken to pltfs. proceeding, it was arranged by consent that the question of the validity of one only of the three patents, *i.e.*, one of the two subsequently added, should be tried, together with the question of infringement thereof, pltfs. waiving any inquiry as to damages:—*Held:* the invention was a new application of an old form of protecting cover in combination with old & well known attributes of platinum black so as to produce a useful commercial article; the patent was valid; & defts. had infringed.—HEINE, SOLBY & CO. *v.* CONINCO INCANDESCENT LIGHT CO. (1904), 21 R. P. C. 202.

(c) *Exercise of Invention.*

323. Necessity for.] — SAXBY *v.* GLOUCESTER WAGGON CO., No. 297, *ante*.

324. ——.] — The owner of a patent for improvements in litho & letterpress printing machines brought an action for alleged infringement of the third claim of his specification. Defts. denied infringement, & denied the validity of the patent on the ground, amongst other things, that the alleged invention was not the subject of a patent. Pltf.'s evidence at the trial showed that pltf.'s first & second claims were for the combination of certain brackets & an intermediate frame cast together; there being nothing positively new in the shape or in the parts, but the invention being said to be in the construction which gave greater stability & rigidity, & enabled the frame to be withdrawn without disturbing the rest of the machine:—*Held:* the first & second claims were really for the mere casting together of things well known, & were not subject-matter, & the patent was invalid.—NEWSUM *v.* MANN (1890), 7 R. P. C. 307.

325. ——.] — W. took out a patent for an improved mincing machine which was in effect a combination of a mincing machine & a filling machine, both of which were old. He brought an action for infringement against N. & co., who put in issue the validity of the patent on the ground that the alleged invention consisted simply in joining two well known machines, & was not subject-matter:—*Held:* there was not sufficient invention to constitute subject-matter.

To maintain a patent there must be a substantial exercise of the inventive power or inventive genius, though it may be very slight alterations will produce important results, & in those slight alterations there may be great ingenuity (COTTON, L.J.).—WILLIAMS *v.* NYE (1890), 7 R. P. C. 62, C. A.

Annotations:—**Refd.** Northern Press & Engineering Co. & Annand *v.* Hoe (1906), 22 T. L. R. 453; Mergenthaler Linotype Co. *v.* Intertype Co. (1926), 42 T. L. R. 682.

326. ——.]—VICKERS, SONS & CO. *v.* SIDDELL, No. 910, *post*.

327. ——.] — The action was for infringement of two patents for improvements in pince nez double eyeglasses. Deft. denied infringement & alleged that the patents were invalid on various grounds, including want of novelty & subject-matter, & anticipation by prior specifications & prior user. At the trial, pltf. claimed that his invention was a combination of a rigid bridge, pivoted placquets, & spring arms:—*Held:* the combination was not such a novel invention as could form the subject-matter of a patent, & the invention, if any, was anticipated.—WOOD *v.* RAPHAEL (1897), 14 R. P. C. 496, C. A.

Annotations:—**Refd.** British United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631; Mergenthaler Linotype Co. *v.* Intertype Co. (1926), 42 T. L. R. 682.

328. ——.] — BROOKS *v.* LAMPLUGH, No. 231, *ante*.

329. ——.] — The principle of using a small auxiliary cylinder was indeed known before, but pltfs.' combination was substantially a new process, which was the result of real invention (ROMER, L.J.).—TAYLOR & SCOTT *v.* ANNAND & NORTHERN PRESS & ENGINEERING CO., LTD. (1899), 17 R. P. C. 126; 16 T. L. R. 84; 44 Sol.

PART IV. SECT. 1, SUB-SECT. 7.—B. (c).

323 i. *Necessity for.*]—A combination of two or more known mechanical appliances, the result of which is to effect a new purpose, or to effect an old purpose with greater efficiency or economy, may be the subject-matter of a patent if it involves some substantial exercise of the inventive faculty.—WILLMANN *v.* PETERSEN (1904), 2 C. L. R. 1.—**AUS.**

323 ii. ——.]—Where there is merely the substitution of one well known material, for another equally well known material, to produce the same result on the same principle in a more agreeable, & useful manner, or a mere mechanical equivalent for the use of the material, & it is void of invention, it is not the subject of a patent.—BALL *v.* CROMPTON CORSET CO. (1887), 13 S. C. R. 469.—**CAN.**

323 iii. ——.]—WISNER *v.* COULTHARD (1893), 22 S. C. R. 178.—**CAN.**

323 iv. ——.]—TAYLOR *v.* BRANDON MANUFACTURING CO. (1894), 21 A. R. 361.—**CAN.**

323 v. ——.] — VAN BERKEL *v.* SIMPSON (R. D.), LTD., [1907] S. C. 165; 44 Sc. L. R. 87; 14 S. L. T. 454. —**SCOT.**

323 vi. ——.]—WALSH *v.* SHEELEY, [1911] T. P. D. 1.—**S. AF.**

Sect. 1.—*What constitutes subject-matter: Sub-sect.* 7, *B.* (*c*); *sub-sect.* 8.]

Jo. 117, C. A.; *on appeal* (1900), 18 R. P. C. 53, H. L.

Annotation:—**Refd.** Benton & Stone *v.* Denston (1925), 42 R. P. C. 284.

330. ——.]—PARKER & SMITH *v.* SATCHWELL & CO., LTD., No. 304, *ante*.

331. ——.]—In 1893 a patent was granted to G. for "improvements in steam traps." In 1894 another patent was granted to G. for "improvements in steam traps." The traps in question were expansion traps. The 1894 patent was in effect for a combination of a lever & spring operating the valve of the steam trap. Defts. in an action for infringement of this patent pleaded a number of prior publications, & contended that all that pltf. had done was to take a well known mechanical contrivance & apply it to a subject to which it had not been hitherto applied, & that there was no invention:—*Held*: pltf.'s invention had not been anticipated, & the arrangement of his combination required the exercise of considerable ingenuity; the patent was valid, & pltf. entitled to succeed.—GEIPEL *v.* MANCHESTER CORPN. (1903), 21 R. P. C. 41.

332. ——.]—In 1894 a patent was granted for improvements in & relating to the suspension of incandescent gas lamps. The object of the patent was to avoid vibration & thus prevent the incandescent mantle from being destroyed. The patentee claimed "A gas burner fitting combined with a flexible connecting tube & suspended by one or more elastic cords or springs connected thereto, all arranged substantially in the manner as shown & described & for the purpose as hereinbefore set forth." In 1904 pltfs., in whom the patent had become vested, commenced an action for infringement of the same. Deft. pleaded that the alleged invention contained no improvement on or addition to the then state of public knowledge, but was merely the application of incandescent gas fittings of a device which was a matter of common knowledge in the case of every instrument which required to be suspended free from vibration, & he also alleged anticipation by certain prior users. There was evidence that the patented contrivance was more effectual for the purpose than any other in use:—*Held*: there was good subject-matter.—ANTI-VIBRATION INCANDESCENT LIGHTING CO., LTD. *v.* CROSSLEY (1905), 22 R. P. C. 441, C. A.

333. ——.]—The ct. held that a patent for the combination of two well known printing machines, erected end on with a space between them, & a single or double longitudinal folding machine placed in the space for folding the paper web or webs & passing the same on to any other machine, either for transverse folding, cutting, or delivery, or any two or three of these operations or processes, was not a valid patent, upon the ground that such an arrangement, having regard to the state of knowledge at the time, required no substantial exercise of invention, & did not furnish sufficient subject-matter for a patent.—NORTHERN PRESS & ENGINEERING CO., LTD. *v.* HOE & CO. (1906), 23 R. P. C. 613; 22 T. L. R. 723, C. A.

334. ——.]—DONNERSMARCKHÜTTE OBERSCHLESISCHE EISEN UND KOHLENWERKE ACT *v.* ELECTRIC CONSTRUCTION CO., LTD. (1910), 27 R. P. C. 774, C. A.

335. ——.]—BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING CO. *v.* BRAULIK (1910), 27 R. P. C. 209, C. A.

336. ——.]—In an action for infringement of the patent, defts. alleged (*inter alia*) want of subject-matter, prior grant, & non-infringement. Defts.' device had a cap screwed into the inner hub part, so that the cap projected beyond the outer hub part, but the latter projected slightly beyond the inner hub part without the cap. At the trial, defts. contended that the cap was not a part of the inner hub part, & that the latter did not pass through the outer hub part, or that, if the cap was a part of the inner hub part, there was no lubricating device, & that in either case there was infringement. Defts. alleged a prior grant to pltf. by a patent, issued under No. 7530 of 1908, with provisional specifications dated respectively Apr. 4 & July 1, 1908:—*Held*: the patent was invalid for want of subject-matter.—PUGH *v.* RILEY CYCLE CO., LTD. (1914), 31 R. P. C. 266, H. L.

337. ——.]—A patent was granted for "improvements in metal cutting blow pipe apparatus." The first claim was as follows:—In combination with metal cutting blow pipe apparatus, a lever operating the valve for controlling the supply, to the nozzle, of oxygen for cutting, the said lever having the part which acts upon the valve constituted by an adjustable screw; substantially as, & for the purposes, hereinbefore described." In an action for infringement of the patent pltfs. alleged infringement of that claim & a second claim. At the trial pltfs. alleged infringement of the first claim only, &, substantially, the only contest was as to the invalidity of that claim for want of novelty & of subject-matter. Pltfs. contended that the control-device in their apparatus operated upon a valve that was normally open, in contrast to earlier apparatus in which the valve was normally closed, & that, although all the elements of their device were old, the combination was new:—*Held*: a metal cutting blow pipe with all the parts of pltfs.' device had not been made before, &, in that sense, there was novelty, & the device had some utility; but there was not any inventive element in the combination, & the claim in question was invalid.—BRITISH OXYGEN CO., LTD. *v.* MAINE LIGHTING CO. (1924), 41 R. P. C. 176.

Annotation:—**Refd.** Harris *v.* Brandreth (1925), 42 R. P. C. 471.

338. ——.]—A patent was granted for a "spring re-inforcement for use with existing surface spring mattresses." Claims 1 & 2 were as follows:—"(1) In a re-inforcement for preventing & remedying sag in existing surface spring mattresses, of the kind consisting of compression springs having vertical axes & attached to bearers or equivalent supporting means adapted for attachment to the frame of a bed or mattress, a frame consisting of a collapsible trellis, to which each spring is attached by a spigot end substantially as herein described. (2) A re-inforcement as claimed in claim 1, the frame being adapted for suspension from a bed or mattress frame by bands or hoops perforated at their ends to form suspending loops easily adjustable in length to suit each particular case." In an action for infringement of the patent deft. alleged that the patent was invalid for want of utility, novelty & subject-matter, &, as to the two latter issues, relied upon (*inter alia*) prior specifications of D., referred to in pltf.'s specification, & M. He alleged also that his device was not collapsible in the sense in which the word was used in claim 1. Pltf. alleged that deft.'s device was substantially the same as pltf.'s, & had been sold in large quantities immediately after the publication of pltf.'s specification, & that a trellis work made

collapsible or capable of being taken to pieces, springs fixed into the bearers by spigot ends & the use of a band or hoop as described by pltf., taken in combination with the other parts of the device constituted good subject-matter :—*Held :* if the patent was valid, it had been infringed ; assuming some utility in pltf.'s device, the combination of the features of that device was a work that any skilled workman with D.'s & M.'s specifications before him could carry out, & claims 1 & 2 could not be supported.—HARRIS *v.* BRANDRETH (1925), 42 R. P. C. 471.

339. ——.] — Pltfs. were the grantees & proprietors of a patent for "improvements in the liquid fuel supply arrangements of internal combustion engines." Claim 1 of the specification was as follows :—"In the liquid fuel supply arrangements of internal combustion engines, the combination with a main tank or vessel, of a supplementary chamber or vessel into which the liquid is drawn by suction from the main tank or vessel, & from which the liquid passes on its way to the carburettor through an automatically valve-controlled passage, & means for isolating said supplementary vessel from the source of suction & for placing same under atmospheric pressure, all arranged substantially as & for the purpose described." Claim 2 was as follows :—"In the liquid fuel supply arrangements of internal combustion engines, the provision between the main fuel supply, tank or vessel & the carburettor of a supplementary vessel in communication with said main tank & also with a source of suction, & an auxiliary vessel in communication with the atmosphere with said supplementary vessel through an automatically valve-controlled passage & with the carburettor, the whole arranged & operating substantially as & for the purposes described." In an action for infringement of the patent deft. denied infringement & pleaded that the patent was invalid by reason of lack of novelty & lack of subject-matter owing to common general knowledge & prior publication, want of utility, insufficiency & false suggestion in the specification, & he counterclaimed for revocation of the patent. In a previous action the patent had been attacked only on the ground of prior publication of two specifications, G. & V., & the issue of infringement had not been contested. In that action the patent had been held to be valid. At the trial it was contended by deft. that the ct. was bound by the prior decision only as to construction of the specification & not as to subject-matter, that the additional documents relied on showed features claimed in the specification not disclosed by G. or V., & that, owing to the issue of infringement not having been contested, it had been unnecessary for the ct. to define the ambit of the claims :—*Held :* (1) the decision in the previous action meant that pltfs.' invention lay in the idea of avoiding the drawbacks of both gravity & pressure feeds by using suction & gravity acting alternately for the purpose of feeding a carburettor &, though the mechanical appliances for giving practical effect to the idea were old, invention lay in the particular combination applied to & embodied in apparatus adapted to give effect to the idea, &, so understood, the patent was not anticipated by the specifications of G. or V. ; (2) the ct. was not strictly bound by a prior decision as to anticipation, & it was open to deft. to prove anticipation by documents not before the ct. in the previous action, but that the fresh documents did not introduce any further facts for consideration.—HIGGINSON & ARUNDEL *v.* PYMAN (1926), 43 R. P. C. 291, C. A.

340. ——.] — MERGENTHALER LINOTYPE CO. *v.* INTERTYPE CO., LTD., No. 286, *ante*.

SUB-SECT. 8.—SELECTION OF ONE OF A CLASS OF THINGS OR PROCESSES.

341. Patentable.] — *Re* HARTLEY'S PATENT (1777), 1 Web. Pat. Cas. 54.

342. ——.]—(1) In the specification of a prior patent for purifying gas, dated in 1840, C., after speaking of the use of black oxide of manganese for purifying gas, went on to say, "The same effect may be produced by the application of the oxide of zinc, & the oxides of iron treated precisely in the way above described" :—*Held :* assuming that C. meant to claim all oxides of iron for purifying gas, inasmuch as some would not answer, the ct. could not say, as a matter of law, that a patent could not be had by a person who afterwards discovered that precipitated hydrated oxides were those which it was proper to use.

The jury, having found that C.'s specification did not disclose the use of hydrated oxides of iron, the ct. refused to grant a new trial.

(2) In working, for the purpose of completing the specification of his patent, C. had used oxides of iron for the purification of gas, & the gas purified by him—to the extent of 20,000 feet a day—had for many days been mixed with the ordinary gas, & supplied to the public from the mains of a gas co. He had renovated the material by exposing it to heat on the top of some retort beds. The oxides were originally in a hydrated state, & the heat used by him while so working was not sufficient to render them anhydrous ; but, not knowing the difference between hydrated & anhydrous oxides, & supposing that a better result would thereby be obtained, he directed in his specification that the material should be raised to a red heat, which would render the oxides anhydrous. The jury having found that what C. did was in the nature of an experiment & not a publication to the world, the ct. refused to disturb the verdict on that point.

It is true that C. said oxides of iron & it may be true that he meant all oxides. Take it to be so, that is not such a statement as precludes invention & discovery by pltf., because there are many oxides, the hydrated & anhydrous, the natural & the artificial, some of which will, & some will not, answer the purpose, & therefore it is a matter of investigation & experiment to see which will (BRAMWELL, B.).—HILLS *v.* LONDON GAS LIGHT CO. (1860), 5 H. & N. 312 ; 29 L. J. Ex. 409 ; Goodeve's Patent Cases, 244 ; 157 E. R. 1202.

Annotations :—As to (1) **Consd.** Betts *v.* Menzies (1860), 1 E. & E. 1020 ; Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 11 T. L. R. 345 ; *Re* Wylie & Morton's Appln. (1896), 13 R. P. C. 97. **Ref.** Hills *v.* Liverpool United Gaslight Co. (1862), 32 L. J. Ch. 28. **Dist.** Hills *v.* London Gas Co. (1862), 4 De G. F. & J. 288.

343. ——. The object which pltfs. had in view, & which they attain by their two patents, was by the first to extract the gold from the crushed ore by getting the gold into a state of solution by means of the application of
of cyanide of potassium, & then by their second, which was for an improvement in precipitation of gold by zinc, which was then well known, to extract the gold, & heretofore brought into a solution, out of it. . . . The selective action claimed by pltfs. for the application of a very

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PART IV. SECT. 1, SUB-SECT. 8.

o. *Patentable — If involving new operation of parts selected.*]—It is no invention to omit one of the parts of an existing thing, unless such omission causes a new mode of operation of the parts retained.—*Re* ALLAN & REED (1888), 14 Q. L. R. 126.—CAN.

Sect. 1.—*What constitutes subject-matter: Sub-sects.* 8 & 9, *A.*]

dilute solution containing an extremely small quantity of cyanide of potassium to ore containing gold has, in our judgment, been proved (SMITH, L.J.).—CASSEL GOLD EXTRACTING CO., LTD. *v.* CYANIDE GOLD RECOVERY SYNDICATE (1895), 11 T. L. R. 345; 12 R. P. C. 232, C. A.

Annotation:—**Consd.** Electric Construction Co. *v.* Imperial Tram. Co. (1900), 17 R. P. C. 537.

344. ——.]—I do not think that an inventor who specifies an efficient method of performing the desired operation but says that any other suitable method may be adopted, invalidates his patent if it should turn out that the method specified by him is the only suitable method. There seems to me a distinction between this case & the case of a patentee saying that any known method of producing a result indicated may be used when in fact one or more of such known methods would fail (NEVILLE, J.).—*Re* BROWN'S PATENT (1907), 24 R. P. C. 313.

345. —— Public knowledge & publication of process generally.]—VORWERK & SON *v.* EVANS & CO., No. 423, *post.*

346. —— If producing beneficial result.]—The making of a selection of ingredients & so producing a beneficial result may be invention.

Invention may consist in trying a number of things of common knowledge, & ascertaining that by a certain process a new & useful result may be arrived at.—LANCASHIRE EXPLOSIVES CO., LTD. *v.* ROBURITE EXPLOSIVES CO., LTD. (1895), 12 R. P. C. 470; 12 T. L. R. 35, C. A.

347. —— ——.]—Where different machines of a certain general class or character are well known, if a person selects one specially adapted for his purpose to effect a new object, & with the result of producing a new article, or the old article in a substantially more expeditious & economical way than it was produced before, then he may properly claim, as subject-matter of a patent, that machine as applied to the new object, even though he could not have claimed the machine *per se*, that is to say, without limitations as to its application.—ADAMANT STONE & PAVING CO., LTD. *v.* LIVERPOOL CORPN. (1896), 14 R. P. C. 21; *on appeal* (1897), 14 R. P. C. 264, C. A.

348. —— ——.]—In 1894 letters patent were granted for improvements in the manufacture of toluene sulpho chlorides. The specification stated (*inter alia*) that the manufacture of these chlorides from toluene, especially of ortho-toluene-sulpho-chloride used in the manufacture of saccharin, was a tedious operation involving a number of processes & producing a small yield; that according to the invention chlorsulphonic acid was made to react with toluene under certain specific conditions, whereby the whole of the toluene was converted into toluene-sulpho-chloride; that the action of chlorsulphonic acid upon toluene had been studied by C. & W. under other conditions & with different results, only about half the toluene being converted into toluene-sulpho-chlorides & half into toluene sulphonic acids; that the inventor had found that by keeping the temperature of the reacting mass between the limits of 0° & 5° C., & by employing a large excess of acid, the reaction took place according to an equation given. A convenient way of performing the operation was given, the quantities being on a commercial scale, & the process being described in detail, including a stirring of the mixture for twelve hours. The separation of the two forms of sulpho-chloride produced was described, but this was not alleged to be new. The specification stated that the amount of liquid chloride, ortho-toluene-sulpho-chloride, remaining constituted 60 per cent. of the theoretical yield of chlorides & claimed (*a*) the manufacture of toluene-sulpho-chloride by acting with chlorsulphonic acid in large excess on toluene at a temperature not exceeding 5° C., substantially as described; (*b*) the direct conversion of toluene by means of chlorsulphonic acid into toluene-sulpho-chlorides, mostly in liquid form, substantially as described. The Saccharin Corporation, Ltd., the owners of the patent, having brought an action for infringement, defts. admitted acts which if the patent was valid constituted infringement, but alleged the invalidity of the patent on the ground that having regard to the existing knowledge there was no subject-matter. They contended that the existing knowledge would have indicated to a chemist that to increase the yield of the ortho-toluene-sulpho-chloride an increase in the quantity of acid used must be made, & that neither the product nor the process was new, whilst they denied that a cheaper article was produced. There was evidence that by the patented process the yield of chlorides had been increased from about 51 to about 93 per cent., & the yield of the ortho-toluene-sulpho-chloride from 25 to about 60 per cent.:—*Held:* there was subject-matter to support the patent.

I am not aware of any principle or authority to the effect that a patent is bad merely because the most sanguine expectation of the patentee as to a favourable result is not realised in full (NORTH, J.).—SACCHARIN CORPN., LTD. *v.* CHEMICALS & DRUGS CO., LTD. (1899), 17 R. P. C. 28; *subsequent proceedings*, [1900] 2 Ch. 556, C. A.

349. —— —— Or avoiding disadvantage.]—A mere selection among possible alternatives is not subject-matter. A selection to be patentable must be a selection to secure some advantage or avoid some disadvantage; &, in describing such an invention, the advantages to be gained, or the disadvantages to be avoided, ought to be referred to (LORD PARKER).—CLYDE NAIL CO., LTD. *v.* RUSSELL (1916), 33 R. P. C. 291, H. L.

Annotations:—**Expld.** Auster *v.* Perfecta Motor Equipments (1924), 41 R. P. C. 482. **Apld.** Thomas *v.* South Wales Colliery Tramworks & Engineering Co. (1924), 42 R. P. C. 22.

350. —— ——.]—COMMERCIAL SOLVENTS CORPN. *v.* SYNTHETIC PRODUCTS CO., LTD. (1926), 43 R. P. C. 185.

351. —— If involving invention.]—Opposition to the grant of a patent for improvements relating to shuttle armatures in dynamo electric machines on the ground that the invention had been claimed in the specification of a patent of a prior date:—*Held:* a claim including the making of a shuttle armature of non-magnetic material should not be restricted to a claim for the materials specified by way of example only, & it included the use of non-magnetisable steel which had been selected by appct.—*Re* BOSCH'S APPLICATION (1909), 26 R. P. C. 710.

SUB-SECT. 9.—APPLICATION OF OLD CONTRIVANCE OR PROCESS.

A. Application in Old Way to Analogous Subject.

352. General rule—Not patentable.]—CROYSDALE *v.* FISHER (1884), 1 R. P. C. 17; Griffin's Patent Cases (1884–86), 73.

PART IV. SECT. 1, SUB-SECT. 9.—A.

352 i. *General rule—Not patentable.*]—SAGE *v.* GLENCROSS (1888), 10 N. S. W. Eq. 1.—**AUS.**

352 ii. —— ——.]—An immaterial variation of a machine in general use cannot be the subject of a patent right; there must be at least a new

353. —— ——.]—LOSH *v.* HAGUE, No. 16, *ante*.

354. —— ——.]—A patent had been obtained for new & improved machinery for preparing & spinning flax, hemp, & other fibrous substances, by power. The improvement, as to the spinning, consisted in the placing of the retaining & drawing rollers nearer to each other, at the distance of 2½ inches, than they had been ever used before in flax spinning; the shortening of the reach being rendered practicable by the maceration of the flax in the new machinery for preparing it. But spinning machines, varying in the distance of the reach according to the length of the fibre of the substance to be spun, had been in use before the patent was obtained:—*Held:* the machinery for spinning was not a new invention, & the patent was not valid in point of law.

If he has discovered any means of using the spinning machine which the world had not known before, the benefit of that he has a right to secure to himself by means of a patent; but if this mode of using the spinning machine was known before . . . then pltf. cannot deprive them of having the benefit of that which they enjoyed before (LORD COTTENHAM, C.).—KAY *v.* MARSHALL (1841), 8 Cl. & Fin. 245; 2 Web. Pat. Cas. 79; West, 682; 5 Jur. 1028; 8 E. R. 96, H. L.

Annotations:—**Consd.** Bovill *v.* Smith (1868), Griffin's Patent Cases (1888), 49. **Distd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. **Consd.** Jandus Arc Lamp & Electric Co. *v.* Arc Lamps (1905), 21 T. L. R. 308. **Refd.** *Re* Kay's Patent (1839), 3 Moo. P. C. C. 24; *Re* Martin's & Keating's Patents (1847), 2 Web. Pat. Cas. 175; Steiner *v.* Heald (1851), 20 L. J. Ex. 410; Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531; Easterbrook *v.* G. W. Ry. (1886), Griffin's Patent Cases (1884–86), 81; Edison & Swan Electric Light Co. *v.* Woodhouse & Rawson (1887), 3 T. L. R. 327; *Re* Bosch's Appln. (1909), 26 R. P. C. 710.

355. —— ——.]—Patent for the invention of a nipping lever for causing the rotation of wheels, shafts, or cylinders, under certain circumstances. The specification claimed as the invention "the nipping lever, with its tusk & sliding box, before described, applied to a rimmed wheel, or to a rimmed flange, for the purpose of causing the same to rotate or move together with any shaft, cylinder, or other suitable machinery which may be attached thereto." The nipping lever was not new; but the application of it by means of the sliding box was new:—*Held:* it must also appear that the use of sliding boxes was essential to the invention.—POW *v.* TAUNTON (1845), 5 L. T. O. S. 346; 9 Jur. 1056.

356. —— ——.]—The application of a known article to a new use, the mode of application not being new, cannot be the subject of a patent.—R. *v.* CUTLER (1849), 3 Car. & Kir. 215; Macr. 124; 12 L. T. O. S. 512.

Annotations:—**Refd.** Booth *v.* Kennard (1856), 5 W. R. 85; Brook *v.* Aston (1857), 27 L. J. Q. B. 145.

357. —— ——.]—BUSH *v.* FOX, No. 616, *post*.

358. —— ——.]—A patent was taken out in 1853 for, amongst other things, improving the texture of the threads of cotton & linen yarns by exposing the threads in a distended state to the action of beaters, the effect of which was to polish the sides of the threads & produce smoothness & a glacé effect. In 1856 pltfs. took out a patent for, amongst other things, an improvement in the finishing yarns of wool or hair, by exposing their threads in a distended state to the action of machinery which, it was admitted, was substantially the same as the machinery described in the patent of 1853. The claim in pltfs.' specification was, amongst other things, to the invention of causing yarns of wool or hair whilst distended & kept separate to be subjected to the action of rotatory beaters or burnishers, whereby the fibre is closed & strengthened, & the surface effectually polished. On the trial of an action for the infringement of pltfs.' patent, it was proved that the process of the patentees of 1853 had not previously been applied to wool or hair; & evidence was given that the effect upon wool was not the same as upon linen:—*Held:* pltfs.' specification claimed what was merely the application of the old machinery in the old manner to an analogous subject, & was not the subject-matter for which a patent could be claimed, &, consequently, that pltfs.' patent was wholly void. *Aliter* if the claim had shown any novelty or invention in the mode of applying the old machinery to the new purpose.—BROOK *v.* ASTON (1859), 28 L. J. Q. B. 175; 32 L. T. O. S. 341; 5 Jur. N. S. 1025, Ex. Ch.

Annotations:—**Consd.** Penn *v.* Bibby (1866), 2 Ch. App. 127. **Apld.** Rushton *v.* Crawley (1870), L. R. 10 Eq. 522. **Distd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. **Consd.** Rickmann *v.* Thierry (1896), 14 R. P. C. 105. **Refd.** Harwood *v.* G. N. Ry. (1862), 2 B. & S. 222; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569.

359. —— ——.]—The pneumatic lever, a kind of bellows, was used in organs before 1851; the compensating valve was used in the pedal bellows of organs before 1851, for the purpose of easing their working, but had never been applied to the pneumatic lever; pltf., in 1851, took out a patent for the application of the compensating valve to the pneumatic lever, for the purpose of easing the working of the latter:—*Held:* pltf.'s contrivance was not such a new invention as was capable of becoming the subject of a patent.—WILLIS *v.* DAVISON (1863), 1 New Rep. 234.

360. —— ——.]—Before pltf.'s invention, tubular boilers were cast in several pieces, which were fastened together afterwards. Pltf. claimed, as a patent, the casting of boilers in one piece. This was found to be a beneficial way of making them. It was not suggested that they were cast by any new mode of casting:—*Held:* the casting of boilers in one piece was not the subject of a patent.—ORMSON *v.* CLARKE (1863), 14 C. B. N. S. 475; 2 New Rep. 192; 32 L. J. C. P. 291; 10 Jur. N. S. 128; 11 W. R. 787; 143 E. R. 531, Ex. Ch.

Annotations:—**Apld.** Trotman *v.* Wood (1864), 16 C. B. N. S. 479; Newsum *v.* Mann (1890), 7 R. P. C. 307. **Refd.** Thomson *v.* American Braided Wire Co. (1889), 6 R. P. C. 518; Vickers *v.* Siddell (1890), 7 R. P. C. 292.

361. —— ——.]—Letters patent were granted to W. for an alleged invention of fishes & fish-joints, for connecting the ends of rails used on railways. The fishes were made of iron, with a groove on the outer surface, for the purpose of preventing the square heads of the bolts passing through them & the rail, from turning round, & also for the purpose of procuring greater strength

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adaptation of a known principle or some change which has called forth the inventive faculty.—BARIL *v.* MASTERMAN (1881), 4 L. N. 181.—**CAN.**

352 iii. —— ——.]—SYLVESTER *v.* MASSON (1885), 12 A. R. 335.—**CAN.**

352 iv. —— ——.]—LAROSE *v.* AUBERTIN (1907), Q. R. 32 S. C. 430.—**CAN.**

352 v. —— ——.]—TREO CO. INC. *v.* DOMINION CORSET CO. (Que.) (1918), 18 Exch. C. R. 115; 42 D. L. R. 605.—**CAN.**

352 vi. —— ——.]—NORTHERN SHIRT CO., LTD. *v.* CLARK (Man.), [1919] 1 W. W. R. 178; 57 S. C. R. 607.—**CAN.**

352 vii. —— ——.]—R. *v.* TESSIER (1921), 21 Exch. C. R. 150.—**CAN.**

352 viii. —— ——.]—DURABLE ELECTRIC APPLIANCE CO., LTD. *v.* RENFREW ELECTRIC PRODUCTS, LTD., DURABLE ELECTRIC APPLIANCE CO., LTD. *v.* SUPERIOR ELECTRICS, LTD., [1926] 4 D. L. R. 1004; 59 O. L. R. 527.—**CAN.**

352 ix. —— ——.]—SHACKLOCK *v.* BRINSLEY (1898), 16 N. Z. L. R. 364.—**N.Z.**

Sect. 1.—*What constitutes subject-matter: Sub-sect.*

with an equal weight of metal than could have been obtained from a fish of the same thickness throughout. Before these letters patent had been granted, grooved iron plates with bolts let into the grooves had been used for the purpose of fastening timbers placed vertically upon one another, or placed horizontally side by side. In one case of a bridge, a channelled plate with bolts had been used for the purpose of fishing a scarf-joint where the ends of two timbers met together:—*Held:* there was no novelty in the patent, & therefore it was bad; the supposed invention had been in use previously to the date of the patent, not only in the case of a bridge but for other purposes, & a patent could not be upheld for the mere application of a well known mechanical contrivance to a purpose which was analogous to the manner or to the purpose in or to which it had been hitherto notoriously used or applied.—HARWOOD *v.* GREAT NORTHERN RY. CO. (1864), 11 H. L. Cas. 654; 35 L. J. Q. B. 27; 12 L. T. 771; 14 W. R. 1; 11 E. R. 1488, H. L.; *affg.* (1862), 2 B. & S. 222, Ex. Ch.; *revsg.* S. C. *sub nom.* HARRISON *v.* GREAT NORTHERN RY. CO. (1860), 6 Jur. N. S. 993.

Annotations:—**Apld.** Horton *v.* Mahon (1862), 12 C. B. N. S. 437; Ormson *v.* Clarke (1862), 13 C. B. N. S. 337; Willis *v.* Davison (1863), 1 New Rep. 234. **Folld.** Jordan *v.* Moore (1866), L. R. 1 C. P. 624. **Apld.** Blakey *v.* Latham (1889), 5 T. L. R. 301; Thompson *v.* American Braided Wire Co. (1889), 5 T. L. R. 537. **Consd.** Elias *v.* Grovesend Tinplate Co. (1890), 7 R. P. C. 455; Morgan *v.* Windover (1890), 7 R. P. C. 131; Williams *v.* Nye (1890), 7 R. P. C. 62; Lane-Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424. **Distd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. **Apld.** Rickmann *v.* Thierry (1896), 14 R. P. C. 105. **Consd.** Case *v.* Cressy (1901), 18 R. P. C. 417; Acetylene Illuminating Co. *v.* United Alkali Co. (1904), 22 R. P. C. 145; Hill *v.* Thomas (1907), 24 R. P. C. 415; Shaw *v.* Burnet (1924), 41 R. P. C. 432. **Refd.** Penn *v.* Bibby (1866), 2 Ch. App. 127; White *v.* Toms (1867), 37 L. J. Ch. 204; Lister *v.* Norton (1886), 3 R. P. C. 199; Edison & Swan Electric Light Co. *v.* Woodhouse (1887), 3 T. L. R. 367; Vickers *v.* Siddell (1890), 7 R. P. C. 292; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Van Berkel *v.* Simpson (1906), 24 R. P. C. 117; British Ore Concentration Syndicate *v.* Minerals Separation (1909), 27 R. P. C. 33; British Vacuum Cleaner Co. *v.* L. & S. W. Ry. (1912), 29 R. P. C. 309; Layland *v.* Baldy (1913), 30 R. P. C. 547; Wallace *v.* Tullis Russell (1921), 38 R. P. C. 199.

362. —— ——.]—A. obtained a patent for "certain improvements in the construction of ships & other vessels navigating on water." By his specification he claimed as his invention, amongst others, (1) the construction of ships "with an iron frame, combined with an external covering of timber planking for the sides, bilges, & bottoms:" (6) "the construction of iron frames adapted to an external covering of timber for the sides, bilges, & bottoms, as described":—*Held:* the expression "iron frame" in the first claim was not confined to an iron frame such as that specified in the sixth claim, but comprehended whatever might, according to the ordinary use of language, be called "an iron frame"; &, inasmuch as the combination of iron & timber in the construction of ships was already well known & commonly used, the patent could not be sustained.—JORDAN *v.* MOORE (1866), L. R. 1 C. P. 624; 35 L. J. C. P. 268; 12 Jur. N. S. 766; 14 W. R. 769.

Annotations:—**Consd.** Arnold *v.* Bradbury (1871), 6 Ch. App. 706; Parkinson *v.* Simon (1894), 11 R. P. C. 493. **Distd.** Edison Bell Phonograph Corpn. *v.* Smith & Young (1894), 11 R. P. C. 389.

363. —— ——.]—BAMLETT *v.* PICKSLEY (1875), Griffin's Patent Cases (1884–86), 40.

364. —— ——.]—(1) The grantee of a patent for an automatic dancing figure brought an action alleging infringement, & asking for an injunction. Defts. denied infringement, & denied the validity of the patent, on the ground that it was not the subject of a patent. The specification contained two claims, the first being for the whole combination, the second for the actuating mechanism:—*Held:* the second claim was an independent claim which was clearly old, & the patent was invalid. (2) The Ct. of Appeal, not being satisfied that pltfs. had not been deterred from asking one of their witnesses certain questions relative to the novelty of the claim by the expressed opinion of the learned judge, gave applts. an opportunity of calling such witness, & heard witnesses on behalf of resps. upon this point:—*Held:* the alleged invention claimed by the second claim was an obvious adaption of old mechanism not mentioned in the particulars, but of common knowledge, to effect an old purpose.—BRITAIN *v.* HIRSCH (1888), 5 R. P. C. 226.

Annotations:—**Refd.** Lane-Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424; Acetylene Illuminating Co. *v.* United Alkali Co. (1904), 22 R. P. C. 145.

365. —— ——.]—B. & co. sued L. & co. for infringement of letters patent for "an improved heel plate for boots & shoes," the invention being alleged to consist in the forming the heelplate with spikes permanently attached to it, properly shaped to fit the heel of a boot or shoe, & so as to be applicable by any person. Pltf.'s goods, which he called boot protectors, were intended for use for the soles as well as for the heels of boots. Defts. denied infringement, & alleged that the patent was invalid on the ground of anticipation by various prior specifications & certain arts. in actual use before the date of the patent:—*Held:* there was nothing patentable in the alleged invention.—BLAKEY & SONS *v.* LATHAM & CO. (1889), 5 T. L. R. 301; 6 R. P. C. 184, C. A.

Annotations:—**Consd.** Williams *v.* Nye (1890), 7 R. P. C. 62. **Refd.** Savage *v.* Harris (1896), 13 R. P. C. 364.

366. —— ——.]—LEADBEATER *v.* KITCHIN, No. 1092, *post.*

367. —— ——.]—This was an action for infringement brought by the patentee of an invention of improvements in the machinery used in the manufacture of tin plates, by means of which two plates could be taken at a time instead of one from the grease pot, thus effecting a saving of time & labour. Defts. alleged that the invention was merely a modification of an older machine invented by M.; that pltf. was not the true inventor, inasmuch as he communicated his "idea" to T., who mentioned it to H., who made a sketch of the proposed machine, & was therefore the sole or part inventor; prior publication by pltf. himself, who manufactured & used the invention commercially without secrecy before he applied for a patent:—*Held:* pltf.'s case failed, the patent being bad on all three grounds.

(2) A person who suggests an idea, without the means of carrying it into effect, to T., who procures H. to make a plan of the machine to be constructed, is not the true & first inventor.—ELIAS *v.* GROVESEND TINPLATE CO. (1890), 7 R. P. C. 455, C. A.

368. —— ——.]—The patentee of an invention of an improved horizontal tubular boiler made three claims in his specification, viz., for recessed water joints, for an improved elastic packing & mode of compressing the same, & for an improvement in the configuration of the casting. The patentee commenced an action for infringement. Deft. denied infringement, & alleged the invalidity

of the patent on the ground that the alleged invention was not novel or useful, & was anticipated. —*Held:* (1) pltf.'s water joint was substantially old, having been previously applied to coils, & the use in boilers was the mere use of the old thing for analogous purposes & not subject-matter; (2) if the patent was confined to the precise joint shown in the specification, that was not useful, & had not been used by pltf., & had not been taken by deft.; (3) the packing used by pltf. & his method of compression were both old; & (4) there was no novelty in the configuration. —BAKER *v.* KINNELL (1892), 9 R. P. C. 441.

369. —— ——.]—The patentee of an invention for a safety skirt for ladies' riding habits brought an action for infringement. The main feature of the invention was that the skirt had a seam running through the waist to the bottom of the skirt. This had special fasteners which burst open if a slight strain was on them, so that if the rider was thrown & her skirt caught on the pommels, her weight would cause the fastenings to give way, & she would fall clear of her skirt & not be in danger of being dragged. Defts. denied infringement, & alleged that the invention was not subject-matter, & was anticipated. It appeared that an earlier patentee had described a safety skirt with a burstable seam part of the way up, so that if this seam caught on the pommels it would burst & release the skirt from entanglement:—*Held:* pltf.'s alleged invention was the mere use of a known contrivance for a known purpose, being only a discovery that if the seam was extended further it would work better, & it was not good subject-matter of a patent.—NICOLL *v.* SWEARS & WELLS (1893), 69 L. T. 110; 9 T. L. R. 420.

370. —— ——.]—The assignees of a patent for shaping the heels of hose & socks, during the process of manufacture, by adding widenings to the upper portion of the backs thereof, brought an action for infringement. The defence relied on was that the patent was void for want of subject-matter:—*Held:* widening being an old process, & an obvious method of shaping the upper parts of the heels of hose, although it had never been so employed before the date of the patent, the invention, though useful, was not subject-matter. —SUDBURY *v.* LEE & GLEN (1894), 11 R. P. C. 58.

371. —— ——.]—S. & S., as owners of a patent for improvements in velocipedes having for its object to lock the steering wheel relatively to the remaining part of the machine so as to prevent a safety bicycle from falling down when resting against a wall, brought an action for infringement thereof against the R. Cycle co., who denied infringement & alleged that the invention was not novel & had been anticipated by the prior specifications of R. & C.:—*Held:* the patentees had, in substance, merely taken an old well known form of locking & applied it to a bicycle when wanted to be at rest, & this was not good subject-matter for a patent.—SINGER *v.* RUDGE CYCLE Co. (1894), 11 R. P. C. 585.

372. —— ——.]—(1) This was an action for infringement of a patent for an eyelet for boots, etc., made of metal & coated both above & below the flange with celluloid, so as to provide a permanent facing for the eyelet. Deft. denied infringement, and alleged that pltfs.' invention was anticipated or that, having regard to the state of knowledge, there was no subject-matter. Infringement was admitted at the trial. In the anticipations, metal hooks & studs were shown coated with celluloid, & also an eyelet coated on one side; but no such eyelet as pltfs.' had been produced on the market. There was, however, a demand for an eyelet which would stand wear. Pltfs. experimented for six years before arriving at their invention:—*Held:* the patentees, by their specification, disclaimed all right to their process, & claimed any eyelet of any metal if covered with celluloid or any similar material; while no smallness or simplicity will prevent a patent being valid, mere novelty of manufacture, or usefulness in the application of known materials to analogous uses, will not necessarily establish invention within the meaning of the patent law; metal studs & hooks, & metal studs & hooks covered with celluloid or a similar material, were old; & though pltfs. had succeeded in producing an improved eyelet, & there was some ingenuity in the mode of manufacture, there was not sufficient invention to form the subject-matter of a patent.

The law as to subject-matter in such a case is that laid down in *Harwood* v. *G. N. R. Co.*, No. 361, *ante*, in which it was held that a mere application of an old contrivance in the ordinary way to an analogous subject, without any novelty in the mode of applying such old contrivance to the new purpose, does not make a valid subject-matter of a patent (LORD MACNAGHTEN, LORD DAVEY).

(2) Both a process & a product may be patentable.—RIEKMANN *v.* THIERRY (1896), 14 R. P. C. 105, H. L.; *revsg.* THIERRY *v.* RICKMANN (1895), 12 R. P. C. 543, C. A.

Annotation:—As to (1) **Consd.** Savage *v.* Harris (1896), 13 R. P. C. 364.

373. —— ——.] — CASE *v.* CRESSY, No. 118, *ante*.

374. —— ——.] — Pltfs. were the assignees of a patent for "improvements in the formation of solid ends on flexible or compound electrical conductors." The specification stated: "according to my invention, metal, which should be of the same kind as that of which the wires or strips are composed, is applied at the requisite temperature to the ends of the wires or strips. This is most conveniently effected by introducing the ends of the wires or strips, to be connected, to an extent necessary to ensure firm connection, into a mould of the form & size which the solid ends are to have & introducing molten metal into this mould." The claim was for: "flexible or compound electrical conductors provided with solid ends in the manner hereinbefore described." Pltfs. manufactured & sold an integral rail bond consisting of a flexible body made of strands of copper wire with solid ends of the same metal burnt on in a mould, *i.e.* the flexible wire being placed in a mould, the molten metal run through inlet & outlet holes prior to filling the mould, in order to remove the chill from the wires & effect fusion of the surface of the wire. Defts. manufactured & sold an integral rail bond produced by, (*a*) forging the ends; (*b*) drilling them & inserting the wires; & (*c*) by subjecting them to heat & pressure. Pltfs. claimed to have taught the world to produce a new art., viz., an integral flexible rail bond composed of copper, & alleged that defts. had infringed by producing a similar art. by an equivalent process, viz., welding:—*Held:* the patent was for a process: the process was an old process applied to substances to which it had been previously applied; & there was no invention.—GLOVER (W. T.) & Co., LTD. *v.* AMERICAN STEEL & WIRE Co. (1902), 19 R. P. C. 102.

375. —— ——.] — ACETYLENE ILLUMINATING Co., LTD. *v.* UNITED ALKALI Co., LTD., No. 457, *post*.

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376. —— ——.]—BRITISH LIQUID AIR CO., LTD. *v.* BRITISH OXYGEN CO., LTD., BRITISH OXYGEN CO., LTD. *v.* BRITISH LIQUID AIR CO., LTD., No. 408, *post.*

377. —— ——.]—The owners of a patent for "improvements in or relating to bottles, & the like" brought an action for infringement. Defts. relied at the trial upon the invalidity of the patent upon the ground that the specification did not disclose any novelty in the alleged invention but merely the adaptation for another purpose of an article well known & used for scientific purposes: —*Held:* having regard to the state of knowledge at the time, the alleged invention was not subject matter for a patent.

There is no doubt that the article which he put upon the market proved a very great success; & I think that the idea, if it was his idea, was a good one. But the question is whether, because the idea is commercially good, it, therefore, involves the exercise of the inventive faculty. It seems to me that though in many, & one may say in most cases it does, it does not in all (NEVILLE, J.).—THERMOS, LTD. *v.* ISOLA, LTD. (1910), 27 R. P. C. 388.

Annotation:—**Mentd.** British Thomson-Houston Co. *v.* Duram, [1915] 1 Ch. 823.

378. —— ——.]—A patent was granted in 1907 for "improvements in pipe joints." The pipes were stoneware pipes used for drains & sewers, & the specification stated that the invention related to the joints of pipes in which one end of the pipe was provided with a socket, such joints being made by filling in the space between the outside of the spigot & the inside of the socket with Portland cement grout, such grout being held in position by a ring of canvas secured to the two pipes. Claim 1 was for "a pipe joint consisting of a socket, a spigot entering the socket & having a collar at such a distance from its end that a space is left between the end of the socket & the collar, & an external band of porous material having its edges secured to the socket & spigot & covering over this space except at the top substantially as described." In 1897 S. obtained a patent for an improvement to a well known joint known as the Hassell joint. The Hassell joint was made with two rings of bituminous material in the socket & two similar ones on the spigot end, so arranged that when the spigot was forced into the socket an annulus was left between the two bituminous seals, & this was filled with cement grout poured in through two holes in the exterior of the socket. In S.'s joint the pipes were made with a stoneware collar on the spigot; against this collar rested the bituminous material of the outer seal, having in it a wedge shaped projection of the same material, & there was a corresponding V-shaped depression in the socket to receive this projection, so that when the pipes were pushed home the seal was completed. S.'s pipes were, however, also made without the bitumen forming the outer seal, & in that case, when the pipe was pushed home, there was a space between the end of the socket & the collar on the spigot. An outer seal was then used which was made of clay while the pipes were being laid. The use of canvas bands for the purpose of keeping the cement grout in position was admittedly well known before the date of the patent in 1907:—*Held:* the patent was invalid for want of subject-matter.—DOULTON & CO., LTD. *v.* ALBION CLAY CO., LTD. (1911), 28 R. P. C. 638, C. A.

379. —— ——.]—The owner of a patent for a luggage carrier for cycles & other vehicles having brought an action for infringement. Defts. denied infringement & alleged that the patent was invalid on the grounds of anticipation & want of subject-matter. The first claim of the specification was for a luggage carrier constructed with a collapsible frame in two or more sections which were connected with one or more bolts as particularly described & illustrated. Before the date of the patent, practically the same thing but for a seat for a wall or counter had been patented by B.:—*Held:* the patentee had only put an old & well known joint in an old & well known form of luggage carrier; &, further, he had merely taken B.'s seat & fitted it on to a bicycle for a luggage carrier; & the patent was invalid for want of subject-matter having regard to previous knowledge.—MAIN *v.* ASHBY & CO. (1911), 28 R. P. C. 492.

380. —— ——.]—In an action for infringement pltfs. were the owners of letters patent for an invention relating to vibrating trough conveyors, the objects of which were to reduce vibration by balancing the conveyor trough, to reduce the power required to operate it, & to avoid the necessity of making the conveyor trough heavier towards the driving end in the case of long conveyors. For the first object the patentee divided the trough into sections, the adjacent sections being caused to move in opposite directions, thus reducing vibration. The defence relied on was mainly want of subject-matter in the patent:—*Held:* the balancing method for reducing vibration & the particular method of balancing were well known; &, in effect, the invention was one which had been used in a machine for the classification of goods; &, having regard to the state of knowledge, there was want of novelty, & the patent was invalid.—NORTON *v.* BARKER (W. H.) & SON (1913), 30 R. P. C. 741, C. A.

381. —— ——.]—A patent for the mere new use of a known contrivance without any additional ingenuity in overcoming fresh difficulties is bad & cannot be supported; but a patent for a new use of a known contrivance is good & can be supported if the new use involves practical difficulties which the patentee has been the first to see & overcome by some ingenuity of his own. An improved thing produced by a new & ingenious application of a known contrivance to an old thing is a manner of new manufacture within Statute of Monopolies, 1623 (c. 3).—LAYLAND *v.* BOLDY & SON, LTD. (1913), 29 T. L. R. 651; 30 R. P. C. 547, C. A.

382. —— ——.]—In 1904 a patent was granted for "improvements in printing." One of the claims was for the "method of effecting intaglio letterpress printing, that is to say, intaglio type printing in combination with the printing of illustrations for reproducing newspapers, periodicals, books, show cards, etc., the distinguishing feature being that the printing-matter is arranged on cylinders having doctors or colour wipers, colour in a light liquid form being employed." A petition for the revocation of the patent was presented. At the hearing it was proved that methods of producing illustrations similar to the methods described by the patentee were well known at the date of the patent, but resps. contended that there was novelty in the idea of applying the methods to the production of letterpress in combination with illustrations,

& in using colour in a light liquid form for the purpose :—*Held :* the patent was for putting known contrivances to a use that was new, but analogous to the uses to which they had previously been put, without overcoming any fresh difficulties; as to the use of a light liquid colour, the patentee merely suggested its use for letterpress printing by the intaglio process, & not for the production of pictures ; & the patent was invalid for want of subject-matter.—*Re* MERTEN'S PATENT (1914), 31 R. P. C. 373.

383. —— ——.] — *Re* B. A.'S APPLICATION (1915), 32 R. P. C. 348.

Annotation :—**Reld.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

384. —— ——.] — A patent was in 1903 granted in New Zealand to G. for "an improvement in pneumatic milking apparatus." An action for infringement was commenced in New Zealand by G. against a co. The Supreme Ct. of New Zealand dismissed the action, holding the patent invalid, G. appealed to His Majesty in Council :—*Held :* G.'s alleged invention was simply the application to a milking apparatus of a well known physical law accomplished by the oldest & simplest method ; & was not subject-matter for a patent.—GILLIES *v.* GANE MILKING MACHINE CO. (1916), 34 R. P. C. 21, P. C.

385. —— ——.]—Letters patent were granted to B. & R. for "improved means for connecting tubular electric conduits together & to their fittings." The claim in the specification was for "an appliance for connecting the ends of two tubular electrical conduits or fittings, consisting of two longitudinally divided socket like clips formed together with a cross slot between them, said clips being made with lugs & tightening screws or bolts & of the proper internal diameter to suit the respective tubular conduits or fittings on to which they are to be clamped, substantially as set forth." In an action for infringement of the patent, defts. contended that the patent was invalid for want of subject-matter. It was admitted that the method of gripping employed at each end of the appliance was old :—*Held :* pltfs.' appliance was merely the duplication of two old results without any interaction between them, without the creation of a single new result, & there was no subject-matter ; &, further, pltfs.' device only differed from an earlier patented device in having the longitudinal opening narrower & the lugs more pronounced, which were matters of degree, & in that the earlier device had no adequate transverse slot, a defect which would be readily cured by persons possessing the common knowledge of the trade ; & on this ground also there was no subject-matter—READ *v.* STELLA CONDUIT CO. (1916), 33 R. P. C. 191, C. A.

386. —— ——.] — WILKINS *v.* MILLER (1918), 35 R. P. C. 257, C. A.

387. —— ——.] — A patent was granted in 1916 for "appliances for playing a race game." Claim 1 was as follows :—"an appliance for playing a game of skill comprising a number of units each of which is adapted to be moved along a course by a hand operated member & having a speed regulating member to release the connection between the latter & the corresponding unit if the speed of movement of the said member exceeds a predetermined value." In an action for infringement of the patent deft. denied infringement & alleged that the patent was invalid, on the grounds (*inter alia*) of want of novelty & subject-matter, & alleged common general knowledge :—*Held :* for an idea to be patentable it must involve invention & further must not limit the right of the public to do what they were previously able to do without invention & according to the natural development in the art relating to the subject-matter of the idea ; & the patentee had applied to a well known form of game apparatus the idea which had been previously published of having a critical predetermined speed in race games, & the patent was invalid.—CLORIUS *v.* TONNER (1922), 39 R. P. C. 242.

388. —— ——.] — HIGGINSON & ARUNDEL *v.* PYMAN, No. 339, *ante*.

389. —— —— **Though result be production of known machine in cheaper or better manner.**]— The application of a known article to a purpose analogous to those to which it had before been applied, is not the subject of a patent, although the result of its application to the new purpose may be the production of a known machine in a cheaper or better manner. For instance, the application of "double angle iron." a well known article, to the formation of hydraulic cups or joints to telescopic gasholders, instead of forming them, as had theretofore been done, by riveting two pieces of single angle iron to a plate.—HORTON *v.* MABON (1862), 12 C. B. N. S. 437 ; 31 L. J. C. P. 255 ; 6 L. T. 289 ; 10 W. R. 582 ; 142 E. R. 1213 ; *affd.* (1864), 16 C. B. N. S. 141 ; 4 New Rep. 66 ; 9 L. T. 815 ; 12 W. R. 491 ; 143 E. R. 1079, Ex. Ch.

Annotations :—**Apld.** Willis *v.* Davison (1863), 1 New Rep. 234 ; White *v.* Toms (1867), 37 L. J. Ch. 204. **Reld.** Ormson *v.* Clarke (1862), 13 C. B. N. S. 337 ; Lister *v.* Norton (1886), 3 R. P. C. 199 ; Vickers *v.* Siddell (1890), 7 R. P. C. 292 ; Lane-Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424 ; Acetylene Illuminated Co. *v.* United Alkali Co. (1904), 20 R. P. C. 161.

390. —— —— **Though resulting in new advantages.**]—The assignees of a patent for supporting the front of a four-wheel carriage by C springs brought an action for infringement thereof against W. & co. The main defences relied on were (*a*) want of novelty in the patented invention, inasmuch as it consisted in the applying of a known article to an analogous purpose ; (*b*) prior user of the invention by F. :—*Held :* (1) the invention was not subject-matter for a patent, being only the application of a known article to an analogous purpose without any ingenuity.

(2) If a known article is applied to an analogous purpose, the application is not patentable simply because it produced advantages not produced before.—MORGAN & CO., LTD. *v.* WINDOVER & CO., LTD. (1890), 7 R. P. C. 131, H. L.

Annotations :—*As to* (1) **Apld.** Layland *v.* Boldy (1913), 30 R. P. C. 547. **Reld.** Vickers *v.* Siddell (1890), 7 R. P. C. 292 ; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569 ; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 431 ; British Ore Concentration Syndicate *v.* Minerals Separation (1909), 27 R. P. C. 33 ; Bonnard *v.* London General Omnibus Co. (1920), 38 R. P. C. 1. *As to* (2) **Apld.** Elias *v.* Grovesend Tinplate Co. (1890), 7 R. P. C. 455. *Generally*, **Reld.** Goddard *v.* Lyon (1894), 11 R. P. C. 354 ; Gold Ore Treatment Co of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95.

391. —— —— ——.]—A patent was granted in 1903 for "improvements in the manufacture of tin plate & arts. therefrom." The alleged improvements consisted in omitting the usual cold rolling process, then tinning the plate, & afterwards forming, ornamenting, & finishing it upon the rough grain-like surface, & then manufacturing from the tin plate so obtained ornamental boxes & other arts. with an antique or oxidised silver effect. One of the claims in the specification was for the improved tin plate arts. & the method of producing the same. An action for infringement was brought by the owners of the patent & the

Sect. 1.—*What constitutes subject-matter: Sub-sect. B.*]

patentee, claiming the usual relief:—*Held:* the production of the grained tin by the omission of the cold rolling process was well known at the date of the patent, & if the patentee had claimed the manufacture of tin plate in that way the patent would have been invalid for want of novelty, but that which he had claimed was the manufacture of ornamental arts. by the use of the tin plate described; there no invention in taking a well-known art. & applying to it ordinary processes & producing a new result; & the patent was invalid for want of subject-matter.—HUDSON, SCOTT & CO., LTD. *v.* BARRINGER, WALLIS & MANNERS, LTD. (1906), 23 R. P. C. 502, C. A.

392. ——.]—An action for infringement was brought by the owners of a patent granted to C. for "an improved joint for the rails of railways, tramways, & the like" against the London County Council. Defts. set up the invalidity of the patent on various grounds, including want of subject-matter & prior publication by a number of specifications & other documents including the specification of L. & also prior user:—*Held:* (1) the patentee's improved joint was described in L.'s specification; (2) if the invention was for adapting L.'s joint to tramways there was no such novelty as to constitute subject-matter.—COOPER PATENT ANCHOR RAIL JOINT CO., LTD. *v.* LONDON COUNTY COUNCIL (1906), 23 R. P. C. 289.

393. Exception to rule—Chemical processes.]—CALVERT *v.* ASHBURN (1862), cited 4 New Rep. at p. 219, Ex. Ch.

Annotation:—**Refd.** Young *v.* Fernie (1864), 4 New Rep. 218.

394. —— ——.]—YOUNG *v.* FERNIE, No. 32, *ante*.

B. Application Involving Exercise of Invention.

395. Patentable.]—CROYSDALE *v.* FISHER, No. 352, *ante*.

396. ——.]—MACINTOSH *v.* EVERINGTON (1836), 2 Carp. Pat. Cas. 186.

397. ——.]—KAY *v.* MARSHALL, No. 354, *ante*.

398. ——.]—CRANE *v.* PRICE, No. 315, *ante*.

399. ——.]—STEINER *v.* HEALD, No. 88, *ante*.

400. ——.]—BROOK *v.* ASTON, No. 358, *ante*.

401. ——.] — HARWOOD *v.* GREAT NORTHERN RY. CO., No. 361, *ante*.

402. ——.]—(1) A provisional specification, if allowed by the law officer of the Crown, cannot be impeached as being too general. The complete specification must not claim anything different from that which is included in the provisional specification, but need not extend to everything so included.

(2) The new application of any means or contrivance may be the subject of a patent if it lies so much out of the track of the former use as not naturally to suggest itself, but to require some application of thought & study.

(3) It seems clear . . . that the office of the provisional specification is to describe the nature of the invention (LORD CHELMSFORD, C.).—PENN *v.* BIBBY (1866), 2 Ch. App. 127; *sub nom.* PENN *v.* BIBBY, PENN *v.* JACK, 36 L. J. Ch. 455; 15 L. T. 399; 15 W. R. 208, L. C.

Annotations:—*As to* (1) **Flld.** Horrocks *v.* Stubbs (1886), 3 R. P. C. 221. **Apld.** Acetylene Illuminating Co. *v.* United Alkali Co. (1904), 22 R. P. C. 145. **Refd.** Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre & Automatic Valve Co. (1898), 15 R. P. C. 159. *As to* (2) **Consd.** Blakey *v.* Latham (1889), 6 R. P. C. 184. **Distd.** Blakey *v.* Latham (1889), 5 T. L. R. 301. **Apld.** Elias *v.* Grovesend Tinplate Co. (1890), 7 R. P. C. 455; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; British Vacuum Cleaner Co. *v.* L. & S. W. Ry. (1912), 29 R. P. C. 309. **Refd.** Vickers *v.* Siddell (1890), 7 R. P. C. 292; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. *Generally*, **Mentd.** Ball *v.* Ray (1873), 30 L. T. 1; Dean *v.* Brown, [1909] 2 K. B. 573.

403. ——.] — In an action for infringement of a patent it appeared that pltf. had, on July 24, 1880, filed a provisional specification of an invention for improvements in the manufacture of pile fabrics in imitation of sealskin & other similar fabrics. This specification was abandoned by pltf., & on Jan. 21, 1881, he filed a second provisional specification of an invention for improvements in the manufacture of velvets & of pile fabrics in imitation of sealskin & other similar materials. On July 21, 1881, he obtained a grant of letters patent on his provisional specification of Jan. 21, 1881. The invention claimed by the specifications consisted in a new combination of materials, for use in the manufacture of the fabrics referred to, by the employment of a mixture of mohair & silk when in the raw state, by combining & blending before spinning:—*Held:* (1) the alleged invention, so far as it consisted of the application of a well known material to a new use with a new result, exhibited an amount of novelty of invention which, in the absence of anticipation, would entitle its inventor to a patent; but on the issues of fact defts. had shown both prior publication & prior user, & therefore the patent was invalid.

(2) The question whether the application of well known material to a new use is subject-matter depends on the circumstances of each case.

(3) If the public once becomes possessed of an invention by any means whatever, no subsequent patent for it can be granted either to the true & first inventor himself, or to any other person.

He, pltf., accordingly manufactures, without any conditions of secrecy, imitations, skins which he described as patent seals, & he openly offered them for sale, & sold some of them. . . . The argument that these were mere experiments to ascertain whether the goods would stand wear or to ascertain whether the buyer would take to the goods or some other such collateral purpose is wholly untenable (CHITTY, J.).—LISTER *v.* NORTON BROTHERS & CO. (1886), 3 R. P. C. 199; Griffin's Patent Cases (1884–1886), 148.

Annotation:—*As to* (2) **Consd.** Morgan *v.* Windover (1887), 3 T. L R.. 748.

404. ——.]—R. & others were patentees of an invention for compressing & storing ensilage. By their specification they claimed as their invention the use of chains for the above-mentioned purpose in the manner described in the specification. They brought an action for infringement of their patent against A. & C., who also used chains for the purpose of compressing & storing ensilage. Defts. denied that there was any novelty in pltf.'s invention, & alleged that their apparatus was dissimilar from pltf.'s:—*Held:*

PART IV. SECT. 1, SUB-SECT. 9.—B.

395 i. *Patentable.*]—The application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought & study.—BICKNELL *v.* PETERSON (1897), 24 A. R. 427.—**CAN.**

395 ii. ——.]—LAIR *v.* AUTHIER (1907), Q. R. 33 S. C. 64.—**CAN.**

395 iii. ——.] — ELECTRIC FIRE-PROOFING CO. *v.* ELECTRIC FIRE-PROOFING CO. OF CANADA (1907), Q. R. 31 S. C. 34.—**CAN.**

395 iv. ——.]—CONCRETE APPLIANCES CO. *v.* ROURKE, MCDONALD, ETC. (1915), 8 W. W. R. 6.—**CAN.**

395 v. ——.]—An invention by which an old process is used for a new purpose is patentable.—USSHER *v.* CHAMBER OF MINES, [1912] T. P. D. 1075.—**S. AF.**

pltf.'s invention was novel & patentable, & defts. had infringed.—REYNOLDS *v.* AMOS (1886), Griffin's Patent Cases (1884–1886), 201; 3 R. P. C. 215.

Annotations:—**Reld.** Sharp *v.* Brauer (1886), Griffin's Patent Cases (1884–1886), 205; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429.

405. ——.]—The owners of a patent for improvements in bustles or dress improvers which consisted substantially in the application of tubular sections of braided hard wire to bustles brought an action against defts. alleging that they had infringed & asking for an injunction. Defts. admitted that they had made bustles identical with those made in accordance with the patent but denied infringement & alleged that the patent was invalid on the grounds (*inter alia*) that the alleged invention was not useful & had been anticipated by prior use & publications including among the latter the specification of one J. which specified certain applications of braided wire to satchel handles & other articles & mentioned that the material might be applied to bustles. Defts. tendered no evidence in support of their allegations of inutility & prior use:—*Held*: the invention was not anticipated by either of the alleged prior publications of J. & L., & it was good subject-matter of a patent.—AMERICAN BRAIDED WIRE CO. *v.* THOMSON (1888), 4 T. L. R. 279; 5 R. P. C. 113, C. A.; *affd.*, *sub nom.* THOMPSON & CO. *v.* AMERICAN BRAIDED WIRE CO., 5 T. L. R. 537, H. L.

Annotations:—**Consd.** Morgan *v.* Windover (1890), 7 R. P. C. 131; Vorwerk *v.* Evans (1890), 7 R. P. C. 167; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429; Savage *v.* Harris (1896), 12 T. L. R. 187; Kopp *v.* Rosenwald (1900), 19 R. P. C. 205. **Reld.** Ehrlich *v.* Ihlee & Sankey (1888), 4 T. L. R. 337; Vickers *v.* Siddell (1890), 7 R. P. C. 292; Williams *v.* Nye (1890), 7 R. P. C. 62; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Alexander *v.* Henry, Mitchell, Henry & Waller (1895), 12 R. P. C. 360; Case *v.* Cressy (1900), 17 R. P. C. 255; British Vacuum Cleaner Co. *v.* L. & S. W. Ry. (1912), 29 R. P. C. 309; British Thomson-Houston *v.* Charlesworth, Peebles (1924), 41 R. P. C. 241.

406. ——.]—GADD & MASON *v.* MANCHESTER CORPN., No. 921, *post*.

407. ——.]—VICKERS, SONS & CO. *v.* SIDDELL, No. 910, *post*.

408. ——.]—It is, of course, well settled law that the application of a known device to its ordinary purpose under analogous circumstances is not good subject-matter for letters patent, because it does not involve invention. But this principle does not apply when the circumstances are not analogous, or when invention is required to adopt the device to the new circumstances (FLETCHER MOULTON, L.J.).—BRITISH LIQUID AIR CO., LTD. *v.* BRITISH OXYGEN CO., LTD., BRITISH OXYGEN CO., LTD. *v.* BRITISH LIQUID AIR CO., LTD. (1908), 25 R. P. C. 577, C. A.; *affd.* (1909), 26 R. P. C. 509, H. L.

409. ——.]—The first claim of the specification of a patent for improvements in & relating to levers & go-through lace machines was: In the manufacture of lace on twist lace machines of the levers & go-through type, the traversing of the bobbins & carriages to & fro across the breadth or part of the breadth of lace being made for the purpose of equalising the thread drawn off each bobbin substantially as herein described. In an action against the P. & M. co., Ltd., & T. for infringement of the patent, defts. alleged, among other defences, that there was no subject-matter. The method of traversing described in the specification was by endwise movement of the comb-bars known as shogging. Traversing the carriages & bobbins in a lace machine by shogging the comb-bar was old, & equalising the bobbin threads by interchanging the bobbins by hand was old. Pltf. alleged that it was new to traverse in a levers & go-through machine that the alleged anticipations all related to net-making machines, & that in them traversing was for the purpose of making pattern & not of equalising. Defts. contended that, if this were so, yet that the use of the old device to effect equalising was not subject-matter for a patent, no ingenuity being required when once the idea was given. It was admitted that a considerable saving of yarn was effected. It was held at the trial, that traversing the bobbins by shogging the comb-bars in levers machines, in order to equalise the comsumption of thread, was new; that traversing by shogging in other lace machines was old, but not for the purpose of equalising the threads, although it was known that the movement did equalise the threads; that, on the evidence, when once the idea of shogging for equalising was suggested, there was no difficulty in carrying it into effect; & that, although there was commercial utility, there was no invention. The patent was held to be invalid for want of subject-matter, & the action as regards deft. co. was dismissed with costs, but judgment was given by consent against deft. T. Pltfs. appealed:—*Held*: the idea of equalising the use of threads by shogging the comb-bar was new & meritorious, &, there being invention in the idea, & a way of carrying it out being shown, there was good subject-matter for a patent, notwithstanding that there was no difficulty in carrying the idea into effect.

If you have got a new idea, a new conception of manufacturing something, or a new way of manufacturing something, & you suggest a way of carrying it out, that is patentable. Here the inventor makes the lace—an old thing; he makes it by cheaper means, because he saves the wasted thread in the bobbin & he does that by employing, for the first time in a new manner & for a new purpose, the old operation called shogging. . . . To my mind that is plainly patentable (BUCKLEY, L.J.).—HICKTON'S PATENT SYNDICATE *v.* PATENTS & MACHINE IMPROVEMENTS CO., LTD. (1909), 26 R. P. C. 339, C. A.

Annotations:—**Reld.** British United Shoe Machinery Co. *v.* Unique Shoe Co. (1918), 36 R. P. C. 33; Wallace *v.* Tullis Russell (1921), 38 R. P. C. 199; Clorius *v.* Tonner (1922), 39 R. P. C. 242; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1923), 40 R. P. C. 426; Armstrong, Whitworth *v.* Hardcastle (1924), 41 R. P. C. 189; Higginson & Arundel *v.* Pyman (1926), 43 R. P. C. 291.

410. ——.]—LAYLAND *v.* BOLDY & SON, LTD., No. 381, *ante*.

——.]—A patent was granted for improvements in or relating to gyro-compasses. The chief object of the invention was stated in the specification to be the provision of the necessary gravitational control of the gyroscope giving the north seeking property without subjecting the gyroscope to appreciable disturbing forces due to rolling, pitching, or other short period motions of ships. Three of the claims were as follows: (*a*) A gyro-compass in which the pendulous or gravitational factor which controls the gyroscope acts through a relay or intermediate source of power, for the purpose specified. (*b*) A gyro-compass in which the gyro-casing together with the members carried by it is mounted in neutral equilibrium around its horizontal axis & the gravity control device acts upon the casing around the said axis through a relay or intermediate source of power, for the purpose specified. (*c*) A gyro-compass in which the pendulous or gravitational factor controls the gyro-casing through an intermediate source of power that displaces a controlling weight along a

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lever arm, for the purpose specified. At the trial of an action for infringement of the patent, & of another patent as to which pltf.'s case was abandoned, pltf.'s case was confined to an alleged infringement of the above three claims. Defts. alleged that the patent in suit was invalid by reason of want of utility, novelty & subject-matter, & they relied, in particular, on three prior specifications of Ach, Anschütz-Kaempfe & Ford & Tanner. Pltf. contended (*inter alia*) that defts.' instrument comprised a gyro-compass in which a gyro-wheel & casing were mounted in neutral equilibrium, & were controlled by a separate gravitational device acting through an intermediate source of power, that method of controlling the gyroscope being employed for the purpose of eliminating the error, known as quadrantal error, due to the rolling or pitching or other short motions of ships on courses, known as intercardinal courses, other than north-south or east-west, & that, therefore, defts. had infringed:—*Held:* the three claims could only be applicable to cases in which the pendulous or gravitational device was constructionally capable of severance from the gyroscope so as to admit of the interposition of an intermediate source of power, the invention was effective for the limited purpose for which it was intended, & the patent was not invalid for want of utility; the object & method of Ach were different from those of the grantees of the patent in suit; & his specification was not destructive of novelty or subject-matter; the grantees, in taking for another purpose the device used by Anschütz-Kaempfe for damping, had made an inventive step sufficient to constitute subject-matter; defts.' compass did not contain any separate gravitational device not producing a direct torque, or any intermediate source of power, & was not an infringement of any of the three claims; &, in consequence, no question of anticipation based upon the specification of Ford & Tanner arose.—BROWN *v.* SPERRY GYROSCOPE CO., LTD. (1925), 43 R. P. C. 1, C. A.

412. ——.]—Pltf. was the owner of letters patent for "Means of Indicating Variations of Temperature of the Cylinders of Internal Combustion Engines." The specification stated, "The object of my invention is to provide a temperature-indicating device for use on the radiator of an automobile whereof the engine has liquid-cooled cylinders, the device, which is designed for the purpose of constantly affording a visual indication of the temperature conditions prevailing within the so-called air space above the surface of the liquid in the radiator without imposing upon the driver the necessity of leaving his seat for the purpose of inspecting the indicator, being specially adapted for attracting the driver's attention by day or by night on the occurrence of an abnormal rise of temperature in the liquid within the cooling jacket of the engine cylinders," & the specification claimed, "The combination with the liquid-circulation cooling-system appertaining to the engine of an automobile, of means for indicating the temperature-conditions prevailing within the cooling jacket of the engine, said means comprising a thermometer the heat responsive element of which is exposed to the temperature conditions prevailing within the so-called air space immediately above the normal surface level of the liquid in said system, substantially as set forth." Pltf. manufactured & sold a device for utilising the invention, & this defts. purchased & fitted as a standard fitting to motor-cars manufactured & sold by them. After some time defts. ceased to fit pltf.'s device & began to fit another device known as the "Wilmot Calometer" to their motor-cars. Pltf. commenced an action for infringement & defts. alleged that the patent was invalid by reason of prior publication in certain specifications & by reason of two prior users wherein thermometers placed in the radiators of motor-cars had been used for testing the performance of the cars & settling their designs, & further by reason of prior common general knowledge. Defts. also alleged that there was no subject-matter & that the invention was not useful, because certain advantages which were alleged by patentee were not in fact obtained. They also denied infringement:—*Held:* the selection of the particular medium into which the thermometer was placed gave a real & practical advantage in communicating to the driver at the right moment the existence of danger, there was real exercise of the inventive faculty; the alleged prior user was at the most a mere casual, accidental, or incidental user in the course of a completely different investigation, & was not made use of, & also was not a public user, & the patent had not been anticipated, & had been infringed.—BOYCE *v.* MORRIS MOTORS, LTD. (1926), 44 R. P. C. 105, C. A.

413. Necessity for exercise of invention.]—SHAW *v.* BARTON & LOUDON, No. 228, *ante*.

414. ——.]—In 1899 a patent was granted for improvements in & relating to puttees or leg & other bandages, & in their construction or method of manufacture. The improvements consisted chiefly in making the materials of the puttees or bandages in a curved form, so as to fit the leg of the wearer more neatly than straight puttees, without the necessity for cross twists on the leg. In an action for infringement, defts. alleged that the patent had been anticipated by the specification of H.'s patent for gaiters which specification had been accepted a few days before, but had not been printed, at the date of pltf.'s patent. They gave evidence that the use of curvature of the outline of the material in fitting a curved surface was a matter of common knowledge, & that, if pltf. claimed the use of curvature generally, the patent was invalid for want of subject-matter; that, if the claim was limited to a particular curve, the specification gave insufficient directions for obtaining the curves required for fitting legs of different shapes; & that defts.' puttees were of different curvature from pltf.'s & were not an infringement:—*Held:* under Patents & Designs Act, 1907 (c. 29), s. 9, there had been a publication of H.'s specification; pltf.'s patent was not for a particular curve, but was for a suitable curve, as illustrated by the drawings; the patent was valid; & the defts. had infringed.—FOX *v.* ASTRACHANS, LTD. (1910), 27 R. P. C. 377.

415. ——.]—The owner of a patent for improvements in wristlets for watches brought an action for infringement of the patent. The amended claim was as follows: A watch wristlet comprising a pair of straps adapted to be secured to one another & provided at their free ends with bent over portions or loops adapted to be passed through the watch loops & secured thereon by U-shaped spring clips fitted to the said looped ends, substantially as described & illustrated. Defts. by their defence alleged that the patent was invalid on the grounds (*inter alia*) of want of novelty, prior user & want of subject-matter, & they denied infringement & counterclaimed for revocation of the patent:—*Held:* a watch wristlet in use before the date of the patent differed only from the patented article as sold & illustrated in

that the spring metal was not covered with leather, that the spring bullets at the end of driving reins manufactured & sold by defts.' predecessors in business performed functions so analogous to the functions performed by the patented wristlet as to be practically the same & that it did not require the exercise of any inventive ingenuity to adapt the idea embodied in such reins to a watch wristlet; the patent was invalid for want of subject-matter & of novelty, & further even if the patent could be treated as valid, defts. had not infringed. The action was dismissed with costs & on the counter-claim an order was made for the revocation of the patent.—BOWEN *v.* PEARSON (E. J.) & SONS, LTD. (1924), 42 R. P. C. 101.

416. ——.]—A patent was granted for improvements in or relating to veil nets. The first claim was as follows: The combination with a veil net having an elastic thread run therein of a free elastic thread disposed so as to form with the run-in thread an endless elastic loop that can be passed over the crown of a hat to retain the veil net in position. In an action for infringement of the patent defts. alleged (*inter alia*) want of novelty, utility & subject-matter:—*Held:* deft. was using an elastic loop of exactly the same character as pltf.'s; but that on the construction of the claim the only question to be determined was whether adding a piece of elastic to an ordinary bag veil so as to prevent it slipping off a hat was sufficient subject-matter for a patent; the veil produced by pltf. was obviously useful & had been extremely successful, but the application of a perfectly common form of device to the veil was a mere workshop improvement not involving invention; & the patent was invalid for want of subject-matter.—SHAW *v.* BURNET & CO. (1924), 41 R. P. C. 432.

SUB-SECT. 10.—TOOLS.

A. In General.

417. Whether subject-matter of patent — Cardboard pattern sleeve.]—Pltf. claimed copyright in a cardboard pattern sleeve containing upon it scales, figures, & descriptive words for adapting it to sleeves of any dimensions. *Semble:* it might be the subject of a patent as an instrument or tool.—HOLLINRAKE *v.* TRUSWELL, [1894] 3 Ch. 420; 63 L. J. Ch. 719; 71 L. T. 419; 10 T. L. R. 663; 38 Sol. Jo. 706; 7 R. 568, C. A.

Annotations:—**Mentd.** Boosey *v.* Whight, [1900] 1 Ch. 122; Walter *v.* Lane, [1900] A. C. 539; Warren *v.* Foster Clothing Co. (1906), 51 Sol. Jo. 145; Libraco *v.* Shaw Walker (1913), 30 T. L. R. 22; Anderson *v.* Lieber Code Co. (1917), 117 L. T. 361; McCrum *v.* Eisner (1917), 87 L. J. Ch. 99.

B. New Use for Old Tools.

418. Whether patentable.]—BOULTON *v.* BULL, No. 90, *ante*.

419. ——.]—LOSH *v.* HAGUE, No. 16, *ante*.

420. ——.]—BROOK *v.* ASTON, No. 358, *ante*.

421. ——.]—(1) The infringement of any part of a patent process is actionable, if that part is of itself new & useful, so as that it might be the subject-matter of a patent, & is used by the infringer to effect the object proposed by the patentee.

(2) But the application of a well known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent. Pltfs. took out a patent for improvements in the manufacture of cases or envelopes for covering bottles, & in the specification the invention was stated to consist in an arrangement of apparatus by which lengths of rush, straw, or other suitable material may be readily tied together, so as to form cases or covers to protect bottles from breakage when packed. It then proceeded—For this purpose I take equal lengths of rush, straw, or other suitable material, & confine them at one end within a ring or cap, which I then place over the neck end of a mould or mandril, corresponding in form to the bottle for which the case or cover is intended. The mould is fixed to a frame, etc. Deft. made bottle envelopes out of similar materials somewhat differently applied, placing them upon a model of a bottle, or mandril, & fastening the material in a manner somewhat like pltfs.' method:—*Held:* the use of the mandril, which was admitted to have been long commonly used for producing given forms of pliable materials, was not an infringement of pltfs.' patent; for, that the application of a well known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent.—PATENT BOTTLE ENVELOPE CO. *v.* SEYMER (1858), 5 C. B. N. S. 164; 28 L. J. C. P. 22; 141 E. R. 65; *sub nom.* BOTTLE ENVELOPE CO. *v.* SEYMOUR, 5 Jur. N. S. 174.

Annotations:—*As to* (2) **Follid.** Brook *v.* Aston (1859), 28 L. J. Q. B. 175. **Refd.** Horton *v.* Mabon (1862), 12 C. B. N. S. 437; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429.

422. ——.] — This was an action for infringement of a patent for a method of cutting, at one operation, necktie linings by means of a revolving band knife, the material being clamped firmly between two templets of identical form. The judge held that the invention claimed was not sufficient to form the subject-matter of a patent, being merely the application of the use of a band knife, in its ordinary function as a cutter of piles of substances, by applying it to necktie linings, when such linings to be cut were clamped together with guides:—*Held:* there was no invention which was patentable.

A more skilled application of well understood tools & well understood processes is not a patentable invention (LORD HALSBURY, C.).—DREDGE *v.* PARNELL (1899), 16 R. P. C. 625, H. L.

Annotations:—**Refd.** Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95; British Oxygen Co. *v.* Maine Lighting Co. (1924), 41 R. P. C. 604; Harris *v.* Brandreth (1925), 42 R. P. C. 471.

SUB-SECT. 11.—PRODUCT OF MANUFACTURE.

See, now, Patent Act, 1919 (c. 80), s. 11.

423. Whether good subject-matter of patent.]—The assignee of a patent for improvements in skirt waistbands, & in the method of & means for weaving webs suitable for such uses, brought an action for infringement. The specification stated that three conical rollers were used, a detailed description being given of this arrangement with drawings, & further on that two rollers, or any suitable number of rollers greater than three, might be used. No description, however, was given how to work with two or more than three rollers. The claims were (*a*) the waistband of the formation substantially as set forth; (*b*) the taking-up motion having conically formed rollers arranged & acting substantially as & for the purpose set forth. Defts. denied infringement, & alleged the patent was invalid on the ground that the alleged invention was not new; was the application of means previously well known & was not subject-matter; that the specification did not sufficiently

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describe the invention, & was ambiguous & misleading, in particular, in not ascertaining the form, shape, & position of the rollers where two or more then three rollers were employed, & that the invention had been previously published. It was proved that defts. sold waistbands precisely similar to pltf.'s, but made by a machine with two conical rollers:—*Held:* (1) the patentee claimed by his first claim a waistband formed in the manner described in his specification; (2) not treating B.'s specification as an anticipation, but having regard to the knowledge before him, & given by him, a patent could only be taken out for a particular method of affecting that which B. had given to the world, namely, the producing radial wefts by the differential drag of conical rollers, & that as defts. in this case produced the result by a method different from pltf.'s, they had not infringed; (3) a claim for a waistband might be perfectly good if the thing claimed was new & complied with the other requirements of the law. —VORWERK & SON *v.* EVANS & CO. (1890), 7 R. P. C. 265, C. A.

424. ——.]—RIEKMANN *v.* THIERRY, No. 372, *ante*.

425. ——.]—KOPP *v.* ROSENWALD BROTHERS, No. 814, *post*.

426. ——.]—ACETYLENE ILLUMINATING CO., LTD. *v.* UNITED ALKALI CO., LTD., No. 457, *post*.

427. —— **Substance produced by chemical process or intended for food or medicine.**]—*Re* S. CO.'S APPLICATION (1921), 38 R. P. C. 399.

Annotation:—**Consd.** *Re* H. E. P.'s Appln. (1925), 43 R. P. C. 150.

428. ——.]—*Re* W., K. J., & W., LTD.'s APPLICATIONS (1922), 39 R. P. C. 263.

.]—*Re* Q. O.'s APPLICATION (1924), 41 R. P. C. 581.

S.'s APPLICATION (1924), 41 R. P. C. 583.

.]—*Re* J. S.'s APPLICATION (1924), 41 R. P. C. 585.

K.'s APPLICATION (1924), 41 R. P. C. 587.

's APPLICATION (1924), 41 R. P. C. 590.

434. —— ——.]—A patent was granted for "Improvements in or relating to the manufacture of alkyl resorcinols." Defts. alleged (*inter alia*) that the patent was invalid for want of novelty & subject-matter; that the methods described in the specification had been published before the date of the patent, or that the prior publications indicated methods to be adopted for obtaining homologous alkyl resorcinols higher than those theretofore obtained. Pltfs. contended that, by selection of processes & research, they had made an invention, it being not unusual in chemistry to find that a reaction that would produce a particular body would not produce the higher homologues of that body:—*Held:* pltfs. had not produced a new body such that the merit & the novelty of the invention would consist in the substance produced; there was not any inventive step in the subject of the patent, having regard to the prior publications; & the patent was invalid for want of subject-matter.—SHARPE & DOHME INC. *v.* BOOTS PURE DRUG CO., LTD. (1927), 44 R. P. C. 69.

435. —— —— **"Special" methods or process.**]—"Special" in the phrase "the special methods or processes of manufacture" does not mean merely particular, but is used to connote a method or process which has such attributes that it is the proper subject of a claim for letters patent; one that has some intrinsic characteristics which are the invention of the inventor, & for which a patent may be properly & legitimately claimed & granted. —*Re* M.'s APPLICATION (1922), 39 R. P. C. 261.

SECT. 2.—NOVELTY.

SUB-SECT. 1.—IN GENERAL.

See Statute of Monopolies, 1623 (c. 3), s. 6; Patents & Designs Act, 1907 (c. 29), s. 93.

436. General rule—Novelty essential to validity of patent.]—Where any man by his own charge & industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, & that for the good of the realm, that in such cases the King may grant to him a monopoly patent, for some reasonable time until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth, otherwise not (*per* CUR.).—DARCY *v.* ALLIN (1602), Noy, 173; Moore, K. B. 671; 1 Web. Pat. Cas. 1; 74 E. R. 1131; *sub nom.* CASE OF MONOPOLIES, 11 Co. Rep. 84 b.

Annotations:—**Consd.** Crane *v.* Price (1842), 4 Man. & G. 580; Marsden *v.* Saville Street Foundry & Engineering Co. (1878), 3 Ex. D. 203. **Refd.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463; Beard *v.* Egerton (1846), 3 C. B. 97; Caldwell *v.* Vanvlissengen, Caldwell *v.* Verbeck, Caldwell *v.* Rolfe (1851), 9 Hare, 415; Young *v.* Fernie (1864), 4 Giff. 577; Murray *v.* Clayton (1872), 7 Ch. App. 573, n.; R. *v.* Halifax County Court Judge, [1891] 1 Q. B. 793. **Mentd.** London City Case (1610), 8 Co. Rep. 121 b; Norris *v.* Staps (1616), Hob. 210; Dublin Corpn. Case (1620), Palm. 1; R. *v.* Maidenhead Corpn. (1620), Palm. 76; Fleming *v.* Pitman (1623), Win. 63; R. *v.* Hampden (1637), 3 State Tr. 826; Thomas *v.* Sorrel (1673), 3 Keb. 143; Yarmouth *v.* Darrel (1686), 3 Mod. Rep. 75; Precedence, etc. of the Judges (1693), Fortes. Rep. 382; Rogers *v.* Rajendro Dutt (1860), 13 Moo. P. C. C. 209; G. E. Ry. *v.* Goldsmid (1884), 9 App. Cas. 927; Jenks *v.* Turpin (1884), 13 Q. B. D. 505; British South Africa Co. *v.* De Beers Consolidated Mines, [1910] 1 Ch. 354; North Western Salt Co. *v.* Electrolytic Alkali Co. (1912), 107 L. T. 439; A.-G. of Commonwealth of Australia *v.* Adelaide S.S. Co., [1913] A. C. 781.

to validity of patent.]—If a person has discovered a new principle, & invented a mode of carrying it into effect, he may obtain a patent for that principle coupled with the mode of carrying it into effect, & he is thereby protected against persons carrying the principle into effect by other modes.—MINERALS SEPARATION, LTD. *v.* POTTER'S SULPHIDE ORE TREATMENT, LTD. (1909), 8 C. L. R. 779.—**AUS.**

436 ii. —— ——.]—ROGERS *v.* PATENTS COMR. (1910), 10 C. L. R. 701.—**AUS.**

436 iii. —— ——.]—BROADBENT *v.* DAVIES (1916), 21 C. L. R. 253.—**AUS.**

436 iv. —— ——.]—The act or contrivance which is the subject of a patent must be new, & it is not sufficient that the object or application of a contrivance is new if the contrivance itself be old.—WATEROUS *v.* BISHOP (1869), 20 C. P. 29.—**CAN.**

436 v. —— ——.]—ALMOUR *v.* CABLE (1887), 31 L. C. J. 157.—**CAN.**

436 vi. —— ——.]—When a pretended invention constitutes neither a new process nor a new combination producing a result unknown before, it is not patentable.—DOMPIERRE *v.* BARIL (1889), 18 R. L. O. S. 597.—**CAN.**

436 vii. —— ——.]—COPELAND-CHATTERSON CO. *v.* PAQUETTE (1907), 27 C. L. T. 311; 38 S. C. R. 451.—**CAN.**

436 viii. —— ——.]—EASTERN HAT & CAP CO. *v.* WALMSLEY (N. S.) (1909), 5 E. L. R. 538; 6 E. L. R. 525.—**CAN.**

436 ix. —— ——.]—Where prior to a certain patent, persons had to resort to a dangerous practice to do that which was the object of the patent, although not a determining factor it strengthens the conclusion that the invention is a new & useful one.—ASHDOWN *v.* NICKSON CONSTRUCTION CO., LTD., [1924] 4 D. L. R. 868; 34 B. C. R. 351.—**CAN.**

436 x. —— ——.]—KINMOND *v.* KEAY (1903), 20 R. P. C. 497.—**SCOT.**

436 xi. —— ——.]—MURCHLAND *v.* NICHOLSON (1893), 20 R. (Ct. of Sess.) 1006; 30 Sc. L. R. 857; 1 S. L. T. 173.—**SCOT.**

437. —— ——.]—If a man has brought in a new invention & a new trade within the kingdom, in peril of his life, & consumption of his estate or stock, etc., or if a man has made a new discovery of anything, in such cases the King of his grace & favour, in recompense of his costs & travail, may grant by charter unto him, that he only shall use such a trade or traffic for a certain time, because at first the people of the kingdom are ignorant, & have not the knowledge or skill to use it; but when that patent is expired, the King cannot make a new grant thereof: for when the trade is become common, & others have been bound apprentices in the same trade, there is no reason that such should be forbidden to use it (*per* CUR.).—IPSWICH CLOTHWORKERS CASE (1614), Godb. 252; 11 Co. Rep. 53 a; 78 E. R. 147; *sub nom.* IPSWICH TAILORS *v.* SHERRING, 1 Roll. Rep. 4.

Annotations:—**Consd.** Marsden *v.* Saville Street Foundry & Engineering Co. (1878), 3 Ex. D. 203. **Refd.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463; Beard *v.* Egerton (1846), 3 C. B. 97. **Mentd.** Norris *v.* Staps (1616), Hob. 210; Joliffe *v.* Brode (1621), W. Jo. 13; Thomas *v.* Sorrel (1673), 3 Keb. 223; Hacket *v.* Tilly (1706), 11 Mod. Rep. 93; Green *v.* Durham Corpn. (1757), 1 Burr. 127; French *v.* Adams (1763), 2 Wils. 168; Jefferys *v.* Boosey (1854), 4 H. L. Cas. 819; Rogers *v.* Rajendro Dutt (1860), 13 Moo. P. C. C. 209; Davies *v.* Davies (1887), 36 Ch. D. 359; Kruse *v.* Johnson, [1898] 2 Q. B. 91.

438. —— ——.]—MANTON *v.* MANTON (1815), Dav. Pat. Cas. 333; 1 Carp. Pat. Cas. 278.

439. —— ——.]—BRUNTON *v.* HAWKES, No. 293, *ante*.

440. —— ——.]—(1) The patentees of a shearing machine claimed in their specification four things, among which was a brush for raising the pile of the cloth. It was proved that the brush had only been used once by the patentees themselves, & that they had not sold one with a brush; &, that, as to some cloths, it was entirely useless:—*Held:* inasmuch as the brush had not been claimed as essential, the mention of it in the specification did not affect the patent; for that every substantive part of a patent need not be useful, although every part claimed must be new.

(2) The patentees claimed that they were the inventors of a machine for shearing cloth from list to list by means of a rotatory cutter. It was proved that the idea could be extracted from the specification of an older patent, that a specification of it had been received from America, & shown to several persons, that a model of such a machine had been in England before this patent, & seen by several persons, but no machine had been made from it, & also, that a similar machine had been made & used for a very short period, a long time ago:—*Held:* these circumstances did not amount to a publication, & consequently the patent was valid.

The prerogative of the Crown as to granting patents was restrained by statute of Monopolies, 1623 (c. 3), s. 6, to cases of grants, "to the true & first inventors of manufactures, which others at the time of granting the patent shall not use." The condition, therefore, is, that the thing shall be new, not that it shall be useful; & although the question of its utility has been sometimes left to a jury, I think the condition imposed by the statute has been complied with, when it has been proved to be new (PARKE, J.).—LEWIS *v.* MARLING (1829), 10 B. & C. 22; 4 C. & P. 52; 1 Web. Pat. Cas. 493; 1 Carp. Pat. Cas. 478; L. & Welsb. 29; 5 Man. & Ry. K. B. 66; 8 L. J. O. S. K. B. 46; 109 E. R. 359.

Annotations:—*As to* (1) **Consd.** Morgan *v.* Seaward (1837), 2 M. & W. 544. **Distd.** R. *v.* Cutler (1849), 3 Car. & Kir. 215. **Apld.** Poupard *v.* Fardell (1869), 21 L. T. 696. *As to* (2) **Refd.** Carpenter *v.* Smith (1842), 9 M. & W. 300; Heath *v.* Smith (1854), 3 E. & B. 256. *Generally*, **Refd.** Wegmann *v.* Corcoran (1879), 13 Ch. D. 65.

441. —— ——.]—LOSH *v.* HAGUE, No. 16, *ante*.

442. —— ——.]—(1) The degree of utility is not material; it is sufficient to support a patent if the invention be an improvement.

(2) The facts being undisputed, the question whether the invention is new is for the ct.

(3) The specification is to warn the public of what is prohibited, & to teach them the invention. The specification must be such as may be followed without invention or addition. The ordinary means of knowledge common to the trade may be required. If a competent engineer with ordinary knowledge could carry out the invention without solving a problem, the specification is sufficient. The most advantageous mode must be stated in the specification.

A specification merely suggesting something, so as to throw on the public the trouble of experiment, is bad. Information acquired from any other source than the specification must be excluded. Reasonable data must be given. All extreme or exaggerated cases should be discarded. Any circumstance conducive to the advantageous operations must be stated. The specifications is sufficient, if a workman by following the directions could execute an order.

(4) An invention not getting into general use, a presumption against its utility.

(5) It is sufficient if an invention be new, & of any use.—MORGAN *v.* SEAWARD (1836), 1 Web. Pat. Cas. 170; 2 Carp. Pat. Cas. 37, N. P.; *subsequent proceedings* (1837), 2 M. & W. 544.

Annotations:—*As to* (3) **Consd.** Plimpton *v.* Malcolmson (1876), 34 L. T. 340. **Refd.** Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co. (1919), 36 R. P. C. 95.

443. —— ——.]—NEWTON *v.* VAUCHER, No. 159, *ante*.

444. —— ——.]—BUSH *v.* FOX, No. 616, *post*.

445. —— ——.]—BOOTH *v.* KENNARD, No. 1062, *post*.

446. —— ——.]—Hoops of whalebone, cane & other substances, suspended from the waist & forming a petticoat, had long since been used by ladies. Pltfs. took out a patent for using, for the same purpose, hoops made of steel watch springs:—*Held:* this was not an invention which could properly be made the subject of a patent.

To constitute the subject of a patent there must be some real novelty in the invention, either by a new combination of old existing materials, or else by the discovery of something that did not exist before (ROMILLY, M.R.).—THOMPSON *v.* JAMES (1863), 32 Beav. 570; 55 E. R. 224.

Annotation:—**Apld.** White *v.* Toms (1867), 37 L. J. Ch. 204.

447. —— ——.]—F. obtained a patent for umbrella ribs, & enjoyed it uninterruptedly to its conclusion with the exception of an action for damages by H., another patentee, who recovered £300, & a manufacture & sale of the ribs by O. six months before it expired. F. filed a bill & restrained D.:—*Held:* F.'s invention was neither novel nor important, the two requisites to support a patent.—FOX *v.* DELLESTABLE, FOX *v.* JONES (1866), 15 W. R. 194.

Annotation:—**Refd.** Poupard *v.* Fardell (1869), 21 L. T. 696.

448. —— ——.]—The first thing a patentee has to do is to describe the nature of the invention, & when a question arises whether the invention is sufficiently described the first thing the ct. has to do is to ascertain what the invention is. . . . You must proceed to ascertain when the invention is from the specification & for this purpose . . .

Sect. 2.—Novelty: Sub-sects. 1 & 2, A.]

the specification is to be construed as any other document would be construed by a ct. of justice. . . . If in doing that the ct. arrives at the conclusion that the specification is unmeaning the patent is bad. If it arrives at the conclusion *ex facie* part of the invention or the whole of the invention is old, it would be bad. If it arrives at the conclusion *ex facie* that that which is claimed as an invention is no invention at all the patent would be bad. If it arrives at the conclusion *ex facie* . . . that there is not sufficient discrimination in the claim between the limits of what is old & what is new, then again the patent would be bad. . . .

It may then proceed to ascertain whether the patentee has sufficiently described the manner in which the invention is to be performed & for that purpose the ct. may naturally apply for evidence to workmen or to persons skilled in operations of a similar kind. But it will be seen that the ct. addresses itself to that further inquiry when, & only when, it has ascertained what the invention is (LORD CAIRNS, C.).—BOVILL *v.* SMITH (1868), Griffin's Patent Cases (1887), 49, L. C.

449. —— ——.]—The inventor of a painting machine, by his final specification, claimed the various parts of the machine, &, among others, "The shallow sliding tray T., arranged & used substantially in the manner & for the purpose specified," being, in fact, an ordinary movable tray, used for catching the drippings of the paint from the brushes & other parts of the machine, & being a thing commonly known & used before the date of the papers. He also claimed the general construction & combination of the several parts of the machine. Upon an action by the owner of the patent to restrain an alleged infringement:—*Held:* the patent was bad for want of novelty, inasmuch as it was impossible to construe the claim for the sliding tray otherwise than as a distinct claim for a separate invention.—ROBERTS *v.* HEYWOOD (1879), 27 W. R. 454.

450. —— ——.]—DOWNES *v.* FALCON ENGINE WORKS (1886), Griffin's Patent Cases (1884–1886), 77, C. A.

451. —— ——.]—SHARP *v.* BRAUER, BRAUER *v.* SHARP (1886), 3 R. P. C. 193; Griffin's Patent Cases (1884–1886), 205.

452. —— ——.]—MOORE *v.* THOMSON (1890), 7 R. P. C. 325, H. L.

453. —— ——.]—The patentee of a fee water governor, described in his provisional specification, an apparatus acting by "a rod or other attachment"; in his complete, an apparatus acting by a "rod, wire, or other suitable means"; in the drawing attached to the complete the apparatus acted by a "rotatory spindle." The patentee brought an action for infringement, & deft. alleged that the patent was invalid. At the trial it appeared, from pltf.'s own evidence, that the rotatory spindle was the essential part of his invention, & that the rod was not suitable, & was not new:—*Held:* assuming that "rod or other attachment" included a rotatory spindle so that there was no variance, pltf. clearly, in his complete specification, stated that a rod & wire were suitable, & claimed these, & as these were not novel his patent was invalid.—PETHER *v.* SHAW (1893), 10 R. P. C. 293.

454. —— ——.]—ALLEN *v.* DUCKETT & SON (1893), 10 R. P. C. 397.

455. —— ——.]—BENNO JAFFÉ & DARMSTAEDTER LANOLIN FABRIK *v.* RICHARDSON (JOHN) & CO. (LEICESTER), LTD. (1894), 11 R. P. C. 261; 10 T. L. R. 398, C. A.

Annotations:—**Consd.** Marconi & Marconi's Wireless Telegraph Co. *v.* British Radio Telegraph & Telephone Co. (1911), 27 T. L. R. 274. **Apld.** Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369.

456. —— ——.]—This action was for the infringement of a patent relating to various methods of opening & closing fanlights, skylights, ventilators & analogous articles. Deft. denied infringement, & alleged the invalidity of the patent on the grounds of want of novelty, utility & subject-matter, & also of disconformity:—*Held:* pltf.'s letters patent were invalid on the ground of want of novelty, want of subject-matter & disconformity.

I do not think . . . that pltf. has successfully met the case of disconformity put forward by deft. An essential portion of the combination claimed in claims 1 & 2, figs. 1, 2 & 3, is the ratchet & pawl device. There is no trace of this in the provisional specification. The essential point in the provisional specification is the use of a spring in various ways therein described. Of the ratchet & pawl device there is no express mention & I cannot find it implied, as pltf. suggests that I ought to do, in the closing lines of p. 1 of the provisional specification & the top lines of p. 2 (KENNEDY, J.).—ADAMS *v.* STEVENS (1898), 16 R. P. C. 225.

457. —— ——.]—The owners of letters patent for an invention of "Improved metallic carbides applicable for use in the production of acetylene, & means for producing the same," having commenced an action for infringement, defts. denied infringement & alleged want of invention & novelty, relying on (*inter alia*) a United States patent of W. of 1892 & five papers by M. The first claim in the specification was for "the manufacture of crystalline calcium carbide by subjecting lime & carbonaceous matter in suitable proportions to the continued action of electrically generated heat, substantially as hereinbefore described." In the body of the specification the patentee said that he employed "a suitable electric furnace, such as a Siemens arc furnace." Pltfs.' case was that the patentee was the first person to show how to manufacture calcium carbide on a commercial scale; that the patent was confined to using an electric furnace so that the current passed through the material, but not to an arc furnace as distinguished from an incandescent furnace; that there were no sufficient directions in W.'s U.S. patent for the manufacture of calcium carbide; that M. only produced calcium carbide in minute quantities, & avoided electrolytic action, which the patentee discovered was harmless:—*Held:* the patent was anticipated, & moreover there was no subject-matter, the alleged invention being, at the most, the application of a known process to a purpose analogous to that for which it had been used.

If the only thing that can be put forward is the finding out that the actual passing of the arc through the materials produces no injurious electrolysis, it would be contrary to every principle which has ever been established in patent law that that discovery would be made the subject of a patent (LORD HALSBURY, J.).

I need scarcely say that if the patentee had discovered a new material of the character which he mentions, a material having the very valuable commercial properties which he ascribes to it, that would have been a good subject-matter for a patent, & there could have been no question, supposing he had done so, that his patent was a

good one (LORD DAVEY).—ACETYLENE ILLUMINATING CO., LTD. *v.* UNITED ALKALI CO., LTD. (1904), 22 R. P. C. 145, H. L.

Annotation :—**Reld.** British Thomson-Houston Co. *v.* Charlesworth, Peebles (1923), 40 R. P. C. 426.

458. —— ——.]—GRAMOPHONE CO., LTD. *v.* RUHL (1910), 28 R. P. C. 20, C. A.

459. —— ——.]—An Indian patent was granted for "Improvements in the manufacture of a medicinal preparation." The preparation was a substance "banslochan" or "bamboo camphor" that was made from a substance found in some bamboos & called "tabakshir" or "bamboo mannar." The claims were as follows:—"(*a*) In the preparation of the said substance, the treatment of the same when red hot with an acid. (*b*) An oven or stove substantially as described & illustrated for drying, heating, roasting or calcining the said substance." In an action for infringement of the patent it was proved that before the date of the patent, "banslochan" had been made by a process that included washing the crude material in water, treating it at some part of the process with sulphuric acid; & calcining the product in an iron stove at a high temperature:—*Held:* (1) the first claim was invalid on the grounds of want of novelty & prior user, & the patent was therefore invalid; (2) it was unnecessary to examine the second claim.—GOPI LAL *v.* LAKHPAT RAI, LAKHPAT RAI *v.* SRI KISHEN DAS (1923), 40 R. P. C. 147, P. C.

460. Test of novelty.]—Pltfs. were patentees of alleged improvements in the manufacture of stays & corsets, & claimed as their invention the manufacture of stays or corsets in which the seams that unite the several pieces composing the stays or corsets are arranged in a diagonal or oblique direction substantially as & for the purpose specified in their specification. Pltfs. brought their action against defts. for infringement of their patent, claiming an injunction & an account of profits or damages. Defts. denied that pltfs.' invention was novel or useful, & alleged that it had been anticipated by a patent previously granted to W. & B. & by sales prior to the grant of pltfs.' patent of stays & corsets similar to those specified for by pltfs. by W. & B. & other persons named in defts.' particulars of objections. Evidence was adduced in support of pltfs.' & defts.' cases, & the jury found that pltfs.' invention had been infringed, but that it was not novel or useful. Judgment was delivered for defts. with costs.

It was found necessary for the protection of the public that the patentee should enrol a specification, & in that he was required to describe the nature of his invention in order that the rest of the public might know what his invention really is, so that they may not unintentionally infringe it, & so that they may know what they are prohibited from using without his leave and licence. He must also describe the means of performing his invention, in order that when his patent expires people may know how to make it (GROVE, J.).

It must not only have been new in his invention, he must not only, so to speak, have "found it out," but he must have found something out which was not in use before, because if it was in public use before, even by one person, his patent is bad.

Mere private use in the closet, mere experimental working in a laboratory, without publishing the invention, but keeping it a secret with a view possibly of a patent being taken out, would not invalidate it (GROVE, J.).—YOUNG & NEILSON *v.* ROSENTHAL & CO. (1884), 1 R. P. C. 29; Griffin's Patent Cases (1884–1886), 249.

Annotation :—**Consd.** Welsbach Incandescent Gas Light Co. *v.* New Incandescent Sunlight Patent Gas Lighting Co., [1900] 1 Ch. 843.

461. Existence of novelty — When question for judge or jury.]—MORGAN *v.* SEAWARD, No. 442, *ante*.

462. —— ——.]—BREFFITT *v.* WINTERBOTTOM (1852), 20 L. T. O. S. 66.

463. —— ——.]—Whether the thing is new or not is a question of fact (LORD ESHER, M.R.).—EDISON-BELL PHONOGRAPH CORPN., LTD. *v.* SMITH (1894), 11 R. P. C. 389; 10 T. L. R. 522, C. A.

Annotations :—**Reld.** Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co. (1919), 36 R. P. C. 95. **Mentd.** Hatmaker *v.* Nathan (1917), 35 R. P. C. 61.

Necessity for to constitute improvement.]—*See* Sect. 1, sub-sect. 5, B., *ante*.

Necessity for to constitute combination.]—*See* Sect. 1, sub-sect. 7, B. (*a*), *ante*.

SUB-SECT. 2.—AVOIDANCE BY ANTICIPATION OR PRIOR PUBLIC KNOWLEDGE.

A. In General.

464. Anticipation.]—LEADBEATER *v.* KITCHIN, No. 1092, *post*.

465. ——.]—BENNO JAFFE & DARMSTAEDTER LANOLIN FABRIK *v.* RICHARDSON (JOHN) & CO. (LEICESTER), LTD. (1894), 11 R. P. C. 261; 10 T. L. R. 398, C. A.

Annotations :—**Apld.** Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369. **Reld.** Marconi & Marconi's Wireless Telegraph Co. *v.* British Radio-Telegraph & Telephone Co. (1911), 27 T. L. R. 274.

466. ——.]—R., the grantee of a patent for improvements in securing cleats on bulb angles, Z-frames, plain angle irons, & the like, brought an action, for infringement thereof, against P. & co. P. & co. contended (*a*) that the patent was anticipated by what they had themselves done prior to the date thereof; (*b*) that there was no utility in the invention, as it had never been put into practice; (*c*) that the patent was void for want of subject-matter:—*Held:* anticipation was not proved, want of utility was not established, but, having regard to prior knowledge, the patent was void for want of subject-matter.—ROCKLIFFE *v.* PRIESTMAN & CO. (1898), 15 R. P. C. 155.

467. ——.]—A patent was granted to N. in 1898 for "The manufacture or production of acetyl salicylic acid." The claims in the specification

460 i. *Test of novelty.*]—In deciding whether a machine, patented as an entire invention, is an imitation & piracy of another machine previously patented as an entire invention the question is—is the later patented machine substantially the same as the earlier one?—KINMOND *v.* JACKSON, KINMOND *v.* LAWRIE, 1 C. L. R. 66.—**IND.**

p. *Existence of novelty—Effect of grant of foreign patent.*]—*Held:* the grant of a foreign patent is conclusive in this colony as to the novelty & utility of the invention & the patentee's rights.—CABOT S. WHALING CO. *v.* NEWFOUNDLAND S. WHALING CO. (1905), 9 Nfld. L. R. 122.—**NFLD.**

PART IV. SECT. 2, SUB-SECT. 2.—A.

464 i. *Anticipation.*]—A patent for prisms intended for use in deflecting the course of rays of light falling obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses or shops, is not void for anticipation by reason of prior patents for prisms for use where the light falls vertically or obliquely on glass placed horizontally, as in pavements.—LUXFER PRISM CO. *v.* WEBSTER & PARKES (1902), 8 Exch. C. R. 59; 22 C. L. T. 426.—**CAN.**

464 ii. ——.]—LAROSE *v.* AUBERTIN (1907), 4 E. L. R. 82.—**CAN.**

464 iii. ——.]—MURCHLAND *v.* NICHOLSON (1893), 10 R. P. C. 417.—**SCOT.**

464 iv. ——.]—ROSE'S PATENTS CO., LTD. *v.* BRABY & CO., LTD. (1894), 21 R. (Ct. of Sess.) 1107; 31 Sc. L. R. 474.—**SCOT.**

Sect. 2.—Novelty: Sub-sect. 2, A.]

were for two processes of manufacture of the acid for the alleged new body, & for its use for therapeutic purposes. Pltfs. alleged that, by the method of recrystallisation from dry chloroform adopted by them, the acid, which was sold under the name of "aspirin" & used in medicine, had been for the first time prepared in a state of purity. Defts. alleged that K. in 1869 had published a description of the preparation of the acid by one of the said processes, that as so prepared the acid contained a small proportion of impurity, but that this impurity did not produce any difference of therapeutic effect, & that it could be removed by recrystallisation from boiling water as described by K.:—*Held:* the patent was for acetyl salicylic acid as a new body & not for the process of purification, & the patent had been anticipated & was invalid.

Semble: the patent would have been invalid even if it had been confined to the process of purification adopted.—FARBENFABRIKEN VORMALS FRIEDRICH BAYER & Co. *v.* CHEMISCHE FABRIK VON HEYDON (1905), 22 R. P. C. 501.

468. —— Of part of invention.]—A specification is not invalid by reason of its describing an invention part of which was not new at the date of the patent, if, after eliminating what was old, a residue is left of sufficient utility, in which case the residue if properly claimed will be a proper subject-matter for the grant of letters patent.—FREARSON *v.* LOE (1878), 9 Ch. D. 48; 27 W. R. 183.

Annotation:—**Refd.** British United Shoe Machinery Co. *v.* Simon Collier (1910), 26 R. P. C. 534.

469. —— —— Essential part.]—THIERRY *v.* RICKMANN, No. 284, *ante*.

470. —— —— Main claim.]—In cases where the main claim is shown to have been anticipated & the very minimum of invention is left, every precaution should be taken to limit the patent to so much of the claim as is in reality an invention, & the position of a master patent is not to be discussed in any narrow spirit.—*Re* SACHSE'S APPLICATION (1900), 18 R. P. C. 221.

471. —— By registration of trade design—By patentee or stranger.]—On Nov. 8, 1901, pltfs. applied for a patent for improvements in frames for motor cycles, & delivered a provisional specification. On Nov. 18, 1901, pltfs. obtained registration of a design for motor cycles. On Aug. 8, 1902, pltfs. delivered a complete specification for the patent which was accepted on Oct. 23, 1902, & the patent was afterwards granted bearing date Nov. 8, 1901. The complete specification contained a drawing identical with the registered design. In an action by pltfs. to restrain the infringement of the design:—*Held:* the validity of the registration of the design was not affected by the subsequent grant of the patent of prior date.

A patent right in an article & a copyright in a design for the same article may co-exist, but the registration of a design which secures mechanical advantages may, as an anticipation, prevent the grant of a subsequent valid patent for the article, & that whether appct. for the patent be the proprietor of the design or a stranger.

A patentee, who registers a design for an article after he has applied for a patent for it, & before the delivery of a complete specification containing a drawing of the article identical with the registered design, is not, by the subsequent grant of a patent bearing the date of his application, estopped from saying that the design was new & original at the date of registration.

In most cases it will be very difficult for a patent right in respect of a new article & a copyright in a registered design for the shape of the article to co-exist. But in such circumstances as those of the present case the two rights, being not necessarily the same, might co-exist, though the right which was second in point of date must be held subject to the first right. The grant of the patent in such a case does not destroy the effect of the registration of the design which was valid at the date when it took place, & this whether the owner of the patent & the owner of the design are the same person or different persons.—WERNER MOTORS, LTD. *v.* GAMAGE (A. W.), LTD., [1904] 2 Ch. 580; 73 L. J. Ch. 770; 91 L. T. 588; 53 W. R. 167; 20 T. L. R. [illegible] 21 R. P. C. 621, C. A.

Annotations:—**Distd.** Boustead *v.* Dempster Moore (1907), 25 R. P. C. 121. **Refd.** Rose *v.* Pickavant (1923), 40 R. P. C. 320.

472. —— Whether court bound by prior decisions as to—Admissibility of documents not previously before court.]—HIGGINSON & ARUNDEL *v.* PYMAN, No. 339, *ante*.

—— **Prior user.**]—*See* Sub-sect. 2, B., *post*.

Prior publication.]—*See* Sub-sect. 2, C., *post*.

473. Prior public knowledge.]—There are two modes by which an invention can be made public. The one is by a publication in fact, or by user, such as that by the user alone the invention becomes a part of the general stock of public information; the other is by a publication in law. There is a publication in law of an invention in this country when the inventor of it, whether an Englishman or a foreigner, makes, either by himself or his agent, a written description of it, puts that into a book, & sends it to a bookseller here to be published by him; & it is not necessary to prove further that any one volume of the book has been sold.

Where upon a bill filed by pltfs. for an injunction to restrain deft. from infringing a patent of theirs, it appeared that a plan identical with that of the pltfs. had been described in a work published in Paris & sent over here for sale, & a few copies of the work were actually sold here prior to the date of pltfs.' specification:—*Held:* they were not the first inventors of the plan, & the injunction was refused accordingly.—LANG *v.* GISBORNE (1862), 31 Beav. 133; 31 L. J. Ch. 769; 6 L. T. 771; 8 Jur. N. S. 736; 10 W. R. 638; 54 E. R. 1088.

Annotations:—**Consd.** Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531; Harris *v.* Rothwell (1887), 35 Ch. D. 416. **Refd.** United Telephone, Co. *v.* Harrison, Cox, Walker (1882), 46 L. T. 620.

474. —— Exhibition in shop.]—Deft. was the owner of a patent for an invention similar to that of pltf., for which he obtained provisional protection about six weeks before the date of pltfs.' patent, & which he had used publicly before the

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473 i. *Prior public knowledge.*]—*Held:* the alleged invention the subject of the application was substantially identical with that already known, & was therefore not novel.—LINOTYPE CO., LTD. *v.* MOUNSEY 1909), 9 C. L. R. 194.—**AUS.**

473 ii. ——.]—Validity of a patent must be decided according to the state of knowledge at the date of the patent.—BITULITHIC & CONTRACTING, LTD. *v.* CANADIAN MINERAL RUBBER CO. & CALGARY (1915), 8 W. W. R. 207; 25 D. L. R. 827.—**CAN.**

473 iii. ——.]—To determine whether an invention involves a new idea or not the invention must be viewed in the light of the knowledge possessed by people engaged in the class of business for which the invention is designed, at the time of application for a patent for the invention.—WALSH *v.* SHEELEY, [1911] T. P. D. 1.—**S. AF.**

same date :—*Held :* pltfs.' patent was invalid upon the ground that the alleged invention was the same combination as that which deft. had already used publicly, with a modification which was not the subject of a patent. Deft. had had an experimental article made for him which had been made in the shop of the person employed to make it & it was alleged that what had taken place had amounted to publication. The patent was invalid on the further ground that it was the fair conclusion from the evidence that some English people, under no obligation of secrecy arising from confidence, or good faith towards the patentee, knew of the invention at the date of the patent (FRY, L.J.).—HUMPHERSON *v.* SYER (1887), 4 R. P. C. 407, C. A.

Annotations :—**Consd.** Blank *v.* Footman, Pretty (1888), 39 Ch. D. 678 ; Tickelpenny *v.* Army & Navy Co-op. Soc. (1888), 5 R. P. C. 405. **Refd.** Elias *v.* Grovesend Tinplate Co. (1890), 7 R. P. C. 455 ; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569 ; Westley Richards *v.* Perkes (1893), 9 T. L. R. 351 ; British Thomson-Houston Co. *v.* Stonebridge Electrical Co. (1916), 33 R. P. C. 166. **Mentd.** Davies *v.* Davies (1887), 56 L. J. Ch. 481.

475. ——.]—It being known that if paranitrotoluolsulpho-acid (called for shortness A) was treated with caustic soda lye a yellow colouring matter B was obtained, which, however, was not a fast dye, B., in 1886, patented a discovery that by treating B with zinc dust or other reducing agents a colourless product C was obtained, which was a valuable basis of colouring dyes. In 1888, B. discovered that if B was treated with oxidisable (dioxidising) substances, he obtained before reaching C a new & valuable dye fast to alkali. He took out a patent for this invention, stating in his specification that a number of oxidisable substances, which he mentioned, could be used & also others : he gave a number of examples of carrying out his process with certain oxidisable substances, & claimed, " The process of producing colouring matters fast to alkali, which will dye cotton yellow, orange to brown, without mordant by the action of suitable oxidisable substances & free alkalies upon A under heat, substantially as described." The owners of this patent brought the present action for infringement of this patent against K. K. had taken out a subsequent patent, but did not work exactly according to it. K. treated a product similar to B with ferro sulphate, an oxidisable substance, but not mentioned by B., & used two steps in the process instead of one. K. denied infringement, & alleged B.'s patent to be invalid on the ground (*a*) that the specification was ambiguous & misleading, because it showed no means for ascertaining what oxidisable substances were not suitable, because the proportions in which the various alternative oxidisable substances were to be used were not stated, nor how the process could be varied to produce the several shades of colour mentioned, & the specification entirely failed to state the chemical nature of the compound, the product of the processes ; (*b*) that the claiming clause was too general as it stated other oxidisable substances could be used which would include zinc dust, the action of which on A was already known, & while claiming colouring matters, did not indicate the processes to produce particular shades ; (*c*) that the alleged invention was not new ; & (*d*) was anticipated by B.'s 1886 specification & other publications ; (*e*) that owing to general public knowledge there was no subject-matter. K. also contended that the substance he started with was not identical with B, because produced at a special temperature, which was essential, there was a substantial difficulty in using ferro sulphate, & therefore it was not within the patent ; & there was also a substantial difficulty with regard to using zinc dust, because with that the process might be carried on to produce C instead of the new dye, as there was no sufficient direction in the specification :—*Held :* B.'s discovery of the new dye was a valuable & ingenious one ; it was not anticipated by B.'s previous patent, or the other publications, & there was no prior knowledge which took away the merit of the invention ; it was not necessary for the patentee to specify all the oxidisable substances which could be used, or to point out those which ought rather to be avoided ; ferro sulphate could be effectively used with pltf.'s process by taking ordinary precautions known to chemists ; with regard to zinc dust the patentee told the public to go on as long as the colouring matter was formed, & so gave a sufficient direction, & zinc dust was suitable with ordinary precautions, though not so suitable as other substances ; in giving the best methods to be used & examples of the best oxidisable substances, the patentee had given sufficient information, although he had not given a chemical theory of this operation ; as to the use of substances of which no examples were given, it was easy for chemists to work them by comparison with the given examples ; it was not necessary for the patentee to show how to obtain the various shades of colour, or to state the chemical nature of the compound ; the claim was not too general ; K., in effect, had taken the same substance as B & treated it with an oxidisable substance, which was within pltf.'s patent, using pltf.'s process, & obtaining pltf.'s result, & had infringed.—LEONHARDT & CO. *v.* KALLE & CO. (1895), 12 R. P. C. 103.

Annotation :—**Refd.** Crosfield *v.* Techno-Chemical Laboratories (1913), 29 T. L. R. 378.

476. ——.] — ROCKLIFFE *v.* PRIESTMAN & CO., No. 466, *ante*.

477. ——.] — The owner of letters patent for " Means or apparatus for effecting the simulation of flames of fire for spectacular purposes " having commenced an action for infringement, dett. denied infringement, & alleged that the patent was invalid on the grounds of prior publication, prior user, & want of subject-matter. The first claim of the specification was : " In stage appliances, an openwork base, streamers attached to the said base, & means for directing currents of air to the base & for illuminating streamers through the base :—*Held :* the alleged invention was not disclosed as a whole in the prior specifications alleged as anticipations, but prior user was established, & at all events there was, in view of the common knowledge of the art, no subject-matter ; & deft., not using streamers, had not infringed.—FULLER *v.* HANDY (1903), 21 R. P. C. 6.

478. ——.]—In an action for infringement of letters patent for " Improvements in or relating to dust collecting apparatus " deft. denied infringement, & alleged that the patent was invalid by reason of want of novelty, & he relied on the prior publication of three specifications :—*Held :* patent was invalid for want of subject-matter.—BIMM *v.* SHOPPEE (1911), 28 R. P. C. 265.

479. ——.]—A patent was granted for " Improvements in or relating to electric switches." The claims, as amended, were as follows :—" (*a*) An electric switch adapted to operate by a quick make & break action by virtue of a compression spring element pivotally co-operating on the one hand with the contact arm & on the other hand with an operating member & which operating member is utilised also for positively displacing the contact arm both in the operation of breaking & in the operation of making throughout or substantially

B. Prior User.

(a) In General.

480. General rule.]—TENNANT *v.* —— (1802), 1 Web. Pat. Cas. 125, n.; *sub nom. Re* TENNANT'S PATENT, 1 Carp. Pat. Cas. 177.

Annotations:—**Consd.** Hill *v.* Thompson (1818), 8 Taunt. 375. **Refd.** Robertson *v.* Purdey (1907), 23 T. L. R. 343.

481. ——.]—(1) The invention must be an improvement for all purposes, not for one only. Cheapness is an improvement, but not alone to be considered.

(2) If known publicly, & practised openly, so that others might acquire the knowledge, the patent void.

(3) Unsuccessful experiment cannot vitiate.

(4) The user which will vitiate must not be such as can be classified as experiment, or secret, but must be public. The question of public use is entirely for the jury.

(5) The specification of a prior patent, enrolled after granting a subsequent patent, & containing part of the invention claimed by such subsequent patent, is not conclusive against its validity.

(6) There may be many discoverers starting at the same time, many rivals that may be running on the same road at the same time, & the first which comes to the Crown & takes out a patent, it not being generally known to the public, is the man who has a right to clothe himself with the authority of the patent, & enjoy its benefits (TINDAL, C.J.).

(7) If this . . . was at the time these letters were granted in any degree of general use; if it was known at all to the world publicly & practised openly, so that any other person might have the means of acquiring the knowledge of it, as well as

488. ——.]—Evidence was given on behalf of deft. of the user of almost the identical thing claimed by both patentees prior to the date of both patents:—*Held:* both patents bad.—HILL *v.* ADAMS (1893), 10 R. P. C. 102.

489. ——.]—The owners of a patent for improvements in fire grates brought an action for infringement. The first claim was for "the employment of an adjustable canopy A, to act as a flap or damper, whereby the distance of the said canopy A from the firebrick back G can be determined as desired substantially in the manner herein described & illustrated." Defts. denied infringement, & alleged that invalidity of the patent on various grounds, including want of novelty & anticipation by K.'s stove. Canopies & backs of pltf.'s shape were old at the date of the patent, & were also combined in the K. stove; but pltfs. alleged that their claim was confined to a stove in which the canopy was placed in a special position relatively to the back, namely, with the bottom of the canopy immediately level with the top of the back, that in K.'s stove the top of the back was above the level of the top of the canopy, & that this made a difference, inasmuch as in K.'s stove the canopy acted as a blower, in pltf.'s as a damper:—*Held:* on the true construction of the claim, the patentee claimed for the general combination of canopy & back, & his alleged invention was anticipated by K.'s stove.—CROSTHWAITE *v.* MOORWOOD, SONS & CO. (1894), 11 R. P. C. 555.

490. ——.]—In an action by S., the patentee of a patent for improvements in type or blocks for printing purposes, against J., the patent was held valid, & not anticipated by a previous specification of G., as there was no evidence that G.'s process could

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PART IV. SECT. 2, SUB-SECT. 2.—B. (a).

480 i. *General rule.*]—On motion by the deft. for a new trial in an action for the alleged infringement of a patent right:—*Held:* setting where it was proved that the article patented was in public use or on sale in the province with the consent of the patentee at the time of the application for the patent, pltf. could not recover.—BERNIER *v.* BEAUCHEMIN (1858), 2 L. C. J. 289.—**CAN.**

480 ii. ——.]—Canadian patent is void if the invention has been in public use or on sale anywhere, with the consent or allowance of the inventor, for more than one year prior to the application for such patent.—CONCRETE APPLIANCES CO. *v.* ROURKE, MCDONALD, ETC. (1915), 8 W. W. R. 6.—**CAN.**

480 iii. ——.]—*Held:* if one of the parts of the process proved to have been in previous use, it would be sufficient to invalidate the patent.—TEMPLETON *v.* MACFARLANE (1848), 10 Dunl. (Ct. of Sess.), 796; 20 Sc. Jur. 263.—**SCOT.**

be, or been, practically used. S. now brought an action against D. for infringement of the same patent: D. alleged anticipation by G., & brought evidence to show that G.'s invention was practically used. The processes of G. & S. were substantially similar, G.'s being confined to purposes of ornamentation, S. including that & also printing letterpress:—*Held:* S.'s patent covered the previous process of G., & as G.'s process had been commercially used, it was an anticipation.—SHAW *v.* DAY & COLLINS, LTD. (1894), 11 R. P. C. 185.

491. ——.]—Pltfs. sued for infringement of a patent for an improved process of manufacture whereby resinous matters were removed from paper pulp by treatment with paraffin or similar oil. Defts. & others had previously used the same solvents in the same manner for another purpose, namely, softening the resinous deposits on the plant & machinery; but, when they started with perfectly clean plant, they attained pltfs.' result:—*Held:* the patent was invalid for want of subject-matter.

A discovery that a process in use before the patent will have an extra benefit attached to it if the machinery to be used in the process is thoroughly cleaned is not patentable.—PARTINGTON *v.* HARTLEPOOLS PULP & PAPER CO., LTD. (1895), 12 R. P. C. 295.

492. ——.]—In 1886, a patent was granted to R. for "Improvements relating to the production of light by the incandescence of refractory materials." The patent was intended to meet the difficulty in the transmission of Welsbach mantles after ignition, & the specification stated "that the difficulty might be overcome by dipping the mantle after ignition into a liquid which would thoroughly penetrate the interstices of the material, & would afterwards set to such a degree of hardness as to protect the material from danger of breakage in packing or handling, & which could afterwards be removed without mechanical injury to the mantles & without leaving any objectionable residue." It then stated that a satisfactory method consisted in dipping into a hot solution of volatile hydrocarbon mixed with paraffin wax or paraffin alone, & described the process for paraffin. Then it continued, "Other materials may be employed so long as they set hard at ordinary temperatures, &, etc." The claims were (*a*) the treatment of the mantles after ignition by immersion in a liquid which will afterwards set & will burn away without prejudicial results to the mantles for the purposes set forth; (*b*) the use of paraffin substantially as described in the treatment claimed under the first claim. An action for infringement having been brought on this patent by the S. co. against the I. co., alleging infringement by the use of collodion with various solvents, the defences relied on at the trial were (*a*) that the patentees were not the true & first inventors, the invention having been communicated to them by W.; (*b*) non-infringement; (*c*) want of utility; (*d*) want of novelty by reason of anticipation by an invention of Bright in the year 1848 for stiffening the wicks of lamps by dipping into wax, & by the importation into this country of Clamond's magnesium baskets coated, for strengthening purposes, with dextrine or collodion, & the subsequent burning of them:—*Held:* according to the proper construction of the specification, it did not claim any setting except that effected by cooling; that the invention was not anticipated by Bright, & the importation & burning of Clamond's baskets, coated as mentioned, was not a publication of Clamond's process, although, if it had been, Clamond's process would have constituted an anticipation; that the alleged communication of the invention by W. was not established; that utility was established; the use of collodion was not an infringement, since the of collodion is not by cooling but by evaporation. — SUNLIGHT INCANDESCENT GAS LAMP CO., LTD. *v.* INCANDESCENT GAS LIGHT CO., LTD. (1897), 14 R. P. C. 757.

493. ——.]—The patentee of a patent for "Improvements in & connected with ice tanks" brought an action for infringement of his patent. The patentee had six claims claiming substantially for a combination of a number of parts. Defts. pleaded that pltf.'s alleged improvements contained no invention, & were anticipated by prior specifications, prior user, & prior publication:—*Held:* pltf.'s invention was anticipated, & his patent was invalid for want of subject-matter.—SIDDELEY *v.* LONDON HYGIENIC ICE CO., LTD. (1897), 14 R. P. C. 514.

494. ——.]—The owner of a patent for "Improvements in distributing electricity, & apparatus therefor" sued defts. for infringement. Defts. alleged that the patent was invalid by reason of anticipation in several documents, prior user, & want of subject-matter:—*Held:* the letters patent were invalid because of want of subject-matter, prior user had been established, & the alleged invention was contained in prior publications.—RUCKER *v.* LONDON ELECTRIC SUPPLY CORPN., LTD. (1900), 17 R. P. C. 279.

495. ——.]—This was an action for infringement of a patent for improvements in gaiters. Defts. alleged the invalidity of the patent on various grounds, including want of subject-matter & prior user:—*Held:* pltfs.' patent was bad for want of subject-matter, & two of the prior users alleged by defts. were proved.—STOHWASSER & WINTER *v.* HUMPHREYS & CROOK (1900), 18 R. P. C. 116.

496. ——.]—Letters patent having been granted in 1898 to B. for "improvements in & relating to stone breaking & ore crushing machines" the owners of this patent commenced in 1903 an action for infringement of the same. Deft. denied infringement, & alleged the invalidity of the patent on the grounds (*inter alia*) of want of subject-matter & of anticipation by prior user. It appeared that in 1885 B. had obtained a patent for a stone breaking double screen machine driven from the bottom; that the 1898 patent sued on was for applying top driving instead of bottom driving in B.'s old machine; that top driving as applied to single screen machines was very common & had been used by deft. himself long before 1898; & that top driving & bottom driving were two interchangeable alternatives perfectly familiar to engineers. Evidence was also given that a machine had been erected & used by S. many years prior to 1898 at Leyburn Quarry which in all material respects resembled the patented machine:—*Held:* the action must be dismissed on the ground of want of invention, & prior user by S. had been established.—BAXTER *v.* MARSDEN (1904), 22 R. P. C. 18.

497. ——.]—In 1901, a patent was granted to M. for "Improvements in heat non-conducting materials." The claim was: "The use of the waste residue, obtained in the manufacture of tartaric acid, in combination with other non-conducting materials, especially with those of a fibrous nature, & with agglutinating substances so as to form a composition, easily applied to steam pipe boilers & other vessels to prevent the radiation of heat." In 1903, M. commenced an action for

Sect. 2.—*Novelty : Sub-sect.* 2, *B.* (*a*) & (*b*) *i.* *ii.*]

infringement against L. & co., Ltd., who denied infringement & alleged that the patent was invalid for want of subject-matter & novelty, & by reason of prior user, prior publication, & prior grant :—*Held :* the patent was invalid for want of subject-matter, & by reason of prior user of the invention.

MCLAY *v.* LAWES & CO., LTD. (1905), 22 R. P. C. 199.

498. ——.]—The patentees of an invention of "Improvements in attaching bindings to brims of hats," who had been successful in an action against the users of a machine which they alleged to be an infringement of the patent, brought an action against the makers of the machine. Evidence was produced by defts. that the method of binding hats which was carried out by pltf.'s invention had for many years been practised in England by the use of other machines, which they alleged to be an anticipation of pltf.'s invention :—*Held :* the invention was anticipated, & pltf.'s patent was invalid.—GAMMONS *v.* SINGER MANUFACTURING CO. (1905), 22 R. P. C. 452.

499. ——.]—The owner of a patent for improvements in machinery for scouring & washing wool commenced an action for infringement, in which deft. alleged the invalidity of the patent on the grounds of want of subject-matter & prior user. Pltf. alleged that his patented combination was a washing tank, that such tanks formerly had an upper trough with a false bottom of perforated plates through which the dirt fell to the bottom of the tank, & that the plates had to be removed for the purpose of cleaning out the tank, & that the novel features of his combination were a clear space at the side of the tank through which brushes could be inserted without removing the plates, & that the bottom of the tank sloped laterally or was curved for the purpose of allowing the dirt to accumulate at one part of the bottom of the tank where it could be most easily reached. In one of the alleged prior users the washing trough was, for a purpose other than cleaning, made to taper & thus a tapering space was formed at one side, & deft. alleged that the tank was cleaned out by putting brooms down through this clear space. Pltf. contended that it was not possible so to clean out the tank in question. The tank had a curved bottom :—*Held :* there was no patentable invention, & therefore no subject-matter, & further, even if there was subject-matter, the invention had been anticipated by the prior user above referred to.—MCNAUGHT *v.* DAWSON (1906), 23 R. P. C. 219.

500. .]—NORTON *v.* BARKER (W. H.) & SON, No. 380, *ante*.

501. ——.]—GOPI LAL *v.* LAKHPAT RAI, LAKHPAT RAI *v.* SRI KISHEN DAS, No. 459, *ante*.

502. ——.]—In 1911 a patent was granted for "Improvements in & connected with cardboard boxes & the like." In 1922 a patent for "Improvement in & connected with cardboard fibre board containers & the like" was granted to one of the grantees of the patent of 1911. In two actions, tried together, for infringement of the patents, pltfs. alleged infringement & stated that their boxes were thief-proof, & had had in the case of the patent of 1911 a great, &, in the case of the patent of 1922, a substantial, commercial success. The patent of 1911 had been inadvertently allowed to lapse between the commencement of the action & the trial. Defts. contended that the patents were invalid for want of novelty & subject-matter :—*Held :* as to the patent of 1911, claim 1 was invalid by reason of prior user, & the alleged invention was not novel owing to the prior publication of certain specifications & to prior user ; & as to the patent of 1922, claims 2 & 3 were deficient in novelty & subject-matter.—COLE *v.* ALLIANCE BOX CO., LTD., COLE & SMALLDRIDGE *v.* SAME (1927), 44 R. P. C. 273.

503. User in ignorance—Of method of principle.]—The specification of a patent improved chair stated the invention to consist "in the application of a self-adjusting leverage to the back & seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back." Before this patent was taken out, a chair had been made & sold by B. to which the same mechanical principle had been applied, although the operation of it was incumbered by some additional machinery :—*Held :* the patent could not be sustained, inasmuch as the specification claimed more than the patentee had invented, & would have precluded B. from making his own chair.

Semble : had the specification been for an improvement only in the application of the principle, it would have been good.—MINTER *v.* MOWER (1837), 6 Ad. & El. 735 ; 1 Nev. & P. K. B. 595 ; Will. Woll. & Dav. 262 ; 6 L. J. K. B. 183 ; 112 E. R. 282.

504. User in part.]—MINTER *v.* MOWER, No. 503, *ante*.

505. ——.]—A patent was taken out for "a new & improved mode of manufacturing silk, cotton, linen & woollen fabrics." The specification, & a disclaimer, subsequently filed under 5 & 6 Will. 4, c. 83, set forth that the patentees claimed "the mode hereinbefore described of producing or preparing stripes of silk, cotton, woollen, or linen, or of a mixture of two or more of these materials, in such a manner that the weft or lateral fibres of both cut edges of each stripe are all brought up on one side, & into close contact with each other, & the reweaving of such stripes with the whole fur or pile uppermost, into the surfaces of carpets, etc." It appeared that one of these processes was old. The judge directed the jury that if one was new, the patent could be supported for the combination of them, & would only be invalid if there had been a public use of both before the date of the patent :—*Held :* this direction was erroneous, & the patent was void.—TEMPLETON *v.* MACFARLANE (1848), 1 H. L. Cas. 595 ; 9 E. R. 893, H. L.

Annotation :—**Apld.** United Horse Nail Co. *v.* Stewart (1885), 2 R. P. C. 122.

506. ——.]—(1) A patent is not invalid because part of the invention claimed has been anticipated so long as there is a sufficient amount of utility & advantage to be derived from what remains after striking out the part so anticipated ; & in such a case the remaining part is a proper subject for the grant of letters patent.

(2) Though an invention protected by letters patent may be imitated with impunity by way of *bonâ fide* experiment, yet, where a right is claimed to the manufacture, even to a limited extent, of articles so protected for profit, & the experiments are conducted with a view thereto, such a proceeding is an infringement of the patent & will be restrained by injunction.—FREARSON *v.* LOE (1878), 9 Ch. D. 48 ; 27 W. R. 183.

Annotation :—*As to* (1) **Refd.** British United Shoe Machinery Co. *v.* Collier (1910), 26 R. P. C. 534.

507. Sufficiency of user—User by one person.]—STEAD *v.* WILLIAMS, No. 20, *ante*.

508. Prior user followed by abandonment.]—HOUSEHILL COAL & IRON CO. *v.* NEILSON, No. 13, *ante.*

509. Length of user.]—HOUSEHILL COAL & IRON CO. *v.* NEILSON, No. 13, *ante.*

510. Secret user.]—YOUNG & NEILSON *v.* ROSENTHAL & CO., No. 460, *ante.*

511. User not amounting to publication.]—ROBERTSON *v.* PURDEY, No. 517, *post.*

512. Casual or accidental user.]—BOYCE *v.* MORRIS MOTORS, LTD., No. 412, *ante.*

(b) What Amounts to Prior User.

i. *In General.*

513. Question for jury.]—CORNISH & SIEVIER *v.* KEENE & NICKELS, No. 481, *ante.*

514. ——.]—(1) The question of public use is for the jury.

(2) Specification addressed to persons of skill.

The . . . point is, whether pltf. has given such a description in his specification as would enable a workman of competent skill (it would not enable me, of course, to make anything of the sort, or any person who is not a person of skill conversant with the trade) to carry the invention into effect (COLTMAN, J.).—ELLIOTT *v.* ASTON (1840), 1 Web. Pat. Cas. 222.

515. Secret user.]—CORNISH & SIEVIER *v.* KEENE & NICKELS, No. 481, *ante.*

516. User for analogous purpose.]—PARTINGTON *v.* HARTLEPOOLS PULP & PAPER CO., LTD., No. 491, *ante.*

517. Evidence to be examined with great care—Where invention a commercial success.]—Where an invention has proved a commercial success, evidence of anticipation by prior user must be examined with the greatest care & caution.

The owner of a patent, No. 22,894 of 1894, for "improvements in drop-down guns" brought an action for infringement. The invention consisted of certain improvements in single trigger guns to prevent involuntary discharge of the second barrel after the firing of the first. A firer, on the recoil of the gun, unconsciously releases the trigger & involuntarily & subconsciously gives it a second pull. An interceptor was introduced by the patentee, which prevented the trigger mechanism from engaging the second barrel, but which was removed by the second or involuntary pull. Defts. pleaded (*inter alia*) that the patent was invalid: (*a*) by reason of the prior manufacture, use, & publication of certain guns containing the invention during the year 1883; (*b*) by reason of the manufacture & use of guns similarly constructed during the months of July to Nov. 1894; (*c*) that the patentee was not the true & first inventor, who was N.; & (*d*) by the prior grant to N. of a patent for the same invention, No. 13,130 of 1894. Pltf. in his reply stated that the alleged prior grant was (*e*) for a two-pull as distinguished from his three-pull mechanism; or (*f*) alternatively, if it was for a three-pull mechanism it was invalid for disconformity or for insufficiency of the specification; & (*g*) that the plea of prior grant was bad in law:—*Held:* prior invention by another will not of itself avoid a patent granted to a subsequent true inventor; N. had in fact invented pltf's device before the date of his patent, but it was not published before that date; the alleged user by firing the guns at a private range was not of such a nature as to invalidate the subsequent patent of pltf.; the plea of prior grant was good in law, but on the true construction of N.'s specification there was no prior grant of the patented invention, N.'s patent being invalid for insufficiency; there was prior user of the invention by the manufacture & use of the guns made in 1883, & the patent was invalid on that ground.—ROBERTSON *v.* PURDEY (1907), 23 T. L. R. 343; 24 R. P. C. 273.

Annotation:—**Refd.** Crosthwaite Fire Bar Syndicate *v.* Senior, [1909] 1 Ch. 801.

518. User of different material & ingredients.]—A patent was granted in 1901 for "improvements in conditioning or improving the quality of recently ground flour, semolina, or the like." One of the claims was as follows: "In the process of conditioning flour & the like, passing the same with full exposure through an atmosphere containing a gaseous oxide of nitrogen or chlorine or bromine oxidising agent in the gaseous or vapourised state." It was stated in the complete specification that, preferably, nitric acid or nitrogen peroxide was caused to act upon the flour by forcing a current of air over or through the oxidising agent employed, & into contact with the flour, & an apparatus for the purpose was described & shown. The use of ozone as an oxidising agent was excluded. In the provisional specification it was stated that "the invention consists essentially in exposing the flour to the action of nascent oxygen or a gaseous oxidising agent whereby nascent oxygen is produced in the flour," & that the oxidising agent preferred was air passed through nitric acid. In an action for infringement of the patent defts. alleged (*inter alia*) that the patent was invalid by reason of disconformity, inutility, insufficiency & false suggestion, but at the trial substantially their only allegation was want of novelty through prior public general knowledge, prior publication & prior user, & want of subject-matter in so far as it was involved in want of novelty. The alleged anticipations chiefly relied upon were the specifications of H. & F., & user by H. In all of these electrical methods were employed:—*Held:* notwithstanding new evidence as to F.'s process, & although the processes of H. & F. could be used to produce nitrogen peroxide, the specifications would not have led to the use of it, nitrogen peroxide being regarded as an impurity by F., & these specifications were not prior publications of pltfs.' invention; there was good subject-matter; in the instances of alleged prior user a brush & not a sparking discharge was used, & the predominant gas was ozone & not nitrogen peroxide & no prior user was established; the patent was valid & had been infringed.—FLOUR OXIDIZING CO., LTD. *v.* CARR & CO., LTD. (1908), 25 R. P. C. 428.

Annotation:—**Refd.** Metropolitan Vickers Electrical Co. *v.* British Thomson-Houston (1925), 43 R. P. C. 76.

ii. *Public User.*

519. Distinguished from secret or private use.]—CARPENTER *v.* SMITH, No. 574, *post.*

520. ——.]—(1) The specification of a patent may describe the process to be adopted so insufficiently as to invalidate the patent, & yet disclose enough to show that what is claimed by a subsequent patent is not new.

PART IV. SECT. 2, SUB-SECT. 2.-B. (b) i.

q. *User in different manufacture.*—It is not sufficient, to establish prior use of a patent, that the invention patented had been employed in some different manufacture than that for which the patent had been taken out.—WILSON *v.* BLACK (1847), 10 Dunl. (Ct. of Sess.) 1.—**SCOT.**

r. *Proof of prior user.*]—*Held:* the uncorroborated evidence of two persons interested in voiding the patent, to the effect that they had manufactured & sold articles for a limited period many years before the date of the patent sought to be impugned, could not in the circumstances be accepted as establishing more than an experiment.—DICK *v.* TULLIS (1896), 13 R. P. C. 149.—**SCOT.**

Sect. 2.—Novelty: Sub-sect. 2, B. (b) ii. & iii.]

(2) Whether a specification contains a sufficient description can only be ascertained by experiment; & in making the experiment knowledge & means may be employed which have been acquired since the date of the patent.

(3) A prior publication will not invalidate a patent, unless it has imparted information so as to enable any one working upon it to reckon with confidence on the result.

(4) In order to establish the prior public use of a patented article so as to invalidate the patent, it is not necessary to show that the article had been manufactured for sale.

(5) Where the subject of a patent in England is made in a foreign country, & applied to the purpose for which it was made, & under these circumstances is sent to this country for transmission to another foreign country:—*Held:* this is a sufficient user of the patent in England to constitute an infringement.

(6) Public use of an invention means an use in public, so as to come to a knowledge of others than the inventor, as contradistinguished from the use of it by himself in his chamber.

If, therefore, the evidence which I am about to examine establishes the fact that lead coated with tin by mechanical pressure, & capable of useful application, has upon any occasion been manufactured openly, not by way of experiment, but in the course of business, although not a single piece of the material was actually sold, I should hold that Betts's patent was invalidated (LORD CHELMSFORD, C.).—BETTS *v.* NEILSON, BETTS *v.* DE VITRE (1868), 3 Ch. App. 429; 37 L. J. Ch. 321, 325; 18 L. T. 159, 165; 32 J. P. 547; 16 W. R. 524, 529, L. C.; *affd. sub nom* NEILSON *v.* BETTS (1871), L. R. 5 H. L. 1, H. L.

Annotations:—As to (1) **Refd.** Newman *v.* Pinto (1887), 57 L. T. 31. *As to* (3) **Consd.** Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569. **Refd.** Von Heyden *v.* Neustadt (1880), 50 L. J. Ch. 126. *As to* (5) **Consd.** Nobel's Explosives Co. *v.* Jones (1882), 8 App. Cas. 5. **Refd.** Badische Anilin und Soda Fabrik *v.* Johnson & Basle Chemical Works, Bindschedler, [1897] 2 Ch. 322; British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122. *As to* (6) **Refd.** United Telephone Co. *v.* London & Globe Telephone & Maintenance Co. (1884), 51 L. T. 187. *Generally*, **Consd.** British Thomson-Houston Co. *v.* Sterling Accessories, British Thomson-Houston Co. *v.* Crowther & Osborn, [1924] 2 Ch. 33. **Refd.** Elmslie *v.* Boursier (1869), L. R. 9 Eq. 217; Plimpton *v.* Spiller (1877), 6 Ch. D. 412; Watson *v.* Holliday (1882), 20 Ch. D. 780; United Horseshoe & Nail Co. *v.* Stewart (1888), 13 App. Cas. 401; Saccharin Corpn. *v.* Chemicals & Drugs Co., [1900] 2 Ch. 556; Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind Coope *v.* Same, [1920] 2 K. B. 487.

521. What amounts to public user—Exhibition of model.]—LEWIS *v.* MARLING, No. 440, *ante*.

522. —— Exhibition of abortive machine.]—MURRAY *v.* CLAYTON, No. 316, *ante*.

523. ——.]—HUMPHERSON *v.* SYER, No. 474, *ante*.

524. —— User in private grounds.]—STEAD *v.* WILLIAMS, No. 20, *ante*.

525. —— Prolonged experimental user.]—A contractor for certain harbour works had in the progress of his undertaking invented an apparatus which greatly facilitated the works, but which could only be tested in a place accessible to the public. After having used the apparatus for four months in the progress of the works. he applied for a patent:—*Held:* such user amounted to a dedication to the public, & he was not entitled to a patent.—*Re* ADAMSON'S PATENT (1856), 6 De G. M. & G. 420; 25 L. J. Ch. 456; 27 L. T. O. S. 73; 4 W. R. 473; 43 E. R. 1296, L. C.

Annotation:—**Refd.** *Re* Newell & Elliot & Glass (1858), 4 C. B. N. S. 269.

Experimental user.]—*See* Sub-sect. 2, B. (*b*) iii., *post*.

526. —— User for profit.]—(1) The nature of an invention need only be described generally in the provisional specification, which need not give all the details as to the manner in which the invention is to be carried out.

(2) An experiment performed in the presence of others, which not only turns out to be successful, but actually beneficial in the particular instance, is not necessarily a gift of the invention to the world; but if the inventor on other & subsequent occasions use his invention, & unnecessarily delays his application for a patent, he gives his invention to the world.—*Re* NEWALL, ELLIOT & GLASS (1858), 4 C. B. N. S. 269; 140 E. R. 1087; *sub nom.* NEWALL *v.* ELLIOT, 27 L. J. C. P. 337; 31 L. T. O. S. 180; 4 Jur. N. S. 562; Goodeve's Patent Cases, 326.

Annotations:—As to (1) **Consd.** Moseley *v.* Victoria Rubber Co. (1887), 57 L. T. 142; Siddell *v.* Vickers (1888), 39 Ch. D. 92. **Refd.** Penn *v.* Bibby (1866), 2 Ch. App. 127; United Telephone Co. *v.* Harrison, Cox-Walker (1882), 21 Ch. D. 720; Lucas *v.* Miller (1885), Griffin's Patent Cases (1884–86) 156; Nuttall *v.* Hargreaves, [1892] 1 Ch. 23; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre Co. (1899), 16 R. P. C. 531. *As to* (2) **Distd.** Hoe *v.* Foster (1898), 16 R. P. C. 33. **Refd.** Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569.

527. —— User for purposes not contemplated by patent.]—HARWOOD *v.* GREAT NORTHERN RY. Co., No. 361, *ante*.

528. —— Unsuccessful user of similar invention.]—DAW *v.* ELEY, No. 288, *ante*.

529. —— User on highway—Mechanical device not visible.]—BRERETON *v.* RICHARDSON (1884), Griffin's Patent Cases (1884–86), 54.

530. —— Discussion of plans with architects.]—*Qu.:* whether the mere preparation & discussion of plans between directors & their architects could be an anticipation doubted, especially having regard to *Humpherson* v. *Syer*, No. 474, *ante*.—TICKLEPENNY *v.* ARMY & NAVY CO-OPERATIVE SOCIETY, LTD. (1888), 5 R. P. C. 405.

PART IV. SECT. 2, SUB-SECT. 2.—B. (b) ii.

521 i. *What amounts to public user—Exhibition of model.*]—LIFEBOAT Co. *v.* CHAMBERS BROTHERS & Co. (1891), 8 R. P. C. 418; 28 Sc. L. R. 674.—**SCOT.**

t. —— *User abroad.*]—Action for the infringement of a patent. Plea, that the invention was not new, but had been publicly used & vended in a foreign country:—*Held:* a good answer.—VANNORMAN *v.* LEONARD (1845), 2 U. C. R. 72.—**CAN.**

a. —— ——.]—LEAN *v.* HUSTON (1885), 8 O. R. 521.—**CAN.**

b. —— ——.]—A patent obtained for an invention in Scotland, is invalidated by proof of previous use in England.—ROEBUCK & GARBET *v.* STIRLING (1774), 2 Pat. App. 346.—**SCOT.**

c. —— ——.]—Use of an invention in England previous to the grant of a Scotch patent in regard to the same invention, voids the patent.—BROWN *v.* ANNANDALE & SON (1842), 1 Bell, Sc. App. 70.—**SCOT.**

d. —— *User in workshop.*]—SUMMERS *v.* ABELL (1869), 15 Gr. 532.—**CAN.**

-.]—BONATHAN MANVILLE FURNITURE MANUFACTURING Co. (1871), 31 U. C. R. 413.—**CAN.**

f. —— *Partial user.*]—In an action for the infringement of a patent verdict for patentee & observed that it is no evidence of prior use, if, while the patentee is perfecting his invention his workmen should divulge it, & a partial use of it thereupon take place.—TEMPLETON *v.* MACFARLANE (1847), 10 Dunl. (Ct. of Sess.) 4.—**SCOT.**

523 i. ——.]—Public use does not mean a use or exercise by the public, but a use or exercise in a public manner.—CONCRETE APPLIANCES Co. *v.* ROURKE, MCDONALD, ETC. (1915), 8 W. W. R. 6.—**CAN.**

523 ii. ——.]—In order to support an objecton to the patent on the ground of the want of originality in the invention, founded on alleged discovery & prior use, the evidence must be sufficient to show that the actual invention, as disclosed & set forth in the specification, was not only discovered, but put to public use.—NEILSON *v.* BAIRD (WILLIAM) & Co. (1843), 6 Dunl. (Ct. of Sess.) 51.—**SCOT.**

531. —— User by public without knowledge of invention.]—User of golf balls by members of the public held to constitute prior user of an invention relating to their mode of manufacture, although the persons using them may not have known, or did not know, the contents of the balls or how they were made.—HASKELL GOLF BALL CO., LTD. *v.* HUTCHINSON (No. 2) (1906), 23 R. P. C. 301, C. A.

—— Exhibition at industrial or international exhibitions.]—*See* Patents & Designs Acts, 1907 (c. 29), s. 45, & Patents Rules, 1920, r. 102.

iii. *Experimental User.*

532. Distinguished from trade user.] —WOOD *v.* ZIMMER (1815), Holt, N. P. 58 ; 1 Web. Pat. Cas. 44, n. ; 1 Carp. Pat. Cas. 290, N. P.

Annotations :—**Distd.** Morgan *v.* Seaward (1837), 2 M. & W. 544 ; Bentley *v.* Fleming (1844), 1 Car. & Kir. 587.

533. ——.]—WALTON *v.* BATEMAN, No. 64, *ante.*

534. ——.]—HOUSEHILL COAL & IRON CO. *v.* NEILSON, No. 13, *ante.*

535. ——.]—The use of a process for the purpose of trade, & not of experiment, will invalidate subsequent patent.

To a declaration for infringement of a patent, deft. pleaded that the invention was not new, but had been publicly & generally practised & used in England before the date of the patent. It was proved that, before the date of the patent, five different persons had used the process independently, three of them without concealment, & all five had publicly & generally sold, for their own profit, the article thereby produced. It did not appear that there had been any other publication of the invention :—*Held :* the plea was proved.—HEATH *v.* SMITH (1854), 3 E. & B. 256 ; 2 Web. Pat. Cas. 268 ; 2 C. L. R. 1584 ; 23 L. J. Q. B. 166 ; 22 L. T. O. S. 257 ; 18 Jur. 601 ; 2 W. R. 200 ; 118 E. R. 1136.

Annotations :—**Apld.** Westley Richards *v.* Perkes (1893), 9 T. L. R. 351. **Consd.** Robertson *v.* Purdey (1907), 23 T. L. R. 343.

536. ——.] —*Re* NEWALL, ELLIOT & GLASS, No. 526, *ante.*

537. ——.]—Pltf. as the grantee of a patent for improvements in the manufacture of manure sued deft., who was also the grantee of letters patent of a later date for an analogous invention, for infringement. Deft. alleged that pltf.'s invention was not new, &, among other objections to the validity of pltf.'s patent, alleged that prior to the date thereof pltf.'s letter patent had been used by certain specified firms or persons :—*Held :* deft.'s witnesses proved prior user, amounting to publication, & the deft. was entitled to a verdict & judgment with costs.

When it is said that a process has been disclosed or an invention has been disclosed by means of user, it is not necessary that such user should be a user by the public proper, provided only there is a user in public, that is to say, in such a way as contra-distinguished from a mere experimental user with a view of patenting a thing which may or may not be existing (POLLOCK, B.).—CROYSDALE *v.* FISHER (1884), 1 R. P. C. 17 ; Griffin's Patent Cases (1884–1886), 73.

538. ——.]—LISTER *v.* NORTON BROTHERS & CO., No. 403, *ante.*

539. ——.]—In 1885, a patent was granted for improvements in a certain portion of web printing & folding machines, & in 1896 the proprietors of the patent commenced an action against a firm for infringement of the same, the particular part alleged to be infringed being the longitudinal folding apparatus. Defts. denied infringement & validity, alleging want of subject-matter & want of novelty by reason of the prior publication of the invention in several specifications & also prior publication by the importation of machines containing the mechanism in question, which machines were alleged to have been seen by divers persons & to have been used in the United Kingdom before the date of the patent. Pltfs. contended that if the machines were seen, they were seen under a pledge of confidence, & that any user of them was merely for the purpose of testing :—*Held :* the invention had been used within the realm prior to the date of the patent by others in conjunction with the patentees, & the patent was invalid.—HOE & Co. *v.* FOSTER & SONS (1898), 16 R. P. C. 33, C. A.

540. User followed by abandonment.]—JONES *v.* PEARCE (1832), 1 Web. Pat. Cas. 122 ; 1 Carp. Pat. Cas. 524.

Annotations :—**Consd.** Household Coal & Iron Co. *v.* Neilson (1843), 9 Cl. & Fin. 788. **Distd.** Heath *v.* Smith (1854), 3 E. & B. 256. **Folld.** Tangye *v.* Stott (1866), 14 W. R. 386. **Refd.** Minter *v.* Williams (1835), 1 Har. & W. 585 ; Carpenter *v.* Smith (1842), 9 M. & W. 300 ; Wright *v.* Hitchcock (1870), L. R. 5 Exch. 37 ; Murray *v.* Clayton (1872), 7 Ch. App. 570.

541. ——.] —(1) As to the sufficiency of the specification. A studied or manifest ambiguity will vitiate.

(2) Experiment not brought to completion, or conducted to a fine result, will not vitiate the patent of a more successful person in the same line.

(3) Experiment abandoned or conducted to a successful issue, will not prejudice a more fortunate competitor, who adds the last or required link.

(4) But the main question on this point is for you (*i.e.* the jury), & that is, whether it is such a fair & clear statement, that a person with a competent degree of knowledge upon the subject-matter to which the patent relates, would be able to make that which pltf. now enjoys the exclusive privilege of (TINDAL, C.J.).—GALLOWAY *v.* BLEADEN (1839), 1 Web. Pat. Cas. 521.

Annotations :—**Refd.** Penn *v.* Jack, Penn *v.* Bibby, Penn *v.* Fernie (1866), 14 W. R. 760 ; Bolingbroke *v.* Townsend (1873), L. R. 8 C. P. 645.

542. ——.]—STEAD *v.* WILLIAMS, No. 20, *ante.*

543. ——.]—*Semble :* a worthless & abandoned patent may be an anticipation of a subsequent invention if it describe such invention in terms which fully & sufficiently disclose it & the manner in which it is to be practised.—KAYE *v.* CHUBB & SONS, LTD. (1886), 5 R. P. C. 641, H. L.

Annotation :—**Refd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429.

544. ——.] —WINBY *v.* MANCHESTER, ETC. STEAM TRAMWAYS CO., No. 38, *ante.*

545. ——.]—HOUSEHILL COAL & IRON CO. *v.* NEILSON, No. 13, *ante.*

546. Whether invalidating patent—After invention completed.]—The objection to D.'s patent was, that he was the inventor of the new method of making object glasses, but that H. had made the same discovery before him. But it was holden, that as H. had confined it to his closet, & the public were not acquainted with it, D. was to be considered as the inventor (BULLER, J.).—DOLLAND *v.* —— (1766), 1 Web. Pat. Cas. 43.

Annotations :—**Consd.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463. **Refd.** Hill *v.* Thompson & Forman (1818), 2 Moore, C. P. 424. **Mentd.** Vickers *v.* Siddell (1890), 7 R. P. C. 292.

547. —— Experimental user by person other than inventor.]—The patentee of an invention for "a new or improved bearing for the necks of rolls" brought an action for infringement. Defts. denied infringement, & alleged the invalidity of the patent, on the ground of want of subject-matter & novelty, but at the trial the only defence relied on was want of novelty. The action was tried before a judge & a common jury.

iv. & v.]

The judge directed the jury that, with the old arings, there was a difficulty that the contact of the bearing with the neck of one of the rolls produced much friction, & caused breakages; that pltf. invented a method of applying the bearing to the neck of the roll, namely, instead of making the bearing fit close to the neck of the roll, he took out a piece of the bearing next to the neck, so as to leave a hollow, by which the area of contact, & consequently the friction was reduced, & the danger of breakage diminished, that pltf.'s claim was not to be taken as limited to a claim for the special application of the invention to rolls, but was a claim to prevent friction generally by his means at the neck of the shaft or roll; that his invention would not be novel if previously used for shafts for the same purpose, though the use of something like it for shafts for a different purpose would be no anticipation; that experimental user by an inventor, who subsequently takes out a patent, is very different from experimental user by another person, & that such last user would prevent the inventor getting a patent; that the question was whether other persons had substantially used the invention, whether tentatively or not was immaterial prior to the patent; that defts. brought evidence to show that other persons & also defts. had used the invention for the purpose of diminishing friction on the rolls; that pltf. brought counter evidence to show that other persons did not use the invention, & that defts. did not do more than use something similar to pltf.'s invention for shafts only, & for a totally different purpose; & he left it to the jury to say whether defts. had used the invention on either shafts or rolls for the same purpose as pltf. The jury found for pltf., that the invention was novel. —WESTLEY *v.* TOLLEY, SONS & BOSTOCK, WESTLEY *v.* RICHARDS (W. H.) & CO. (1894), 11 R. P. C. 602.

548. ——.]—CORNISH & SIEVIER *v.* KEENE & NICKELS, No. 481, *ante*.

549. ——.]—MORGAN *v.* SEAWARD, No. 442, *ante*.

550. ——.]—BENTLEY *v.* FLEMING, No. 85, *ante*.

551. ——.]—Patent invalidated by sale & use. Mere experiment will not invalidate a patent.

I think if that anchor of L.'s was sold in the regular way of business, although it turned out a failure, as possibly it may have been, if it was sold in the regular way of trade or business, there is an end of your case, & this patent cannot be supported (MARTIN, B.).—HONIBALL *v.* BLOOMER (1854), 2 Web. Pat. Cas. 199.

552. ——.]—*Re* NEWALL, ELLIOT & GLASS, No. 526, *ante*.

553. ——.]—BETTS *v.* MENZIES, No. 170, *ante*.

554. ——.]—HILLS *v.* LONDON GAS LIGHT CO., No. 342, *ante*.

555. ——.]—TANGYE *v.* STOTT (1866), 14 W. R. 386.

556. ——.]—Prior publication to be anticipation must give really the same full & sufficiently precise information which is required in a specification. Although an article has been produced by laboratory experiments & the fact has been recorded in chemical publications, that is no anticipation of a process by which a person for the first time produces the article in quantity, so that it becomes of practical & public utility, & is manufactured as an article of commerce.—VON HEYDEN *v.* NEUSTADT (1880), 14 Ch. D. 230; 50 L. J. Ch. 126; 42 L. T. 300; 28 W. R. 496, C. A.

Annotations:—**Consd.** Moseley *v.* Victoria Rubber Co. (1887), 57 L. T. 142. **Reld.** Badische Anilin und Soda Fabrik *v.* Johnson & Basle Chemical Works, Bindschedler, [1897] 2 Ch. 322; British Motor Syndicate *v.* Taylor, [1900] 1 Ch. 577; Saccharin Corpn. *v.* Reitmeyer, [1900] 2 Ch. 659; Saccharin Corpn. *v.* Anglo-Continental Chemical Works, [1901] 1 Ch. 414; Badische Anilin und Soda Fabrik *v.* Hickson, [1906] A. C. 419; British United Shoe Machinery Co. *v.* Johnson (1925), 42 R. P. C. 243; Mergenthaler Linotype Co. *v.* Intertype Co. (1926), 42 T. L. R. 682.

557. ——.]—YOUNG & NEILSON *v.* ROSENTHAL & CO., No. 460, *ante*.

558. ——.]—USEFUL PATENTS CO., LTD. *v* RYLANDS (1885), 2 R. P. C. 255; Griffin's Patent Cases (1884–1886) 234.

Annotation:—**Reld.** Ashworth *v.* Law (1890), 7 R. P. C. 231.

559. ——.]—MORGAN & CO., LTD. *v.* WINDOVER & CO., LTD. (1890), 7 R. P. C. 131, H. L.

Annotations:—**Consd.** British Ore Concentration Syndicate *v.* Minerals Separation (1909), 27 R. P. C. 33. **Reld.** Elias *v.* Grovesend Tinplate Co. (1890), 7 R. P. C. 455; Vickers *v.* Siddell (1890), 7 R. P. C. 292; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Goddard *v.* Lyon (1894), 11 R. P. C. 354; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429; Layland *v.* Boldy (1913), 30 R. P. C. 547; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co. (1919), 36 R. P. C. 95; Bonnard *v.* London General Omnibus Co. (1920), 38 R. P. C. 1.

560. ——.]—An inventor is entitled to make experiments to test an invention, & for that purpose to employ others, &, if need be, a large number to assist in those experiments. Further, he may take others into his confidence & obtain their advice & opinions respecting the practical or useful character of the invention (KEKEWICH, J.).—GADD & MASON *v.* MANCHESTER CORPN. (1892), 9 R. P. C. 249; 67 L. T. 569; *on appeal*, 9 R. P. C. 516, C. A.

Annotations:—**Reld.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429; Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 11 T. L. R. 345; Shrewsbury & Talbot S. T. Cab Co. *v.* Sterckx (1895), 12 T. L. R. 122; Savage *v.* Harris (1896), 12 T. L. R. 187; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre & Automatic Valve Co. (1899), 16 R. P. C. 50; Taylor & Scott *v.* Annand & Northern Press & Engineering Co. (1899), 16 R. P. C. 547; Layland *v.* Boldy (1913), 30 R. P. C. 547; Norton *v.* Barker (1913), 30 R. P. C. 741; *Re* Merten's Patent (1914), 31 R. P. C. 373; Mellor *v.* Beardmore (1926), 43 R. P. C. 361.

561. ——.] — The owner of a patent for apparatus for purifying, disinfecting, drying, & heating, brought an action for infringement. Pltf.'s patent substantially consisted in an arrangement of an inner chamber into which steam was admitted for disinfection, & the surrounding of the inner chamber by a steam jacket, also heated by steam, so that the steam in the inner chamber was prevented from condensing. The steam kept in the inner chamber at a certain degree of pressure, found by experience to be from 10 lbs. to 20 lbs., thoroughly penetrated the articles to be disinfected, & completely purified them without damage, Pltf.'s patent was twelve & a half years old, & was of great utility. Pltf.'s specification stated that the apparatus might be used without steam in the inner chamber for drying purposes. Defts. denied infringement, & alleged the invalidity of the patent on various grounds, viz., (*a*) that pltf. claimed for the use of dry heat, which was old; (*b*) that he did not mention high pressure, & that

PART IV. SECT. 2, SUB-SECT. 2.—B. (b) iii.

548 i. *Whether invalidating patent.*]—The use of an invention by the inventor, or by other persons under his direction, by way of experiment, & in order to bring the invention to perfection, is not such a public use as, under the statute, defeats his right to a patent. —CONWAY *v.* OTTAWA ELECTRIC RY. CO. (1904), 8 Exch. C. R. 432.—**CAN.**

548 ii. ——.]—So long as an inventor is actually engaged in good faith in testing the operation of a machine, to ascertain if it will accomplish the desired result, & to show it to be a practicable invention, this is not a public use.—CONCRETE APPLIANCES CO. *v.* ROURKE, MCDONALD, ETC. (1915), 8 W. W. R. 6.—**CAN.**

without high pressure his invention was useless; (*c*) anticipation by a prior specification, & (*d*) by prior user:—*Held:* (1) pltf. did not claim the use for dry heat, but only that his machine for disinfecting was also useful for the other purposes, his invention was extremely useful & meritorious, & it was infringed; (2) the patent was valid & had not been anticipated, the machine specially relied on by way of prior user being held to have been too imperfect & of too experimental a character to be an anticipation.—LYON *v.* GODDARD (1893), 10 R. P. C. 121; *affd.*, 9 T. L. R. 546; 10 R. P. C. 334, C. A.; *affd., sub nom.* GODDARD *v.* LYON (1894), 11 R. P. C. 354, H. L.

Annotations:—As to (1) **Refd.** Van Berkel *v.* Simpson (1906), 23 R. P. C. 237; *Re* Alsop's Patent (1907), 24 R. P. C. 733; Hatmaker *v.* Nathan (1917), 34 R. P. C. 317; Benton & Stone *v.* Denston (1925), 42 R. P. C. 284. *As to* (2) **Refd.** *Re* Andrews' Patent (1907), 24 R. P. C. 349. *Generally,* **Refd.** Case *v.* Cressy (1901), 17 R. P. C. 255.

562. ——.] — On Feb. 10, 1894, a patent for improvements in beer engines was granted to M. One of the claims was for tubes & gauze in the nozzles of beer engines, either separately or combined, for the purpose set forth. M. brought an action for infringement against P. & C., & certain other defts. who consented to a perpetual injunction before the trial. The defences relied on at the trial were the insufficiency of the specification & want of novelty by reason of prior user of the invention by defts.:—*Held:* the specification was sufficient, & the evidence did not satisfactorily establish the alleged prior user by defts.; but if such prior user took place in fact, it was experimental.—MATHEWS *v.* PARMENTER & CRAWLEY (1896), 13 R. P. C. 514.

563. ——.] — The owners of a patent for "improved apparatus for the electro-deposition of metals" brought an action for infringement against H. & co., who denied infringement, & attacked the validity of the patent on the grounds (*inter alia*) of anticipation by prior publication & prior user. The question of prior user was the main issue at the trial. B., some years before the date of the patent, had used an apparatus similar to that of pltfs.' for coating rifle bullets with nickel. Pltfs. contended that this was merely an experimental user:—*Held:* pltfs.' patent was not anticipated, either by the specifications cited or by B.'s user, which was merely experimental, though his apparatus was identical with pltfs.'; *semble:* evidence may be given of want of subject-matter, though it is not alleged in the particulars of objections, the objection of want of novelty being sufficient to cover it.—ELECTROLYTIC PLATING APPARATUS CO., LTD. *v.* HOLLAND (1901), 18 R. P. C. 521.

564. ——.]—ROBERTSON *v.* PURDEY, No. 517, *ante.*

Protected experimental user.]—*See* No. 525, *ante.*

iv. *Manufacture and Offer for Sale.*

565. As negativing novelty—Deposit in warehouse.]—The prior deposit of articles, of novel manufacture, in a warehouse for sale, is a sufficient publication to defeat a patentee's claim to novelty in the invention of similar articles.—MULLINS *v.* HART (1852), 3 Car. & Kir. 297, N. P.

566. —— **No sale effected.**]—(1) A patent was taken out for "certain improvements in the doors & sashes of carriages." In the specification, after describing it, the patentee said: "I have shown my invention as applied to railway carriage doors & window fittings, although they are equally applicable to the doors & windows of any other description of carriage, or in any position where windows & doors are subject to jar & vibration":—*Held:* the claim made in the specification was not larger than the title of the patent.

(2) One part of the invention was described as "a novel arrangement & mode of fitting & working sliding sashes, glass frames, blinds, & shutters for railway & other carriages," which consisted of a metal plate with a slot & a stud or pin working in a groove on each side of the sash or frame: & the patentee claimed "the metal fittings & the mode of applying the same, described herein as the second part of my invention":—*Held:* this was a claim, not for the metal fittings themselves, but for the mode of applying them; &, consequently, the patent was sustained by proof that the application was new, though the stud & plate themselves were old.

(3 The circumstance of the patentee having previously filed, but abandoned, a provisional specification describing in part the same invention, does not render a subsequent patent void, the filing of the previous provisional specification not being a publication within 15 & 16 Vict. c. 83.

(4) The manufacture of a patent article for the purpose of sale, & offering it for sale, although no sale is actually effected, is a user of the invention. *Semble:* it is equally a user though the article is made merely as a sample.

(5) The declaration alleged an agreement for the sale by pltf. to deft. of the exclusive right to the use of an invention of "improvements in elastic cushion fittings for carriage & other window frames," & also of "improvements in the arrangement of the stud & plate for carriage window-frames & for other purposes":—*Held:* the declaration was sustained by a specification in which the inventions were described as an invention of "improvements in the doors & windows of carriages," the claim being (*a*) for "the construction of elastic pads or cushions as herein described," (*b*) "the mode of applying vulcanised india-rubber or other elastic material to sliding sashes, glass frames, & doors, as herein described"; & also for "a novel arrangement & mode of fitting & making sliding sashes, etc. for railway & other carriages," etc., the descriptions being confined to carriages.—OXLEY *v.* HOLDEN (1860), 8 C. B. N. S. 666; 30 L. J. C. P. 68; 2 L. T. 464; 8 W. R. 626; Goodeve's Patent Cases, 350; 141 E. R. 1327.

Annotations:—As to (3) **Refd.** Lister *v.* Norton (1886), Griffin's Patent Cases (1884–1886), 148; Harris *v.* Rothwell (1887), 35 Ch. D. 416. *As to* (4) **Consd.** British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122.

567. —— ——.]—BETTS *v.* NEILSON, BETTS *v.* DE VITRE, No. 520, *ante.*

568. —— **Article offered as sample.**] — OXLEY *v.* HOLDEN, No. 566, *ante.*

569 —— ——.]—HUDSON, SCOTT & CO., LTD. *v.* BARRINGER, WALLIS & MANNERS, LTD., No. 391, *ante.*

570. —— **Offer to ascertain trade value.**] — LISTER *v.* NORTON BROTHERS & CO., No. 403, *ante.*

Experimental use.]—*See* Sub-sect. 2, B. (*b*) iii., *ante.*

v. *Manufacture and Sale.*

571. As negativing novelty.]—MORGAN *v.* SEAWARD, No. 442, *ante.*

PART IV. SECT. 2, SUB-SECT. 2.—B. (b) v.

571 i. *As negativing novelty.*]—Where a patent is obtained for a process of manufacture, & there has been a prior public sale of the product of that manufacture, if the product is such that any person conversant with the subject & applying the common knowledge at the time of the sale, could have brought about the same result, the patent is

Sect. 2.—Novelty: Sub-sect. 2, B. (b) v., & C. (a).]

572. ——.]—LOSH *v.* HAGUE, No. 16, *ante.*

573. ——.] — (1) If they (defts.) have themselves sold an article of exactly the same fabric made in the same manner as that for which the patent was taken out, such sale may be considered as a using of the invention within the terms of the declaration (TINDAL, C.J.).

(2) All that I mean to leave to you is the question of fact . . . whether it [the specification] is so worded & such explanations are given in it that a person of a sufficient degree of understanding on the particular subject could carry the provisions of the specification into effect & obtain the proposed result (TINDAL, C.J.).—GIBSON *v.* BRAND (1841), 1 Web. Pat. Cas. 627; *on appeal* (1842), 4 Man. & G. 179.

Annotation:—As to (1) **Refd.** Walton *v.* Lavator (1860), 8 C. B. N. S. 162.

574. ——.]—Here you have an article, manufactured by an English manufacturer, & sold, &, in my opinion, if it was sold even for the assumed purpose, of which there is no legal evidence, for the assumed purpose of being sent to America, I cannot but think that that would be a destruction of the novelty of pltf.'s invention. Here let me be clearly understood: I do not mean to say, that if a man in America employs an agent to see if he can get an article manufactured in England by a particular model, & chooses to take out a patent for it himself, but not with a view of making it public at all, I do not mean to say that that man is to be considered as not entitled to the invention afterwards (LORD ABINGER, C.B.).—CARPENTER *v.* SMITH (1841), 1 Web. Pat. Cas. 530, N. P.; *subsequent proceedings* (1842), 9 M. & W. 300.

Annotations:—**Refd.** Heath *v.* Smith (1854), 3 E. & B. 256; Betts *v.* Menzie (1857), 3 Jur. N. S. 357; Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194; Elias *v.* Grovesend Tinplate Co. (1890), 7 R. P. C. 455.

575. ——.] — HANCOCK *v.* SOMERVELL (1851), cited Halsbury's Laws of England, Vol. XXII. at p. 143.

576. ——.]—HEATH *v.* SMITH, No. 535, *ante.*

577. ——.]—HONIBALL *v.* BLOOMER, No. 551, *ante.*

578. ——.]—J. in 1878 took out a patent for a lubricating apparatus, & in 1885 brought an action against S. for infringing this patent. It was proved at the trial that prior to the date of the patent (*a*) lubricators substantially similar to the patented invention had been sold in England by the agents of a foreign firm; (*b*) lubricators substantially similiar to the patented invention had been used by a firm of engineers in England on machines sold by them:—*Held:* the patent was invalid.—JENSEN *v.* SMITH (1885), 2 R. P. C. 249; Griffin's Patent Cases (1884–1886), 136.

579. ——.] — Although it has been thought & may be thought by a certain class of persons to be hard law that the patentee must not make a beneficial use to himself of his invention before he takes out his patent, on the other hand it is to be remembered that if a patentee were to be at liberty to sell his mysterious & secret product first for a substantial period of time, & then go & obtain a patent for his own invention, he would be able to give himself a longer monopoly than the law gives him; he would be able first of all to give himself a monopoly during the time he was selling his product made secretly, & then he would be able to get the years of monopoly which the statute gives him; so that there is no particular reason to think that the law has been unintentionally left in the state in which it is (BOWEN, C.J.).—GERM MILLING CO., LTD. *v.* ROBINSON (1886), 3 R. P. C. 399; 3 T. L. R. 71, C. A.

580. ——.] — GUILBERT-MARTIN *v.* KERR & JUBB (1886), 3 T. L. R. 87.

581. ——.]—H. brought an action for infringement of a patent for a teapot against C. & co. The action was tried by a judge & jury. C. & co. proved that they had sold to three persons before the date of the patent, teapots similar to those of which pltf. complained as being infringements of his patent. The judge directed the jury that defts had proved anticipation, & the jury having returned a verdict for defts., the judge gave judgment for defts. with costs.—HOLLINS *v.* CAPPER & Co. (1888), 5 R. P. C. 289.

582. ——.] — ELIAS *v.* GROVESEND TINPLATE Co., No. 367, *ante.*

583. ——.] — Patentee of an invention for improvements in the extracting mechanism of drop-down small arms brought an action for infringement. The invention practically was for a combination of part of this ejecting mechanism with extracting mechanism or mechanism for partially extracting the cartridge so that it could then be removed by hand. The other claims were for combinations of different parts of patentee's mechanism.

Deft. alleged the invalidity of the patent on the ground that the first claim was anticipated by a prior specification of deft. & that the third, fourth & fifth claims were anticipated by a gun made in 1882 to the order of one M., by R. R. sent the order to B., a gun manufacturer, in whose shop the gun was made without secrecy. The gun was then sent on to R., by whom it was sold without secrecy to the agent of M. & by him transmitted to M., who was abroad. Evidence was given by one witness for pltfs. that the fore end of this gun, which was produced at the trial had in 1888 no extractor mechanism; deft.'s witnesses, by whom the gun was made, gave evidence that the fore end as originally made had the extractor mechanism:—*Held:* the first claim was for part of the ejecting mechanism with any extracting mechanism & was anticipated by deft.'s specification; the gun made by R. was completely published & as originally made had the extracting mechanism & was one anticipation of claims 4 & 5 & also of part of claim 3. The action was dismissed with costs including the costs of the issue of infringement.—WESTLEY, RICHARDS & CO. *v.* PERKES (1893), 10 R. P. C. 181, 382; 9 T. L. R. 351; *on appeal, sub nom.* DEELEY *v.* PERKES, [1896] A. C. 496, H. L.

Annotations:—**Mentd.** *Re* Dellwick's Patent, [1896] 2 Ch. 705; Ludington Cigarette Machine Co. *v.* Baron Cigarette Co., *Re* Pitt's Patent, [1900] 1 Ch. 508; *Re* Justice's Patent (1901), 18 R. P. C. 241; *Re* Geipel's Patent, [1903] 2 Ch. 715; *Re* Ralston's Patent, *Re* Preston & Ralston's Patent (1909), 100 L. T. 386; Porter *v.* Freudenberg, Kreglinger *v.* Samuel & Rosenfeld, *Re* Merten's Patents, [1915] 1 K. B. 857.

584. ——.] — In 1890, a patent was granted to M. for the manufacture of an alloy from certain metals, including bismuth, in the proportions stated in the specification, & for the use of sal ammoniac as part of the process. M., who was an American citizen, was trustee of the patent for an American co. of cos. H. presented a petition for revocation of this patent. After the petition

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invalidated.—CULLEN *v.* WELSBACH LIGHT CO. OF AUSTRALASIA, LTD. (1907), 4 C. L. R. 990.—**AUS.**

ii. ——.]—HESSIN *v.* COPPIN (1873), 19 Gr. 629.—**CAN.**

571 iii. ——.]—BARNETT MCQUEEN Co. *v.* CANADIAN STEWART CO. (1910), 9 E. L. R. 46.—**CAN.**

had been several times before the ct., it was established, to the satisfaction of the judge, that the patented alloy had been sold in England before the date of the patent. The American cos. were then desirous of intervening, & of raising the further point that the said sales of the patented alloy before the date of the patent were not a prior publication of the invention because at the dates of the sale a competent chemist, analysing the alloy, could not have discovered the presence of bismuth, bismuth being alleged to be the important ingredient in the alloy. This point was tried before the judge separately, with oral evidence:—*Held:* if reasonable care & reasonable skill were used by analysts before the date of the patent, the constituents & the proper proportions of the constituents of the alloy sold could have been ascertained, & therefore the patent was anticipated.—*Re* MILLER'S PATENT (1898), 15 R. P. C. 205, C. A.

Annotation:—**Apprvd.** *Re* Strahlwerk Becker Akt. (1918), 36 R. P. C. 13.

585. ——.]—A patent was granted in 1912 for "an improved high speed tool steel." The claim was for "a high speed tool steel produced by the addition of up to 15 per cent. of cobalt to the known compositions (steel, chromium & tungsten, with or without either or both of the metals vanadium & molybdenum), hitherto employed in the production of high speed tool steels, substantially as described." The following example was given in the complete specification of the production of a high speed tool steel of exceptional quality:—"An alloy of steel containing about 0.70 per cent. carbon, 5 per cent. chromium, 18 per cent. tungsten, 1 per cent. vanadium, 0.75 per cent. molybdenum, & about 4 per cent. cobalt," the inclusion of either vanadium or molybdenum, or both, being, however, optional. A petition was presented for the revocation of [illegible] on the grounds of prior user & want of subject-matter & utility. Petitioners alleged that from 1911 they had manufactured, &, after that year, but before the date of the patent, had sold a high speed tool steel, & that the fact that cobalt entered into its composition was known to workmen in petitioners' employment, who were not under any obligation to conceal the fact. Resps. did not deny that, if the composition of the steel had been published, the manufacture & sale of it was a prior user of the invention, but they contended that the user had been experimental, & that the composition of the steel had not been published:—*Held:* in order to establish prior public user it was enough to prove that the steel had been manufactured & sold before the patent was taken out, & any person who had purchased the steel could, by analysis, have known what the composition was; it was not necessary to establish that the composition had been in fact ascertained by analysis to show that there was a public knowledge or that the circumstances should show a probability that an analysis had been made.—*Re* STAHLWERK BECKER AKT.'s PATENT (1918), 36 R. P. C. 13, H. L.

C. Prior Publication.

(*a*) *In General.*

586. General rule—Prior publication invalidates patent.]—STEAD *v.* WILLIAMS, No. 20, *ante.*

587. —— ——.]—(1) The specification of a patent reaping machine described the improvements as having for their object the holding of the straw in a favourable position while being cut, & the more conveniently arranging, collecting & disposing of it when cut. Underneath a set of spearhead shaped fingers, placed at regular intervals apart from each other, was placed the cutting blade, formed of a thin plate of steel, toothed upon its front edge & fitted into a groove. the blade having perfect freedom to slide from one side of the machine to the other. Wheel gearing, being set in motion by the horse attached to the machine, caused a reel or gatherer to revolve & so prevent the straws from being pressed forward when coming in contact with the cutting blade, which had a rapid reciprocating motion imparted to it by the action of a crank & connecting rod; the straws were thus speedily cut through & fell backwards on the platform The blade was [illegible] the one blade zigzag or indented. "In every case, however, it has been found (the specification stated) to be of great advantage to have the cutting edge toothed somewhat similar to a sickle, & to have those teeth divided into sections [illegible] to the number of fingers, each section having one half of the teeth inclined in one direction, & the other half having the teeth i[illegible] direction." The inventor claimed "the construction of reaping machines according to the improvements before described; that is to say, the constructing & placing of holding fingers [illegible] blades & gathering reels respectively, as before described, & the embodiment of those parts as so constructed & placed, all or any of them, in machines for reaping purposes, whether such machines are constructed in other respects as [illegible] direction, & the other half & resembling the blades figured & described in the specification & capable of being used in the reaping machines, was not an infringement of the patent.

(2) The published description of a previous patent machine stated it to be "for improvements in that kind of the machine in which the grain is cut by the serrated edge of a straight & vibrating cutter operated by a crank, the grain being sustained by fingers. The blade is serrated like a sickle except that the angle of the teeth is reversed for every alternate tooth. . . . The fingers for supporting the grain are spear-formed":—*Held:* in an action for an infringement of the subsequent patent, deft. was, by reason of this prior publication, entitled to the verdict on the plea that the manufacture was not new. (3) In the absence of proof that the machine in its entirety was not new, pltf. was entitled to the verdict on that issue, notwithstanding the want of novelty in its separate parts.—MCCORMICK *v.* GRAY (1861), 7 H. & N. 25; 31 L. J. Ex. 42; 4 L. T. 832; 9 W. R. 809; 158 E. R. 377.

Annotation:—**Refd.** Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 164.

588. — .]—RUCKER *v.* LONDON ELECTRIC SUPPLY CORPN., LTD., No. 494, *ante.*

589. —— ——.]—A patent was granted in 1912 for "improvements in cylinders for internal combustion engines." One of the claims was for

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PART IV. SECT. 2, SUB-SECT. 2.—C. (a).

586 1. *General rule—Prior publication invalidates patent.*]—If the secret of an invention has been previously publicly communicated to the world, either by the inventor or some one else, the invention is not patentable.—WALSH *v.* SHEELEY, [1911] T. P. D. 1.—S. AF.

Sect. 2.—Novelty: Sub-sect. 2, C. (a), (b) & (c).]

"steel cylinders for internal combustion engines made in one piece with lugs, bosses, flanges & the like, & having the cooling jacket fixed by welding to the bosses, lugs, & flanges on the cylinder, upon which latter no direct welding takes place, substantially as described." A petition was presented for the revocation of the patent on the grounds of prior publication & want of subject-matter. The patentees, an enemy firm, did not appear at the hearing, nor did a British co. claiming an interest in the patent under a contract with the enemy firm. Petitioners gave evidence of prior publication, & contended that there was not subject-matter in the application of a well known process, such as welding or autogenous soldering, to the construction of the cylinders:—*Held:* there had been prior publication.—*Re* DAIMLER-MOTOREN GESELLSCHAFT'S PATENT (1918), 35 R. P. C. 253.

590. Meaning of publication.] — "Generally known" means known to the public generally, or at least to that portion of the public whose attention is turned to such matters. But "published" means offered or dedicated to the public. Was the invention published or offered to the public to such an extent as that it was generally known amongst engineers & persons likely to take an interest in such a matter? (PARKE, B.).—STEAD *v.* ANDERSON (1846), 2 Web. Pat. Cas. 147; 4 C. B. 806 at p. 823; 136 E. R. 732; *subsequent proceedings* (1847), 4 C. B. 806.

Annotations:—**Apld.** Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531; Plimpton *v.* Spiller (1877), 6 Ch. D. 412.

591. Sufficiency of publication—Whether user also necessary.]—(1) Publication sufficient without user.

(2) No infringement unless evidence of a substantial resemblance in matters to which the exclusive right extends.

(3) Plea of public use good under the statute [of Monopolies]. *Semble:* a plea averring knowledge & publication only would be bad.—STEAD *v.* ANDERSON (1847), 4 C. B. 806; 2 Web. Pat. Cas. 151; 16 L. J. C. P. 250; 9 L. T. O. S. 434; 11 Jur. 877; 136 E. R. 724; *previous proceedings* (1846), 2 Web. Pat. Cas. 147.

Annotation:—*Generally*, **Mentd.** Embrey *v.* Owen (1851), 6 Exch. 353.

592. —— Mere suggestion.] — Mere suggestion in a work previously published immaterial. — *Re* WOODCROFT'S PATENT (1846), 2 Web. Pat. Cas. 18; 10 Jur. 363, P. C.

593. —— Publication in terms of mere generality.]—(1) The question of the identity of two specifications, for the purpose of deciding as to the novelty of an invention, is one of fact, to be left to the jury.

(2) A specification of a patent does not differ from any other publication of an invention for the purpose of invalidating a subsequent patent for want of novelty.

(3) A prior publication, to have that effect, must be one from which a person with ordinary knowledge would be able practically to apply the discovery without further experiment. If something remains to be ascertained there is room for a valid patent.

(4) Publication of an invention in terms of mere generality or not true to their full extent will not invalidate a subsequent patent, the specification of which is limited & accurate & gives a specific rule of practical application.

(5) Prior knowledge must, in order to avoid a patent for want of novelty, be knowledge equal to that required to be given by a specification.

(6) The construction of a specification, as the construction of all other written instruments, belongs to the ct.; but the explanation of the words or technical terms of art, the phases used in commerce, & the proof & results of the processes which are described, & in a chemical patent the ascertainment of chemical equivalents are matters of fact upon which evidence may be given, contradictory testimony may be adduced, & upon which it is the province & right of a jury to decide.—HILL *v.* EVANS (1862), 4 De G. F. & J. 288; 31 L. J. Ch. 457; 6 L. T. 90; 8 Jur. N. S. 525; Goodeves Patent Cases, 248; 45 E. R. 1195, L. C.

Annotations:—*As to* (1) **Consd.** Hills *v.* Liverpool United Gaslight Co. (1862), 32 L. J. Ch. 28. *As to* (3) **Apld.** Young *v.* Fernie (1864), 4 Giff. 577. **Consd.** Neilson *v.* Betts (1871), L. R. 5 H. L. 1. **Foild.** Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531. **Apld.** Moseley *v.* Victoria Rubber Co. (1887), 57 L. T. 142; American Braided Wire Co. *v.* Thomson (1888), 5 R. P. C. 113; *Re* Gaulard & Gibbs' Patent (1890), 7 R. P. C. 367; Shrewsbury & Talbot Cab Co. *v.* Sterckx (1895), 13 R. P. C. 44. **Consd.** Savage *v.* Harris (1896), 13 R. P. C. 364; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre & Automatic Valve Co. (1898), 16 R. P. C. 50. **Apld.** Molassine Co. *v.* Townsend (1905), 23 R. P. C. 27. **Consd.** Flour Oxidizing Co. *v.* Carr (1908), 25 R. P. C. 428. **Refd.** Von Heyden *v.* Neustadt (1880), 50 L. J. Ch. 126; Otto *v.* Linford (1882), 46 L. T. 35; Lawrence *v.* Perry (1883), Griffin's Patent Cases (1884–1886), 143; Ellington *v.* Clark, Bunnett (1887), 58 L. T. 40; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429; Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 11 T. L. R. 345; *Re* Lewis & Stirckler's Patent (1896), 14 R. P. C. 24. *As to* (5) **Refd.** Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Metropolitan Vickers Electrical Co. *v.* British Thomson-Houston Co. (1925), 43 R. P. C. 76. *Generally*, **Refd.** De Vitre *v.* Betts (1873), L. R. 6 H. L. 319; Watson *v.* Holliday (1882), 20 Ch. D. 780; Craysdale *v.* Fisher (1884), 1 R. P. C. 17; Meters *v.* Metropolitan Gas Meters (1911), 104 L. T. 113. **Mentd.** Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135.

594. ——.] — BETTS *v.* NEILSON, BETTS *v.* DE VITRE, No. 520, *ante*.

595. ——.] — PLIMPTON *v.* MALCOLMSON, No. 68, *ante*.

596. ——.] — VON HEYDEN *v.* NEUSTADT, No. 556, *ante*.

597. Importation of foreign patent.]—SUNLIGHT INCANDESCENT GAS LAMP CO., LTD. *v.* INCANDESCENT GAS LIGHT CO., LTD., No. 492, *ante*.

598. Publication covers component parts.]—PUGH *v.* RILEY CYCLE CO., LTD. (1914), 31 R. P. C. 266, H. L.

Publication without knowledge or consent of patentee.]—*See* Patents & Designs Acts, 1907 (c. 29), s. 41 (2), & 1919 (c. 80), s. 13.

(*b*) *Publication in Book, Document or Picture.*

599. Publication in book.] — *Re* WESTRUPP & GIBBINS' PATENT (1836), 1 Web. Pat. Cas. 554, P. C.

Annotations:—**Refd.** *Re* Stead's Patent (1846), 2 Web. Pat. Cas. 143; *Re* Honiball's Patent (1855), 9 Moo. P. C. C. 378. **Mentd.** *Re* Wield's Patent (1871), L. R. 4 P. C. 89.

600. —— Foreign book—On sale in England.]—LANG *v.* GISBORNE, No. 473, *ante*.

... of publication.]—For a previous description of an article to constitute a prior publication of the subject matter of a patent, it is not necessary that it should contain as full, precise, or detailed information as a specification of a patent is required to contain, so as to enable an ordinary skilled workman to make the article; it is enough if the description enables men of science & employers of labour, without any exercise of inventive ingenuity, to understand it & to give directions for its construction.—RODD *v.* HAMILTON MUNICIPALITY (1893), 14 N. S. W. Eq. 221; 10 N. S. W. W. N. 91.—**AUS.**

g. *Question of fact.*]—What constitutes publication is a question of fact, depending upon the circumstances of each case.—GERRARD WIRE TYING MACHINES CO., LTD. OF CANADA *v.* CARY MANUFACTURING CO., [1926] 3

601. —— —— ——.]—PICKARD & CURREY *v.* PRESCOTT, [1892] A. C. 263, H. L.

602. —— —— **Seen in public library.**]—(1) A witness had seen in a German journal in a public library in this country a description of an invention which he, though ignorant of German, by the aid of certain plates & technical words could make out:—*Held:* there had been publication of the invention.

(2) Words in a provisional specification explanatory of methods to carry out the invention:—*Held:* not to include a machine that might be referred to by such words, but which was not within the scope of the invention as indicated by other parts of the document or the "title," & therefore a claim in the complete specification for such machine invalidated the patent.—UNITED TELEPHONE CO. *v.* HARRISON, COX-WALKER & CO. (1882), 21 Ch. D. 720; 51 L. J. Ch. 705; 46 L. T. 620; 30 W. R. 724.

Annotations:—*As to* (1) **Consd.** Harris *v.* Rothwell (1887), 35 Ch. D. 416. *As to* (2) **Consd.** Horrocks *v.* Stubbs (1886), 3 R. P. C. 221; Moseley *v.* Victoria Rubber Co. (1887), 57 L. T. 142. **Distd.** *Re* Everitt (1886), Griffin's Patent Cases (1884–1886), 27. **Consd.** Siddell *v.* Vickers (1888), 39 Ch. D. 92. **Refd.** Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Pneumatic Tyre Co. *v.* East London Rubber Co. (1896), 75 L. T. 488. *Generally*, **Refd.** United Telephone Co. *v.* Bassano & Slater (1886), 2 T. L. R. 840.

603. —— —— **One copy in British Museum.**]—A French treatise was placed in the British Museum library in 1863. The Museum catalogue is kept with reference to author's names; books are arranged according to subject-matter; readers can under guidance search for books on particular subjects:—*Held:* there was no prior publication in England of matter contained in the treatise so as to avoid a patent taken out in 1876.—OTTO *v.* STEEL (1885), 31 Ch. D. 241; 55 L. J. Ch. 196; 54 L. T. 157; 34 W. R. 289; Griffin's Patent Cases (1884–1886), 179; 3 R. P. C. 109; *subsequent proceedings*, 3 R. P. C. p. 114.

Annotation:—**Distd.** Harris *v.* Rothwell (1887), 35 Ch. D. 416.

604. —— —— **Available in English libraries.**]—(1) In Dec. 1878, & Feb. 1880, the specifications, in the German language, with drawings, of two patents taken out in Germany, were deposited in the free public library of the Patent Office, & the journal published periodically by the Patent Comrs., amongst the list of patents granted in Germany, contained entries of the particular patents, with a note in each case that the specifications as well as the list of applications might be consulted in the free public library of the office. In Apr. 1880, a patent was obtained in this country for an invention similar to those for which the German patents had been granted:—*Held:* the fair & legitimate inference from the above facts was, that the public availed themselves of the facilities afforded to them for obtaining information as to the inventions, & accordingly that there was sufficient evidence of publication of the German specifications in this country prior to the date of the English patent of 1880 to avoid such patent; this inference was not affected by the fact that the prior specifications were in the German language.

(2) *Primâ facie* a patentee is not the first inventor if before the date of his patent an intelligible description of his invention, either in English or in any other language commonly known in this country, was known to exist in this country either in the Patent Office or in any other public library to which persons in search of information on the subject would naturally go for information. But if it be proved that the foreign publication, although in a public library, was not in fact known to be there, the existence of the publication in this country is not fatal to the patent. (3) The existence of the German specifications in the library of the Patent Office, where they were unreservedly accessible to every one, was in itself conclusive evidence of a prior publication.—HARRIS *v.* ROTHWELL (1887), 35 Ch. D. 416; 56 L. J. Ch. 459; 56 L. T. 552; 35 W. R. 581; 3 T. L. R. 553; 4 R. P. C. 225, C. A.

Annotation:—*As to* (2) **Refd.** Humpherson *v.* Sayer (1887), 4 R. P. C. 407.

605. —— **By inventor or agent.**] — LANG *v.* GISBORNE, No. 473, *ante*.

606. —— **Book in Patent Office library — But not catalogued.**]—PLIMPTON *v.* SPILLER, No. 1035 *post*.

607. —— —— **But not known to be there.**]—HARRIS *v.* ROTHWELL, No. 604, *ante*.

608. —— **No copy of book issued or sold.**]—LANG *v.* GISBORNE, No. 473, *ante*.

609. —— ——.] —PLIMPTON *v.* MALCOLMSON, No. 68, *ante*.

610. —— **By suggestion.**] —*Re* WOODCROFT'S PATENT, No. 592, *ante*.

611. Publication by picture.] —HERRBURGER, SCHWANDER ET CIE. *v.* SQUIRE, No. 216, *ante*.

612. Publication in official report.] —PATTERSON *v.* GAS LIGHT & COKE CO., No. 10, *ante*.

613. Publication in pamphlet—With exhibition of drawing.]—*Re* DICKINSON'S APPLICATION (1926), 44 R. P. C. 79.

Publication in connection with & for purposes of industrial exhibitions.]—*See* Patents & Designs Act, 1907 (c. 29), s. 45.

(c) *Publication in Specification.*

See, now, Patents & Designs Act, 1907 (c. 29), s. 41 (1).

614. Whether amounting to prior publication—Specification enrolled after former patent sealed.] —CORNISH & SIEVIER *v.* KEENE & NICKELS, No. 481, *ante*.

615. ——.]—MUNTZ *v.* FOSTER, No. 26, *ante*.

616. ——.] — In an action for an alleged infringement of a patent where the defence is that the supposed invention is not new, the judge may compare pltf.'s specification with the specification of a previous patent, & may on such comparison direct the jury to find a verdict.

B. took out a patent which he described as relating to "means & apparatus for working under water in order to produce excavations & building foundations of lighthouses, piers, jetties, & other structures under water." There had been a previous patent taken out by another person, for

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D. L. R. 374; [1926] Exch. C. R. 170. —CAN.

PART IV. SECT. 2, SUB-SECT. 2.—C. (b).

611 i. *Publication by picture.*] — Before the issue of the letters of registration of the patent for the machine, there had been published an illustrated advertisement of wire produced by the machine, & wire so produced had also been offered for sale. It was admitted that a skilled workman could not from seeing & examining the advertisement, or the wire offered for sale, construct the machine patented:—*Held:* there had been no prior publication or user invalidating the letters of registration. —BRISCOE & CO. *v.* WASHBURN & MOEN MANUFACTURING CO. (1891), 10 N. Z. L. R. 85.—N.Z.

PART IV. SECT. 2, SUB-SECT. 2.—C. (c).

615 i. *Whether amounting to prior publication.*]—*Held:* by the specification to his former patent appct. had disclosed the invention now claimed, & the same must be taken to have abandoned & dedicated to the public.—*Re* LEONARD'S PATENT (1913), 13 E. L. R. 280; 14 D. L. R. 361; 14 Exch. C. R. 351; 49 C. L. J. N. S. 752.—CAN.

615 ii. ——.]—SMITH *v.* DAVIDSON (1857), 19 Dunl. (Ct. of Sess.) 691.—SCOT.

Sect. 2.—Novelty: Sub-sect. 2, C. (c).]

"An apparatus to facilitate excavating, sinking, & mining." On comparing the two patents, the judge at the trial was of opinion that both claimed substantially the same invention. The evidence showed some difference in the mode of working, but the witnesses said that both patents had substantially the same object. The judge thereon directed a verdict to be found for deft.:—*Held:* the direction was right.—BUSH *v.* FOX (1856), 5 H. L. Cas. 707; Macr. 179; 25 L. J. Ex. 251; 28 L. T. O. S. 240; 2 Jur. N. S. 1029; 4 W. R. 675; 10 E. R. 1080, H. L.

Annotations:—**Apld.** Booth *v.* Kennard (1857), 2 H. & N. 84. **Distd.** Betts *v.* Menzies (1862), 10 H. L. Cas. 118; Hill *v.* Evans (1862), 4 De G. F. & J. 288. **Refd.** Brook *v.* Aston (1859), 28 L. J. Q. B. 175; Hills *v.* London Gas Light Co. (1860), 5 H. & N. 312; Patterson *v.* Gas Light & Coke Co. (1877), 3 App. Cas. 239; Harris *v.* Rothwell (1887), 35 Ch. D. 416.

617. ——.]—HILL *v.* EVANS, No. 593, *ante*.

618. ——.]—HUDDART *v.* GRIMSHAW (1803), 1 Web. Pat. Cas. 85; 1 Carp. Pat. Cas. 200; Dav. Pat. Cas. 265.

Annotations:—**Distd.** Campion *v.* Benyon (1821), 6 Moore, C. P. 71. **Refd.** Bateman & Moore *v.* Gray (1853), Macr. 93; Murray *v.* Clayton (1872), 7 Ch. App. 573, n.; Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 L. R. 294.

619. ——.]—HARRIS *v.* ROTHWELL, No. 604, *ante*.

620. ——.]—AMERICAN BRAIDED WIRE CO. *v.* THOMSON, No. 405, *ante*.

621. ——.]—BLAKEY & SONS *v.* LATHAM & CO., No. 365, *ante*.

622. ——.]—THOMSON *v.* MACDONALD & CO. (1890), 8 R. P. C. 5.

623. ——.]—DAIRY *v.* BAILEY, No. 487, *ante*.

624. ——.]—The patentee of an improvement in sewing machines for boots, being a method of holding the thread at tension perpendicularly to the needle by means of a forked looper, brought an action for infringement. Defts. alleged anticipation by a previous specification of M., & denied infringement on the ground that the thread in their machine was not at tension; in argument they also relied on B.'s specification alone to show common knowledge. M.'s invention had a forked looper & an auxiliary looper, which pltf. dispensed with, & presented the thread to the point of the needle, this was shown by the evidence to be a defect leading to missed stitches, so that M.'s invention was not practically applicable to leather. It was held at the trial that M.'s invention was no anticipation, & that defts. infringed:—*Held:* pltf.'s invention, getting rid of the auxiliary looper & presenting the thread in a different place to M., namely, to the hook of the needle, so as to avoid the defects of M.'s method, required ingenuity & invention, & was not anticipated, & defts., though they retained M.'s auxiliary looper, had taken pltf.'s invention & infringed.—ENGLISH & AMERICAN MACHINERY CO., LTD. *v.* UNION BOOT & SHOE MACHINE CO., LTD. (1894), 11 R. P. C. 367, C. A.; *subsequent proceedings* (1895), 13 R. P. C. 64.

Annotations:—**Mentd.** Sutcliffe *v.* Abbott (1902), 20 R. P. C. 50; British Thomson-Houston Co. *v.* Stonebridge Electrical Co. (1916), 33 R. P. C. 166.

625. ——.]—S., in 1894, obtained a patent for an appliance for fastening a lady's hat upon the head. A patent had been granted to O. in 1893, in the United States, for a hat fastener, the publication of which in England was admitted. This was alleged to be an anticipation. H. & Sons subsequently brought out a hat fastener & patented it. S. then brought an action against H. & Sons, alleging it to be an infringement of her patent. For defts. it was contended that pltf.'s article was anticipated by O., & there was no invention in it:—*Held:* pltf.'s patent was anticipated by O.'s specification, & there was no invention in producing pltf.'s appliance, & pltf.'s patent was invalid.

There may be prior anticipation by publication, although the specification is defective in the directions given to the workman (LINDLEY, L.J.).—SAVAGE *v.* HARRIS (D. B.) & SONS (1896), 13 R. P. C. 364; 12 T. L. R. 332, C. A.

Annotation:—**Refd.** British Thomson-Houston Co. *v.* Charlesworth, Peebles (1923), 40 R. P. C. 426.

626. ——.]—In 1887, a patent was granted to D. & F. for improvements in feeding oil for lighting & heating. In Dec. 1895, an action was brought by the patentees & their sole licencees for infringement of this patent against S., who denied infringement, & put in issue the validity of the patent, but solely on a paper anticipation, viz., R.'s specification of 1872:—*Held:* the patent was not anticipated by R.'s specification, & judgment was given for pltfs.—DEFRIES & FEENY *v.* SHERWOOD & SONS (1897), 14 R. P. C. 313.

627. ——.]—SIDDELEY *v.* LONDON HYGIENIC ICE CO., LTD., No. 493, *ante*.

628. ——.]—On June 1, 1892, a patent for an improvement in electrical insulating sheets was granted to W. On the following day a patent for a similar invention was granted to D. The M. co., as proprietors, brought an action for infringement of both patents against the E. co., but subsequently dropped the claim in respect of W.'s patent. Defts. denied infringement of D.'s patent, & alleged that it was invalid on the following, among other, grounds: Prior grant to W., in his patent, anticipations by S. & T., & prior users of the invention. Pltfs., by their reply, denied the prior grant to W., & alleged that W.'s patent was invalid by reasons of the matters stated in defts.' original particulars of objections. Defts. rejoined that even if W.'s patent had been anticipated, that was no defence to the plea of prior grant. It was admitted at the trial that the specification of S. & T. anticipated W.'s patent:—*Held:* as S. & T. anticipated W., D.'s patent was not invalid on the ground of a prior grant to W., but, if so, then D.'s patent was anticipated by S. & T. & also certain prior users of the invention were proved.—MICA INSULATOR CO. *v.* ELECTRICAL CO., LTD. (1898), 15 R. P. C. 489.

629. ——.]—BRITISH MOTOR TRACTION CO., LTD. *v.* FRISWELL, No. 152, *ante*.

630. ——.]—The owner of a patent for "improvements in revolvable heel pads for boots & shoes" having brought an action for infringement, deft. denied infringement, & contended that pltf.'s patent was completely anticipated by several prior specifications for the construction of rubber heel pads. The claim was in effect for a heel pad, made of rubber composition, comprising a thin base piece, a surface piece, & between them a perforated metal plate extending nearly to the edge of the pad. The holes in the metal plate permitted the front & back surfaces to have attachment to each other. Deft. relied upon, among others, the specification of a prior patent for fixed heel pads, in which a perforated metal plate was inserted between two layers of rubber although not intended to form a revolving heel:—*Held:* anticipation had been proved, & pltf.'s patent was therefore invalid.—HICKSON *v.* REDFERN (1905), 22 R. P. C. 307.

631. ——.]—COOPER PATENT ANCHOR RAILWAY JOINT CO., LTD. *v.* LONDON COUNTY COUNCIL, No. 392, *ante*.

632. ——.]—Letters patent were granted to A. for an improvement in driving aprons, consisting in forming at the lower part of the apron horizontally projecting pockets or footholds into which the wearers' feet were inserted so as to be protected from the weather & which at the same time assisted in keeping the apron in position. In an action for infringement brought by A.:—*Held:* the patent had been anticipated by P.'s specification "of a covering for the lower part of the body & knees, which is continued down to the feet where it is adapted to receive & enclose them, opening thence above the heels on the under side upwards."—ARNOT *v.* DUNLOP PNEUMATIC TYRE CO., LTD. (1908), 25 R. P. C. 309, H. L.

633. ——.]—In 1901 a patent was granted for "an improved process for mounting photographs, engravings & the like, & means for carrying the same into practice." The first claim was for "a dry process for mounting photographs, engravings, or the like, on cardboard, bristol board or the like, consisting in interposing, between the two parts to be united, a thin layer of material made in the manner above described & capable of becoming adhesive under the action of heat, & then applying heat & pressure thereto substantially as described." The second claim was "for carrying into practice the process hereinbefore described, a pellicle which is adhesive when hot & consists of a thin sheet of paper or other carrier immersed in a solution of gum lac or other gum-resin, in such a manner that the adhesive material is incorporated in the carrier & covers the two faces thereof, substantially as described." In an action for infringement of the patent it was alleged by pltfs. that the second claim was for a pellicle intended to be used in the process described in the first claim, & that defts. had infringed by selling such a pellicle. Defts. contended that the first claim had been anticipated by the specifications of D., describing the use, with heat, of an adhesive material coated with gutta-percha, & the coating of such material by dipping it in a solution of gutta-percha. They contended that the second claim was for the pellicle, & that the sale by them of their pellicle was not an infringement, or, if the claim was for the manufacture of the pellicle, it had been anticipated by the specification of J.:—*Held:* the first claim had been anticipated by D.; the second claim was for the pellicle & had been anticipated as alleged.—ADHESIVE DRY MOUNTING CO., LTD. *v.* TRAPP & CO. (1910), 27 R. P. C. 341.

634. ——.]—In 1903 a patent was granted for "improvements in filters." One of the claims was as follows: "In a filtering system, the combination with a tank for containing the material to be filtered & a tank for containing a cleansing liquid, of a filter, means for introducing & removing the same into & from the first tank, & for introducing & removing the same into & from the second tank, means for drawing the material contained in first tank through the filtering medium while the filter is within the tank, & for drawing the liquid from the second tank through the filter while therein & means for passing a cleansing current through filter in an opposite direction to the movement of the filtered material." There were twenty-four other claims. In an action for infringement of the patent, defts. alleged (*inter alia*) that the patent was invalid because of want of utility, insufficiency of description, & want of novelty & of subject-matter, &, in particular, because the alleged invertion had been published in the prior specifications of T. & others They also alleged that the specification did not distinguish between what was new & what was old:—*Held:* in certain claims, subordinate parts of the combination of which the alleged invention consisted, were claimed & were old; as to one of the claims, it could not be found that that claim was useful; some of the combinations claimed would not work; some of the claims were wanting in subject-matter; & the patent was invalid.—MOORE FILTER CO. *v.* GREAT BOULDER PROPRIETARY GOLD MINES, LTD. (1921), 38 R. P. C. 239, P. C.

635. ——.]—BRITISH SPIRO TURBINE, LTD. *v.* SULLIVAN MACHINERY CO., No. 224, *ante*.

636. ——.] — Pltfs. were the grantees & proprietors of a patent for "improvements in the liquid fuel supply arrangements of internal combustion engines." Claim 1 of the specification was as follows: "In the liquid fuel supply arrangements of internal combustion engines, the combination with a main tank or vessel, of a supplementary chamber or vessel into which the liquid is drawn by suction from the said main tank or vessel, & from which the liquid passes on its way to the carburettor through an automatically valve-controlled passage, & means for isolating said supplementary vessel from the source of suction & for placing same under atmospheric pressure, all arranged substantially as & for the purposes described." Claim 2 was as follows: "In the liquid fuel supply arrangements of internal combustion engines, the provision between the main fuel supply tank of vessel & the carburettor, of a supplementary vessel in communication with said main tank & also with a source of suction, & an auxiliary vessel in communication with the atmosphere, with said supplementary vessel through an automatically valve-controlled passage & with the carburettor, the whole arranged & operating substantially as & for the purposes described." In an action for infringement of the patent defts. pleaded prior publication, insufficiency, lack of utility & non-infringement. At the trial defts. did not ultimately contest utility or infringement, but contended that the patent was invalid by reason of the prior publication of two specifications, G. & V. It was contended that G.'s specification had indicated the problem to be solved & disclosed the subject-matter of pltfs.' patent, & that V.'s specification was an actual anticipation, & that all that pltfs. had done was to use known equivalents in carrying out the idea. It was held at the trial that the object of pltfs.' invention was to afford a gravitational feed to the carburettor of a motor vehicle from a small auxiliary tank which could be readily placed so as to be above the carburettor on any road level; & that to meet difficulties of construction it was proposed to suck the petrol up from the main tank at a lower level, & ultimately to deposit it in a comparatively small auxiliary tank under normal atmospheric pressure, whence it could escape to the carburettor; that, if the main idea was novel in the connection for which it was used, & was carried into effect by a combination of known appliances devised for the purpose, that would *primâ facie* afford sufficient subject-matter to support a patent; that G.'s specification did not show the essential elements of & was not confined to the particular object of pltf.'s invention, that there was no evidence that G.'s invention had ever been successful, & that his specification did not disclose the subject-matter of pltfs.' patent; that, though V.'s apparatus was in some respects similar to pltfs.' it did not contain pltfs.' main idea & did not provide for a definite alternate periodicity of suction & atmospheric pressure, that it had not been

Sect. 2.—Novelty: Sub-sect. 2, C. (c).]

shown that the apparatus would work successfully, & that it did not anticipate pltfs.' invention. Judgment was given for pltfs. Deft. appealed :—*Held:* (1) though the application of such a well known thing as a suction pump in a different manner & for a different purpose was not of itself subject-matter, the main idea of pltfs.' invention, namely, to make use of a pump to supply petrol to a carburettor & thereby to avoid the defects both of the gravitational & of the pressure feed, a thing not successfully done before, was novel in this connection & was carried into effect by a particular combination, devised for the purpose, of well known mechanical appliances, which combination, though in the abstract not of itself novel, was novel for the purpose for which it was used, & the patent was not invalid for want of subject-matter, & (2) V.'s specification had an object & an apparatus different from the object & apparatus of pltfs. & did not disclose one of the essential features of pltfs.' invention, & neither V.'s nor G.'s specification was an anticipation of pltfs.' patent.—HIGGINSON & ARUNDEL *v.* BENTLEY & BENTLEY, LTD. (1922), 39 R. P. C. 177, C. A.

637. ——.]—The S. G. co. were the proprietors of a patent granted to M. in respect of an invention of a "tablet for use in ascertaining the position of particular 'places.'" Claim (*a*) of the complete specification was as follows: "A tablet for ascertaining the positions of particular places, characterised by a chart or map with electric incandescent lamps arranged on the back of the same, by means of which different marked points on the map can be illuminated from the back, further by a switchboard connected with the map with references to the corresponding points in the map arranged in connection with the contact services for particular incandescent lamps." Q. applied by petition for the revocation of the patent on the grounds (*inter alia*) that he had invented, & applied for a patent in respect of, an advertising service consisting of a screen containing spaces for advertisements, a map of the locality in which the advertisers' premises are situated & having means of illuminating the map at points corresponding with the situation of the advertisers' premises; that the S. G. co. claimed to be entitled to restrain the manufacture, sale & exhibition of petitioner's invention; & that the S. G. co.'s patent was invalid by reason of the prior publication of the complete specifications of M., B., S., C. & P., prior common general knowledge, want of subject-matter & want of utility:—*Held:* the patented invention was obviously useful as evidenced by the admitted demand for the apparatus & for the apparatus in which petitioner was interested; the specification was capable of only one construction, viz., the patentee was merely dealing with a device of that kind which by means of a push-button temporarily closes a gap, whereby electrical contact is made, & on release of the button, opens the gap again, & the term "switchboard" in the specification was limited to such a contrivance, & the object of the inventor was to provide an apparatus which would give temporary information, & which, after so doing, would resume its original position; the specifications of M. & C. were irrelevant; the specifications of S. & B. were directed to altogether different objects; P.'s specification related to permanent electrical connections, & not temporary bridgings of a gap as in the case of M. W.'s patent.—*Re* MERK-WIRZ'S PATENT (1923), 40 R. P. C. 270.

638. ——.]—GIUSTI PATENTS & ENGINEERING WORKS, LTD. *v.* REES, No. 147, *ante*.

639. ——.]—TUCKER *v.* WANDSWORTH ELECTRICAL MANUFACTURING CO., LTD., No. 479, *ante*.

640. ——.]—A patent was granted for "improvements in & relating to the treatment of tungsten to facilitate working." Two of the claims were as follows: "(*a*) A body of mechanically worked tungsten which is ductile at ordinary temperature. (*b*) The method which consists in the repeated working of a body of coherent tungsten while it is hot until it becomes ductile at ordinary temperature." An action for infringement of the patent was brought in Scotland against a co., & a similar action was subsequently brought in England against another co., the allegations in the two actions being substantially the same. In the English action defts. alleged that the patent was invalid on the grounds of want of novelty & subject-matter, insufficiency of the specification & want of utility. In particular they alleged that the alleged invention had been anticipated by the publication of the specification of a patent of 1906 which had been held invalid for want of subject-matter. Pltfs. admitted that in the action on the 1906 patent they had contended that by following the directions in the specification of that patent a filament of drawn tungsten wire could be obtained. In the English action pltfs. contended that the essential features of the 1909 process were working the tungsten at 1,000 degrees to 1,300 degrees C., & by steps more numerous than would be used in the case of other metals, & that the specification of 1906 did not specify any temperature of working except by mentioning dull redness as a point to which the heating might be carried in air without oxidation, & did not indicate the necessity for repeated working, or the fact that the product was ductile cold. Defts. contended that the 1906 specification, with the common knowledge of the time, would enable a practical worker to obtain the results of the 1909 process. As to infringement, defts. contended that pltfs. had not shown that the metal upon which defts. had worked had not been purchased from one of pltfs.' licencees:—*Held:* the patent of 1909 was invalid on the ground that it was anticipated by the specification of 1906.

"I am unable to believe that repeated mechanical working was by itself a new discovery as a patentable invention. . . . Unless the ductile cold metal which was its product when the metal had been left to cool added the required element of novelty in the invention, the process for its production was not patentable; & I have already given my reasons for the conclusion that tungsten ductile cold, merely as such, was not a patentable result (LORD HALDANE).—BRITISH THOMSON-HOUSTON CO., LTD. *v.* CHARLESWORTH, PEEBLES & CO., SAME *v.* BRITISH INSULATED & HELSBY CABLES, LTD. (1925), 42 R. P. C. 180; *sub nom.* CHARLESWORTH, PEEBLES & CO. *v.* BRITISH THOMSON-HOUSTON CO., LTD., BRITISH THOMSON-HOUSTON CO., LTD. *v.* BRITISH INSULATED & HELSBY CABLES, LTD., 41 T. L. R. 259, H. L.

641. ——.]—A patent was granted for a "method of making stiffened foreparts of boot & shoe uppers." Claim (*a*) was as follows: "The method of making stiffened foreparts of boot & shoe uppers, which consists in incorporating in the un-lasted upper a stiffener blank comprising absorbent fibrous material containing a stiffening composition or material adapted to be softened by a degree of heat which is not injurious to leather, & to be stiffened by cooling, heating the blank to soften the same, lasting the upper while the blank

is heated & soft & thereby imparting to the blank the form of a box toe conforming to the toe portion of the last, & allowing the box toe to stiffen by cooling." Claim (*b*) was for a shoe having a box-toe made according to the method claimed in claim (*a*) & claims (*c*) & (*d*) were, shortly, for a box-toe blank of an absorbent material adapted to be softened by a temperature of approximately 110 degrees Fahrenheit. In an action for infringement, defts. alleged (*inter alia*) prior publication & prior user, & proved that a good toe-box could be made by following the directions given in a prior specification. Pltfs. proved that their toe-boxes, or toe-puffs, had had a great commercial success :—*Held :* the commercial success of pltfs.' toe-boxes was attributable to their convenience in manufacture ; claim (*a*) was exceedingly wide, & was invalid for want of subject-matter & want of novelty ; & all the other claims were invalid.—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* JOHNSON (E. A.) & CO., LTD. (1925), 42 R. P. C. 243, C. A.

642. ——.]—COLE *v.* ALLIANCE BOX CO., LTD., COLE & SMALLDRIDGE *v.* SAME, No. 502, *ante.*

643. —— **Specification substantially true—Though chemically incorrect.**]—A patent was granted in 1894 for an "improved manufacture of cattle food." The alleged improvement consisted in mixing peat with molasses or similar saccharine liquids. It was stated in the specification that the detrimental action on the animal organism of the potassium salt in the molasses was thereby avoided, & the digestion of the molasses facilitated. In an action for infringement brought by the owners of the patent, it was alleged that the invention was not good subject-matter, that it had been anticipated by the specification of A., published in 1857, & that it was not useful. At the trial the defts. admitted, after evidence as to the beneficial character of the food had been given, that they could not further contest the validity of the patent :—*Held :* there was sufficient subject-matter, & the specification of A. was not such as to constitute an anticipation.—MOLASSINE CO., LTD. *v.* TOWNSEND (R.) & CO., LTD. (1905), 23 R. P. C. 27.

644. —— **Prior specification abandoned.**]—OXLEY *v.* HOLDEN, No. 566, *ante.*

645. —— ——.]—A provisional specification is not, in general, intended to give a complete description of an invention to the public, but only to protect the inventor until the description is perfected in the final specification. Where a provisional specification contained an incomplete description, part of which was omitted in the final specification :—*Held :* there was no prior publication of the part omitted so as to vitiate a subsequent patent of a similar invention on the ground of want of novelty.—STONER *v.* TODD (1876), 4 Ch. D. 58 ; 46 L. J. Ch. 32 ; 35 L. T. 661 ; 25 W. R. 38.

Annotations :—**Consd.** Moseley *v.* Victoria Rubber Co. (1887), 57 L. T. 142. **Distd.** Sandow *v.* Szalay (1905), 23 R. P. C. 6. **Refd.** United Telephone Co. *v.* Harrison, Cox-Walker (1882), 21 Ch. D. 720.

646. —— ——.]—KAYE *v.* CHUBB & SONS, LTD., No. 543, *ante.*

647. —— **Sufficiency of disclosure.**]—HILL *v.* EVANS, No. 593, *ante.*

648. —— ——.]—OTTO *v.* LINFORD, No. 162, *ante.*

649. —— ——.]—Pltf., who was the grantee of a patent (1299 of 1882) for "Improvements in apparatus for use in drafting patterns for ladies' dresses & undergarments," brought an action against deft. for infringement of his patent by selling apparatus similar or practically similar to pltf.'s patent apparatus. Deft. denied the novelty & utility of pltf.'s invention, & alleged that it was not the subject of a patent. She also denied the sufficiency of the specification, & that she had infringed the patent :—*Held :* (1) pltf.'s specification had not particularly described & ascertained the nature of his invention, as it did not distinguish between what was old & what was new therein, & therefore the patent was void ; (2) if the patent was for the whole invention, parts thereof were included in certain previous American patents published in England, & if it was for part, the specification did not distinguish which part was claimed ; (3) if the patent was valid at all it must be as claiming a particular scale, & as deft. was not using that scale there was no infringement ; (4) taking the existing knowledge into consideration, pltfs.' alleged invention was only the application of a known method in a known way, & was not therefore the subject of a patent; (5) pltf.'s alleged invention was not devoid of utility.

It has been decided over & over again that the slightest amount of utility, I will not say an infinitesimal scintilla but a very slight amount of utility, is sufficient to sustain a patent, & that, for the purpose of utility, as indeed for the purpose of most of the other issues, you must take it by itself. I must suppose that this invention is new, that it is properly specified, & that it is subject-matter of a patent. I must assume all that in deciding the question of utility (GROVE, J.).

(6) A patentee, for the purpose of telling the public what his patent prevents their using without his licence for fourteen years, must give the nature of his invention in reasonably accurate language. . . . I do not say that he can possibly do it so as to prevent a critic finding some fault with it. Therefore I should read the specification liberally, & I should apply my mind to it in this way : Is the specification such that a fair man willing or wishing to understand it can reasonably gather from it what the patentee considers his invention & what he says he prohibits the public from using ? (GROVE, J.).

(7) My opinion is that there is not the same necessity for accurate description of how an invention shall be carried into effect, for the purpose of anticipating an invention, as there is for the purpose of sustaining a patent in the hands of a patentee, because in the latter case a description ought to be given which ought not to merely inform the minds of every skilled person or scientific person in the trade, but should inform the minds of ordinary people who are accustomed to work at the trade (GROVE, J.).—PHILPOTT *v.* HANBURY (1885), Griffin's Patent Cases (1884–1886), 185 ; 2 R. P. C. 33.

Annotations :—*As to* (1) **Refd.** Hollinrake *v.* Truswell, [1894] 3 Ch. 420. *As to* (6) **Refd.** Layland *v.* Boldy (1913), 30 R. P. C. 547 ; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1924), 41 R. P. C. 241. *As to* (7) **Refd.** Savage *v.* Harris (1896), 13 R. P. C. 364.

650. —— ——.]—The validity of a patent for making dynamo-electric machines was challenged on the ground of prior publications, founded upon a description in the specification in an earlier patent :—*Held :* the question whether the specification of the earlier patent was sufficient to disclose the invention to the public did not turn upon the sufficiency or insufficiency of the specification for the guidance of a skilled workman, for the patent might be void for incomplete directions to a workman of ordinary skill, & yet sufficient to inform the public of the invention, but the proper test was whether the description in the specification was sufficient to convey to men of science & employers of labour information which would enable

Sect. 2.—Novelty: Sub-sect. 2, C. (c) & (d). Sect. 3: Sub-sect. 1.]

them to understand the invention & give a workman specific directions for the making of the machine; &, applying such test, there had been prior publication.—ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPN. *v.* KING, BROWN & CO., [1892] A. C. 367; 9 R. P. C. 313, H. L.

Annotations:—**Follod.** Wilfley Ore Concentrator Syndicate *v* Guthridge, [1906] A. C. 548. **Refd.** Savage *v.* Harris (1896), 13 R. P. C. 364; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1924), 41 R. P. C. 241.

651. —— ——.]—CASSEL GOLD EXTRACTING CO., LTD. *v.* CYANIDE GOLD RECOVERY SYNDICATE, No. 343, *ante*.

652. —— ——.]—FULLER *v.* HANDY, No. 477, *ante*.

653. —— ——.]—The law as laid down seems to their Lordships to be in entire accordance with the judgment of the House of Lords in the case of *The Anglo-American Brush Electric Light Corpn.* v. *King, Brown & Co.*, No. 650, *ante*. Both the judgments of Lord Halsbury, then Lord Chancellor, & of Lord Watson expressly lay down that the specification is not required to contain "explanations or directions which would enable a workman of ordinary skill to construct" the patented invention. All that is required is that the specification of the patentee should "convey to men of science & employers of labour information which will enable them, without any exercise of inventive ingenuity, to understand his invention, & to give a workman the specific directions which he failed to communicate." Therefore, the construction of the document was a matter for the ct. (LORD DAVEY).—WILFLEY ORE CONCENTRATOR SYNDICATE, LTD. *v.* GUTHRIDGE (N.), LTD., [1906] A. C. 548; 75 L. J. P. C. 87; 95 L. T. 73; 23 R. P. C. 535, P. C.

654. —— **Specification accepted but not printed —At date of plaintiff's patent.**]—FOX *v.* ASTRACHANS, LTD., No. 414, *ante*.

655. —— **Complete specification lodged — After application for second patent.**]—BLOXHAM *v.* KEELESS CLOCK CO., No. 127, *ante*.

656. What specification must disclose — Practicable mode of producing article to be patented.]—BETTS *v.* MENZIES, No. 170, *ante*.

657. —— ——.]—We know what is necessary if there is said to be anticipation, not by the existence of an actual thing, but by description, either in a specification or otherwise, that the description must be of such a character as to enable any one competent to make the machine for which protection is claimed by the patentee to make it from the description given (COTTON, L.J.).—EHRLICH *v.* IHLEE (1888), 4 T. L. R. 337; 5 R. P. C. 437.

Annotations:—**Consd.** Gadd *v.* Manchester Corpn. (1892), 9 R. P. C. 516. **Apld.** Shrewsbury & Talbot Cab Co. *v.* Sterckx (1895), 13 R. P. C. 44. **Refd.** Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 12 R. P. C. 232; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre & Automatic Valve Co. (1899), 16 R. P. C. 50.

658. —— ——.]—Pltfs. were the proprietors of three patents for certain improvements in noiseless tyres for cabs, etc., & brought this action for infringement of the three patents. The first patent, which was the only one finally relied on by pltfs. at the trial, was for rolling the metal part of the tyres with a dovetail or undercut section, *i.e.*, with a flat base & flanges at an acute angle, so as to secure the india rubber. Deft. denied infringement, & alleged the invalidity of the patents. Deft. specially relied on a prior specification of A. as either anticipating pltfs.' first patent, or disclosing so much that there was no novelty or invention in such patent. The principal object of A.'s invention was to roll large iron plates, with flanges at right angles, to be used for the plating of ships & other purposes:—*Held:* A.'s specification did not enable a skilled workman to perceive pltf.'s invention & carry it into practical use, & inventive ingenuity was required to bring about pltfs.' result, & pltf.'s patent was valid.—SHREWSBURY & TALBOT CAB CO., LTD. *v.* STERCKX (1895), 13 R. P. C. 44; 12 T. L. R. 122, C. A.

659. —— ——.]—A patent was granted to R. for "improvements relating to synchronous dynamo electric machines." Claim (*a*) of the specification was as follows: "Arrangement for starting synchronous dynamo electric machines by means of an electric motor, in which a series or electrically equivalent connection is provided between the windings of the starting motor & the synchronous machine, for the purpose of effecting in one operation both the speeding up & the synchronising of the synchronous machine with the supply current." Pltfs. alleged infringement of the claim by the sale by defts. of a rotary converter to West Hartlepool Corpn. Defts. alleged that the patent was invalid by reason of want of novelty & of subject-matter. At the trial defts. relied upon the publication of the specification of an United States patent which showed an arrangement which was capable of being used in the manner indicated by R. They also contended that the series connection in the alleged infringement did not perform the function specified in the claim. Pltfs. contended that the prior arrangement was not suitable for the purpose claimed, & that the patentee had selected useful members from a known class & applied them to a new object. The United States patent had not been used:—*Held:* the patent was not anticipated by the United States specification, & was valid.—METROPOLITAN VICKERS ELECTRICAL CO., LTD. *v.* BRITISH THOMSON-HOUSTON CO., LTD. (1925), 43 R. P. C. 76, C. A.

660. Specification treating as impurity substance proposed to be used.]—FLOUR OXIDIZING CO., LTD. *v.* CARR & CO., LTD., No. 518, *ante*.

(d) Paper Read before Learned Society.

See Patents & Designs Acts, 1907 (c. 29), s. 45, & 1919 (c. 80) sched.; Patents Rules, 1920, r. 103.

SECT. 3.—UTILITY.

SUB-SECT. 1.—IN GENERAL.

661. Meaning of "utility."]—A very small amount of utility is sufficient to support a patent. Utility, in patent law, does not mean abstract, or comparative, or competitive, or commercial utility; but, as applied to an invention, it means that the invention is better than the preceding knowledge of the trade as to a particular fabric, better that is in some respect though not necessarily in every respect. For instance, an invention is useful by which an article good, though not so good as one previously known, can be produced

PART IV. SECT. 3, SUB-SECT. 1.

661 i. *Meaning of "utility."*]—Patent which provided a useful choice held not to be bad on the ground of inutility.—KELVIN *v.* WHYTE, THOMSON & CO. (1907), 25 R. P. C. 177.—SCOT.

661 ii. ——.]—The fact that a machine has been several times improved since the original patent was obtained is no argument against its

more cheaply by a different process. An invention is useful when the public are thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could do before, or in other words, an invention is patentable which offers the public a useful choice.—WELSBACH INCANDESCENT GAS LIGHT CO. *v.* NEW INCANDESCENT (SUNLIGHT PATENT) GAS LIGHTING CO., [1900] 1 Ch. 843; 69 L. J. Ch. 343; 82 L. T. 293; 48 W. R. 362; 16 T. L. R. 205; 44 Sol. Jo. 262; 17 R. P. C. 237.

Atkins & Applegarth *v.* Castner [illegible], 18 R. P. C. 281. *v.* Whyte, Thomson (1907), 25 R. P. C. 177.

662. ——.]—(1) In 1890 letters patents were granted to A. & A. for "improved means & apparatus for separating alkaline & earthy metals from the salts of such metals or from other substances containing them." The object of the invention was to obtain by electrolysis that which they admitted had been already so obtained, but to obtain it on a practical scale, & with a saving of energy, by reducing the amount of counter electromotive force set up by the reaction. They used a continuously flowing mercury cathode with a metal basis upon which the mercury was to flow. The mercury was to remove the product from the electrolytic cell, but the speed or rate of flow was not specified or relied on as essential. They did not say whether in the electrolysis of common salt their principal product was sodium or caustic soda, though they expected to get both. In 1897 they commenced an action for infringement of their patent against the C. K. A. Co. Defts. denied infringement, & attacked the patent on the grounds of want of novelty & want of utility. They claimed to be working under patents granted to their predecessors in title in 1892 & 1893:—*Held:* though pltfs. were wrong in thinking that counter electromotive force was the obstacle they had to contend with, this did not *per se* invalidate their patent, but nevertheless their patent was invalid for want of novelty & want of utility, & also defts. had not infringed, as in their apparatus the cathode was of mercury only & the base of non-conducting material.

The fact that the patentees misconceive & misstate their theory does not, I think, invalidate their patent. Their theory may be wrong, but if their process & apparatus are right their patent may be supported notwithstanding their faulty theory. (BUCKLEY, J.).

(2) The utility I have to investigate is not necessarily commercial utility or competitive utility, but utility for the purposes of patent law. As regards this patent the essential utility consists in my judgment of two things. First, that the patentees, adopting a known process, undertake to show the public how to effect on a practical scale that which could be effected before, but not on a practical scale; & secondly, that the way they indicate shall be one which effects an economy of power (BUCKLEY, J.).—ATKINS & APPLEGARTH *v.* CASTNER-KELLNER ALKALI CO., LTD. (1901), 18 R. P. C. 281.

663. ——.]—"Utility" means having commercial existence as a process of manufacture (LORD HALSBURY, C.).—WILSON BROTHERS BOBBIN CO., LTD. *v.* WILSON & CO. (BARNSLEY), LTD. (1902), 20 R. P. C. 1.

664. Necessity for "utility."]—MANTON *v.* PARKER (1814), 1 Carp. Pat. Cas. 274; *Dav. Pat. Cas.* 327; 1 Web. *Pat. Cas.* 192, n.

665. ——.]—MANTON *v.* MANTON, No. 438, *ante.*

666. ——.]—*The utility* of the invention & the *intelligibility* of the specification are for the jury.—HILL *v.* THOMPSON (1817), 1 Web. Pat. Cas. 237; 3 Mer. 622; 1 Carp. Pat. Cas. 377; *subsequent proceedings* (1818), 8 Taunt. 375.

Annotations:—**Reid.** Brunton *v.* Hawkes (1821), 4 B. & Ald. 541; Bickford *v.* Skewes (1827), 1 Web. Pat. Cas. 211; Russell *v.* Barnsley (1834), 1 Web. Pat. Cas. 472; Kay *v.* Marshall (1836), 1 My. & Cr. 373; Curtis *v.* Cutts (1839), 8 L. J. Ch. 184; Neilson *v.* Harford (1841), 1 Web. Pat. Cas. 295; Crane *v.* Price (1842), 4 Man. & G. 580; Cook *v.* Pearce (1843), 8 Q. B. 1044; Electric Telegraph Co. *v.* Nott (1847), 2 Coop. *temp.* Cott. 41; Newall *v.* Wilson (1852), 2 De G. M. & G. 282; Harwood *v.* G. N. Ry. Co. (1860), 2 B. & S. 194; Bovill *v.* Goodier (1866), 35 Beav. 427; Murray *v.* Clayton (1872), 20 W. R. 649; Clark *v.* Adie (1877), 2 App. Cas. 315; Coles *v.* Baylis (1886), 3 R. P. C. 180.

667. ——.]—LEWIS *v.* MARLING, No. 440, *ante.*

668. ——.]—MORGAN *v.* SEAWARD, No. 442, *ante.*

669. ——.]—STEAD *v.* WILLIAMS, No. 20, *ante.*

670. ——.]—ECCLES & BRIERLY *v.* MCGREGOR, No. 200, *ante.*

671. ——.]—FOX *v.* DELLESTABLE, FOX *v.* JONES, No. 447, *ante.*

672. ——.]—BARLOW *v.* BAYLIS (1870), Griffin's Patent Cases (1884–1886), 44, N. P.

673. ——.]—DOWNES *v.* FALCON ENGINE WORKS, No. 450, *ante.*

674. ——.]—LANE FOX *v.* KENSINGTON & KNIGHTSBRIDGE ELECTRIC LIGHTING CO., No. 117, *ante.*

675. ——.]—ALLEN *v.* DUCKETT & SON, No. 454, *ante.*

676. ——.]—In 1892 a patent was granted to S. for "Improvements in pneumatic tyres for velocipedes & other vehicles." In the provisional specification the patentee stated that he preferred to employ an endless band made of caoutchouc & cloth & moulded in the form of a tubular ring; after describing enlargements at the edge of the lower margin & at a convenient distance from the edge of the upper margin & stating that these enlargements lay in a recess at the bottom of the rim, the specification continued as follows: "When the tyre is inflated, the upper margin is pressed against the lower margin, an airtight joint resulting. The enlarged parts engage with the shoulders at the bottom of the rim, & thereby limit the expansion of the tubular band." It also stated: "Instead, however, of using a single band, two bands may be employed. The outer band would then have enlarged edges for engaging with the shoulders at the bottom of the rim, the inner band lying between the enlarged edges & having lateral flaps projecting over the margins of the outer band." The complete specification included a form of tyre in which the lateral flaps of the second band lay underneath the margins of the first band, & also a form of tyre in which the second band was omitted, but the margins of the one band did not meet; the specification stated that the band in this form had each of its margins forced by the

being a useful invention.—KINMOND *v.* JACKSON, KINMOND *v.* LAWRIE, 1 C. L. R. 66.—**IND.**

664 i. *Necessity for "utility."*]—Where prior to a certain patent, persons had to resort to a dangerous practice to do that which was the object of the patent, although not a determining factor it strengthens the conclusion that the invention is a new & useful one.—ASHDOWN *v.* NICKSON CONSTRUCTION CO., LTD., [1924] 4 D. L. R. 868; 34 B. C. R. 351.—**CAN.**

664 ii. ——.]—Commercial success alone, without the solution of a difficulty, will not establish subject-matter.—DURABLE ELECTRIC APPLIANCE CO., LTD. *v.* RENFREW ELECTRIC PRODUCTS, LTD., DURABLE ELECTRIC APPLIANCE CO., LTD. *v.* SUPERIOR ELECTRICS, LTD., [1926] 4 D. L. R. 1004; 59 O. L. R. 527.—**CAN.**

664 iii. ——.]—WALLACE *v.* JACK & SON, LTD. (1904), 22 R. P. C. 581.—**SCOT.**

Sect. 3.—*Utility: Sub-sects.* 1 & 2. *Part V. Sects.* 1, 2, 3, 4 & 5: *Sub-sect.* 1.]

direct pressure of the compressed air against the bottom of the rim, & that the head of the spokes lay under the margins, & that no air could escape past the holes in the rim. In 1897 the owners of S.'s patent brought an action for infringement of the same against a co., who set up numerous defences, including disconformity, want of utility, insufficiency of description, & anticipation by the publication of a letter by B. in a cycling paper in 1890. In this letter B. suggested a tyre in one piece consisting alternately of rubber, canvas, & rubber, all vulcanised together, & stated that he had taken out a patent for a plan whereby the completely moulded tyre, made as above, should be cut longitudinally on the under side & provided with a non-return valve throughout the whole length & then the edges made up with canvas, & in that way he would be able to get at the inside & patch the hole in case of puncture. The application for this patent was not proceeded with. Pltfs. contended that S. was the first inventor of a detachable circumferentially air-sealed tyre. No tyres had been made under S.'s patent until 1896, & the tyres that had been made by pltfs. during & since that year were alleged by defts. to have certain features not disclosed by S.'s patent, & to owe their practicability to those features & to the employment of soft soap to produce an initial seal, soft soap not being at the date of the invention known for that purpose in connection with tyres:—*Held:* the patent was bad on account of disconformity & want of utility; on account of disconformity, because the complete specification included the form of tyre in which there was no overlapping of rubber on rubber, but a seal was stated to be obtained by the pressure of each of the margins of the tyre against the metal rim; & on accouut of want of utility, because the patented invention would not work except with the aid of subsequent discovery & invention.—TUBELESS PNEUMATIC TYRE & CAPON HEATON, LTD. *v.* TRENCH TUBELESS TYRE CO., LTD. (1899), 16 R. P. C. 291.

677. ——.] — ATKINS & APPLEGARTH *v.* CASTNER-KELLNER ALKALI CO., LTD., No. 662, *ante*.

678. ——.] — Hearing of appeal adjourned for further evidence as to the effect or non-effect of these processes:—*Held:* the evidence failed to establish that the difference created by these processes was a reasonably substantial & beneficial difference so as to justify the grant of a patent.—*Re* HODGKINS APPLICATION (1906), 23 R. P. C. 527.

679. ——.]—A patent was granted in 1895 for "An improved process for obtaining acetic acid from pyrolignate of lime." The claim was for a process for obtaining the pure acid by decomposing the pyrolignate with acids, & distilling over the released acetic acid in a vacuum, with the object of preventing any over distillation of the tar spirit or oils combined or mixed with the crude pyrolignate. At the trial of an action for infringement of the patent defts. alleged that the process was for obtaining the pure acid by a single distillation in a vacuum & gave evidence to show that the acid so produced contained tarry impurities & required a second distillation for its purification. The process used by defts. consisted in distilling in a vacuum & redistilling. Pltf. gave evidence to show that distillation of the pyrolignate in a vacuum reduced the quantity of sulphurous acid formed. Defts. contended that that advantage was not pointed out in the specification & that the patent was not limited to the use of sulphuric acid:—*Held:* pltf.'s process had not the useful result claimed for it; the patent was invalid for want of subject-matter; & if it had been valid, the process used by defts. would not have been an infringement.—VON DER LINDE *v.* BRUMMERSTAEDT & CO. (1909), 26 R. P. C. 289.

680. ——.] — *Re* MERK-WIRZ'S PATENT, No. 637, *ante*.

——Necessity for as constituting improvement.]—*See* Sect. 1, sub-sect. 5, B., *ante*.

——Necessity for as constituting combination.]—*See* Sect. 1, sub-sect. 7, B. (*b*), *ante*.

681. Question for jury.] — HILL *v.* THOMPSON, No. 666, *ante*.

682. Presumption against utility—Invention not in general use.]—(1) The term manufacture means either the machine or the mode of constructing the machine.

(2) The user of an invention by the patentee, for the purposes of commerce before the date of the patent will vitiate.

(3) The novelty of every part of the invention is the consideration of the grant.

(4) The inutility of parts of an invention will not vitiate if the result on the whole be useful, provided there be no false suggestion.

(5) It must be admitted that if the patentee himself had before his patent constructed machines for sale as an article of commerce, for gain to himself, & been in the practice of selling them publicly, that is, to any one of the public, who would buy, the invention would not be new at the date of the patent (PARKE, B.).—MORGAN *v.* SEAWARD (1837), 2 M. & W. 544; 1 Web. Pat. Cas. 187; Murp. & H. 55; 2 Carp. Pat. Cas. 96; 6 L. J. Ex. 153; 1 Jur. 527; 150 E. R. 874.

Annotations:—As to (2) **Consd.** Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194. *As to* (3) **Consd.** Bovill *v.* Finch (1870), L. R. 5 C. P. 523. *Generally*, **Reld.** Heath *v.* Smith (1854), 3 E. & B. 256; Patterson *v.* Gas Light & Coke Co. (1877), 3 App. Cas. 239; United Horse Nail Co. *v.* Stewart (1885), 2 R. P. C. 122; Westley Richards *v.* Perkes (1893), 9 T. L. R. 351.

683. Degree of utility necessary to support patent—Effect of failure of part.]—HILL *v.* THOMPSON, No. 25, *ante*.

684. —— ——.] — MORGAN *v.* SEAWARD, No. 442, *ante*.

685. ——.]—PHILPOTT *v.* HANBURY, No. 649, *ante*.

686. ——.]—UNITED TELEPHONE CO. *v.* BASSANO, No. 252,

687. ——.] — WELSBACH INCANDESCENT GAS LIGHT CO. *v.* NEW INCANDESCENT (SUNLIGHT PATENT) GAS LIGHTING CO., No. 661, *ante*.

688. ——.]—If there is a really good invention, & there is a minor claim for a subordinate part, a small amount of utility will support that minor claim (LORD ALVERSTONE, C.J.).—*Re* BROWN'S PATENT (1907), 25 R. P. C. 86, C. A.

689. Utility not specified in specification — For particular purpose—Sufficiency of showing any utility.]—(1) In an action for infringement of a patent for "Improvements in dobbins or apparatus for operating the healds of looms for weaving," defts. denied infringement, & alleged that the patent was invalid (*inter alia*) on the grounds of (*a*) the inutility of the invention claimed in the second claim; (*b*) that neither of the patentees was, but that J. was, the true & first inventor of the invention; (*c*) disconformity; (*d*) want of subject-matter; & (*e*) anticipation:—*Held:* neither disconformity nor want of utility was established.

(2) Where the alleged utility of a patent consists in presenting to the public an alternative or choice, there must be a useful alternative or a useful choice.

(3) If there is no representation in the specification as to utility for any particular purpose, it is sufficient if pltfs. can show any utility.—WARD BROTHERS *v.* HILL (JAMES) & SONS (1901), 18 R. P. C. 481; *affd.* (1903), 20 R. P. C. 189, C. A.

SUB-SECT. 2.—EVIDENCE OF WANT OF UTILITY.

690. Effect of non-user.]—MINTER *v.* MOWER (1835), 1 Web. Pat. Cas. 138, N. P.; *subsequent proceedings* (1837), 6 Ad. & El. 735.

691. —— & non-sale.]—RAYNER *v.* LIVINGSTONE (1882), cited in 46 L. T. at p. 41.

Annotation:—**Consd.** Otto *v.* Linford (1882), 46 L. T. 35.

692. —— ——.]—OTTO *v.* LINFORD, No. 162, *ante.*

693. ——.]—Where an invention has not been brought into use during the term of the letters patent, but such non-user is satisfactorily accounted for, & the invention is one of great merit, an extension may be granted.—*Re* SOUTHBY'S PATENT, [1891] A. C. 432, P. C.

694. Limited user—Must be considered.]—ECCLES & BRIERLY *v.* MCGREGOR, No. 200, *ante.*

Part V.—Application for Patent.

SECT. 1.—WHO MAY APPLY.

See Patents & Designs Act, 1907 (c. 29), ss. 1 (1), (2), 43; Patent Rules, 1920, rr. 8–18.

Capacity to obtain letters patent.]—*See* Part II., *ante.*

Applications under international convention.] *See* Part XVI., *post.*

troller-General, acting under Patents & Designs Act, 1907 (c. 29), s. 2 (5), required appct. to furnish samples; the requirements were only in part complied with. The chief examiner, acting for the Comptroller-General, required further samples to be furnished before acceptance of the complete specification.—*Re* J. Y. J.'s APPLICATIONS (1910), 28 R. P. C. 625.

SECT. 2.—FORM AND DATE OF APPLICATION.

See Patents & Designs Acts, 1907 (c. 29), ss. 1, 2, 43, 91; 1919 (c. 80), Sched.; Patents Rules, 1920, rr. 10–18.

695. Form—Application by foreign corporation.]—A foreign corpn. applied for a patent on form A., declaring that they were the true & first inventors of the invention. The Comptroller required the application to be amended. Form A. in the sched. to the Patent Rules is not applicable to the case of corpn., but is intended for personal appcts. who are true & first inventors; Form A. is intended for the use where there has been a communication from abroad, whether the communicator is a corpn. or private individual.—*Re* SOCIÉTÉ ANONYME DU GÉNÉRATEUR DU TEMPLE'S, APPLICATION (1895), 13 R. P. C. 54.

696. —— Co-applicants abroad—Where some have no equitable interest.]—NOTES OF OFFICIAL RULINGS, 1926 (A), No. 1056, *post.*

697. Date—Foreign patentee—Renewed application.]—*Re* VAN DE POELE'S PATENT (1889), 7 R. P. C. 69.

698. —— ——.]—Patent applied for under the convention must bear the same date as the appct.'s foreign patent.—*Re* SCOTT'S PATENT (1910), 27 R. P. C. 298.

699. —— Application left at Patent Office after hours.]—*Re* MATTHEWS & STRANGE'S APPLICATION (1910), 27 R. P. C. 288.

SECT. 3.—SAMPLES.

See Patents & Designs Act, 1907 (c. 29), s. 2 (5); Patents Rules, 1920, r. 38.

700 Right of Comptroller to require samples—Chemical invention.]—On each of two applications for patents for chemical inventions the Comptroller-General, acting under Patents & Designs Act, 1907 (c. 29), s. 2 (5), required appct. to furnish samples; the requirements were only in part complied with. The chief examiner, acting for the Comptroller-General, required further samples to be furnished before acceptance of the complete specification.—*Re* J. Y. J.'s APPLICATIONS (1910), 28 R. P. C. 625.

SECT. 4.—SPECIFICATION.

See Part VI., *post.*

SECT. 5.—PROCEDURE.

SUB-SECT. 1.—POWERS AND DUTIES OF COMPTROLLER.

See Patents & Designs Act, 1907 (c. 29), ss. 7 (1), 70, 74, 75, 78; Patents & Designs Act, 1919 (c. 80), ss. 12, 17, sched.; & Patents Rules, 1920, rr. 10–18.

701. Reference of application to Examiner.]—*Re* C.'S APPLICATION, No. 712, *post.*

702. Matters for consideration of Comptroller—Whether a "manner of manufacture."]—*Re* COOPER'S APPLICATION, No. 103, *ante.*

703. —— ——.]—*Re* R.'S THREE APPLICATIONS (1923), 40 R. P. C. 465.

Annotation:—**Refd.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

704. —— ——.]—*Re* D. A. & K.'S APPLICATION (1925), 43 R. P. C. 154.

705. —— Whether an invention.]—*Re* A. F.'S APPLICATION (1913), 31 R. P. C. 58.

Annotation:—**Apld.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

706. —— Invention contravening known laws of mechanics.]—*Re* T. S.'S APPLICATION (1924), 41 R. P. C. 530.

707. —— Whether invention obtained by fraud committed abroad—Application under international convention.]—On an opposition, under Patents & Designs Act, 1907 (c. 29), s. 11, to the grant of a patent on the grounds that the invention had been obtained from the opponent in the United States of America, & was the subject-matter of an application of the opponent made before the date of appct.'s application in the

PART V. SECT. 2.

h. *Delay caused by war.*]—*Re* LOCOMOTIVE STOKER CORPN. LETTERS PATENT (1920), 20 Exch. C. R. 191.—**CAN.**

PART V. SECT. 3.

k. *Necessity for filing model.*]—The omission to file a model of an invention for which letters patent are applied for, is fatal to the validity of the patent issued without such model, & without any dispensation by the comr. of patents from filing a model.—CAMPBELL *v.* BATE (1883), 29 L. C. J. 47.—**CAN.**

PART V. SECT. 5, SUB-SECT. 1.

l. *Conflicting applications for patent—Power to appoint arbitrator.*]—When there are more than two conflicting applications for any patent, & one of the appcts. has intimated to the comr.

Sect. 5.—*Procedure: Sub-sects.* 1, 2, 3, 4 & 5, *A.* & *B. Sects.* 6 & 7.]

United Kingdom, but after the date claimed by the appct. under the provisions of Patents & Designs Act, 1907 (c. 29), s. 91, the opposition was dismissed by the Comptroller-General, who held that he had no jurisdiction to determine the issues raised, & that the opponent was not entitled to plead them in opposition to the grant of a patent:—*Held:* the decision of the Comptroller-General was right.—*Re* CURWEN'S APPLICATION (1912), 30 R. P. C. 128.

708. —— Disconformity between provisional & complete specification of prior patent.]—In considering whether a reference to a prior specification ought to be inserted in a later specification under Sect. 8 of Patents & Designs Acts, 1907 (c. 29), & 1919 (c. 80), on the ground that the invention claimed in the later specification has been wholly or in part claimed in the prior specification, the question of disconformity between the provisional & complete specifications of the prior patent is not a matter into which the law officer or the Comptroller ought to enter.—*Re* HANDLEY PAGE & HANDLEY PAGE, LTD.'S APPLICATION (1924), 41 R. P. C. 109.

709. To accord earlier date to one of two identical specifications.]—A complete specification was filed under sect. 16 in respect of two provisional specifications, one of which was identical with an earlier provisional specification, & the date of the earlier specification was granted. The Examiner reported that the invention was in part claimed in the complete specification which had been filed in respect of the earlier provisional specification referred to. In order to avoid a statutory reference under sect. 8, two of co-appcts. agreed to convert the application into one for a patent of addition under sect. 19, but third appct. disagreed with this course. At a hearing under sect. 12 (1) (*b*) the Assistant-Comptroller decided that the application might proceed in the names of the two appcts. without the third. An appeal was lodged on the grounds that there was no dispute within the meaning of sect. 12 (1) (*b*) & that the earlier date should not have been accorded one of the provisional specifications. It was contended also that a provisional specification which had been cognated with another could not be again cognated. The Law Officer dismissed the appeal, holding that both grounds of appeal failed. —*Re* NOVOCRETES, LTD., CASE & GARROW'S APPLICATION (1926), 43 R. P. C. 171.

Amendment of specification.]—*See* Part VI., Sect. 7, *post*.

SUB-SECT. 2.—FILING OF SPECIFICATION.

Patents & Designs Acts, 1907 (c. 29), s. 5; (c. 80), sched., Patents Rules, 1920, rr. 13, 30.

710. After time expired.] — Leave to file a specification, after the time for that purpose had expired, under the [illegible] (1886), 26 L. T. O. S. 90, L. JJ.

Mandatory order to compel filing—Refused on bonâ fide difference between parties.]—The [illegible]ers of two inventions relating to the same subject, for which provisional protection had been obtained, sold one third share of the inventions to pltf., & agreed to forthwith apply for patents for the inventions. Pltf. commenced an action for specific performance of this contract, & then moved for a mandatory order to compel defts. to file a complete specification in respect to the first invention. The nine months allowed for filing the complete specification would expire on May 1, 1894. Defts. put in evidence to show that it was useless to take out a patent for the first invention, & if it were done there might be great risk of rendering the second invalid. Pltf. disputed this, & alleged that it was to the interest of all parties to obtain a patent for the first invention:—*Held:* as there appeared to be a *bonâ fide* difference of opinion between the parties, & the evidence was conflicting, no order ought to be made, even if such an order could be made on motion.—PUNCHARD *v.* DADE (1894), 11 R. P. C. 257.

SUB-SECT. 3.—EXAMINATION OF APPLICATION.

See Patents & Designs Act, 1907 (c. 29), ss. 3 (1), (2), 6, 7 (1), 8 (1), 68; Patents & Designs Act, 1919 (c. 80), sched., & Patents Rules, 1920, rr. 28–31.

712. Power of comptroller to refer.] — The question then arises, what are the powers of the Comptoller in such a case, & I should have thought that there was not much doubt upon the point, having regard to Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 5 (4), & s. 7 (1). Sect. 5 (4) provides that: "A complete specification, whether left on application or subsequently, must particularly describe & ascertain the nature of the invention, & in what manner it is to be performed, & must be accompanied by drawings if required," & that condition applies to the complete specification whether left originally or subsequently. There is then power in the Comptroller to refer these applications to Examiners. Under sect. 6, every application is reported upon by an Examiner, in order to ascertain whether the condition of sect. 5 (4) has been fulfilled. In my judgment the report of the Examiner is not to fetter the judgment of the Comptroller but to assist him, & if upon the face of the specification the Comptroller saw apart from the report of the Examiner that the specification was insufficient, it would be in his power to require an amendment. On reference to sect. 7 (1) it will be observed that the provision is that: "If the Examiner reports that the nature of the invention is not fairly "described," the Comptroller may refuse to accept the application or require that the application be amended before he proceeds. The amendment which is to be required is to be determined by the judicial act of the Comptroller, with an appeal to the law officer. Quite apart from any general practice, I should hold that it is not intended to relegate to the Examiner the function of deciding what the amendment is to be, though, undoubtedly, if the Examiner reports that there is a full & fair description, the application goes on (SIR RICHARD WEBSTER, A.-G.).—*Re* C.'S APPLICATION (1890), 7 R. P. C. 250.

713. Object of reference—Assistance of comptroller.]—*Re* C.'S APPLICATION, No. 712, *ante*.

714. —— Report on nature of invention.] — *Re* C.'S APPLICATION, No. 712, *ante*.

715. —— Conformity of complete specification to statutory requirements.]—*Re* C.'S APPLICATION, No. 712, *ante*.

that he will not unite with the other appcts. in appointing arbitrators, the appointment may be made by the comr. | without notice to or consultation of the wishes of the other appcts.—FALLER *v.* AYLEN (1904), 8 O. L. R. 70; 4 O. W. R. 97; 24 C. L. T. 322.—CAN.

716. Authority of examiner — To decide nature of amendment.]—*Re* C.'S APPLICATION, No. 712, *ante*.

717. —— To report alleged invention no invention.]—Appct. lodged an application for a patent & a provisional & a complete specification, & the application was referred by the Comptroller-General of patents to an Examiner under Patents & Designs Act, 1907 (c. 29), s. 3. On the Examiner's report that the application did not refer to a manner of new manufacture & was therefore not within Patents & Designs Act, 1907 (c. 29), s. 93, the Comptroller refused to accept the application. A rule *nisi* having been obtained for a *mandamus* to the Comptroller to hear the application according to law, on the ground that in refusing it for the reason that it did not refer to a manner of new manufacture he had exceeded his jurisdiction:—*Held:* the rule must be discharged, (1) because the examiner was entitled under Patents & Designs Act, 1907 (c. 29), s. 3 (2), to report that the alleged invention was not an invention at all, & (2) because the appropriate remedy was not by *mandamus*, but by appeal to the law officer.—R. *v.* COMPTROLLER-GENERAL OF PATENTS, *Ex p.* MUNTZ (1922), 127 L. T. 547; 38 T. L. R. 652; 66 Sol. Jo. 558; 39 R. P. C. 335, D. C.

Annotation:—*As to* (1) **Refd.** *Re* D. A. & K.'s Appln. (1925), 43 R. P. C. 154.

718. Report of examiner — Not binding on Comptroller.]—*Re* C.'S APPLICATION, No. 712, *ante*.

719. Investigation of previous specifications—What amounts to publication.]—On an application for a patent by P. & S. it was held by the Chief Examiner, acting for the Comptroller, that a specification which is open to public inspection under Patents Act, 1901 (c. 18), s. 1 (2), now re-enacted by Patents & Designs Act, 1907 (c. 29), s. 91 (3) (*a*), is "published" within the meaning of sect. 7 of the Act, & that a specification of T. was so published. Appcts. appealed:—*Held:* the decision of the Chief Examiner was right.—*Re* PARSONS & STONEY'S APPLICATION (1910), 27 R. P. C. 491.

Amendment by Comptroller.]—*See* Part VI., Sect. 7, *post*.

SUB-SECT. 4.—HEARING BEFORE COMPTROLLER.

See Patents & Designs Acts, 1907 (c. 29), ss. 7, 8, 73, 77; 1919 (c. 80), sched.; Patents Rules, 1920, r. 34.

SUB-SECT. 5.—APPEAL FROM COMPTROLLER.

A. In General.

See Patents & Designs Act, 1907 (c. 29), ss. 3 (3), 6 (4), 7 (5), 40, 77; Patents & Designs Act, 1919 (c. 80), s. 17.

720. Appeal to law officer—Attorney-General not a court.]—The A.-G. could not by sub-sect. 8 [of Patents, Designs & Trade Marks Act, 1883 (c. 57)] make a valid amendment if it made the specification substantially larger or substantially different from the invention claimed by the original specification. . . . Sub-sect. 9 [of Patents, Design & Trade Marks Act, 1883 (c. 57)] had not the effect of making an amendment wrongly allowed conclusive; & if any one attempted to enforce the patent so amended, he could be met by saying that the amendment was a nullity & could not alter the original specification. The words in sub-sect. 9, for all purposes, had not the effect of altering the law as it stood before the Act. The A.-G. though acting judicially in the matter, was not a ct., & no prohibition would lie (LORD ESHER, M.R.).—*Ex p.* SIMON (1888), 4 T. L. R. 754, C. A.

721. ——.]—R. *v.* COMPTROLLER-GENERAL OF PATENTS, *Ex p.* MUNTZ, No. 717, *ante*.

722. Admission of new evidence—Grounds of refusal—Acceptance of Comptroller's decision by applicant.]—*Re* HAMPTON & FACER (1887), Griffin's Patent Cases (1887), 13.

723. —— —— Opportunity of filing declarations before Comptroller.]—*Re* PITT'S PATENT (1888), 5 R. P. C. 343.

724. Cross-examination — Refused where opportunity of filing declarations before Comptroller.]—*Re* PITT'S PATENT (1888), 5 R. P. C. 343.

B. Costs.

See Patents & Designs Act, 1907 (c. 29), s. 40.

725. General rule.] — Under ordinary circumstances, where the parties are not successful in in appealing, I shall award costs against the unsuccessful party, but this is a case of a second disclaimer, & I have always held the opinion that second disclaimers are not to be encouraged if they can possibly be avoided, & therefore, as they must be narrowly watched, I shall make no order as to costs.—*Re* HADDAN'S PATENT (1885), Griffin's Patent Cases (1887), 12.

Annotation:—**Refd.** *Re* Ashworth's Patent (1886), Griffin's Patent Cases (1887), 6.

726. Power of law officer—Defined by statute.]—*Re* PIETSCHMANN'S PATENT, No. 1334, *post*.

On amendment.]—*See* Part VI., Sect. 7, subsect. 2, II., *post*.

SECT. 6.—**ACCEPTANCE OF SPECIFICATION.**

See Patents & Designs Act, 1907 (c. 29), ss. 6 (5), 7 (3), 9, 10; Patent Rules, 1920, rr. 39–41.

727. Injunction to restrain acceptance—"Lawful ground of objection"—Secret processes.]—REX CO. & REX RESEARCH CORPN. *v.* MUIRHEAD & CONTROLLER-GENERAL OF PATENTS (1926), 162 L. T. Jo. 409.

SECT. 7.—**WITHDRAWAL OF APPLICATION.**

728. Joint application — Threat of inventor to abandon.]—WOOL, HIDE & SKIN SYNDICATE, LTD. *v.* RICHES (1902), 19 R. P. C. 127.

Annotation:—**Consd.** *Re* A. & B.'s Appln. (1910), 28 R. P. C. 454.

729. —— Effect of abandonment by inventor.]—*Re* A. & B.'S APPLICATION (1910), 28 R. P. C. 454.

Part VI.—Specifications.

SECT. 1.—IN GENERAL.

730. Object of specification—To inform public.]—LIARDET *v.* JOHNSON, No. 844, *post.*

731. —— ——.]—R. *v.* ARKWRIGHT, No. 14, *ante.*

732. —— ——.]—MORGAN *v.* SEAWARD, No. 442, *ante.*

733. —— ——.]—HOLMES *v.* LONDON & NORTH-WESTERN RY. CO., No. 1049, *post.*

734. —— ——.]—YOUNG & NEILSON *v.* ROSENTHAL & CO., No. 460, *ante.*

735. —— ——.]—A specification, although inartistically & in places inaccurately worded, held sufficiently to describe the patented invention so as to enable a reasonably well-informed artisan to make that which was patented.

Where a patentee in his specification describes his invention as being for improvements on what he has previously patented, the ct. will not readily construe the specification as claiming what the patentee had previously patented.

The meaning which I think, in my view of the patent law, has always been placed on the object & purpose of a specification is, that it is to enable, not any one, but a reasonably well-informed artisan dealing with a subject-matter with which he is familiar, to make the thing, so as to make it available for the public at the end of the protected period (LORD HALSBURY, C.).—TUBES, LTD. *v.* PERFECTA SEAMLESS STEEL TUBE CO., LTD. (1902), 20 R. P. C. 77, H. L.

736. —— ——.]—The patentee's obligation is not to be omniscient; the patentee's obligation is to put the public in the possession of his invention, & if he does that *bonâ fide* in such a way that they know its advantages practically, & they can obtain those advantages practically, the fact that he has formed an erroneous view in theory of that which procures those advantages, or the state of things in which those advantages occur, does not, in my opinion, militate against him. He does not thereby deceive the Crown in such a sense as to militate against the validity of the grant (FLETCHER MOULTON, L.J.).—"Z" ELECTRIC LAMP MANUFACTURING CO., LTD. *v.* MARPLES, LEACH & CO., LTD. (1910), 27 R. P. C. 737, C. A.

737. —— **Protection of patentee's rights.**]—MORGAN *v.* SEAWARD, No. 442, *ante.*

738. —— ——.]—YOUNG & NEILSON *v.* ROSENTHAL & CO., No. 460, *ante.*

739. —— ——.]—HOLMES *v.* LONDON & NORTH-WESTERN RY. CO., No. 1049, *post.*

740. Effect of partial invalidity.]—KAY *v.* MARSHALL, No. 354, *ante.*

741. Effect of mistaken theory.]—ATKINS & APPLEGARTH *v.* CASTNER-KELLNER ALKALI CO., LTD., No. 662, *ante.*

742. Must not contain more than one invention.]—*Re* HEARSON'S PATENT (1885), Griffin's Patent Cases (1884–1886), 266.

743. ——.]—*Re* ROBINSON'S PATENT, No. 755, *post.*

744. ——.]—*Re* Z.'S APPLICATION (1910), 27 R. P. C. 285.

745. Must not include irrelevant matter.]—*Re* FRANCIS' APPLICATION, No. 1454, *post.*

SECT. 2.—TITLE.

See Patents & Designs Act, 1907 (c. 29), s. 2 (4); Patents Rules, 1920, rr. 13, 14.

746. Right of patentee to frame—In accordance with statutory rules.]—The patentee is entitled to frame his title in his own way provided he does not infringe the rules of the statute, & I think, having regard to the narrow nature of the claims, the present title is sufficient. It must, of course, be distinctly understood that I express no opinion as to whether if the specification comes to be litigated he can claim anything more than that which is covered by his title & claims, but he has elected to stand upon his title, & his claims being thus specific I think the title is sufficient (SIR RICHARD WEBSTER, A.-G.).—*Re* BROWN (1887), Griffin's Patent Cases (1887), 1.

747. Vagueness & generality—Must not be too vague.]—COCHRANE *v.* SMETHURST (1816), 2 Coop. *temp.* Cott. 57; 1 Stark. 205; Dav. Pat. Cas. 354; 47 E. R. 1048, L. C.

Annotations:—**Dbtd.** Cook *v.* Pearce (1844), 8 Q. B. 1054. **Refd.** Platt *v.* Else (1853), 8 Exch. 364.

748. —— **Crown may object on grounds of—Before patent granted.**]—Mere vagueness & generality in the title of a patent is an objection which may be taken on the part of the Crown before it grants the patent, but does not afford a ground for holding the patent void after it has been granted, in the absence of any evidence of fraud upon the Crown, or prejudice to the public.—COOKE *v.* PEARCE (1844), 13 L. J. Q. B. 189; 2 L. T. O. S. 371; 8 Jur. 499, Ex. Ch.

Annotations:—**Apld.** Nickels *v.* Haslam (1844), 7 Man. & G. 378. **Consd.** Penn *v.* Bibby (1866), 2 Ch. App. 127. **Refd.** Stead *v.* Williams (1844), 7 Man. & G. 818; Wallington *v.* Dale (1852), 7 Exch. 888; Harwood *v.* G. N. Ry. (1860), 29 L. J. Q. B. 193.

749. —— **Mere generality insufficient to vitiate patent—In absence of evidence of fraud—Or prejudice to public.**]—COOKE *v.* PEARCE, No. 748, *ante.*

750. Must correctly describe invention.]—A brush differing from a common one in no other respect than in the circumstance that the hairs or bristles are purposely made of unequal lengths, is improperly described in a patent for a new invention as a tapering brush.—R. *v.* METCALF (1817), 2 Stark. 249; 1 Web. Pat. Cas. 141, n.

Annotation:—**Refd.** Neilson *v.* Harford (1841), 1 Web. Pat. Cas. 295.

751. Must not include previous discovery.]—A patent was taken out "for an improved method of making sailcloth without any starch whatever." The improvement or discovery, if any, consisted in a new mode of texture, & not in the exclusion of starch, the advantage of excluding which had been discovered & made public before:—*Held:* the patent was void, as claiming, in addition to what the patentee had discovered, the discovery of something already made public.—CAMPION *v.* BENYON (1821), 3 Brod. & Bing. 5; 6 Moore, C. P. 71; 129 E. R. 1184.

752. Must be consistent with specification.]—NEILSON *v.* HARFORD, No. 83, *ante.*

753. ——.]—*Re* BROWN, No. 746, *ante.*

754. —— **What amounts to inconsistency—Not plural for singular.**]—Pltf. obtained letters patent for "improvements in the manufacture of plaited fabrics": the specification described that which together amounted to but a single improvement in the mode of manufacture:—*Held:* this was not such an inconsistency between the title of the patent & the description in the specification as to invalidate the patent.—NICKELS *v.* HASLAM (1844), 7 Man. & G. 378; 8 Scott, N. R. 97; 13 L. J. C. P. 146; 3 L. T. O. S. 76; 8 Jur. 474; 135 E. R. 158.

Annotation:—**Refd.** Beard *v.* Egerton (1846), 3 C. B. 97.

755. Amendment of title—When more than one invention claimed.]—If you intend to claim as a combination the whole of this apparatus as one telegraphic apparatus, then it might all be included in one specification, but if you are including for all purposes the invention of "the appliance," then it is something different, which cannot be protected by the same patent. I should allow this if the whole was limited to telegraphy, because that would make an improved telegraphic arrangement, &, although consisting of several parts, I should allow it to be included in one patent; but if you have two separate things like this, which can only be allowed together because they all go to make up one better kind of instrument or machine, then I should never allow the use of a part of that for a purpose independent of the main purpose of that machine. It is, therefore, a question for you whether it answers your purpose better to protect "the appliance" for all purposes, or to protect improved telgraphic apparatus which consists in the employment of "the appliance" therein. I will allow either of those, but it is for you to say which will be the most to your advantage (HERSCHELL, S.-G.).

Appct. elected to take a patent for the general use of "the appliance." The Solicitor-General allowed the title to be amended to "improvements in the art of producing & utilising induced electrical currents," the description of the telegraphic apparatus being struck out from the provisional.—*Re* ROBINSON'S PATENT (1886), Griffin's Patent Cases (1884–1886), 267.

Amendment of specification.]—*See* Part VI., Sect. 7, *post*.

SECT. 3.—PROVISIONAL SPECIFICATION.

See Patents & Designs Act, 1907 (c. 29), s. 2 (1).

756. Distinguished from complete specification.]—FOXWELL *v.* BOSTOCK, No. 909, *post*.

757. ——.]—The functions of the provisional & complete specifications are defined by sect. 2 of the Act of 1907 [Patents & Designs Act, 1907 (c. 29)]. The complete specification must particularly describe & ascertain the nature of the invention & the manner in which the same is to be performed. Less is demanded of the provisional specification, but it must describe the nature of the invention. The act by contrast with its requirements in regard to the complete specification impliedly permits some generality & some uncertainty in the provisional specification (SIR LESLIE SCOTT, S.-G.).—*Re* BRUCE'S APPLICATION (1922), 39 R. P. C. 341.

758. Function of provisional specification—Description of nature of invention.]—*Re* NEWALL, ELLIOT & GLASS, No. 526, *ante*.

759. —— ——.]—FOXWELL *v.* BOSTOCK, No. 909, *post*.

760. —— ——.]—PENN *v.* BIBBY, No. 402, *ante*.

761. —— ——.]—All that a patentee need do in his provisional specification is to describe his invention. He need not go on therein to describe any method of carrying out the invention, but, whether he do so or not, if a different or further mode of carrying out the invention is described in his complete specification, that will not invalidate the patent so long as such new method of carrying out is fairly within the invention as described in the provisional specification.

. . . It is clear that improvements in the arrangement of the mechanism, in the relative position & adaptation of the different parts, with a view of producing the same results, the substitution of mechanical equivalents, & modifications & developments within the scope of the invention set out in the provisional specification, are allowable, & cannot be successfully relied on for the purpose of invalidating a patent on the ground of nonconformity (LOPES, L.J.).—WOODWARD *v.* SANSUM & Co. (1887), 56 L. T. 347; 4 R. P. C. 166, C. A.

Annotations:—**Apld.** Siddell *v.* Vickers (1888), 39 Ch. D. 92. **Consd.** Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre & Automatic Valve Co. (1898), 15 R. P. C. 159. **Apld.** Ward *v.* Hill (1903), 20 R. P. C. 189. **Consd.** *Re* Geipel's Patent (1904), 52 W. R. 339. **Refd.** Moseley *v.* Victoria Rubber Co. (1887), 57 L. T. 142; Kelvin *v.* Whyte, Thomson (1907), 25 R. P. C. 177.

762. —— ——.]—In an action as to the validity of a patent for improvements in the manufacture of ornamental designs on waterproof fabrics & for infringement, pltf.'s patent was impeached on the ground of differences between the provisional & the complete specification, & that the alleged invention was not a proper subject-matter for a patent; & also on the grounds of prior publication & prior user:—*Held:* (1) the object of the provisional specification was only to describe the nature of the invention pursuant to Patent Law (Amendment) Act, 1852 (c. 83), s. 8, that it was the creature of statute, & the object of its introduction was to enable the inventor to obtain protection for his invention for six months, during which time he might use & publish his invention without prejudice to any letters patent to be granted for the same; & that its object was only to describe generally & fairly the nature of the invention, & not to enter into all the minute details of the complete specification.

(2) If the patentee discovered in the interval between the filing of the provisional, & the complete specification, any improvement in the manner in which the invention was to be performed, he was not merely at liberty but was bound to give the public the benefit of his discovery.—MOSELEY *v.* VICTORIA RUBBER CO. (1887), 57 L. T. 142.

Annotations:—*As to* (1) **Refd.** Morgan *v.* Windover (1887), 3 T. L. R. 748; Otto *v.* Singer (1889), 62 L. T. 220.

763. —— ——.]—It is since Patents, Designs & Trade Marks Act, 1883 (c. 57), no less than before, an essential condition of a good patent that the provisional specification should describe the true nature of the invention, & that the invention there described should be the same as that claimed in the complete specification; & non-compliance with the condition is a ground for revocation of the patent.

The patentee of an invention for tapping beer barrels, & preventing waste & leakage, described his invention in the provisional specification as a plug screwed into the barrel end with a valve, & spring, & guide to keep the valve in its place. In the complete specification he added a description of a gauze strainer to keep impurities from escaping into the tap. It was proved that the gauze strainer was the only thing really novel or useful in the invention:—*Held:* the provisional specification did not describe the true nature of the invention, & the patent was invalid. NUTTALL *v.* HARGREAVES, [1892] 1 Ch. 23; 61 L. J. Ch. 94; 65 L. T. 597; 40 W. R. 200; 36 Sol. Jo. 60, C. A.

Annotations:—**Distd.** Gadd & Mason *v.* Manchester Corpn.

PART VI. SECT. 3.

n. *Ambiguous description—Admissibility of evidence.*]—If a provisional specification is ambiguous in the sense that the language is apt to describe two different things, evidence is admissible to show of which appct. was actually speaking.—DUNLOP *v.* COOPER (1908), 7 C. L. R. 146.—**AUS.**

Sect. 3.—*Provisional specification.* *Sect.* 4: *Subsects.* 1 & 2, *A.* (*a*).]

(1892), 67 L. T. 569. **Refd.** Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 2 Ch. 66; Mandleberg *v.* Morley (1895), 64 L. J. Ch. 245.

764. —— ——.]—*Re* BRUCE'S APPLICATION, No. 757, *ante*.

765. —— **Not description of method.**]—*Re* NEWALL, ELLIOTT & GLASS, No. 526, *ante*.

766. —— ——.]—WOODWARD *v.* SANSUM & CO., No. 761, *ante*.

767. —— ——.]—PNEUMATIC TYRE CO. *v.* EAST LONDON RUBBER CO., No. 930, *post*.

768. —— **Not complete description.**]—STONER *v.* TODD, No. 645, *ante*.

769. —— ——.]—Pltf. was the patentee of an invention for centering the recording index of a ship's telegraph. Defts. had devised a precisely similar arrangement. They put forward a number of alleged anticipations to show that part of pltf.'s was old, which was admitted, & had been used for analogous purposes, & that what was new was merely an obvious & necessary arrangement to enable the old part to work under new conditions. Some of the claims were alleged to be too wide, & to cover what was already well known. Three of the claims applied to a double sounding gong mechanism, which sounded almost on completion of the order; it was alleged that this device was not disclosed in the provisional specification. Objection was taken that the invention was not subject-matter, but in their particulars defts. only alluded expressly to the indicating device. The judge did not allow them to set up want of subject-matter in relation to the gong mechanism on the ground that their particulars were misleading, & they declined to avail themselves of the opportunity of amendment on certain terms:—*Held:* the invention was not anticipated; it was sufficiently disclosed in the provisional specification; & defts. had infringed.—CHADBURN *v.* MECHAN & SONS (1895), 12 R. P. C. 120.

770. —— **Not to make claim.**]—It is not the function of a provisional specification to claim anything. The claim is in point of fact a disclaimer; it shows what parts, & what parts only, of the whole invention you mean to protect by your patent. Here pltf. does not attempt to claim by his complete specification any new invention entirely separate & apart from that which was described in the provisional specification; but having described the mode of opening the lamp & barrel, it occurs to him that it would be an improvement upon that particular form of lamp to which this improvement is specially adapted, to have a rim within the barrel into which he could slide these washers. Now, is that an invention so completely apart from the invention described in the provisional specification that it makes the complete specification bad because it is a part of the claim in the complete specification? In my opinion it most clearly is not (KAY, J.).—LUCAS *v.* MILLER (1885), Griffin's Patent Cases (1884–1886), 156; 2 R. P. C. 155.

Annotations:—**Distd.** Horrocks *v.* Stubbs (1886), 3 R. P. C. 221. **Refd.** Osmonds *v.* Balmoral Cycle Co. (1898), 15 R. P. C. 505.

771. —— **Not advantages of invention.**]—PNEUMATIC TYRE CO. *v.* EAST LONDON RUBBER CO., No. 930, *post*.

772. Effect of lodging provisional specification —Six months' protection—Without prejudice to issue of patent—To second applicant.]—Leaving a provisional specification & obtaining provisional protection does not prevent a second appct. from leaving a provisional specification of a similar invention, & obtaining valid letters patent for the invention before six months have elapsed from the time when the first provisional specification was left; & in such a case, letters patent will not be granted to first appct. for any part of his invention which is covered by the letters patent already obtained by second appct.—*Ex p.* BATES & REDGATE (1869), 4 Ch. App. 577; 38 L. J. Ch. 501; 21 L. T. 410; 17 W. R. 900, L. C.

Annotations:—**Consd.** *Ex p.* Manceaux (1870), 6 Ch. App. 272. **Distd.** *Ex p.* Scott & Young (1871), 6 Ch. App. 274. **Folld.** *Ex p.* Bailey (1872), 8 Ch. App. 60. **Expld.** *Ex p.* Henry (1872), 8 Ch. App. 167. **Consd.** Lee *v.* Walker (1872), L. R. 7 C. P. 121; Saxby *v.* Hennett (1873), 28 L. T. 639. **Dbtd. & Distd.** *Re* Dering's Patent (1879), 13 Ch. D. 393. **Expld.** Kurtz *v.* Spence (1887), 58 L. T. 438.

773. —— —— —— ——.]—The Crown will in some cases, after granting one patent, grant a second patent for a similar invention.

D. & R. independently applied on Apr. 29, 1879, for letters patent for inventions, which were, for the purpose of the decision, taken to be similar. R.'s letters patent were sealed on July 25, 1879, & on Aug. 5, 1879, he entered an opposition to the sealing of D.'s letters patent. There was no suggestion of fraud:—*Held:* D.'s letters patent ought to be sealed & be dated as of the day of application, which was also the date of R.'s letters patent.

Two appcts. apply in perfectly good faith upon the same day for patents for what I may call cognate inventions, made respectively by each appct. without any knowledge of what the other was doing or had done. I will assume now that to a greater or less extent those inventions are identical. Before the six months are out one of appcts. succeeds in getting his letters patent sealed. Now, what is the position of the Crown? & what should the Crown do in such a case? *Primâ facie* the Crown ought to seal both patents. The contract with each of them on provisional protection was that he should have six months' protection. Now, if it is true that both have acted in good faith, what right have I to confiscate the invention of one because it happens to be identical with the invention of the other? (LORD CAIRNS, C.).—*Re* DERING'S PATENT (1879), 13 Ch. D. 393; 42 L. T. 634; 28 W. R. 710, C. A.

Annotation:—**Consd.** Kurtz *v.* Spence (1887), 58 L. T. 438.

774. —— —— ——.]—MOSELEY *v.* VICTORIA RUBBER CO., No. 762, *ante*.

775. —— **Protection until filing of complete specification.**]—STONER *v.* TODD, No. 645, *ante*.

776. On what grounds impeachable — Not generality.]—It appears to me that the objections on the provisional are wholly out of place as to the question of invalidating the patent, except from one very particular & narrow point of view. If you really think you have a case in which you can establish that the patentee has done a very dishonest thing, taken out his patent before he has completed his invention, & therefore was not the inventor at the time he got his patent, it may be of use to you to help you when you have other evidence tending that way; it may be of use to you to eke that out, by showing that his provisional mentions nothing at all about it, &, therefore, you might say there is an additional probability that he knew nothing at all about it. But here I have the patentee produced; he has been cross-examined; he has fixed it as to the date, & he has sworn positively that he had completed his working model before he had applied for his patent. The fact that the provisional does not say enough is a matter for the law officer to consider when it is laid before him, but there is nothing in the Act of Parliament which says that the patent is invalid because the provisional is insufficient. It does

say, that if the complete be sufficient the patent is valid, &, therefore, I have nothing to do with the provisional beyond bearing it in mind as a piece of evidence that can be produced to a very useful purpose upon the question I have adverted to, whether or not the invention has been made (WOOD, V.-C.).—CURTIS *v.* PLATT (1863), 3 Ch. D. 135, n.; 8 L. T. 657; Griffin's Patent Cases (1887), 53: Goodeve's Patent Cases, 144; *affd.* (1864), 11 L. T. 245; (1866), L. R. 1 H. L. 337, H. L.

Annotations:—**Consd.** Siddell *v.* Vickers (1888), 39 Ch. D. 92. **Refd.** Foxwell *v.* Bostock (1864), 10 L. T. 144; Adie *v.* Clarke (1876), 3 Ch. D. 134; Badische Anilin und Soda Fabrik *v.* Levinstein (1883), 24 Ch. D. 156; Proctor *v.* Bennis (1887), 36 Ch. D. 740; Gosnell *v.* Bishop (1888), 5 R. P. C. 151; Thomson *v.* Moore (1889), 6 R. P. C. 426; Ticket Punch & Register Co. *v.* Colley's Patents (1895), 11 T. L. R. 262; Akt. Separator *v.* Dairy Outfit Co. (1898), 15 R. P. C. 327; British United Shoe Machinery Co. *v.* Thompson (1904), 22 R. P. C. 177; Van Berkel *v.* Booth (1906), 23 R. P. C. 573; Harrison Patents Co. *v.* Nicholson (1908), 25 R. P. C. 393. **Mentd.** Murray *v.* Clayton (1873), 21 W. R. 498; Miller *v.* Clyde Bridge Steel Co. (1892), 9 R. P. C. 470.

777. ——— ———.]—PENN *v.* BIBBY, No. 402, *ante*.

778. When inspection granted—Not to patentees of similar invention.]—(1) An application under 16 & 17 Vict. c. 115, s. 2, for the inspection of the provisional specification of certain letters patent, on the ground that the subject-matter was the same as that for which appct. had obtained a patent, refused.

(2) Letters patent sealed in a case where the evidence showed great similarity between the alleged invention & one for which a patent was already in force.—*Re* TOLSON'S PATENT (1856), 6 De G. M. & G. 422; 27 L. T. O. S. 94; 4 W. R. 518; 43 E. R. 1297, L. C.

Annotations:—*As to* (1) **Refd.** *Re* Spence's Patent (1859), 32 L. T. O. S. 326. *Generally*, **Refd.** Murray *v.* Clayton (1873), 21 W. R. 498.

779. Production in subsequent action for infringement—Jurisdiction of court to order.]—An action for infringement of a patent having been brought, defts. set up (*inter alia*) the defence of prior user. On deft. being called & cross-examined, pltfs.' counsel called an official from the Patent Office to produce the provisional specification of an invention, in respect of which said deft. had applied for letters patent, but had subsequently abandoned the application. Deft. questioned the jurisdiction of the ct. to allow production:—*Held*: notwithstanding Patent, Designs & Trade Marks (Amendment) Act, 1885 (c. 63), s. 4, the ct. could allow production of, & reference to, such provisional specification for the purposes of the administration of justice.—PNEUMATIC TYRE CO., LTD. *v.* ENGLISH CYCLE & TYRE CO. (1897), 14 R. P. C. 851.

Necessity for conformity with complete specification.]—*See* Part VI., Sect. 3, sub-sect. 2, D., *post*.

Duty to disclose subsequent discoveries.]—*See* Part VI., Sect. 4, sub-sect. 2, C. (*b*) & D. (*b*), *post*.

SECT. 4.—COMPLETE SPECIFICATION.

SUB-SECT. 1.—IN GENERAL.

See Patents & Designs Act, 1907 (c. 29), ss. 1 (3), 2.

780. Function of complete specification—To describe nature of invention particularly—Distinguished from provisional specification.]—FOXWELL *v.* BOSTOCK, No. 909, *post*.

781. Effect of lodging complete specification—Six months' protection—Without prejudice to rights of previous applicant.]—(1) It is the duty of the law officer to hear & determine which of two rival appcts. for patents is entitled to a patent, & the question ought not to be remitted to the Lord Chancellor by directing warrants for both patents.

(2) An appct. for a patent does not, by lodging a complete specification & obtaining protection, acquire the rights of a patentee so as, during the six months' protection, to prevent any other person who had previously applied for a patent for a similar invention from obtaining a patent.

(3) It is no objection to the grant of a patent that another person has been making experiments & working towards a similar invention.—*Ex p.* HENRY (1872), 8 Ch. App. 167; *sub nom. Re* HENRY'S APPLICATION, *Re* FARQUHARSON'S APPLICATION, 42 L. J. Ch. 363; 21 W. R. 233, L. C.

Annotation:—*Generally*, **Refd.** Saxby *v.* Hennett (1873), 28 L. T. 639.

782. Who must sign—Signature of all applicants not necessary.]—The Comptroller-General refused to accept the complete specification because it had not been signed by both appcts. On appeal, the decision of Comptroller-General was reversed.—*Re* GRENFELL & MCEVOY'S PATENT (1889), 7 R. P. C. 151.

Annotation:—**Distd.** *Re* A. & B.'s Appln. (1910), 28 R. P. C. 454.

SUB-SECT. 2.—ESSENTIALS.

A. Certainty of Description.

(*a*) *In General.*

783. Must not contain more than requisite.]—R. *v.* ARKWRIGHT, No. 14, *ante*.

784. Must not be misleading.]—A patent is void, if the specification be ambiguous, or give directions which tend to mislead the public. TURNER *v.* WINTER (1787), Dav. Pat. Cas. 145; 1 Web. Pat. Cas. 77; 1 Term Rep. 602; 99 E. R. 1274.

Annotations:—**Consd.** Hill *v.* Thompson (1818), 8 Taunt. 375; Derosne *v.* Fairie (1835), 2 Cr. M. & R. 476; Bickford *v.* Skewes (1841), 1 Q. B. 938. **Apld.** *Re* Alsop's Patent (1907), 24 R. P. C. 733. **Refd.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463; Crompton *v.* Ibbotson (1828), Dan. & Ll. 33; Lewis *v.* Marling (1829), 10 B. & C. 22; Neilson *v.* Harford (1841), 8 M. & W. 806; Brown *v.* Annandale (1842), 8 Cl. & Fin. 437; Walton *v.* Bateman (1842), 1 Web. Pat. Cas. 613; Wegmann *v.* Corcoran (1879), 13 Ch. D. 65; Hatmaker *v.* Nathan (1917), 35 R. P. C. 61.

785. ———.]—MORGAN *v.* SEAWARD, No. 442, *ante*.

786. ———.]—HUDDART *v.* GRIMSHAW, No. 872, *post*.

787. ——— **Erroneous theory.**]—"Z" ELECTRIC LAMP MANUFACTURING CO., LTD. *v.* MARPLES, LEACH & CO., LTD., No. 736, *ante*.

788. ———.]—KNIGHT *v.* ARGYLLS, LTD., No. 1068, *post*.

789. ——— **Result claimed not produced.**]—A patent was granted for "improvements in drying & preserving milk & milk like products." In the specification one of the claims was for a process of drying milk consisting in delivering it in limited quantity upon a surface heated above 212 degrees Fahrenheit but not above 270; so that it boiled

PART VI. SECT. 4, SUB-SECT. 2.—A. (a).

784 i. *Must not be misleading.*]—Under the local Patent Act the same particularity as to specification is not required as that called for under the English Acts; errors of defect or excess, unless made to mislead, will not void the patent.—HARVEY *v.* MURRAY (1879), 6 Nfld. L. R. 183.—**NFLD.**

o. *Intention to claim general principle—Must not be too general.*]—Specifications containing in general terms a claim for the use of certain things already known & used for the same general purpose as that intended by the inventor are bad if the claim is so

Sect. 4.—*Complete specification: Sub-sect.* 2, *A.* (*a*) & (*b*).]

violently & in them exposing it in a thin layer or film upon a surface similarly heated until it was reduced to a solid but moist condition & it was stated that by drying milk rapidly by the employment of a high temperature as described the solids of milk were obtained in a dry but otherwise unaltered condition. In the first of two consolidated actions for infringement of the patent, pltf. alleged infringement in respect of the dry product of whole milk & in the second action infringement in respect of the product of separated milk. Defts. denied infringement & alleged that the patent was invalid for want of novelty & subject-matter & because the specification gave no sufficient directions to enable a product having the described properties to be obtained. At the trial it was held that the fat & casein in the milk were not by the patentee's process obtained in a dry but otherwise unaltered condition & that the patent was invalid by reason of a material representation as to the utility & result of the invention, contained in the specification, being inaccurate, & the result claimed & described not being produced. A certificate as to the specifications alleged to be anticipations was not given :—*Held:* the process described in the specification of the patent sued on did not produce the results which the patentee said that it did & the patent was invalid.—HATMAKER *v.* NATHAN (JOSEPH) & CO., LTD. (1919), 36 R. P. C. 231, H. L.

790. Must not be ambiguous.]—TURNER *v.* WINTER, No. 784, *ante*.

791. ——.]—HILL *v.* THOMPSON, No. 25, *ante*.

792. ——.]—R. *v.* WHEELER, No. 149, *ante*.

793. ——.]—GALLOWAY *v.* BLEADEN, No. 541, *ante*.

794. ——.]—BEARD *v.* EGERTON, No. 1107, *post*.

795. ——.]—One observation refers to the extremely ambiguous & difficult character of the specification. The statute requires it to be a distinct statement of what is the invention. In construing a specification one has to remember that it is a document not only assuring a monopoly to the patentee, which but for the statute would be contrary to the common law, but so prohibiting any one, other than the patentee, doing what he would be free to do, but for the right which is granted, subject to the condition, among other things, that the patentee states distinctly what his invention is. If he designedly makes it ambiguous, in my judgment the patent would undoubtedly be bad on that ground; but even if negligently or unskilfully he fails to make distinct what his invention is, I am of opinion that the condition is not fulfilled & the consequence would be that the patent would be bad (LORD HALSBURY).—BRITISH ORE CONCENTRATION SYNDICATE, LTD. *v.* MINERALS SEPARATION, LTD. (1909), 27 R. P. C. 33, H. L.

Annotation:—**Refd.** Minerals Separation *v.* Ore Concentration Co. (1905), Ltd., [1909] 1 Ch. 744.

796. ——.]—NATURAL COLOUR KINEMATOGRAPH CO., LTD. *v.* BIOSCHEMES, LTD., No. 996, *post*.

797. Intention to claim general principle—Must be reasonably clear.]—ACKROYD & BEST, LTD. *v.* THOMAS & WILLIAMS, No. 1000, *post*.

798. Effect of ambiguity—Whole patent void.]—I think it is my duty to state explicitly that those who file & secure specifications must take the risk of having the whole thing declared void for ambiguity (LORD LOREBURN, C.).—LINOTYPE & MACHINERY, LTD. *v.* HOPKINS (1910), 27 R. P. C. 109; *sub nom.* HOPKINS *v.* LINOTYPE & MACHINERY, LTD., 101 L. T. 898; 26 T. L. R. 229, H. L.

(*b*) *Degree of Certainty Required.*

799. General principle.]—This question of vagueness as against a specification is often, of course, a serious question. But the principle of the matter can be expressed thus :—A patentee must not use language so vague as to enable him to secure a monopoly for more than his real invention, & so to invade the rights of free rivals. But, on the other hand, it is permissible to state the real invention in language of such generality as is essential to preserve it & to prevent those rivals from invading the rights of the patentee (LORD SHAW).—WATSON, LAIDLAW & CO., LTD. *v.* POTT, CASSELS & WILLIAMSON (1911), 28 R. P. C. 565, H. L.

Annotation:—**Distd.** British Thomson-Houston Co. *v.* Corona Lamp Works (1920), 37 R. P. C. 67.

800. As to materials.]—A patent was granted for a machine to sharpen knives & scissors, &, in the specification, this was directed to be done, by passing their edges backward & forward in an angle formed by the intersection of two circular files; & in the specification it was also stated that other materials might be used according to the delicacy of the edge. It was proved that, for scissors, there ought to be one circular file, & a smooth surface, but that two Turkey stones might also succeed :—*Held:* the specification was bad, as it neither directed the machines for scissors to be made with Turkey stones nor to be made with one circular file & a smooth surface.—FELTON *v.* GREAVES (1829), 3 C. & P. 611, N. P.

801. —— **Some only effective.**]—BICKFORD *v.* SKEWES, No. 868, *post*.

802. —— ——.]—In a patent for a process or method of combining various materials so as to form stuccoes, plasters & cements, & for the manufacture of artificial stones, marbles, etc., used in buildings, the specification, after stating the invention to consist in producing certain hard cements of the combination of the power of gypsum, powder of limestone & chalk, with other materials, such combinations being, subsequent to their mixing, submitted to heat, described the method or process of making a cement from gypsum to consist in mixing with powdered gypsum strong alkali, for instance, best American pearlash, dissolved in a certain proportion of water, this solution to be neutralised with acid, sulphuric acid being the best; the mass to be kept in agitation, & the acid to be added gradually till the effervescence should cease; & then a certain proportion of water to be added, if other alkali were used, the quantity to be varied in proportion to its strength; & the mixture having been brought to a proper consistence by the further addition of powdered gypsum, to be dried in moulds, & finally subjected to a furnace capable of producing a red

general in its language as to cover any such other combinations of recognised methods of giving effect to a well-recognised principle.—TAYLOR *v.* CROWN IRONWORKS CO., LTD. (1902), 23 N. Z. L. R. 5.—**N.Z.**

p. *Must not be uncertain.*]—TAYLOR *v.* BRANDON MANUFACTURING CO. (1894), 21 A. R. 361.—**CAN.**

PART VI. SECT. 4, SUB-SECT. 2.—A. (b).

799 i. *General principle.*]—The description in the specification of an article patented must be sufficient not only to allow a skilled workman to construct it, but to show the public what they cannot use without infringing the patent.—MORTON *v.* MIDDLETON (1863), 1 Macph. (Ct. of Sess.) 718; 35 Sc. Jur. 542.—**SCOT.**

q. *As to method—Difficulty of use not described.*]—DUDGEON *v.* THOMSON (1873), 11 Macph. (Ct. of Sess.) 863; 45 Sc. Jur. 528.—**SCOT.**

heat. The description of the mode of making the cement differed little from that of the preceding process. The specification, after proceeding to state the mode of using the cement so made, stated in conclusion that other acids & alkalies besides those before mentioned would answer the purposes of the invention, though not so well; & that the inventor claimed the method or process thereinbefore described:—*Held:* the specification was bad; for that either the inventor claimed all acids & alkalies or those only which would answer the purpose; in the former of which cases, as some acids & alkalies would not answer the purposes of the invention, the specification was therefore bad; & in the latter case it was bad for not specifying those acids & alkalies which would be found to succeed.—STEVENS *v.* KEATING (1848), 2 Exch. 772; 19 L. J. Ex. 57; 154 E. R. 702.

Annotations:—**Refd.** Unwin *v.* Heath (1855), 5 H. L. Cas. 505; Young *v.* Fernie (1864), 4 New Rep. 218.

803. —— ——.]—G. took out a patent for improvements in belts or bands for driving machinery. The claim in the specification was for constructing belts or bands for driving machinery, of cotton canvas or duck woven hard & stitched, & saturated & soaked with oil, such as linseed oil or any combination thereof, as herein described or set forth, or any modification thereof. G. brought an action against K. & J. & R. & Co., alleging that R. & Co.'s belts were an infringement of his patent, & claiming the usual relief. It was proved at the trial that there were ten numbers of hard woven canvas & that belts for the purposes mentioned in the specification could not be made out of all of such numbers, but only out of some of them. The judge dismissed the action with costs so far as it related to the infringements of patent, holding the patent bad because the specification did not adequately describe the invention:—*Held:* the appeal must be dismissed with costs, on the ground that the specification was bad as not describing the real invention, which was not the manufacture of driving belts for the purposes specified of any kind of hard woven canvas, but only of a particular kind, & although this defect might have been cured by showing that a workman of ordinary skill would never have tried any other kind, there was no evidence of this before the ct.—GANDY *v.* REDDAWAY (1883), Griffin's Patent Cases (1884–1886), 101; 2 R. P. C. 49, C. A.

804. —— ——.]—In 1906 a patent was granted for "improvements in & relating to kinematograph apparatus for the production of coloured pictures." One of the claims was as follows: "in connection with kinematograph apparatus, the employment of a succession of but two colour records, the records of one colour sensation alternating with those of the other colour sensation, so that the observer's persistence of vision causes him to apparently see superimposition, or blending, of the colours received from series of two colour records." On a petition for revocation of the patent, it was alleged by petitioners that (*inter alia*) the patent was invalid for insufficiency of description in that the specification did not point out which particular reds or greens were to be used:—*Held:* if, upon the true construction of the specification, the patentee stated that any red & any green screens might be used, the patent was invalid, because there were many reds & greens that would fail, or if he stated that any red or green that would answer the purpose might be used, the patent was invalid for insufficiency; he stated that, by means of the patented process, blue, or approximately blue, could be reproduced; that colour could not be reproduced; & the patent was therefore invalid.—NATURAL COLOUR KINEMATOGRAPH CO., LTD. *v.* BIOSCHEMES, LTD. (1915), 31 T. L. R. 324; 32 R. P. C. 256, H. L.; *affg.* S. C. *sub nom. Re* SMITH'S PATENT (1914), 31 R. P. C. 237, C. A.

Annotations:—**Refd.** British Thomson-Houston Co. *v.* Duram (1917), 34 R. P. C. 117; British Thomson-Houston Co. *v.* Corona Lamp Works (1920), 37 R. P. C. 277; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1923), 40 R. P. C. 426.

805. As to method.]—JONES *v.* RIPLEY (1834), 1 Carp. Pat. Cas. 611.

806. ——.]—PARKIN *v.* HARRISON (1840), 2 Carp. Pat. Cas. 677.

807. —— **Two processes described—One ineffective.**]—R. *v.* CUTLER (1849), 14 Q. B. 372, *n.*; Macr. 137; 3 Car. & Kir. 215; 12 L. T. O. S. 513; 117 E. R. 147.

Annotations:—**Refd.** Booth *v.* Kennard (1856), 5 W. R. 85; Brook *v.* Aston (1857), 27 L. J. Q. B. 145.

808. —— —— ——.]—Where a specification describes two processes for effecting the end proposed, which are both claimed as part of the invention, & one of such processes is effective & the other ineffective, if the inefficiency of the second process cannot be discovered from the specification itself, it will vitiate the patent.

The rules governing the construction of specifications are the ordinary rules for the interpretation of written instruments; but, unless a specification particularly describe the nature of a patentee's invention, & in what manner the same is to be performed, in such a manner as to be intelligible to a workman of ordinary knowledge, the grant of the letters patent is void.

If a specification alleges that a particular process, which may be slow, troublesome, & expensive, is effective, & the statement is untrue, the vice is not removed by the fact that the same specification also describes another process which is efficient & which is stated to be speedy, certain, & economical. When it is stated that an error in a specification which any workman of ordinary skill & experience would perceive & correct, will not vitiate a patent, it must be understood of errors which appear on the face of the specification, or the drawings it refers to; or which would be at once discovered & corrected in following out the instructions given for any process or manufacture; & the reason is, because such errors cannot possibly mislead. But the proposition is not a correct statement of the law, if applied to errors which are discoverable only by experiment & further inquiry. . . . The specification must be so expressed as to be perfectly intelligible to a workman of ordinary knowledge, & it must follow that if there be any obscurity or ambiguity in the specification which is likely to mislead, this defect ought not to be helped by any refined or secondary interpretation of the language (LORD WESTBURY, C.).—SIMPSON *v.* HOLLIDAY (1865), 5 New Rep. 340; 12 L. T. 99; 13 W. R. 577, L. C.; *subsequent proceedings* (1866), L. R. 1 H. L. 315, H. L.

Annotations:—**Folld.** United Horse Nail Co. *v.* Stewart (1885), 2 R. P. C. 122. **Refd.** Edison & Swan United Electric Light Co. *v.* Holland (1888), 4 T. L. R. 686; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95.

809. —— **Use of known materials in new proportions—Proportions not limited.**]—PATENT TYPE FOUNDING CO. *v.* RICHARD, No. 1134, *post.*

810. —— **Erroneous implication.**]—VIDAL DYES SYNDICATE, LTD. *v.* LEVINSTEIN, LTD., SAME *v.* REED HOLLIDAY & SONS, No. 833, *post.*

811. As to nature of claim.]—The specification of a patent for improved arrangements for raising

Sect. 4.—*Complete specification: Sub-sect.* 2, *A.* (*b*), *B.* (*a*).]

ships' anchors, claimed as the invention of the patentee, a cable holder, which it described thus: The scolloped shell in which the iron chain cable appears in the drawing is upon a new plan, to hold, without slipping, a chain cable of any size, as shown by the opening form of the scollops at the top & bottom of figure 2. It also claimed as the invention of the patentee, the new form of a scolloped shell, in conjunction with the arrangements hereinbefore described. A drawing attached to the specification showed that the inner sides of the cable holder & the scollops were not to be parallel, but should converge towards the centre of the cableholder. In an action for an infringement of the patent, it was proved that the specification & drawings would enable a competent workman to make a cableholder which would hold chains of different sizes:—*Held:* the specification did not sufficiently describe the nature of the invention; it was at least ambiguous whether it was an invention of a cableholder to hold a chain & carry one size, or to hold cables of different sizes, & was therefore bad.—HASTINGS *v.* BROWN (1853), 1 E. & B. 450; 22 L. J. Q. B. 161; 17 Jur. 647; 113 E. R. 505.

Annotation:—**Refd.** Poupard *v.* Fardell (1869), 18 W. R. 127.

812. —— Whether for combination or specific parts.]—ROWCLIFFE *v.* MORRIS, No. 967, *post.*

813. ——.]—The ct. revoked a patent for an improvement in golf balls on the ground that the specification was so vague that it was impossible to say what invention was claimed & that even if the claim was sufficient the patent had been anticipated.—GAMAGE (A. W.) LTD. *v.* SPALDING (A. G.) & BROTHERS (1915), 31 T. L. R. 178.

814. As to essence of invention.]—The owners of a patent for new or improved manufacture of covered whalebone having threatened customers of K., the latter brought an action to restrain the threats. Defts. having justified the threats under the patent, pltfs. denied infringement & alleged the invalidity of the patent on the ground (*inter alia*) of want of subject-matter. The specification claimed the manufacture of the new material, strips of natural whalebone covered or braided with threads of fibrous materials applied substantially in the manner & by the means hereinbefore described with reference to & shown in the drawings. Braiding machines were old at the date of the patent. Defts. contended that the invention was the application of a particular type of a known machine in a particular way to produce an article that was new. It was held at the trial that the claim was for a process & not for a product, & that the claim was for something old, & that the patent was invalid for want of subject-matter:—*Held:* the claim was for a process of manufacture by which a better article was produced; the essence of invention, upon the evidence, was the use of such a form of braiding machine as required a specific number of heads & spindles for each particular case—that is to say, whether two or more whalebones were used; the patentee had failed to indicate the essence of his invention, & on this ground the patent was invalid.—KOPP *v.* ROSENWALD BROTHERS (1902), 20 R. P. C. 154, C. A.

B. Sufficiency of Description.

(*a*) *In General.*

815. Duty of court to consider sufficiency—Though insufficiency not pleaded.]—The real question which I have to determine & on which the validity or invalidity of this patent depends is whether there is a sufficient subject-matter in the patent, & that question resolves itself into another, namely, whether the patentee has, having regard to the state of the art to which the specification refers, described & claimed some specific improvement in the subject-matter of that which he has to deal. I . . . bear carefully in mind the fact that insufficiency of the specification is not pleaded, but in my opinion, the absence of that plea does not affect the proposition which I have just stated (WARRINGTON, J.).—*Re* TAYLOR'S PATENT (1915), 32 R. P. C. 93.

816. What must be described—Principle.]—The specification should distinctly state the principle as well as the mode of bringing it into operation. If the principle claimed be not clearly stated, but is only to be made out by construction, by comparing the several clauses of the specification, an injunction will not be granted.—BRIDSON *v.* M'ALPINE (1844), 3 L. T. O. S. 158; *subsequent proceedings* (1845), 8 Beav. 229.

817. —— —— Not results.]—WEDLAKE *v.* GARDNER, No. 1106, *post.*

818. —— Nature of invention.]—BOVILL *v.* SMITH, No. 448, *ante.*

819. —— ——.]—The owners of a patent for a wheel rim of a particular shape intended to hold a solid indiarubber tyre without pinching or cutting it, & without wires or bands to hold it in its place, claimed the wheel rim in combination with a tyre fitted into it, but not the tyre without the rim, & brought an action against a firm of indiarubber merchants for infringement of their patent. The specification said that the tyre was to be made so as to "approximately fit" the rim, but it appeared that while the base of the rim was flat the tyre would have to be made convex where it fitted on to the base of the rim, & would also have to be somewhat larger than the base of the rim, & would require to be forced into the rim of the machinery:—*Held:* the specification did not particularly describe & ascertain the nature of the invention, & the manner in which it was performed, & the patent was therefore bad.—SIRDAR RUBBER CO. *v.* WALLINGTON, WESTON & CO. (1907), 97 L. T. 113, H. L.

820. —— ——.]—A machine for making paper for newspapers embodied a device by which water containing fibre or pulp in suspension, called the stock, was poured out through a "slice" on to an endless wire sieve kept continually moving. The water drained away through the sieve, & the pulp became felted & subsequently more thoroughly dried by the sieve passing over vacuum chambers. A patent for improvements in this machine claimed, stating it shortly, depressing the further end of the sieve so that the stock tended to flow down the sieve by the action of gravity, thus, as alleged, (*a*) diminishing the dragging effect which produces bad paper; (*b*) increasing the efficiency of the machine in bringing about the felting of the paper; & (*c*) enabling rolls of newspaper to be manu-

PART VI. SECT. 4, SUB-SECT. 2.—B. (a).

818 i. *What must be described—Nature of invention.*]—FREE WHEEL CO., LTD. *v.* INGLIS BROTHERS (1903), 23 N. Z. L. R. 309.—**N.Z.**

r. *Distinction between parts old & new.*]—PATENT COMPOSITION PAVEMENT CO. *v.* RICHMOND CORPN. (1875), 1 V. L. R. (Eq.) 50.—**AUS.**

t. —— *Combination of several parts.*]—Where a patent is sought for a combination of several parts, it is not necessary in the specification to distinguish between those parts which are old & those which are new.—INTERNATIONAL HARVESTER CO. OF

factured at a greatly increased rate of speed. In an action for infringement pltfs. alleged (*inter alia*) that defts. had adopted the device of putting the sieve on a slope; & defts. alleged that the patent was invalid on the grounds (*inter alia*) of want of subject-matter, insufficiency of specification, & prior user at defts.' works:—*Held:* the patent was invalid because the specification did not sufficiently describe any invention at all, & if it did, there was prior user of the invention.—EUROPEAN EIBEL CO., LTD. *v.* LLOYD (EDWARD), LTD. (1911), 28 R. P. C. 349.

821. —— ——.]—*Re* BRUCE'S APPLICATION, No. 757, *ante*.

822. —— **Method of performance.**]—R. *v.* ELSE, No. 1008, *post*.

823. —— ——.]—FOXWELL *v.* BOSTOCK, No. 909, *post*.

824. —— ——.]—A patent for "improvements in the preparation of red & purple dyes," thus described the process: "I mix aniline with dry arsenic acid, & allow the mixture to stand for some time; or I accelerate the operation by heating it to, or near to, its boiling point, until it assumes a rich purple colour." It was proved & not denied by the patentee that it was necessary to apply heat in order to produce the colour; but evidence was given that a competent workman would apply heat:—*Held:* this description in the specification was bad, & the patent founded thereon was invalid.—SIMPSON *v.* HOLLIDAY (1866), L. R. 1 H. L. 315; 35 L. J. Ch. 811, H. L.; *previous proceedings* (1865), 5 New Rep. 340, L. C.

Annotations:—**Apld.** Watson Laidlaw *v.* Potts Cassel & Williamson (1911), 28 R. P. C. 565. **Folld.** Vidal Dyes Syndicate *v.* Levinstein, Same *v.* Read, Holliday (1912), 29 R. P. C. 245. **Refd.** Wallace *v.* Jack (1905), 22 R. P. C. 581. **Mentd.** Fernie *v.* Young (1866), L. R. 1 H. L. 63; *Re* Simpson, *Ex p.* Morgan (1876), 3 Ch. D. 72.

825. —— ——.]—BOVILL *v.* SMITH, No. 448, *ante*.

826. —— ——.]—BETTS *v.* NEILSON, BETTS *v.* DE VITRE, No. 520, *ante*.

827. —— ——.]—BAILEY *v.* ROBERTON, No. 935, *post*.

828. —— ——.]—YOUNG & NEILSON *v.* ROSENTHAL & Co., No. 460, *ante*.

829. —— ——.]—The owner of a patent for improvements in gas cooking apparatus brought an action for infringement against defts., who alleged disconformity between the provisional & complete specifications, absence of subject-matter, & want of novelty, & relied as an anticipation upon an apparatus (Rippingille's), from which pltf.'s alleged invention only differed, in effect, in the substitution of a hinge or a pivot for a slide, as a means of attaching certain deflector plates to the apparatus. Defts. also denied infringement. In pltf.'s specification no description was given of the method to be adopted of making & actuating the hinged or pivoted plates. The plates in defts. apparatus were of a special construction, & produced results not claimed for pltf.'s alleged invention:—*Held:* the specification was insufficient.—FLETCHER *v.* ARDEN, HILL & Co. (1887), 5 R. P. C. 46.

830. —— ——.]—In 1887 a patent was granted to A. for improvements in duplicating writing apparatus. D. became owner of the patent, & in 1898 brought an action against defts. for infringement. Defts. denied infringement, & denied the validity of the patent on the grounds (*inter alia*) that the alleged invention was anticipated by several prior patents; that the description of the invention in the specification was insufficient; & that a person following A.'s directions would not obtain the result described in the specification:—*Held:* on the true construction of the specification the patent was invalid for insufficiency of description.—DICK *v.* ELLAM'S DUPLICATOR CO. (1900), 17 R. P. C. 196, C. A.

831. —— ——.]—SIRDAR RUBBER CO. *v.* WALLINGTON, WESTON & CO., No. 819, *ante*.

832. —— —— **Method described giving no useful result—Method not described giving useful result.**]—VON DER LINDE *v.* BRUMMERSTAEDT & CO., No. 679, *ante*.

833. —— —— **Common knowledge.**]—In 1896 a patent was granted for improvements in colouring matters. The claim was for improvements in the manufacture of black dyestuffs, consisting in causing sulphur to react, either alone or in the presence of sulphuret of sodium, upon diamidophenols & diamidonaphthols or upon dinitrophenols & dinitronaphthols, as described. Two examples of the application of the process to diamidophenol & dinitrophenol were given. The specification stated, as to the dinitrophenols, that it was necessary to reduce those bodies by means of sulphuret of sodium previously to heating them with sulphur, but as to the dinitronaphthols, that it would be also useful to reduce them. In two actions for infringement of the patent, tried together, defts. alleged (*inter alia*) that there had been prior publication by certain specifications, & that the directions in the specification were insufficient, in that no details were given as to the treatment of naphthol derivatives, & misleading, in that the processes described did not give black dyes. Pltfs. contended that the common knowledge of a dyechemist was sufficient to enable him to make the variations necessary for carrying out the processes. They alleged that defts.' dyes had been produced, as in one of pltfs.' experiments, by boiling sodium sulphide, sulphur, & dinitrophenol with a reflux condenser for a considerable time, & defts. admitted that their dyes had been prepared by a process indistinguishable from that of pltfs.' experiment, but contended that the process was not within the patent. It was held at the trial, that the prior specification did not suggest the use of any tri-substituted derivatives of benzene or naphthalene, & that they were not anticipations of the invention; that they formed part of the common knowledge of the art of sulphur dyeing; that the directions given in the specification were sufficient; that the claim covered the process by which defts.' dyes had been prepared; & that defts. had infringed. Judgment was given for pltfs., an inquiry as to damages was ordered, & costs on the higher scale were allowed. Defts. in both actions appealed to the Ct. of Appeal:—*Held:* (1) there was no common knowledge as to the effect of heating the bodies mentioned in the specification with sulphur, either alone or in the presence of sulphuret of sodium; as to diamidonaphthols, the specification was insufficient; as to the dinitronaphthols, the specification, in stating that it would be useful to reduce before treatment with sulphur, erroneously implied that the dye could be formed without previous reduction, & the directions given were insufficient; & the patent was invalid. (2) Defts.'

AMERICA *v.* PEACOCK (1908), 6 C. L. R. 287, P. C.—**AUS.**

a. *Materials of construction—Whether description necessary.*]—STOKES *v.* DAVENPORT & SON (1893), 11 N. Z. L. R. 321.—**N.Z.**

b. *Question for jury.*]—The jury are the judges of the sufficiency & intelligibility of the specification, as construed by the ct.—MORTON *v.* MIDDLETON (1863), 1 Macph. (Ct. of Sess.) 718; 35 Sc. Jur. 542.—**SCOT.**

Sect. 4.—*Complete specification: Sub-sect.* 2, *B.* (*a*) & (*b*) *i.* & *ii.*

dye was a different substance from pltfs.' & was not produced by the process claimed.—VIDAL DYES SYNDICATE, LTD. *v.* LEVINSTEIN, LTD., SAME *v.* READ HOLLIDAY & SONS (1912), 29 R. P. C. 245, C. A.

Annotation:—**Consd.** Act. für Anilin Fabrikation in Berlin *v.* Levinstein (1921), 38 R. P. C. 277.

834. —— ——.] — A patent was granted in 1901 for "improvements relating to the extraction of dust from carpets & other materials." The specification stated that it was essential to practical success to drive by power the pump employed for producing a vacuum, & to maintain a vacuum of at least 5 lbs. per square inch in the filter on the side of the filtering medium where the air & dust entered, when the apparatus was at work, & that it was only to extractors working with a considerable vacuum that the claims related. In an action for infringement of the patent a certificate of validity had been granted. A subsequent action for infringement was brought, & pltfs. claimed costs as between solr. & client. Defts. denied infringement & validity, & made a counterclaim for revocation of the patent. Defts. contended that the direction to use a 5 lbs. vacuum was meaningless, as it was not stated at what part of the apparatus that vacuum was to be, that a vacuum of less than 5 lbs. at the nozzle was sufficient, & that there was no subject-matter. They also contended that forms of the apparatus for which an independent claim, claim 6, was made had been abandoned in practice as useless, & that the patent had been anticipated by the specification of H. & T., which described the use of an ejector for obtaining a vacuum:—*Held:* defts. had infringed; no publication before the date of the patent had indicated the importance of a tight joint at the carpet, or the vacuum required for efficient working; H. & T. had erronenously assumed that every ejector would give a sufficient vacuum, & the evidence of user of their apparatus failed; patentee intended the vacuum of 5 lbs. to be at the dust collector, as being the most convenient part; his specification gave sufficient directions for the construction of an efficient apparatus; & the fact that certain forms claimed had ceased to be used did not render the patent invalid.—BRITISH VACUUM CLEANER CO., LTD. *v.* LONDON & SOUTH WESTERN RY. CO. (1912), 29 R. P. C. 309, H. L.

835. —— ——.] — In 1894 a Western Australian patent was granted for "improvements in or relating to the extraction of precious metals from their ores." The patentees claimed (*inter alia*) the use of halogen compounds of cyanogen in a solvent for precious metals, & described a process in which those compounds, mixed with an aqueous solution of potassium cyanide were used for the extraction of gold from its ores. In 1900, a Western Australian patent, & in 1904, a corresponding Commonwealth patent, were granted for "an improved manufacture of cyanogen bromide." The manufacture consisted in mixing a solution of bromide, a cyanide, & an acid, with or without the addition of an oxidizing agent. In an action for infringement of the patents, defts. contended that the patent of 1894 was invalid because, amongst other reasons, no sufficient directions were given, & if the practice in using potassium cyanide for the extraction of gold were followed, the process would fail. As to the other patents, defts. alleged that the process described in the specification of those patents had been disclosed by the specification of the patent of 1894. At the trial it was held that the patent of 1894 was invalid by reason of the insufficiency of the specification & on other grounds, but that the patents of 1900 & 1904 were valid & had been infringed. Pltfs. appealed to the Privy Council as to the patent of 1894, & defts. appealed as to the other patents:—*Held:* the patent of 1894 was invalid for insufficiency.—GOLD ORE TREATMENT CO. OF WESTERN AUSTRALIA, LTD. (IN LIQUIDATION) *v.* GOLDEN HORSESHOE ESTATES CO., LTD., GOLDEN HORSESHOE ESTATES CO., LTD. *v.* GOLD ORE TREATMENT CO. OF WESTERN AUSTRALIA, LTD. (IN LIQUIDATION) (1919), 36 R. P. C. 95, P. C.

836. —— ——.] — *Re* BRUCE'S APPLICATION, No. 757, *ante*.

837. —— **Application of invention.**] — In a recital of a patent it was stated, that the patentee was the first & true inventor of certain improvements in extracting syrup & sugar from cane juice & other substances containing sugar, & in refining sugar & syrups. The specification alleged that the invention consisted in a means of discolouring syrups of every description by means of charcoal, produced by the distillation of bituminous schistus alone, or mixed with animal charcoal, or even of animal charcoal alone. It then alleged that the discoloration was to be effected by means of a filter made of charcoal, & that there was nothing particular in the carbonisation of the bituminous schistus, only that it was "convenient before the carbonisation, to separate the sulphurets of iron which are mixed with it." To an action of infringing this patent, deft. pleaded, that the patentee did not, by any instrument, particularly describe & ascertain the nature of his invention, & in what manner the same was to be & might be performed:—*Held:* the specification sufficiently described the invention stated in the title of the patent, it being shown that it was applicable with advantage to the extracting of syrup from cane juice, before it is baked to such a consistency as to granulated & become sugar.—DEROSNE *v.* FAIRIE (1835), 2 Cr. M. & R. 476; 1 Web. Pat. Cas. 154; 1 Gale, 109; 1 Mood. & R. 457; 5 Tyr. 393; 150 E. R. 205.

Annotation:—**Refd.** Crane *v.* Price (1842), 4 Man. & G. 580.

838. —— **Full details—Effect of omission.**]—HINKS & SON *v.* SAFETY LIGHTING CO., No. 984, *post*.

839. —— **Essence of invention.**] — KOPP *v.* ROSENWALD BROTHERS, No. 814, *ante*.

840. —— **Effect of invention—When necessary to define invention.**]—A patent was granted to C. for improvements in fishing tackle. The object of the invention was stated to be to provide a trace or paternoster for angling purposes which would give greater advantages than those at present in use by affording a straight pull on a fish, when hooked, by the formation & arrangement of the booms or arms. The claim was for "a trace or paternoster consisting of one or more arms or booms connected by lengths of gut, metal, wire, or other material substantially as described & for the purpose specified." In an action for infringement of this patent defts. put in issue the validity of the patent on the ground (*inter alia*) of want of novelty & prior publication by a number of specifications & other documents, including a specification of K., & also by certain cases of manufacture, use, & sale:—*Held:* it being admitted that the patent could not be supported if the claim included forms of loop on a paternoster which did not bring a jerk when a fish is hooked, the fact that it brought a jerk was a necessary part of the delimitation of the invention, & necessary

part was not to be found in the specification; therefore the specification was defective.

Counsel for pltf. urge the well known principle in patent law that a man need not state the effect or the advantage of his invention, if he describes his invention so as to produce it. But that is not true where he has to rely on the presence or absence of such effect or advantage as a part of the necessary delimitation. The fact that it is a mere consequence cannot be pleaded by him as an excuse for not putting it in, if the leaving it out leaves his invention inadequately defined (FLETCHER MOULTON, L.J.).—CLAY *v.* ALLCOCK & CO., LTD. (1906), 23 R. P. C. 745, C. A.

Annotation:—**Refd.** Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239.

841. —— Subject-matter of patent.]—*Held:* pltfs.' patent for an invention of a process & apparatus for the treatment of metallic tungsten & the manufacture of electric lamp filaments therefrom was invalid, as the specification neither described nor claimed an invention which could be the subject-matter of a patent.—BRITISH THOMSON-HOUSTON CO., LTD. *v.* DURAM, LTD. (1918), 35 R. P. C. 161; 34 T. L. R. 312, H. L.

Annotations:—**Consd.** Charlesworth, Peebles *v.* British Thomson-Houston Co., British Thomson-Houston Co. *v.* British Insulated & Helsby Cables (1925), 41 T. L. R. 259. **Refd.** British Thomson-Houston Co. *v.* British Insulated & Helsby Cables, [1924] 1 Ch. 203; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1924), 41 R. P. C. 211.

842. Effect of insufficiency—Patent invalid.]—One very important question is whether the patentee has in his first claim claimed this stud or rivet as a separate thing, or whether he has claimed it only in combination with a disc or plate, also described in the specification, & with which it is clearly intended to be used. . . . The invention is so described in the body of the specification as to leave it quite open to the patentee to frame his claim in more ways than one. . . . Pltf.'s patent as it stands covers too much, & must be held invalid until amended (LINDLEY, M.R.).—DOWLER *v.* KEELING (1898), 14 T. L. R. 257, C. A.

843. Right to refer to other documents.]—It may perhaps be permissible for a patentee to say in his specification: "For the purpose of carrying my invention into effect, I refer you to such & such a publication in which you will find all necessary directions." I doubt if this would fulfil his obligations to the public, but, at all events, on turning to the publication indicated, you must find in clear & precise terms the very process which he claims, or one which, without further experiment, can be applied for the carrying into effect of his invention (NEVILLE, J.).—JOSEPH CROSFIELD & SONS, LTD. *v.* TECHNO-CHEMICAL LABORATORIES, LTD. (1913), 30 R. P. C. 297.

(*b*) *Degree of Sufficiency Required.*

i. *In General.*

844. Must enable invention to be used.]—LIARDET *v.* JOHNSON (1778), 1 Web. Pat. Cas. 53; 1 Carp. Pat. Cas. 35; Bull. N. P. 76 b.

Annotations:—**Refd.** Harmar *v.* Playne (1809), 11 East, 101; Lewis *v.* Marling (1829), 8 L. J. O. S. K. B. 46; Morgan *v.* Seaward (1836), 1 Web. Pat. Cas. 170.

845. ——.]—To support a patent the specification should be so clear as to enable all the world to use the invention from the moment of the expiration of the patent.—NEWBERY *v.* JAMES (1817), 2 Mer. 446; 1 Carp. Pat. Cas. 367; 35 E. R. 1011.

Annotations:—**Refd.** Green *v.* Church (1823), 1 L. J. O. S. Ch. 203; James *v.* James (1872), 20 W. R. 434; Amber Size & Chemical Co. *v.* Menzel, [1913] 2 Ch. 239. **Mentd.** Morison *v.* Moat (1851), 20 L. J. Ch. 513; Leather Cloth Co. *v.* American Leather Cloth Co. (1863), 4 De G. J. & Sm. 137.

846. Evidence of insufficiency—Subsequent improvements necessary.]—A patent being granted upon a specification, that the machine was capable of performing all the operations necessary to the perfection of the proposed invention; & it appearing that a second patent was taken out for improvements necessary to the efficient operation of the original machine:—*Held:* the consideration of the first patent having failed, both patents were void.—BLOXAM *v.* ELSEE (1827), 6 B. & C. 169; 9 Dow. & Ry. K. B. 215; 5 L. J. O. S. K. B. 104; 108 E. R. 415.

Annotations:—**Refd.** Neilson *v.* Harford (1841), 8 M. & W. 806; Allen *v.* Rawson (1845), 1 C. B. 551; Beard *v.* Egerton (1846), 3 C. B. 97; Palmer *v.* Wagstaff (1854), 9 Exch. 494; Ward *v.* Hill (1903), 20 R. P. C. 189. **Mentd.** Slatterie *v.* Pooley (1840), 6 M. & W. 664.

847. Of chemical patent.]—To require the patentee in a chemical patent to define rigidly the limits of variation of time or of proportions sufficient to ensure his result, would end in invalidating a large proportion of the patents which protect most valuable & meritorious chemical discoveries (SARGANT, J.).—ACT. FÜR ANILIN FABRIKATION IN BERLIN *v.* LEVINSTEIN, LTD. (1914), 31 R. P. C. 177; *on appeal* (1921), 38 R. P. C. 277, C. A.

ii. *To Whom Specification Addressed.*

848. Workman.]—BOULTON *v.* BULL, No. 90, *ante.*

849. ——.]—BOVILL *v.* MOORE (1816), Dav. Pat. Cas. 361; 2 Marsh. 211; 1 Goodeve's Patent Cases, 74.

Annotations:—**Consd.** Cook *v.* Pearce (1843), 8 Q. B. 1044. **Refd.** Germ Milling Co. *v.* Robinson (1884), Griffin's Patent Cases (1884–86), 103.

850. ——.]—GIBSON *v.* BRAND, No. 573, *ante.*

851. —— Of ordinary competence.]—MORGAN *v.* SEAWARD, No. 442, *ante.*

852. —— ——.]—ELLIOTT *v.* ASTON, No. 514, *ante.*

853. —— ——.]—NEILSON *v.* HARFORD, No. 83, *ante.*

854. —— ——.]—HOUSEHILL COAL & IRON CO. *v.* NEILSON, No. 13, *ante.*

855. —— ——.]—BEARD *v.* EGERTON, No. 1107, *post*

856. —— ——.]—FOXWELL *v.* BOSTOCK, No. 909, *post.*

857. —— ——.]—SIMPSON *v.* HOLLIDAY, No. 808, *ante.*

858. —— ——.]—PLIMPTON *v.* MALCOLMSON, No. 1107, *post.*

859. —— ——.]—PHILPOTT *v.* HANBURY, No. 649, *ante.*

860. —— ——.]—EDISON & SWAN ELECTRIC LIGHTING CO. *v.* WOODHOUSE & RAWSON, No. 1037, *post.*

861. Person skilled in particular trade.]—ARKWRIGHT *v.* MORDAUNT (1781), 1 Web. Pat. Cas. 59.

862. ——.]—ARKWRIGHT *v.* NIGHTINGALE (1785), 1 Web. Pat. Cas. 60; Dav. Pat. Cas. 37.

Annotation:—**Consd.** Edison & Swan Electric Light Co. *v.* Holland (1889), 6 R. P. C. 243.

PART VI. SECT. 4, SUB-SECT. 2.—B. (b) i.

c. *Must enable others to make it up—Workman of ordinary knowledge.*]—In judging of the sufficiency of a specification, it is necessary to see whether the patentee sets forth clearly the nature of his invention, & sets it forth so as to serve the double purpose, of showing a workman of ordinary knowledge & skill how he can construct the thing specified in the patent; & of showing persons who read the patent what they must avoid doing if they would not infringe the patent.—MORTON *v.* MIDDLETON (1863), 1 Macph. (Ct. of Sess.) 718.—SCOT.

Sect. 4.—*Complete specification: Sub-sect.* 2, *B.* (*b*) *ii. & iii., & (c), C. (a) & (b).*]

863. ——.] — The question is whether the specification be such that a mechanist can make the machine from the description there given. The patent is to be considered as a bargain with the public & the specification is therefore to be construed on the same principle of good faith as that which regulates all other contracts. If, therefore, the disclosure be such that the invention can be communicated to the public the statute is satisfied (LORD ELDON, C.J.).—CARTWRIGHT *v.* EAMER (1800), Goodeve's Patent Cases, 112.

Annotation:—**Folld.** Harmer *v.* Plane (1807), 14 Ves. 130.

864. ——.]—It may not be necessary, indeed, in stating a specification of a patent for an improvement, to state precisely all the former known parts of the machine, & then to apply to those the improvement; but, on many occasions, it may be sufficient to refer generally to them. As in the instance of a common watch; it may be sufficient for the patentee to, say, take a common watch, & add or alter such & such parts, describing them. When Lord Mansfield said, in the case of *Liardet* v. *Johnson*, No. 844, *ante*, that the meaning of the specification was, that others might be taught to do the thing for which the patent was granted, it must be understood to enable persons of reasonably competent skill in such matters to make it; for no sort of specification would probably enable a ploughman, utterly ignorant of the whole art, to make a watch (LORD ELLENBOROUGH, C.J.).—HARMAR *v.* PLAYNE (1809), 11 East, 101; Dav. Pat. Cas. 311; 103 E. R. 943.

Annotations:—**Consd.** Foxwell *v.* Bostock (1864), 4 De G. J. & Sm. 298. **Apld.** Parkes *v.* Stevens (1869), 5 Ch. App. 36. **Refd.** Hill *v.* Thompson (1817), 3 Mer. 622; Neilson *v.* Harford (1841), 8 M. & W. 806; Crane *v.* Price (1842), 4 Man. & G. 580; Cook *v.* Pearce (1843), 8 Q. B. 1044; Holmes *v.* L. & N. W. Ry. (1852), 12 C. B. 831.

865. ——.]—BLOXAM *v.* ELSEE, No. 12, *ante*.

866. ——.]—STURZ *v.* DE LA RUE, No. 897, *post*.

867. ——.] — MORGAN *v.* SEAWARD, No. 442, *ante*.

868. ——.]—(1) All the substances which will answer need not be stated, if the public are not misled.

(2) But if a whole class of substances be stated as suitable, & one of them will not succeed, this will mislead.

(3) Some knowledge is required in the person reading the specification, which is addressed to artists of competent skill in the particular manufacture.

(4) The attention of pltf. must be clearly directed to the nature of the objection.

(5) The finding of the jury on an objection to the distinctness of the specification is conclusive.

(6) It lay upon deft. to show that port-fire was in fact a substance within the description [gunpowder or other combustible matter], & inapplicable to the purposes in question; & that these points were to be decided by the jury.—BICKFORD *v.* SKEWES (1841), 1 Q. B. 938; 1 Web. Pat. Cas. 211; 1 Gal. & Dav. 736; 10 L. J. Q. B. 302; 6 Jur. 167; 113 E. R. 1391.

Annotation:—*Generally*, **Refd.** Rothwell *v.* King (1886), 3 R. P. C. 379.

869. ——.]—GALLOWAY *v.* BLEADEN, No. 541, *ante*.

870. ——.]—GIBSON *v.* BRAND, No. 573, *ante*.

871. ——.]—ONIONS *v.* CROWLEY (1853), Macr. 256.

872. ——.] — (1) Specification must be sufficient for persons skilled in the subject.

(2) The insertion of anything as important, which is not so in fact, will vitiate a specification.—HUDDART *v.* GRIMSHAW (1803), 1 Web. Pat. Cas. 85; 1 Carp. Pat. Cas. 200; Dav. Pat. Cas. 265.

Annotations:—*As to* (1) **Refd.** Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 T. L. R. 294. *Generally*, **Refd.** Murray *v.* Clayton (1872), 7 Ch. App. 573, n.

873. ——.] — PHILPOTT *v.* HANBURY, No. 649, *ante*.

874. ——.] — The owners of two patents, relating to the construction of incandescent electric lamps, brought an action for infringement. Defts. denied infringement, & alleged that the patents were invalid on the ground (*inter alia*) of insufficiency of specification, want of novelty, & utility: —*Held:* the objection of insufficiency failed, the directions contained in the specification being sufficient to enable a person having a reasonably competent knowledge of the subject, & reasonably competent skill, to make the article without further invention.—EDISON & SWAN UNITED ELECTRIC LIGHT CO. *v.* HOLLAND (1889), 5 T. L. R. 294; 6 R. P. C. 243, C. A.

Annotations:—**Apld.** Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95. **Refd.** Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424; Jandus Arc Lamp & Electric Co. *v.* Arc Lamps (1905), 21 T. L. R. 308; Layland *v.* Boldy (1913), 30 R. P. C. 547; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369; Wallace *v.* Tullis, Russell (1921), 39 R. P. C. 3; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1924), 41 R. P. C. 241.

875. ——.] — TUBES, LTD. *v.* PERFECTA SEAMLESS STEEL TUBE CO., LTD., No. 735, *ante*.

876. Person of ordinary skill.] — MANTON *v.* MANTON, No. 438, *ante*.

iii. *Must be Sufficient in Itself.*

877. Effect of need for addition.] — R. *v.* ARKWRIGHT, No. 14, *ante*.

878. ——.]—MORGAN *v.* SEAWARD, No. 442, *ante*.

879. ——.]—NEILSON *v.* HARFORD, No. 83, *ante*.

880. Effect of need for invention.] — R. *v.* FUSSELL, R. *v.* DANIELL (1827), 1 Carp. Pat. Cas. 449.

881. ——.] — MORGAN *v.* SEAWARD, No. 442, *ante*.

882. ——.]—NEILSON *v.* HARFORD, No. 83, *ante*.

883. ——.]—PLIMPTON *v.* MALCOLMSON, No. 68, *ante*.

884. Effect of need for experiment.] — A specification will be bad, if it use terms calculated to encourage useless experiments to arrive at the desired object, although it give the proper means of arriving at it.

Thus, where a man in his specification used the following terms, "The invention consists in the using certain cloths, which may be made of any suitable material; but I prefer it to be made of linen warp, & woollen weft." The fact being, that he had unavailingly tried other materials, & had found none to answer but linen warp & woollen weft, it was held that the specification was bad.—CROMPTON *v.* IBBOTSON (1828), Dan. & Ll. 33; 6 L. J. O. S. K. B. 133; 1 Web. Pat. Cas. 83; 1 Carp. Pat. Cas. 460.

Annotations:—**Refd.** Lewis *v.* Marling (1829), 10 B. & C. 22; Wegmann *v.* Corcoran, Witt (1878), 27 W. R. 357.

885. ——.]—MORGAN *v.* SEAWARD, No. 442, *ante*.

886. ——.]—BRITISH DYNAMITE CO. *v.* KREBS (1879), 13 R. P. C. 190, H. L.

Annotations:—**Apld.** True & Variable Electric Lamp Syndicate *v.* Bryant Trading Syndicate (1908), 25 R. P. C. 461. **Refd.** Britain *v.* Hirsch (1888), 5 R. P. C. 226; Pneumatic Tyre Co. *v.* Casswell (1896), 13 R. P. C. 164; Dowler *v.* Keeling (1898), 14 T. L. R. 257; Parker & Smith *v.* Satchwell (1901), 45 Sol. Jo. 502; Wallace *v.* Tullis Russell (1921), 39 R. P. C. 3.

887. ——.] — MAXIM-NORDENFELT GUNS & AMMUNITION CO. & HIRAM STEVENS MAXIM *v.* ANDERSON, No. 302, *ante*.

888. ——.]—WATSON LAIDLAW & CO., LTD. *v.* POTT CASSELS & WILLIAMSON, No. 799, *ante*.

889. —— **Where proportions left to discretion of operator.**]—There is no objection in law to a specification which, while giving a definite prescription, leaves the proportions of constituent materials which a particular operator may employ to his own discretion, informed possibly by actual experiment.—ACT. FÜR ANILIN FABRIKATION IN BERLIN *v.* LEVINSTEIN, LTD. (1921), 38 R. P. C. 277, C. A.

(*c*) *Drawings.*

See Patents & Designs Act, 1907 (c. 29), s. 2 (3); Patents Rules, 1920, rr. 19–26.

890. Admissibility in aid of description.] — BLOXAM *v.* ELSEE, No. 12, *ante*.

891. —— **Description too general.**] — Where a specification in the first instance describes the invention in too general terms; but afterwards, in describing the method of performing the invention, refers to certain figures in drawings annexed thereto, & the claim made is for the manufacture of the invention described with reference to those figures, the specification is sufficient.—DAW *v.* ELEY (1865), L. R. 3 Eq. 500, n.; 13 L. T. 399; 11 Jur. N. S. 923; 14 W. R. 126.

892. —— **Description insufficient.**] —*Semble:* a specification of a patent may consist of figures, or one figure only, of a description aided by a figure or figures, & it is not bad if the specification is not complied with, irrespective of the drawings. —POUPARD *v.* FARDELL (1869), 21 L. T. 696; 18 W. R. 127.

893. —— **Description ambiguous.**]—J. H. obtained a patent for improvements in tramcar engines, partly applicable to other purposes, & brought an action against H. & R. for infringement of this patent:—*Held:* the specification did not sufficiently indicate what pltf. claimed as novel, & if he claimed a combination such claim was invalid, & the action must be dismissed.—FAIRBURN & HALL *v.* HOUSEHOLD & ROSHER (1886), 53 L. T. 513; 3 R. P. C. 263; 1 T. L. R. 681; Griffin's Patent Cases (1884–86), 96, C. A.

894. Effect of obvious error.] — An objection was alleged against the patent, viz., that as the lamp was stated in the provisional specification to be specially applicable to lamps in common use & it was clear that as shown in the drawings it could not be used in lamp holders in which the plungers were placed at a certain angle to the bayonet joints, which holders were commonly used at the date of the patent & that the invention lacked utility. A further objection was to a subordinate claim on the ground that it involved no invention as a claim in gross:—*Held:* the particular arrangement of the contact pieces shown in the drawings was a mere error which any workman could correct, & the contrivance was novel, useful & involved invention, & the second claim was not a claim in gross but merely subsidiary.—TRUE & VARIABLE ELECTRIC LAMP SYNDICATE *v.* BRYANT TRADING SYNDICATE (1908), 25 R. P. C. 461.

C. Good Faith.

(*a*) *In General.*

895. Specification must not be false.]—LIARDET *v.* JOHNSON, No. 844, *ante*.

896. ——.]—R. *v.* ARKWRIGHT, No. 14, *ante*.

897. Utmost good faith necessary.]—(1) On an application for an injunction to restrain the infringement of a patent the party must swear, that, at the time of making the application, he believes that at the date of the patent the invention was new, or had not been previously known or used in this kingdom.

It is a principle of patent law, that there must be the utmost good faith in the specification. It must describe the invention in such a way, that a person of ordinary skill in the trade shall be able to carry on the process (LORD LYNDHURST, C.).—STURZ *v.* DE LA RUE (1828), 5 Russ. 322; 7 L. J. O. S. Ch. 47; 38 E. R. 1048, L. C.

Annotation:—**Refd.** Hills *v.* London Gaslight Co. (1857), 27 L. J. Ex. 60.

Misleading specification.]—*See* Sub-sect. 2, A (*a*), *ante*.

(*b*) *Full Disclosure.*

898. General rule—Full disclosure necessary.]—R. *v.* ARKWRIGHT, No. 14, *ante*.

899. What must be disclosed — Most beneficial mode of production.]—WOOD *v.* ZIMMER, No. 532, *ante*.

900. —— ——.] — BOVILL *v.* MOORE (1816), Dav. Pat. Cas. 361; 2 Marsh. 211; 1 Goodeve's Patent Cases, 74.

Annotations:—**Refd.** Cook *v.* Pearce (1843), 8 Q. B. 1054; Germ Milling Co. *v.* Robinson (1886), Griffin's Patent Cases (1884–86), 103.

901. —— ——.]—MORGAN *v.* SEAWARD, No. 442, *ante*.

902. —— ——.] — If at the date of the specification, it was known to pltf. that, by the use of two common substances well known in commerce, more than one hundredfold cheaper than carburet of manganese, the same results precisely would be obtained as by the use of that material, the specification would have been bad, as not truly disclosing the invention (LORD CRANWORTH, C.).—UNWIN *v.* HEATH (1855), 5 H. L. Cas. 505; 16 C. B. 713; 2 Web. Pat. Cas. 279; 25 L. J. C. P. 8; 26 L. T. O. S. 141; 3 W. R. 625; 10 E. R. 997, H. L.; *revsg.* S. C. *sub nom.* HEATH *v.* UNWIN (1852), 12 C. B. 522, Ex. Ch.

Annotations:—**Consd.** Marconi & Marconi's Wireless Telegraph Co. *v.* British Radio Telegraph & Telephone Co. (1911), 27 T. L. R. 274. **Apld.** Vidal Dyes Syndicate *v.* Levinstein (1912), 29 R. P. C. 245. **Consd.** Fellows *v.* Lench (1916), 34 R. P. C. 45. **Refd.** Heath *v.* Smith (1854), 3 E. & B. 256; De la Rue *v.* Dickenson (1857), 7 E. & B. 738; Higgins *v.* Seed (1858), 8 E. & B. 771; Hills *v.* London Gas Light Co. (1860), 5 H. & N. 312; Renard *v.* Levinstein (1865), 13 W. R. 382; Badische Anilin und Soda Fabrik *v.* Levinstein (1885), 29 Ch. D. 366; Edison Bell Phonograph Corpn. *v.* Smith & Young (1894), 11 R. P. C. 389; Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System (1896), 13 R. P. C. 559; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369; Act. fur Anilin Fabrikation in Berlin *v.* Levinstein (1921), 38 R. P. C. 277.

903. —— ——.]—(1) Pltfs. as owners of a patent brought an action for infringement, & moved for an interlocutory injunction to restrain defts. from infringing until the trial of the action. The only substantial defence was that the patent was void on the ground that the complete specification did not disclose all that pltfs. knew at the date thereof to be necessary for the purpose of working the invention. It was proved that competent workmen could carry out the invention with no other assistance than that derived from the specification:—*Held:* pltfs. were entitled to the injunction they moved for.

(2) Inventor must disclose all that he knows to be necessary for the purpose of the invention which he claims.

Is it to be said that the specification not lodged

Sect. 4.—Complete specification: Sub-sect. 2, C. & D. (a).]

by this person, but lodged by a person from whom he bought it, & therefore bought with all its infirmities, if it had any, because he knew a mode by which a stone prepared according to the specification may be more conveniently or more usefully worked than anybody but himself knew, that he was bound to put that into the specification. I know no authority for saying that (BACON, V.-C.).—COLES *v.* BAYLIS, LEWIS & CO. (1886), 3 R. P. C. 178; Griffin's Patent Cases (1884–86), 57.

904. —— Most improved state of invention.]—The patentee is bound to give in his specification the most improved state of his invention up to the time of enrolling his specification (TINDAL, C.J.).—JONES *v.* HEATON (prior to 1841), 1 Web. Pat. Cas. 404, n.

905. —— Anything necessary for beneficial enjoyment.]—(1) If the apparatus described can be used beneficially in its simplest form, it is no objection that great improvements have been made.

(2) If experiments are necessary for the production of any beneficial effect, the patent is void.—NEILSON *v.* HARFORD (1841), 8 M. & W. 806; 1 Web. Pat. Cas. 295; 11 L. J. Ex. 20; 151 E. R. 1266.

Annotations:—As to (1) **Refd.** Unwin *v.* Heath (1855), 5 H. L. Cas. 505; Stoner *v.* Todd (1876), 4 Ch. D. 58; Ticket Punch Register Co. *v.* Colley's Patent (1895), 12 R. P. C. 171. *Generally*, **Refd.** Crane *v.* Price (1842), 12 L. J. C. P. 81; Household Coal & Iron Co. *v.* Neilson (1843), 1 Web. Pat. Cas. 673; Cook *v.* Pearce (1844), 8 Q. B. 1054; Stead *v.* Williams (1844), 7 Man. & G. 818; Allen *v.* Rawson (1845), 1 C. B. 551; Millington *v.* Picken (1845), 1 C. B. 799; Beard *v.* Egerton (1849), 8 C. B. 165; Hull *v.* Bolland (1856), 27 L. T. O. S. 221; Berwick *v.* Horsfall (1858), 4 C. B. N. S. 450; Hills *v.* London Gas Light Co. (1860), 5 H. & N. 312; Betts *v.* Menzies (1862), 10 H. L. Cas. 117; Hill *v.* Evans (1862), 4 De G. F. & J. 288; Simpson *v.* Holliday (1865), 5 New Rep. 340; Edison & Swan United Electric Light Co. *v.* Holland (1888), 4 T. L. R. 686; Pneumatic Tyre Co. & Dunlop Pneumatic Tyre Co. *v.* Tubeless Pneumatic Tyre & Capon Heaton (1898), 14 T. L. R. 341; British Vacuum Cleaner Co. *v.* L. & S. W. Ry. (1912), 29 R. P. C. 309. **Mentd.** Peck *v.* North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Lewis *v.* G. W. Ry. (1877), 47 L. J. Q. B. 131; *Re* North Western Rubber Co. & Huttenbach, [1908] 2 K. B. 907.

906. —— Subject-matter of future patent—Though part of original invention—Carbon filaments of electric lamps.]—A patent, dated as to its final specification May, 1880, claimed an electric lamp with a carbon filament for its illuminating conductor. The patentee took out a subsequent patent, dated as to its provisional specification Dec. 1879, for a method of making carbon filaments for electric lamps:—*Held:* there had been no such want of disclosure as to avoid the first patent.—EDISON & SWAN ELECTRIC LIGHT CO. *v.* WOODHOUSE (1886), 32 Ch. D. 520; 55 L. J. Ch. 943; 55 L. T. 263; 34 W. R. 626; 2 T. L. R. 654; Griffin's Patent Cases (1884–86), 86; 3 R. P. C. 167; *affd.*, 3 T. L. R. 327, C. A.

Annotation:—**Refd.** Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 T. L. R. 294.

907. —— —— Substitute for part of original invention.]—It was objected to a patent that the patentee had not disclosed all the knowledge he possessed, he admitting in evidence that at the date of the patent he had in his mind a substitute for one part of his invention which he subsequently patented. The patentee explained this by saying that at the date of the patent he did not think the substitute equally good, & that though he had afterwards patented it, he had now returned to the [illegible] this did not invalidate the patent.—

908. Effect of claim for subsidiary purpose.]—A patentee who discovers a valuable invention does not invalidate his patent merely because he claims for a subsidiary purpose far less valuable, unless the subsidiary claim has absolutely no utility or has been anticipated or required no invention.—ADAMANT STONE & PAVING CO., LTD. *v.* LIVERPOOL CORPN. (1896), 14 R. P. C. 11, 264.

D. Conformity with Provisional Specification.

(*a*) *In General.*

909. General rule—Must conform to provisional specification—As to nature of invention.]—The provisional specification was introduced by the statute of 1852 for a very important object, & with very definite regulations, stating what it should contain, & the purpose which it was intended to answer. In that Act a contrast was drawn between what was required of a patentee in the provisional specification & what were the rules for the construction of the complete specification; the contrast might be given in the words of the statute which directed that in the provisional specification, the nature of the invention should be described, but that the complete specification should particularly describe & ascertain the nature of the invention, & in what manner the same was to be performed. Now the description of the nature of the invention, which was the duty of the provisional specification, was contrasted with the description which was the duty of the complete specification, in this way—that one was to describe the nature generally, the other to describe it particularly; & further, the complete specification must not only describe it particularly, but must also ascertain in what manner the same was to be performed (LORD WESTBURY, C.).—FOXWELL *v.* BOSTOCK (1864), 4 De G. J. & Sm. 298; 3 New Rep. 546; 10 L. T. 144; 12 W. R. 723; 46 E. R. 934, L. C.

Annotations:—**Consd.** Murray *v.* Clayton (1872), 7 Ch. App. 570; Harrison *v.* Anderston Foundry Co. (1876), 1 App. Cas. 574; Moore *v.* Bennett (1884), Griffin's Patent Cases (1884–86) 158; Perry *v.* Soc. des Lunetiers (1896), 13 R. P. C. 664; Kynoch *v.* Webb (1899), 17 R. P. C. 100; British United Shoe Machinery Co. *v.* Thompson (1904), 22 R. P. C. 177; United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631. **Refd.** Daw *v.* Eley (1865), L. R. 3 Eq. 500, n.; Penn *v.* Jack (1866), 14 L. T. 495; Parkes *v.* Stevens (1869), 5 Ch. App. 36; Clark *v.* Adie (1877), 2 App. Cas. 315; Clark *v.* Adie (No 2) (1877), 2 App. Cas. 423; Nordenfelt *v.* Gardner & Gardner Gun Co. (1884), 1 R. P. C. 61; Watling *v.* Stevens (1886), 3 R. P. C. 37; Proctor *v.* Bennis (1887), 36 Ch. D. 740; British United Machinery Co. *v.* Thompson (1905), 22 R. P. C. 175 Lynch & Wilson *v.* Phillips (1909), 26 R. P. C. 389.

910. —— —— ——.]—(1) The enactment in Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 5 (5), that a complete specification must end with a distinct statement of the invention claimed, is directory only, & non-compliance with it does not invalidate a patent.

(2) It is an essential condition of a good patent that the invention described in the provisional should be the same as that in the complete specification, & non-compliance with this condition is by Patents, Designs & Trade Marks Act, 1883

PART VI. SECT. 4, SUB-SECT. 2.—C. (b).

905 1. *What must be disclosed—Anything necessary for beneficial enjoyment.*]—A patentee, in return for the monopoly or privilege which is granted to him in respect of his inventions, must state in his specifications, clearly & plainly, what his invention is, so that others practising the art may learn & use it with facility at the expiration of the term of the patent. *Uberrima fides* is required in this respect.—BITULITHIC & CONTRACTING, LTD. *v.* CANADIAN MINERAL RUBBER CO. & CALGARY (1915), 8 W. W. R. 207; 25 D. L. R. 827.—**CAN.**

(c. 57), s. 26 (3), preserved as a ground upon which the infringement of a patent right may be defended & a patent may be revoked (LORD HALSBURY, C.).

(3) The question remains, whether this mode of dealing with forgings which require to be gradually turned was so obvious that it would at once occur to any one acquainted with the subject, & desirous of accomplishing the end, or whether it required some invention to devise it. There is no doubt about the law applicable to such a question, though it is often difficult to apply it to the circumstances of a particular case, & its application is perhaps most difficult when the alleged invention consists of a new apparatus combining known elements (LORD HERSCHELL).

The apparatus of pltf. was a new invention & a fit subject-matter for a patent, though I admit that the case is near the border line & that no great exercise of the inventive faculty was required for its production (LORD HERSCHELL).

He [the inventor] has invented a simple, useful & easily manageable apparatus for accomplishing this object [the turning of large forgings]. It may be quite true that every one knew the use of an endless chain & of a ratchet before; but it is clear to my mind that . . . however old the elements of the apparatus the combination was new (LORD HALSBURY, C.).—VICKERS, SONS & CO. *v.* SIDDELL (1890), 15 App. Cas. 496; 60 L. J. Ch. 105; 63 L. T. 590; 39 W. R. 385; 6 T. L. R. 482; 7 R. P. C. 292, H. L.; *affg.* S. C. *sub nom.* SIDDELL *v.* VICKERS (1888), 39 Ch. D. 92, C. A.

Annotations:—*As to* (1) **Consd.** Kelly *v.* Heathman (1890), 45 Ch. D. 256. *As to* (2) **Refd.** Nuttall *v.* Hargreaves, [1892] 1 Ch. 23. *As to* (3) **Consd.** Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Taylor & Scott *v.* Annaud & Northern Press & Engineering Co. (1900), 18 R. P. C. 53; Auster *v.* Perfecta Motor Equipments (1924), 41 R. P. C. 482. **Refd.** Ehrlich *v.* Ihlee & Sankey (1888), 4 T. L. R. 337; Longbottom *v.* Shaw (1891), 8 R. P. C. 333; Nuttall *v.* Hargreaves, [1892] 1 Ch. 23; Savage *v.* Harris (1896), 12 T. L. R. 187; Tubes *v.* Perfecta Seamless Steel Tube Co. (1902), 20 R. P. C. 77; Patent Exploitation *v.* Siemens (1904), 21 R. P. C. 541; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co. (1919), 36 R. P. C. 95; Benton & Stone *v.* Denston (1925), 42 R. P. C. 284. *Generally*, **Refd.** Case *v.* Cressy (1901), 17 R. P. C. 255; Mellor *v.* Beardmore (1926), 43 R. P. C. 361.

911. —— —— ——.]—NUTTALL *v.* HARGREAVES, No. 763, *ante*.

912. —— —— **As to claims.**]—PENN *v.* No. 402, *ante*.

913. —— ——.]—*Re* LANCASTER'S APPLICATION, No. 1408, *post*.

914. Need not extend to everything in provisional specification.]—PENN *v.* BIBBY, No. 402, *ante*.

915. —— **Where no fraud—If effect of remainder not altered.**]—(1) Any part of a provisional specification of a patent may be omitted in the complete specification, if there is no fraud, & the effect of the remainder is not altered by the omission.

(2) All the claiming clauses may be struck out of the specification of a patent by a disclaimer, if there remain in the body of the specification words sufficiently distinguishing what the invention is which the patentee claims.

(3) An alteration, verbal merely & not substantive, by means of a disclaimer will not make a patent void.

(4) A specification to which drawings were attached after describing an instrument marked "g," continued, "It is the arranging an instrument 'g' as herein described, which, while it is the means of holding the fabric . . . is also the means by which the step by step movement is given to the fabric, which constitutes the peculiarity of my invention":—*Held:* this was not a claim of all instruments which were at once the means of holding & moving the fabric; nor, on the other hand, of the exact machine with all its arrangements contained in the drawings; but a claim to the exclusive right to use "g," or any similar instrument, for the purpose of holding & moving the fabric at the same time.—THOMAS *v.* WELCH (1866), L. R. 1 C. P. 192; 35 L. J. C. P. 200; 12 Jur. N. S. 316.

916. ——.]—The sole question before me is one of law as to whether or not this complete can be rejected. As far as I can tell from the complete it is in accordance with the Act. Sect. 5 requires that the provisional should describe the nature of the invention. I am clear that this specification does describe the nature of the invention, & the only criticism that can be made on the complete is that it narrows the ambit of the provisional & does not enlarge it. With regard to the case cited on behalf of the office, *United Telephone Co.* v. *Harrison, Cox-Walker & Co.*, No. 602, *ante*, that has no application, because there it was decided that as a matter of fact the phonograph on which FRY, J., invalidated the patent had been inserted in the complete & was not fairly covered by the provisional, therefore it was a distinct case of extension of the grant & not of cutting it down. With regard to the objection that persons may see complete specifications of other appcts. after filing the provisional it is undoubtedly true, but it must be distinctly understood that I do not decide this case on a question of fact at all. If in any case it was brought before me that the person filing the complete had access to other persons' inventions, or had made use of other persons' specifications or had made use of any invention derived from another source not his own, I should, of course, not allow the complete, but in this case there is no opponent other than the office. Such a question when it arises must be dealt with as one of fact, & I should not seal the patent if it should turn out that such an impropriety, there is none suggested here, had been committed by appct. Of course I can express no opinion as to whether or not this patent will be valid. All I can say is I am clearly of opinion that this is not a case in which the sub-sects. of the Act are infringed upon (SIR RICHARD WEBSTER, A.-G.).—*Re* EVERITT (1887), Griffin's Patent Cases (1888), 27.

917. Must be natural outcome of provisional specification.]—A complete specification is an excess upon a provisional specification if it contains anything not foreshadowed by or developed from the provisional specification.—HORROCKS *v.* STUBBS (1886), 3 R. P. C. 221.

918. ——.]—I will take first the question . . . whether there is any such variation between Mr. Morgan's provisional & complete specification as ought to prevent his relying on his patent in this action. . . . It might be a fair test of the difference between the two specifications to inquire whether in the opinion of practical men one mode of manufacture is or is not the natural outcome of the other, so that a competent workman having the one before him might without any process of invention produce the other (KEKEWICH, J.).—MORGAN & CO., LTD. *v.* WINDOVER & CO., LTD. (1887), 3 T. L. R. 748; 4 R. P. C. 417; *affd.* (1888), 4 T. L. R. 425, C. A.; *revsd.* on other grounds (1890), 7 R. P. C. 131, H. L.

Annotations:—**Refd.** Elias *v.* Grovesend Tinplate Co. (1890), 7 R. P. C. 455; Vickers *v.* Siddell (1890), 7 R. P. C. 292; Gadd *v.* Manchester Corpn. (1892), 67 L. T. 569; Goddard *v.* Lyon (1894), 11 R. P. C. 354; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429; British Ore

Sect. 4.—*Complete specification: Sub-sect.* 2, *D.* (*a*), (*b*) & (*c*).]

Concentration Syndicate *v.* Minerals Separation (1909), 27 R. P. C. 33; Layland *v.* Boldy (1913), 30 R. P. C. 547; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95; Bonnard *v.* London General Omnibus Co. (1920), 38 R. P. C. 1.

(b) What may be added to Provisional Specification.

919. Matters of detail.]—BAILEY *v.* ROBERTON, No. 935, *post.*

920. ——.]—LUCAS *v.* MILLER, No. 770, *ante.*

921. ——.]—(1) A patent for the mere new use of a known contrivance without any additional ingenuity in overcoming fresh difficulties is bad & cannot be supported. If the new use involves no ingenuity but is in manner & purpose analogous to the old use although not quite the same, there is no invention, no manner of new manufacture within Statute of Monopolies, 1623 (c. 3). On the other hand, a patent for a new use of a known contrivance is good, & can be supported if the new use involves practical difficulties which the patentee has been the first to see & overcome by some ingenuity of his own. An improved thing produced by a new & ingenious application of a known contrivance to an old thing is a manner of new manufacture within the statute.

(2) The provisional specification described the invention, specified variations in the gearing, & concluded: other variations in detail may be made without departing from the peculiar character of the invention. In the complete specification the last sentence above quoted was thus added to: Which consists in connecting, by means of torsional or tensional gearing, a number of points round the bottom curb of a gasholder, in such manner that when one point thereof tends to rise or fall the same tendency is transmitted, through such gearing, round the circle to every other point:—*Held:* there was not such a want of conformity between the specifications as invalidated the patent.

The evidence of experts as to the construction of specifications is inadmissible, & that except as to the meaning of scientific terms when they occur, or as to the working of mechanical appliances, or as to what such working will bring about expert evidence should not be admitted (SMITH, L.J.).—GADD & MASON *v.* MANCHESTER CORPN. (1892), 67 L. T. 569; 9 R. P. C. 516; 9 T. L. R. 42, C. A.

Annotations:—As to (1) **Consd.** Shrewsbury & Talbot S. T. Cab Co. *v.* Sterckx (1895), 12 T. L. R. 122; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre & Automatic Valve Co. (1899), 16 R. P. C. 50. **Distd.** Taylor & Scott *v.* Annand & Northern Press & Engineering Co. (1899), 16 R. P. C. 547. **Apld.** Layland *v.* Boldy (1913), 29 T. L. R. 651; Norton *v.* Barker (1913), 30 R. P. C. 741; *Re* Merten's Patent (1914), 31 R. P. C. 373. **Refd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 431; Savage *v.* Harris (1896), 12 T. L. R. 187; Mellor *v.* Beardmore (1926), 43 R. P. C. 361. *As to* (2) **Apld.** Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 11 T. L. R. 345.

922. ——.]—In 1887, a patent was granted for improvements in the manufacture of explosives. According to the provisional specification, the invention consisted in the employment of a nitrated body such as nitrated woody matter or fibre, which is dissolved in a solvent such as ether & then dried & reduced to powder. In the complete specification, the patentee claimed, first, the manufacture of an explosive suited for use in small arms or ordnance by taking vegetable fibres, woody matters, cellulose, or the like . . . & nitrating them & then completely dissolving them in acetic ether or acetone or like solvents of equal strength, until they assume a gelatinous plastic consistency, & forming the mass into suitable shapes, & drying or allowing to dry or distilling off the solvent from the mass, & finally, when required, reducing the product to a powder or granular or other required form, with or without the use therewith of an oxygen yielding substance, or both an oxygen yielding substance & a hydrocarbon all substantially as hereinbefore described. H., in whom the patent had become vested, brought an action for infringement thereof against the S. co., who alleged want of novelty, want of subject-matter, insufficiency, disconformity, anticipation by (*inter alia*) publication of W.'s German patent. Defts., in their manufacture of powder, treated nitro-cellulose with acetone, but they alleged that the greater part of the fibre was not dissolved.

The evidence showed that it was known at the date of the patent that nitro-cellulose could be dissolved by the substance named by the patentee; that the solvents were of two classes—one, which included acetone, dissolving both trinitro-cellulose, & dinitro-cellulose & the other, which included ether-alcohol, dissolving dinitro-cellulose only; that the result of solution was to reduce the nitro-cellulose to an amorphous condition, although chemically unchanged, & that the solvent could be evaporated off. W.'s patent described the manufacture of cartridge cases out of an explosive material obtained by adding chlorate of potash to guncotton, drying & pouring such a quantity of collodion thereon until the saturation effected a dissolution of the cotton, & a gelantinous mass was produced:—*Held:* it was an essential feature of the invention that there should be complete dissolution of the fibre of the nitrocellulose; the provisional specification included both classes of nitro-cellulose & both classes of solvents, & there was no disconformity or insufficiency of description; that on the above-mentioned construction of the patent it was not shown to be anticipated except by W.'s patent, but was anticipated by that; & defts. had not infringed, since in their powder the fibre remained undissolved to a considerable extent.—HEIDEMANN *v.* SMOKELESS POWDER CO., LTD. (1898), 15 R. P. C. 306.

923. ——.]—In 1890 a patent was granted to W. for improvements in rubber tyres & metal rims or felloes of wheels for cycles & other light vehicles. The Pneumatic Tyre co., in whom this patent had become vested, brought an action for infringement against E. & S., trading as the L. co. Defts., in addition to special defences & counterclaims, denied infringement, novelty, utility, subject-matter, & that W. was the first inventor, & alleged disconformity. Prior to the commencement of the action, W.'s patent had been held valid in an action of *Pneumatic Tyre Co., Ltd.* v. *Casswell*, No. 1030, *post*, in which the question of disconformity had been decided; &, before trial, the same question had been decided by the Ct. Appeal in favour of the patent in *Pneumatic Tyre Company, Ltd.* v. *East London Rubber Company, Ltd.*, No. 930, *post:—Held:* the evidence not having established different findings to those in the previous actions, the decisions as to disconformity were binding on the ct., & must be followed; also the patent had not been anticipated, & was good, & had been infringed. Defts. appealed against the judgment on the claim.

It is in the final specification only that it is required of a patentee that he shall state how his invention is to be carried out. If he gives in his provisional specification a wide enough description of the nature of his invention he is entitled to fill

that up, & even to take advantage of knowledge which may come to him between the dates of the provisional specification & the final specification, in order to cover by his final specification matters of detail which he may not have known at the time when he drew up his provisional specification, but which are covered by the description he has given of the nature of his invention (LORD SHAND).—PNEUMATIC TYRE CO., LTD. *v.* LEICESTER PNEUMATIC TYRE & AUTOMATIC VALVE CO. (1899), 16 R. P. C. 531, H. L.

Annotation:—**Refd.** Dunlop Pneumatic Tyre Co. & Pneumatic Tyre Co. *v.* Moseley & India Rubber & Tyre Repairing Co. (1903), 20 T. L. R. 85.

924. Improvements.] — (1) Where a patentee of certain gas apparatus, between the time of taking out the patent & enrolling the specification, made certain improvements in his apparatus, & in the specification claimed the machine so improved as his invention:—*Held:* this did not affect the validity of the patent.

It must be on some strict technical rule that a variance between a patent & the specification is to vitiate the patent. I am not aware of the existence of such a rule, & it would be very hard if a person were to lose the benefit of his invention because he has made it more valuable to the public (LITTLEDALE, J.).

(2) Improvements made during the interval for specifying should be described.

(3) The terms of a specification must be interpreted according to the state of knowledge at the time.—CROSSLEY *v.* BEVERLY (1829), 9 B. & C. 63; 3 C. & P. 513; 1 Web. Pat. Cas. 112; 7 L. J. O. S. K. B. 127; 109 E. R. 24.

Annotations:—*As to* (1) **Consd.** Jupe *v.* Pratt (1836), 1 Web. Pat. Cas. 144. **Refd.** Household Coal & Iron Co. *v.* Neilson (1843), 1 Web. Pat. Cas. 673; Foxwell *v.* Bostock (1864), 10 L. T. 144. *Generally*, **Refd.** Hills *v.* London Gas Light Co. (1860), 5 H. & N. 312.

925. ——.] — BAILEY *v.* ROBERTON, No. 935, *post.*

926. ——.]—LUCAS *v.* MILLER, No. 770, *ante.*

927. —— **Duty to disclose.**] — CROSSLEY *v.* BEVERLY, No. 924, *ante.*

928. —— ——.] — WOODWARD *v.* SANSUM & CO., No. 761, *ante.*

929. —— ——.] — MOSELEY *v.* VICTORIA RUBBER CO., No. 762, *ante.*

930. Subsequent discoveries by other inventors —May be referred to.]—(1) In a provisional specification the nature of the invention need not be described otherwise than roughly, though it must be described fairly, & the manner in which the invention is to be carried into effect need not be described. A patentee is not bound in his provisional specification to detail the advantages of his invention, & in stating in such specification his chief objects, he should not be taken to imply, where the invention consists of several parts that he obtains all these objects in every part of his invention, or that some parts of it may not have other advantages not expressly mentioned.

(2) Although a patented invention may, in consequence of subsequent discoveries made by other inventors, prove more valuable & have a wider field of usefulness than was contemplated by the patentee at the date of his invention, yet the patentee is entitled to the full benefit of the use of his invention if taken & applied for the purposes of these subsequent discoveries; & if the subsequent discoveries take place after the date of the provisional & before the date of the complete specification, there is nothing improper in the patentee referring to them in the complete specification, & thus showing the manner in which his invention could be best applied to them.

(3) If, in the provisional specification, which describes a valuable part of an invention, there is also described, as an alternative to that part, something which turns out not to be valuable & is abandoned in the final specification, such abandonment does not affect the validity of the claim for the invention disregarding the omitted alternative part or deprive the patentee of the right to say that he first discovered & gave to the public the benefit of the valuable part which was retained (ROMER, J.).—PNEUMATIC TYRE CO. *v.* EAST LONDON RUBBER CO. (1896), 75 L. T. 488; 14 R. P. C. 77; 13 T. L. R. 97; *affd.* (1897), 14 R. P. C. 573; 13 T. L. R. 387, C. A.

Annotation:—*Generally*, **Refd.** Dunlop Pneumatic Tyre Co. & Pneumatic Tyre Co. *v.* Moseley & India Rubber & Tyre Repairing Co. (1903), 52 W. R. 189.

931. —— ——.]—PNEUMATIC TYRE CO., LTD. *v.* LEICESTER PNEUMATIC TYRE & AUTOMATIC VALVE CO., No. 923, *ante.*

932. Drawings.]—In 1890, letters patent were granted to W. for an invention of improvements in rubber tyres & metal rims of bicycles. The tyres described in the provisional specification were of an arch-shape, & a method of fastening on by wires in the edges of the tyres was described. After describing special forms of rims, the patentee stated that his rubber tyres were applicable to wheels in present use, & in the *Pneumatic Tyre Co.* v. *East London Rubber Co.*, No. 930, *ante*, these were held by the Ct. Appeal to include pneumatic tyres & to justify Fig. 15 of the complete specification. The provisional specification further stated that he might also fit his tyre to the ordinary rims by modifying the inner surface of the rubbers. Pltfs., in whom the patent was vested, commenced this action for infringement thereof. The alleged infringement was a rubber tyre with metal bands in pockets at the edges of it; these bands nearly met, when in position under the air tube, the rim being almost flat at the bottom & having edges somewhat inclined inwards. The bands overlapped longitudinally, but the ends were not fastened together. Defts. alleged disconformity & non-infringement, relying as to discomformity chiefly so far as the trial was concerned on Fig. 20 of the complete specification, on which no express decision had previously been given:—*Held:* there was no disconformity, & that the patent was valid, but that defts. did not infringe it inasmuch as in W.'s invention the tyre was held on by the inextensibility of the wires, whereas the bands in defts.' were not inextensible & were not in tension.—PNEUMATIC TYRE CO., LTD. *v.* IXION PATENT PNEUMATIC TYRE CO., LTD. (1897), 14 R. P. C. 853.

(c) Effect of Disconformity.

933. General rule—Specification bad.] — ONIONS *v.* CROWLEY, No. 871, *ante.*

934. —— ——.] — If the complete specification sets out & claims an invention independent of that which is in the provisional specification, besides also describing that invention which is in the provisional specification, then the complete specification is bad. It would be equally bad if the invention described in the complete specification were a wholly different invention from that

PART VI. SECT. 4, SUB-SECT. 2.—D. (b).

924 i. *Improvements.*]—The addition of a simple mechanical contrivance, the use of which merely constituted an improvement held to be a legitimate development of the invention disclosed in the provisional specification. —KELVIN *v.* WHYTE, THOMSON & CO. (1907), 25 R. P. C. 177.—SCOT.

Sect. 4.—Complete specification: Sub-sect. 2, D. (c); sub-sects. 3 & 4.]

described in the provisional specification, because, as has been said, the patent is not given then for the invention which is described in the provisional specification. Therefore, if there were only one invention described in the provisional application, & only one in the complete specification, but those two inventions were wholly & substantially different, the patent would be bad. So if an invention is described in the provisional specification, which invention is also described in the complete specification; but in the complete specification another & distinct invention is described & claimed, then it is bad because with regard to the second invention so described & claimed in the complete specification, there would be no provisional specification to cover it (ESHER, M.R.).—WATLING *v.* STEVENS (1886), 3 R. P. C. 147; Griffin's Patent Cases (1884–1886), 240, C. A.

935. Whether whole patent void.] —When the nature of an invention has been described in a provisional specification, it is no objection if the final specification describes the invention in greater detail, even to the extent of showing that further discoveries have been made, provided the nature of the invention remains the same.—BAILEY *v.* ROBERTON (1878), 3 App. Cas. 1055; 38 L. T. 854; 27 W. R. 17, H. L.

Annotations:—**Consd.** Lucas *v.* Miller (1885), 2 R. P. C. 155. **Apld.** Woodward *v.* Sansum (1887), 56 L. T. 347; Siddell *v.* Vickers (1888), 39 Ch. D. 92. **Consd.** *Re* Gaulard & Gibbs's Patent (1888), 4 T. L. R. 666; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Nuttall *v.* Hargreaves, [1892] 1 Ch. 23. **Refd.** United Telephone Co. *v.* Harrison, Cox-Walker (1882), 21 Ch. D. 720; Horrocks *v.* Stubbs (1886), 3 R. P. C. 221; Moseley *v.* Victoria Rubber Co. (1887), 57 L. T. 142; Miller *v.* Clyde Bridge Steel Co. (1892), 9 R. P. C. 470; Ward *v.* Hill (1903), 20 R. P. C. 189.

936. ——.]—TUBELESS PNEUMATIC TYRE & CAPON HEATON, LTD. *v.* TRENCH TUBELESS TYRE CO., LTD., No. 676, *ante*.

937. ——.] — CASTNER-KELLNER ALKALI CO., LTD. *v.* COMMERCIAL DEVELOPMENT CORPN., LTD. (1900), 17 R. P. C. 593, H. L.

Annotation:—**Refd.** Kelvin *v.* Whyte, Thompson (1907), 25 R. P. C. 177.

938. Effect of addition.] — A patent was granted for improvements in the manufacture of gas, & in apparatus used when transmitting & measuring gas. The title as set out in the specification was for improvements in the manufacture of gas, & in apparatus used therein & when transmitting & measuring gas. The body of the specification described four things, & among them improvements in the setting & heating of retorts, & in the manufacture of clay retorts for making gas, & claimed these improvements as part of the subject of the patent:—*Held:* this was not a specification of the invention for which the patent was granted, but of a more extensive invention, & the patent was void.—CROLL *v.* EDGE (1850), 9 C. B. 479; 19 L. J. C. P. 261; 15 L. T. O. S. 66; 14 Jur. 553; 137 E. R. 978.

Annotations:—**Distd.** Hills *v.* London Gaslight Co. (1857), 27 L. J. Ex. 60; Oxley *v.* Holden (1860), 8 C. B. N. S. [illegible] R. *v.* Mill (1850), 10 C. B. 379; Newall *v.* Elliott (1858), 4 Jur. N. S. 562.

939. ——.]—The title of the patent being for improvements in the manufacture of frills or ruffles & the provisional specification describing the invention as relating to a particular manufacture of frills or ruffles, the complete specification described the invention as relating to a particular manufacture of frills, ruffles or trimmings:—*Held:* this was no such material variation as to render the patent invalid.—WRIGHT *v.* HITCHCOCK (1870), L. R. 5 Exch. 37; *sub nom.* WIGHT *v.* HITCHOCK, 39 L. J. Ex. 97.

Annotations:—**Refd.** Von Heyden *v.* Neustadt (1880), 14 Ch. D. 230; Badische Anilin und Soda Fabrik *v.* Johnson & Basle Chemical Works, Bindschedler (1897), 76 L. T. 434; Badische Anilin und Soda Fabrik *v.* Hickson, [1906] A. C. 419.

940. ——.]—UNITED TELEPHONE CO. *v.* HARRISON, COX-WALKER & CO., No. 602, *ante*.

941. ——.] — *Re* GREEN'S PATENT, No. 1406, *post*.

942. ——.] — WATLING *v.* STEVENS, No. 934, *ante*.

943. ——.]—*Re* GAULARD & GIBBS' PATENT, No. 1231, *post*.

944. ——.] — NUTTALL *v.* HARGREAVES, No 763, *ante*.

945. ——.]—ADAMS *v.* STEVENS, No. 456, *ante*.

946. ——.]—In 1894, a patent was granted for improvements in adjusting the driving chain for bicycles & other velocipedes. The first claim was for the improvements in driving chain adjusting mechanism of velocipedes hereinbefore described & illustrated in the accompanying drawings, that is to say, making the ends of the arms or branches of the chain stay hollow or tubular & longitudinally slotted on their inner sides, & arranging on the ends of the driving wheel spindle carrier blocks for taking into & working in the said hollow or tubular ends of the chain stay, the said carrier blocks being moved in the hollow or tubular chain stays in the ways hereinbefore described & illustrated. By his fifth claim, the patentee claimed the combination with the chain adjusting gear for velocipedes hereinbefore described & claimed, when used with semi-circular or semi-elliptical chain stay arms, of foot steps of the kind hereinbefore described & illustrated in Figures 22, 23, & 24 of the accompanying drawings. The provisional specification contained no reference to the foot steps. In 1897, a co., who were then the registered owners of the patent, commenced an action against another co. for infringement, alleging claim 1 to be infringed. Defts. denied infringement, & alleged (*inter alia*) defts.' arrangement had a chain stay with a tubular end which had two slots in it, one at the side through which the end of the driving wheel spindle passed, & on underneath for manipulating a nut which screwed on the end of the spindle inside the tubular chain stay; on the side of the latter nearest the wheel a draw-bolt was screwed on the spindle. Pltfs. contended that defts. had in substance their carrier block. It was held at the trial, that the defence of disconformity failed, & the patent was valid & had been infringed:—*Held:* the invention claimed claim 1 was the combination of the improved tubular end of the chain stay with the particular adjusting apparatus of which the carrier block was the essential feature; defts. had not infringed, & the patent was bad for disconformity, inasmuch as what was claimed claim 5 was not shadowed forth in the provisional specification.—OSMONDS *v.* BALMORAL CYCLE CO., LTD. (1898), 15 R. P. C. 505, C. A.

947. ——.] — SAVAGE BROTHERS, LTD. *v.* BRINDLE, No. 255, *ante*.

PART VI. SECT. 4, SUB-SECT. 2.—D. (c).

938 i. *Effect of addition.*]—HUTCHISON [illegible] 5 R. P. C. 351.—**SCOT.**

938 ii. ——.]—CERA LIGHT CO., LTD. *v.* DOBBIE & SON (1892), 11 R. P. C. 10.—**SCOT.**

d. *Specification bad.*]—DUNLOP *v.* COOPER (1908), 7 C. L. R. 146.—**AUS.**

e. ——.]—GILLIES *v.* DUNBAR (1877), 5 R. (Ct. of Sess.) 337; 15 Sc. L. R. [illegible] —**SCOT.**

948. Effect of omission—Whether intention to exclude presumed.]—STONER *v.* TODD, No. 645, *ante.*

949. —— ——.]—SANDOW, LTD. *v.* SZALAY, No. 184, *ante.*

950. —— **Abandonment of useless alternative.**]—PNEUMATIC TYRE CO. *v.* EAST LONDON RUBBER CO., No. 930, *ante.*

Disconformity as defence to action for infringement.]—*See* Part XIV., Sect. 2, sub-sect. 3, D. (*d*), *post.*

Disconformity as ground for revocation.]—*See* Part XIII., Sect. 1, sub-sect. 2, F., *post.*

SUB-SECT. 3.—REFERENCE TO PRIOR SPECIFICATION.

See Patents & Designs Acts, 1907 (c. 29), ss. 7 (4), 8 (2); 1919 (c. 80) sched.; Patents Rules, 1920, rr. 32, 35.

951. Right to refer to prior specifications.]—PARKES *v.* STEVENS, No. 287, *ante.*

952. ——.]—A patentee has no right to try & put on the public what he believes to be the construction of the written document. He has a perfect right to give his own statement of the prior knowledge & say that he refers, in support of his statement, to any number of previous specifications (SIR RICHARD WEBSTER, A.-G.).—*Re* ATHERTON'S PATENT (1889), 6 R. P. C. 547.

953. Right to refer to defects—General allegation only allowed.]—Although general allegations of defects not allowed in a specification, an obligation of a particular defect in a prior patent will not be allowed.—*Re* GUEST & BARROW'S PATENT (1888), 5 R. P. C. 312.

Annotation:—**Refd.** *Re* Brockie's Appln. (1908), 25 R. P. C. 813.

954. Party applying invention deemed to know prior specifications—Patent for improvement on well known process.]—LISTER *v.* LEATHER, No. 278, *ante.*

SUB-SECT. 4.—PATENTS FOR IMPROVEMENTS AND COMBINATIONS.

955. Whether necessary to distinguish novelty or improvement—General rule.]—A specification of an invention that includes new as well as old matter is bad, unless it sets out clearly what is old & what new, & also a disclaimer by the patentee of such parts of the invention as are not new.—TETLEY *v.* EASTON (1853), 2 E. & B. 956; Macr. 82; 23 L. J. Q. B. 77; 22 L. T. O. S. 134; 18 Jur. 350; 2 W. R. 94; 118 E. R. 1024.

Annotation:—**Refd.** Newall *v.* Elliot (1864), 13 W. R. 11.

956. —— ——.]—BOVILL *v.* SMITH, No. 448, *ante.*

957. —— **Claim for improvement.**]—HARMAR *v.* PLAYNE, No. 864, *ante.*

958. —— ——.]—In the specification of a patent for an improved instrument it is essential to point out precisely what is new, & what is old, & it is not sufficient to give a general description of the construction of the instrument without making such distinction, although a plate is annexed, containing a detached & separate representation of the parts in which the improvement consists.—MACFARLANE *v.* PRICE (1816), 1 Stark. 199, N. P.

959. —— ——.]—HILL *v.* THOMPSON, No. 25, *ante.*

960. —— ——.]—FAIRBURN & HALL *v.* HOUSEHOLD & ROSHER, No. 893, *ante.*

961. —— ——.]—PHILPOTT *v.* HANBURY, No. 649, *ante.*

962. —— **Claim for entirely new combination.**]—Where a person obtains a patent for a machine, consisting of an entirely new combination of parts, though all the parts may have been used, separately, in former machines, the specification is correct in setting out the whole as the invention of the patentee. But if a combination of a certain number of those parts have previously existed up to a certain point, in former machines, the patentee merely adding other combinations, the specification should only state such improvements; though the effect produced be different throughout.—BOVILL *v.* MOORE (1816), 2 Marsh. 211; Gooderve's Patent Cases, 74.

Annotation:—**Consd.** Cook *v.* Pearce (1843), 8 Q. B. 1044.

963. —— ——.]—HOLMES *v.* LONDON & NORTH-WESTERN RY. CO., No. 1049, *post.*

964. —— ——.]—WATLING *v.* STEVENS, No. 934, *ante.*

965. —— ——.]—HARRISON *v.* ANDERSTON FOUNDRY CO., No. 281, *ante.*

966. —— —— **Not for subordinate elements.**]—Pltf., being patentee of improvements in machines for cutting & trimming the hairs or bristles of brushes, sued deft. for using a machine which pltf. alleged was an infringement of his patent. Deft. alleged (*a*) that pltf.'s patent was invalid because his specification was insufficient; (*b*) that deft.'s machine was not an infringement; (*c*) that such machine was in use before the date of the patent:—*Held:* the specification was sufficient, because where the claim is for a new combination only, & not also for subordinate elements included in that combination, then, if the combination & the mode of working it are properly described, it is not necessary to specify which of the subordinate elements are new.

When a claim is made for a general combination & arrangement of the different parts of a machine, if the ct. sees that the combination is not new, but that there is some particular improvement in some particular part, it will not do to claim the whole combination as new, but you must condescend upon that which is improved (LORD SELBORNE, C.).—MOORE *v.* BENNETT (1884), 1 R. P. C. 129; Griffin's Patent Cases (1884–1886), 158, H. L.

Annotations:—**Apld.** Sugg *v.* Bray (1885), Griffin's Patent Cases (1884–1886), 210. **Distd.** Useful Patents Co. *v.* Rylands (1885), 2 R. P. C. 255. **Refd.** International Harvester Co. of America *v.* Peacock (1908), 25 R. P. C. 765; Lynch & Wilson *v.* Phillips (1909), 26 R. P. C. 389.

967. —— ——.]—In 1878 a patent was granted to pltf. for improvements in frames for woven or elastic wire web mattresses. He brought an action against deft. for infringing this patent by making & selling mattresses with frames, which were alleged to be infringements of pltf.'s. Pltf. claimed the usual relief. Deft. denied the alleged infringement, & put in issue the validity of the patent on the grounds of insufficiency of the specification & of the invention. Pltf.'s claim was for a framework constructed entirely of wood, & possessing certain advantages. The invention was in fact a combination of old parts, viz., (*a*) a rectangular frame, (*b*) a transverse adjustable bar resting on such frame, (*c*) adjustable screws

PART VI. SECT. 4, SUB-SECT. 4.

1. Improvement must be shown.

CARTSBURN SUGAR REFINING CO. *v.* SHARP (1884), 1 R. P. C. 181.—SCOT.

g. ——.]—The specification ought to show what the improvement is.—LEGGOTT *v.* MCGEOCH (1893), 10 R. P. C. 434.—SCOT.

passing into or through the transverse bar, & (*d*) webbing fixed to the end of the framework, & capable of being held in tension by the adjustable screws:—*Held:* (1) the specification was not such as to make it clear to the public that the claim was for the combination, & not for the specific things making up the combination, & the patent was invalid on that ground; (2) the patented invention had been anticipated.—ROWCLIFFE *v.* MORRIS (1885), 3 R. P. C. 17.

968. —— ——.]—The assignee of a patent for "improvements in photographic cameras & shutter arrangement for same" having commenced an action for infringement, defts. alleged the invalidity of the patent, on the grounds (*inter alia*) (*a*) that the patentee had not pointed out in what the novelty of his invention, which was held to be for a combination, consisted; (*b*) that an amendment of the specification had enlarged the patent; (*c*) that the patent had been anticipated; & (*d*) that, having regard to common & public knowledge, there was not sufficient novelty to support a patent:—*Held:* none of these objections to the validity of the patent had been made out, & pltf. was entitled to judgment.

Where there is a claim for a combination, & the combination is the novelty, the patentee need not point out how far he claims novelty for particular portions; but where there is only an improvement in some part, the patentee must claim for the improvement, & not for the whole combination.—PERRY *v.* SOCIÉTÉ DES LUNETIERS (1896), 13 R. P. C. 664.

969. —— ——.]—(1) Where a specification has been amended by disclaimer, the amended specification takes the place of the original specification.

(2) *Foxwell* v. *Bostock*, No. 972, *post*, is not overruled, & it is doubtful whether it is true to say, in the case of every invention embodied in a new combination described & ascertained in the specification which claims the whole combination as new, there is no obligation to distinguish what is old from what is new (VAUGHAN WILLIAMS, L.J.).—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* FUSSELL (A.) & SONS, LTD. (1908), 25 R. P. C. 631, C. A.

Annotations:—As to (1) **Folld.** Lynch & Wilson *v.* Phillips (1909), 26 R. P. C. 389. *Generally*, **Refd.** Read *v.* Stella Conduit Co. (1916), 33 R. P. C. 191.

970. —— ——.]—In the specification of a patent for "an improved method of, & apparatus for, producing fasteners from metal or wire, & inserting them in leather goods & the like" the first claim was for the method of making & setting a fastener composed of a single strand of wire, consisting of seven operations, described in such claim, substantially as described. The second claim was for a machine for making & setting such a fastener, characterised by three operations, in such claim described, substantially as described. The owners of the patent commenced an action for infringement, & deft. denied infringement, & alleged the invalidity of the patent on the ground of anticipation, & by reason of the patentee not having defined the extent of the monopoly claimed. At the trial it was contended for deft. that the order of the operations was an essential feature of the first claim, that deft.'s machine had not been used to operate so as to infringe that claim, &, in particular, that, as used, it cut the wire before bending it, whereas the patented method was to bend before cutting, & that deft.'s machine, being substantially different from the machine described in the specification, was not an infringement of the second claim; that if it were within the second claim the claim was a claim by function, covering all machines obtaining the result, & was invalid; that the patentee had not sufficiently indicated what was novel in his invention:—*Held:* where the combination is the novelty, the patentee need not state what elements are new.—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* THOMPSON (1904), 22 R. P. C. 177.

Annotations:—**Consd.** British United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631. **Apld.** Lynch & Wilson *v.* Phillips (1909), 26 R. P. C. 389.

971. —— **Claim for partly new combination.**]—BOVILL *v.* MOORE, No. 819, *ante*.

972. —— ——.]—By 5 & 6 Will. 4, c. 83, it is in effect provided that a disclaimer permitted to be entered under the provisions of that Act must not be such a disclaimer as will extend the exclusive right granted by the letters patent.

Semble: (1) the meaning of this enactment is, that the patent must not, by the operation of the disclaimer, be made to include or comprehend something which was not originally contained in it.

Semble: (2) if a disclaimer operates so as to extend the patent, & thus to transgress the statutory limit, it is not void to all intents & purposes, but only for the excess.

(3) Where a provisional specification described an invention for a particular purpose, & the completed specification described a combination of machinery whereby the purpose was fulfilled, it appearing upon the construction of the two that what was intended to be patented was the particular arrangement of parts, & not any particular piece of mechanism, upon a disclaimer disclaiming three of the auxiliary mechanical arrangements as inventions, but retaining drawings & descriptions of them as acting parts of the combined machine, so that the operation of the disclaimer was, that the combination described in the new specification was different from that described in the old, & that there was no specification remaining of the invention for which the original patent was granted, the amended specification, which formed part of the disclaimer, was held insufficient.

(4) Where a specification describes as an invention an improved combination of machinery, which is only another phrase for an improved machine, the specification must also proceed to describe the improvement, & to define wherein the novelty consists, otherwise than by a mere general description, if not, the specification will be insufficient.

(5) The law requires that a specification should be intelligible to a workman of ordinary skill & information on the subject (LORD WESTBURY, C.).—FOXWELL *v.* BOSTOCK (1864), 4 De G. J. & Sm. 298; 3 New Rep. 546; 10 L. T. 144; 12 W. R. 723; 46 E. R. 934, L. C.

Annotations:—As to (3) **Refd.** Daw *v.* Eley (1865), L. R. 3 Eq. 500, n. *As to* (4) **Consd.** Parkes *v.* Stevens (1869), 5 Ch. App. 36. **Apld.** Murray *v.* Clayton (1872), 7 Ch. App. 570. **Expld.** Harrison *v.* Anderston Foundry Co. (1876), 1 App. Cas. 574. **Apld.** Clark *v.* Adie (1877), 2 App. Cas. 315. **Consd.** Clark *v.* Adie (No. 2) (1877), 2 App. Cas. 423; Moore *v.* Bennett (1884), 1 R. P. C. 129; Perry *v.* Soc. des Lunetiers (1896), 13 R. P. C. 664; Kynoch *v.* Webb (1899), 17 R. P. C. 100. **Distd.** British United Machinery Co. *v.* Thompson (1905), 22 R. P. C. 177. **Consd.** British United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631. **Dbtd.** Lynch & Wilson *v.* Phillips (1909), 26 R. P. C. 389. **Refd.** Nordenfelt *v.* Gardner & Gardner Gun Co. (1884), 1 R. P. C. 61; Watling *v.* Stevens (1886), 3 R. P. C. 37; Proctor *v.* Bennis (1887), 36 Ch. D. 740. *Generally*, **Refd.** Penn *v.* Jack (1866), 14 L. T. 495.

973. —— ——.]—(1) A patent may be granted not only in respect of a whole & complete thing described, but in respect, also, of a subordinate integer of that whole. But then the invention must be so described as to make it clear in respect

of what, the whole or the integer, the patent has been asked for & granted.

(2) Where a person has invented an improvement in the form of a particular apparatus or machine, but combines that individual improvement with other things which are not his inventions, his specification must claim that particular individual thing, & not leave it doubtful whether the claim is made for the whole combination, of which that thing really only forms a part. In a drawing of a machine attached to a specification there was shown an intervening space, or opening, between two parts of the machine, the object of the patent; it was intended as the arching of a cutter-plate, but this was not referred to & explained in the specification. In the specification there was the statement of an evil in existing machines, & upon careful examination, by a skilful person, he might suppose that the space exhibited in the drawing was intended to obviate this evil, but there was no statement to that effect, nor was the form of the opening described, & described as a necessary quality of improvement in the machine. This form was afterwards relied on as one of the great improvements in the combination of the patented apparatus:—*Held:* as it had not been properly explained, described, & claimed, the specification was defective.

(3) There were three other things which, with this one, constituted a combination insisted upon as a novelty. Those three things were old, & the mere combination of the four without a clear & sufficient description of the purpose & use of that which might be claimed as new & valuable, & without a distinct claim in respect of the combination itself, even if such a claim would have been valid:—*Held:* not sufficient to support the patent.—CLARK *v.* ADIE (1877), 2 App. Cas. 315; 46 L. J. Ch. 585; 36 L. T. 923; 26 W. R. 45, H. L.

Annotations:—As to (1) **Consd.** Cropper *v.* Smith (1884), 1 R. P. C. 81. **Apld.** Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System (1896), 13 R. P. C. 559. **Consd.** Dunlop Pneumatic Tyre Co. *v.* Moseley (1904), 91 L. T. 49. **Apld.** Sirdar Rubber Co. *v.* Wallington, Weston, [1905] 1 Ch. 451. **Consd.** British United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631. **Refd.** Proctor *v.* Bennis (1887), 36 Ch. D. 740; Dowler *v.* Keeling (1898), 14 T. L. R. 257; Harrison Patents Co. *v.* Nicholson (1908), 25 R. P. C. 393; Pugh *v.* Riley Cycle Co. (1914), 31 R. P. C. 266. *As to* (2) **Consd.** Hattersley *v.* Hodgson (1906), 23 R. P. C. 193. *As to* (3) **Consd.** Ellington *v.* Clark, Bunnett (1887), 58 L. T. 40. *Generally*, **Refd.** Dudgeon *v.* Thomson (1877), 3 App. Cas. 34; Thomson *v.* Moore (1889), 6 R. P. C. 426; Consolidated Car Heating Co. *v.* Came, [1903] A. C. 509; Patent Exploitation *v.* Siemens (1904), 21 R. P. C. 541; Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323.

974. —— ——.]—MOORE *v.* BENNETT, No. 966, *ante*.

975. —— ——.]—(1) Where a patent is taken out for a combination, it is not material to its validity that the specification should point out what parts are old & what are new, though, if an alleged infringement consists only in taking part of the combination, it is necessary that the patentee should in his specification have claimed the part so taken as new. Neither is it necessary that the patentee should explain the novelty & the merit of the invention.

(2) In an action by P., patentee of a stoking machine, for infringement against persons who had purchased stoking machines made by B., it was proved that before the purchase P., knowing that they were going to set up stoking machines, went to them & asked them to try his machine, saying that they would find it a better machine than B.'s, without giving any intimation that he considered B.'s machine to be an infringement of his patent though he admitted that he did at that time consider it to be so & intended to take legal proceedings when he was in funds:—*Held:* as the purchasers did not depose that when they bought B.'s machines they were ignorant of P.'s patent, nor was there any reason to believe that they were ignorant of it or that P. supposed them to be so, P. had not on the ground of acquiescence or estoppel lost his right to sue them for an infringement in using B.'s machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, & P.'s conduct not amounting to a representation that it was not an infringement.—PROCTOR *v.* BENNIS (1887), 36 Ch. D. 740; 57 L. J. Ch. 11; 57 L. T. 662; 36 W. R. 456; 3 T. L. R. 820; 4 R. P. C. 333, C. A.

Annotations:—As to (1) **Refd.** Automatic Weighing Machine Co. *v.* Combined Weighing Machine Co., Combined Weighing Machine Co. *v.* Automatic Weighing Machine Co. (1889), 6 R. P. C. 120; Perry *v.* Soc. des Lunetiers (1896), 13 R. P. C. 664. *Generally*, **Refd.** Gosnell *v.* Bishop (1888), 5 R. P. C. 151; Automatic Weighing Machine Co. *v.* Knight (1889), 6 R. P. C. 297; Boyd *v.* Horrocks (1889), 6 R. P. C. 152; Crampton *v.* Patents Investment Co. (1889), 6 R. P. C. 287; Thomson *v.* Moore (1889), 6 R. P. C. 426; Muirhead *v.* Commercial Cable Co. (1894), 12 R. P. C. 39; Nobel's Explosives Co. *v.* Anderson (1894), 11 R. P. C. 519; Ticket Punch & Register Co. *v.* Colley's Patents (1895), 11 T. L. R. 262; Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System (1896), 13 R. P. C. 559; Incandescent Gas Light Co. *v.* Sunlight Incandescent Gas Lamp Co. (1896), 13 R. P. C. 333; Akt. Seperator *v.* Dairy Outfit Co. (1898), 15 R. P. C. 327; Presto Gear Case & Components Co. *v.* Simplex Gear Case Co. (1898), 15 R. P. C. 635; Consolidated Car Heating Co. *v.* Came, [1903] A. C. 509; British United Shoe Machinery Co. *v.* Thompson (1904), 22 R. P. C. 177; Kelvin *v.* Whyte, Thomson (1907), 25 R. P. C. 177; Lynch & Wilson *v.* Phillips (1909) 26 R. P. C. 389; Roth *v.* Cracknell (1921), 38 R. P. C. 120.

976. —— —— **May be in body of specification or in claim.**] — NORDENFELT *v.* GARDNER, No. 310, *ante*.

977. Combination of known substances — Description by method of production—Not by known names.]—Patent for a mode of making a medicine by a particular combination of three known substances. The specification not describing those substances by their known names, but pointing out particular methods of producing them, held bad; those methods not being essential to the combination, nor part of the invention.—SAVORY *v.* PRICE (1823), Ry. & M. 1; 1 Web. Pat. Cas. 83, n., N. P.

Annotation:—**Consd.** Holmes *v.* L. & N. W. Ry. (1852), 12 C. B. 831.

978. Partial uselessness of improvement described—Validity of patent—When not essential part.]—LEWIS *v.* MARLING, No. 440, *ante*.

979. Patent limited to terms of specification.]—Where a patent had been granted merely for improvements upon the mechanism of an old & known machine:—*Held:* the patentee's exclusive right thereto could not be permitted to exceed the exact terms of his specification; & defts.' improvements, which had the same object, but were effected in a manner not strictly corresponding to the specification, were not an infringement of his patent.—BROWN *v.* JACKSON, [1895] A. C. 446; 64 L. J. P. C. 180, P. C.

Whether claim limited to novelty.]—*See* Sect. 5, sub-sect. 2, *post*.

SUB-SECT. 5.—FOREIGN PATENTS.

See Patents & Designs Act, 1907 (c. 39), s. 91; 1919 (c. 80), sched.; Patents Rules, 1920, rr. 15–18.

980. What may be claimed — Nothing not protected by foreign patent.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (B) (1910), 27 R. P. C. App. ii.

Sect. 4.—*Complete specification: Sub-sect.* 5. *Sect.* 5: *Sub-sects.* 1 & 2.]

981. Effect of non-compliance with statutory requirements—Specification not open to public inspection—Error in date of foreign application given.]—The Comptroller-General decided that the requirements of Rule 14 not having been complied with, & the complete specification not having been open to public inspection at the expiration of twelve months from the date of the foreign application as a result of the error in the date, the priority claimed under the International Convention could not be given:—*Held:* the Comptroller-General had power to refuse to grant the application under the circumstances as the requirements, which should be treated as conditions precedent, had not been complied with.—*Re* APPLICATION UNDER SECTION 103 OF THE PATENTS ACT, 1883 (1906), 23 R. P. C. 788.

SECT. 5.—THE CLAIM.

SUB-SECT. 1.—IN GENERAL.

See Patents & Designs Act, 1907 (c. 29), s. 2.

982. Distinct from description of invention.]—KAY *v.* MARSHALL, No. 354, *ante.*

983. Object of claim.]—KAY *v.* MARSHALL, No. 354, *ante.*

984. —— To inform public.]—(1) A description in the specification of a lamp burner omitted to state where the hole for admission of air was to be:—*Held:* specification was insufficient.

(2) The office of the claim at the end of a specification is to tell the public exactly what the invention is, & when, according to the natural construction of the claim, a patent would be void for want of novelty, the patentee is not at liberty to refer to the descriptive part of & drawings accompanying the specification, for the purpose of validating the patent by showing that some other is the true construction.

(3) I am anxious . . . to support honest *bonâ fide* inventors who have actually invented something novel & useful, & to prevent their patents from being overturned on mere technical objections, or on mere cavillings with the language of their specification so as to deprive the inventor of the benefit of his invention. This is sometimes called a "benevolent" mode of construction. Perhaps that is not the best term to use, but it may be described as construing a specification fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent. Beyond that the "benevolent" mode of construction does not go (JESSEL, M.R.).—HINKS & SON *v.* SAFETY LIGHTING CO. (1876), 4 Ch. D. 607; 46 L. J. Ch. 185; 36 L. T. 391.

Annotations:—*As to* (3) **Apld.** Roberts *v.* Heywood (1879), 27 W. R. 454. **Refd.** Plimpton *v.* Spiller (1877), 6 Ch. D. 412; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429; Patent Exploitation *v.* Siemens (1904), 21 R. P. C. 541; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95. *Generally*, **Refd.** Halsey *v.* Brotherhood (1880), 15 Ch. D. 514; Rickmann *v.* Thierry (1896), 14 R. P. C. 105.

985. —— To define ambit of invention.]—PLIMPTON *v.* SPILLER, No. 1035, *post.*

986. —— ——.]—EDISON-BELL PHONOGRAPH CORPN., LTD. *v.* SMITH, No. 172, *ante.*

987. —— Security of patentees.]—Claims are for the security of patentees, to prevent it being said that the patentee has claimed more than can be really supported as his invention.—JACKSON *v.* WOLSTENHULMES (1884), Griffin's Patent Cases (1884–86), 134; 1 R. P. C. 105, C. A.

Annotation:—**Consd.** Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323.

988. —— ——.]—It is, however, as it appears to me, impossible for the patentee to go beyond the claim in his specification. The office of the claim is to protect the patentee from the danger of being supposed to make claims beyond those which he elects to make, & it must therefore limit his patent rights to what it fairly embraces (WILLS, J.).—EASTERBROOK *v.* GREAT WESTERN RY. CO. (1885), Griffin's Patent Cases (1884–86), 81; 2 R. P. C. 201.

989. Necessity for claim.]—LISTER *v.* LEATHER, No. 278, *ante.*

990. ——.]—*Re* VON BUCH, No. 1427, *post.*

991. ——.]—VICKERS, SONS & CO. *v.* SIDDELL, No. 910, *ante.*

992. Necessity for clear statement.]—*Re* VON BUCH, No. 1427, *post.*

993. ——.]—This point has been considered by the A.-G. in conjunction with myself; we have come to the conclusion that provided the specification ends with a statement of the invention claimed distinct from the description of the invention contained in the specification, is complied with, & that there is no power in the Patent Office to examine into the conformity of the claims put forward by the patentee with the description of the invention which he has given. I should only guard myself by saying this, that if the statement of the invention claimed were such as I claim the invention described in the specification, that would be regarded as a mere colourable compliance with the terms of the statute, & not as a distinct statement of the invention claimed because it would merely refer back to the previous description. Therefore, I think there must be a real statement of the invention claimed, but if there is such a statement I do not think it is competent to the Patent Office to inquire whether it goes beyond or in conformity with the description of the invention. There is no doubt a claim of a particular machine in saying, I claim the improved bicycle substantially as described, or I claim the improved incandescent light, or anything which clearly points to what the invention is. But merely to say I claim the invention described in the previous specification is a case in which, although it has the form of a claim, I should think it was not a distinct statement of the invention claimed (HERSCHELL, S.-G.).—*Re* SMITH'S PATENT (1883), Griffin's Patent Cases (1884–86), 268.

994. ——.]—VICKERS, SONS & CO. *v.* SIDDELL, No. 910, *ante.*

995. ——.]—Although each claim may in itself be clear & succinct, if the claims are not really & substantially separate the claims taken as a whole would not be clear & succinct. A specification may contain a great many claims separate in their nature which are justifiably made under Patent Rules, 1905, r. 4. So long as the statement of each claim is in itself clear & succinct, & so long as there is an absence of repetition in the separate claims, there is not necessarily any infringement of the rule merely owing to the fact that there are a great many claims. On an application for a patent a complete specification was left, which ended with 23 claims. The Examiner reported that the statement of the invention claimed was not clear & succinct as required by Patent Rules, 1905, r. 4. The Chief Examiner, acting for the Comptroller, decided that the statement of the invention claimed did not comply with r. 4, & unless a clear & succinct statement

was substituted the specification would not be accepted.—*Re* BANCROFT'S APPLICATION (1905), 23 R. P. C. 89.

Annotation :—**Consd.** Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239.

996. ——.]—It is the duty of a patentee to state clearly & distinctly, either in direct words or by clear & distinct reference, the nature & limits of what he claims. If he uses language which, when fairly read, is avoidably obscure or ambiguous, the patent is invalid, whether the defect be due to design, or to carelessness or to want of skill. Where the invention is difficult to explain, due allowance will, of course, be made for any resulting difficulty in the language. But nothing can excuse the use of ambiguous language when simple language can easily be employed, & the only safe way is for the patentee to do his best to be clear & intelligible (LORD LOREBURN).

The ct. may, on its own initiative, declare the patent to be invalid [for ambiguity] (LORD PARKER).—NATURAL COLOUR KINEMATOGRAPH CO., LTD. *v.* BIOSCHEMES, LTD. (1915), 31 T. L. R. 324 ; 32 R. P. C. 256, H. L. ; *affg.* S. C. *sub nom. Re* SMITH'S PATENT (1914), 31 R. P. C. 237, C. A.

Annotations :—**Refd.** British Thomson-Houston Co. *v.* Duram (1917), 34 R. P. C. 117 ; British Thomson-Houston Co. *v.* Corona Lamp Works (1920), 37 R. P. C. 277 ; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1923), 40 R. P. C. 426.

997. ——.]—BETTS *v.* REICHENBERG & CO. (1917), 35 R. P. C. 1.

998. ——.]—In 1913 a patent was granted for improvements relating to the making of chocolate pastry, & in 1914 a patent of addition was granted for improvements relating to the making of pastries. In an action for infringement of the patents, defts. denied infringement & alleged that the patents were invalid on the ground of prior public user, prior common general knowledge, & want of subject-matter :—*Held :* it was impossible to define what was the subject-matter of the claims ; there was no subject-matter to support the patents, & there was no evidence on which it could be held that the patents had been infringed.—DAWSON *v.* HAWLEY (H. B. & R.) (1920), LTD. (1923), 40 R. P. C. 143.

999. Claim of mechanical equivalent—Must be specially claimed.]—TWEEDALE *v.* ASHWORTH, No. 1043, *post.*

1000. Claim of general principle—Must be reasonably clear.]—If a patentee intends to claim a general principle, it is his duty to make that intention reasonably clear in his specification.—ACKROYD & BEST, LTD. *v.* THOMAS & WILLIAMS (1904), 21 R. P. C. 737.

Annotations :—**Consd.** Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323. **Refd.** Ridd Milking Machine Co. *v.* Simplex Milking Machine Co., [1916] 2 A. C. 550 ; Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239 ; Wallace *v.* Tullis Russell (1921), 39 R. P. C. 3.

1001. —— ——.]—HARRISON PATENTS CO., LTD. *v.* NICHOLSON (H. N.) & SONS, LTD. (1908), 25 R. P. C. 393, C. A.

1002. —— ——.]—If a patentee desires to claim a general principle as part of his patent, it is his duty to make that claim reasonably clear in the claim as stated in the specification ; it must not be left to be inferred from a general review of the specification, or to be spelt out from ambiguous language used therein.—RIDD MILKING MACHINE CO., LTD. *v.* SIMPLEX MILKING MACHINE CO., LTD., [1916] 2 A. C. 550 ; 85 L. J. P. C. 211 ; 115 L. T. 459 ; 33 R. P. C. 309.

Annotations :—**Consd.** Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323. **Refd.** Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239 : Wallace *v.* Tullis Russell (1921), 39 R. P. C. 3.

1003. —— **Distinguished from claim for particular arrangements of parts.**]—EDISON-BELL PHONOGRAPH CORPN., LTD. *v.* SMITH, No. 172, *ante.*

1004. May contain several claims—Each must be substantially separate.]—*Re* BANCROFT'S APPLICATION, No. 995, *ante.*

1005. Claim of subordinate integer—Must be clear.]—HARRISON PATENTS CO., LTD. *v.* NICHOLSON (H. N.) & SONS, LTD., No. 1001, *ante.*

1006. Effect of partial invalidity—Patent void.]—*Re* WORRALL'S PATENT (1918), 35 R. P. C. 226.

1007. —— ——.]—MOORE FILTER CO. *v.* GREAT BOULDER PROPRIETARY GOLD MINES, LTD., No. 634, *ante.*

SUB-SECT. 2.—WHAT MAY BE CLAIMED.

1008. Must not claim too much—General rule.]—R. *v.* ELSE (1785), Dav. Pat. Cas. 144 ; 1 Web. Pat. Cas. 76 ; 1 Carp. Pat. Cas. 103.

Annotations :—**Apld.** Bovill *v.* Moore (1816), 2 Marsh. 211. **Refd.** Cook *v.* Pearce (1843), 8 Q. B. 1044 ; Harrison *v.* Anderston Foundry Co. (1876), 1 App. Cas. 574.

1009. —— ——.]—BOVILL *v.* MOORE (1816), Dav. Pat. Cas. 361 ; 2 Marsh. 211 ; 1 Goodeve's Patent Cases, 74.

Annotations :—**Refd.** Cook *v.* Pearce (1843), 8 Q. B. 1054. **Mentd.** Germ Milling Co. *v.* Robinson (1884), Griffin's Patent Cases (1884–1886), 103.

1010. —— ——.]—STEVENS *v.* KEATING, No. 802, *ante.*

1011. —— **Claim for new notes on musical instrument—One note only produced.**]—BAINBRIDGE *v.* WIGLEY (1810), 1 Carp. Pat. Cas. 270.

1012. —— **Claim for dowelling of paving blocks.**]—PARKIN *v.* HARRISON, No. 806, *ante.*

1013. —— **Claim for making gas—Without reference to method.**]—BOOTH *v.* KENNARD, No. 1062, *post.*

1014. Claim must not be general.]—*Re* HAMILTON, HAMILTON & HAMILTON'S APPLICATION, No. 1422, *post.*

1015. ——.]—A patent was granted to R. for "improvements in fuse boxes for electricity supply mains." The patentee in his specification claimed, first, the construction & arrangement of electrical fuse or cut-out boxes or covers which automatically prevent access being obtained to more than one main at a time ; &, secondly, the construction & arrangement of electrical fuse or cut-out boxes substantially as described & shown in the figures. In an action for infringement brought by the owners of the patent, defts. alleged that the patent was invalid on the grounds of want of novelty, want of utility, & want of subject-matter. Defts. relied on the user of interlocking apparatus in signals & other things, & also on the common knowledge that in certain positions doors interfered with one another in opening. Pltfs. alleged that the patentee had for a useful purpose adopted what had in other ways only been known as an inconvenience :—*Held :* the first claim was not confined to the particular construction & arrangement shown in the body of the specification, but was a general claim extending to boxes or covers

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PART VI. SECT. 5, SUB-SECT. 1.

1000 i. *Claim of general principle—Must be reasonably clear.*]—SCOTT BROTHERS, LTD. *v.* HEPBURN & SON, [1918] N. Z. L. R. 865.—**N.Z.**

1000 ii. —— ——.]—WALLACE *v.* TULLIS, RUSSELL & CO. (1921), 39 R. P. C. 3.—**SCOT.**

h. *Claim for re-issue—Combination not in original patent.*]—WITHROW *v.* MALCOLM (1884), 6 O. R. 12.—**CAN.**

k. *Failure to claim essential part—Invention anticipated as claimed.*]—WEIR *v.* DENNY, WORTHINGTON PUMPING ENGINE CO. *v.* WEIR (1894), 11 R. P. C. 657.—**SCOT.**

Sect. 5.—*The claim: Sub-sects.* 2 & 3.]

with lids, whether attached by hinges or not, & of any shape & arrangement provided that one lid, being opened, directly or indirectly prevented the other lid or lids being simultaneously opened, & the patent was invalid.—REASON MANUFACTURING CO., LTD. *v.* MOY (ERNEST F.), LTD. (1903), 20 R. P. C. 205, C. A.

Annotation:—**Refd.** Jandus Arc Lamp & Electric Co. *v.* Arc Lamp Co. (1908), 22 R. P. C. 277.

1016. Claim to whatever will succeed.] —STEVENS *v.* KEATING, No. 802, *ante*.

1017. Claim limited to that which public can use.] —TETLEY *v.* EASTON & AMOS, No. 1059, *post*.

1018. Claim to subject of speculation—Not actually invented by applicant.] — TETLEY *v.* EASTON & AMOS, No. 1059, *post*.

1019. Claim for improvement—Must be limited to novelty.]—R. *v.* ELSE, No. 1008, *ante*.

1020. —— ——.]—MINTER *v.* MOWER, No. 503, *ante*.

1021. —— ——.]—(1) The specification of a patent for "improvements in winnowing or dressing corn," stated the improvements to consist in "the substitution of a revolving screen, which is a cylinder of wire or other suitable material." It also stated that the drawings represented the improved machine "with a portion of the side removed to show the points of novelty." The drawings showed the screen to be used in the place of an ordinary screen, & to be constructed of circles of wire placed at proper distances from each other, but the specification stated that the patentees "did not confine themselves to the precise details," & concluded by claiming "the use of a revolving cylindrical screen for the purpose described":—*Held*: the claim was not confined to screens of the particular construction shown in the drawing; & as revolving cylindrical screens constructed of wirecloth, instead of circular wires had been previously in use, the claim was too large & the patent consequently void.

(2) I have been considering whether a proceeding might not be adopted in this case, which cannot be in a case where there is very complicated machinery & conflicting evidence. In this case I think the questions of the validity of the patent & the infringement will depend upon a comparison of pltf.'s specification with the specifications & the models showing what machines were in use before the date of the patent & the apparatus which defts. have used; & what I propose is, to reserve for the ct. all questions of law, & to leave the ct., upon the consideration & examination of these models & the specifications to say how the verdict should be entered upon the issues. I think, by adopting this course, the ct. would come to a more satisfactory conclusion as to the validity of the patent & the infringement of it, than by proceeding in the usual manner, which is often necessary, but which in this case does not apply (*per* CUR.).—NALDER *v.* CLAYTON & SHUTTLEWORTH (1859), Macr. 378; 33 L. T. O. S. 184.

1022. —— ——.]—The patentees of an invention for obtaining gold & silver from ores & other compounds brought an action for infringement. Defts. denied infringement, & alleged the invalidity of the patent on various grounds, including want of subject-matter & anticipation. Pltf.'s first claim was for the process of obtaining gold & silver from ores & other compounds, consisting in dissolving them out by treating the powdered ore or compound with a solution containing cyanogen or a cyanide or cyanogen yielding substance, substantially as described, & the second claim was for the process of obtaining gold & silver from ores & other compounds, consisting in dissolving them out by treating the powdered ore or compound with a dilute solution containing a quantity of cyanogen or a cyanide or cyanogen yielding substance, the cyanogen of which is proportioned to the gold or silver or gold & silver, substantially as hereinbefore described. Long before the date of pltfs.' patent it was known that a solution of cyanide of potassium would solve gold, though no one had in this country, prior to pltfs.' patent, commercially used such a solution to extract the fine gold from the powdered ore. Little gold ore, however, is found in this country, & ore is not imported for the gold to be extracted. At the date of the pltfs.' patent there was no successful mode known of extracting the gold from the solution, & pltfs.' invention was not used for nearly a year till such a method had been discovered. R., in a specification prior to pltfs.', described the use of a solution of cyanide to solve gold in the powdered ore, using, in addition to electricity to facilitate the action of the solution & to deposit the gold. S., in another prior specification, described a process similar to pltfs.', except that he added to the solution a small amount of carbonate of ammonia. Defts. used a similar process to pltfs., with the addition of an electric current, which they contended distinguished their process:—*Held*: (1) it was known that cyanide of potassium would act as a solvent of finely divided gold, but not known that it would act as a solvent of gold to extract it from ore by a method which left a large residuum in the tailings, & pltfs.' process enabled a large amount of this residuum to be recovered, at any rate, from South African gold; the problem to be solved was to get gold from the ore, leaving the baser metals behind; pltfs. had solved this problem by a dilute solution of cyanide of potassium, which had a selective action, *i.e.*, taking out the gold before the baser metals; this solution was previously unknown, & defts. practically had no evidence to disprove the selective action; defts.' contention that pltfs. had abandoned the selective action in the ct. below, failed; the discovery of the selective action was novel & not anticipated.

(2) The law applicable to paper anticipations . . . if anticipations at all, is clear. It is this: That to constitute a paper anticipation the description in the prior specification must be such that a person skilled in the matter of reading it would find in it the invention which is sought to be protected by the patent, & unless this can be found in the writing itself, it is not an anticipation at all. In our judgment, the existence of a chemical patent, wherein the combined effect of two or more chemicals is claimed in order to bring about a desired result does not by any means constitute an anticipation of a subsequent discovery that by the use of any one of the named chemicals the desired result can be attained, & *a fortiori*, when the compound of the two or more has failed to do so, for, as stated by Professor Mills, there are any number of cases known in chemistry where two things when put together act very differently from what they do apart (SMITH, L.J.).—CASSEL GOLD EXTRACTING CO., LTD. *v.* CYANIDE GOLD RECOVERY SYNDICATE, (1895), 12 R. P. C. 232; 11 T. L. R. 345, C. A.

1023. —— **Method of working known process.**]—ELECTRIC TELEGRAPH CO. *v.* BRETT, No. 143, *ante*.

——.]—*See, generally*, Sect. 4, sub-sect. 4, *ante*.

1024. Claim to produce invention "by machinery"—Where operation never before per-

formed by machinery.]—ARNOLD *v.* BRADBURY, No. 1034, *post.*

1025. Claim for applicability to other purposes.]—I have challenged defts.' counsel to produce any authority for holding that a man may not in a patent for an invention say "This invention is capable of application to other purposes beyond that for which I am now by this specification claiming protection." No authority of that kind has been produced. I am not aware of any myself; &, without authority produced to convince me, I should certainly be prepared to hold that a statement of that kind in this specification does not invalidate the patent (KEKEWICH, J.).—COLE *v.* SAQUI & LAWRENCE (1888), 40 Ch. D. 132; 58 L. J. Ch. 237; 59 L. T. 877; 37 W. R. 109; 5 T. L. R. 84; 5 R. P. C. 489, C. A.

Annotation:—**Refd.** Shoe Machinery Co. *v.* Cutlan, [1896] 1 Ch. 108.

1026. Claim for combination—In addition to specific inventions.]—The pltf. may be right in contending that this is a claim for a combination, but he claims something else as well. . . . Construing the specification most favourably to the pltf., it is a claim for a combination plus the three things specified. The specification is clearly bad (LINDLEY, M.R.).—HAWS *v.* HARDING & CO. (1897), 14 T. L. R. 73, C. A.

1027. —— Must be limited to novelty.]—A patent was granted for "improvements in & relating to liquid fuel 'burners.'" A petition for the revocation of the patent was presented by the owners of, & manufacturers under, a prior patent. Petitioners alleged that resp.'s patent was invalid for want of novelty, subject-matter & utility, & that the sale of petitioners' spraying nozzles had been interfered with by reason of the sale of nozzles made in accordance with resp.'s alleged invention. In resp.'s burner a filter was combined with the atomiser in the nozzle, while in petitioners' burner the filter was placed at a distance from the nozzle:—*Held:* the patentee had failed so to limit his first claim as to confine it to that which was the novelty, if any, of the invention, & accordingly the claim was so wide as to render the patent invalid.—*Re* ERICKSON'S PATENT (1923), 40 R. P. C. 477, C. A.

Annotation:—**Refd.** Hale *v.* Coombes (1924), 41 R. P. C. 112.

1028. Claim to what is old—Where appendant to main claim.]—A. obtained a grant of a patent for an explosive. His specification described the materials from which the same was to be made, but not the proportions, & claimed the explosive & the means described in the specification for igniting the same, one of which means at least was old. The owners of this patent brought an action against K. for infringement:—*Held:* the description in the specification was sufficient, & on the true construction of the specification the patentee had not claimed that which was old outside his invention, & the patent was valid.—BRITISH DYNAMITE CO. *v.* KREBS (1879), 13 R. P. C. 190, H. L.

Annotations:—**Distd.** Britain *v.* Hirsch (1888), 5 R. P. C. 226. **Consd.** Pneumatic Tyre Co. *v.* Casswell (1896), 13 R. P. C. 164. **Refd.** Dowler *v.* Keeling (1898), 14 T. L. R. 257; Parker & Smith *v.* Satchwell (1901), 45 Sol. Jo. 502; True & Variable Electric Lamp Syndicate *v.* Bryant Trading Syndicate (1908), 25 R. P. C. 461; Wallace *v.* Tullis Russell (1921), 39 R. P. C. 3.

1029. Claim to method.]—WALKER *v.* HYDROCARBON SYNDICATE (1885), Griffin's Patent Cases (1884–1886), 238.

1030. —— When surplus to main claim.]—The addition to valid claims of claims for mere methods of application of the invention, which were surplusage, held not to invalidate the patent.—PNEUMATIC TYRE CO. *v.* CASSWELL (1896), 13 R. P. C. 164.

1031. Impossible process.]—This was an action for the infringement of a patent for the manufacture of new colouring matter or dyes. Defts. denied infringement & alleged that the patent was invalid, on the grounds that the specification was insufficient, that the invention was of no utilily, & had been anticipated:—*Held:* pltf. claimed the creation of a new metallic salt, the substitution of an alcoholic radicle for the metal of the salt, & the colouring matters obtained by the process described; defts. had not infringed pltf.'s process; the metallic salt was an impossible product, & it was not a valid claim, as pltf. was either claiming an impossible process or a process that he had not described, & the action was dismissed, with costs.—MONNET *v.* BECK (1897), 14 R. P. C. 777.

1032. Process not described.]—MONNET *v.* BECK, No. 1031, *ante.*

1033. Chemical invention — Application of Patents & Designs Act, 1907 (c. 29), s. 38, as amended by Patents & Designs Act, 1919 (c. 80), s. 11 (1).]—*Re* H. E. P.'S APPLICATION (1925), 43 R. P. C. 150.

SUB-SECT. 3.—CONSTRUCTION OF CLAIM.

1034. General rule—Construed with reference to whole context.]—The usual issues may be granted in a patent suit before the hearing of the cause, although deft. denies the validity of pltf.'s patent on the ground of the generality of the claim in the specification.

Where a patentee, in his specification, professes to do by machinery what has never been done before by machinery, & describes the machinery by which he does it, his claim is not too large on the face of it, because it claims generally to perform the operation "by machinery."

A patentee in his specification described an improved ruffle or frill, & the machinery by which he proposed to make such improved ruffle, & to fasten it to a plain fabric by a single series of stitches. By his claim he claimed the production by machinery of ruffles, & the simultaneous attachment of them to a plain fabric by a single series of stitches:—*Held:* the claim was not, on the face of it, too large.

I do not think that the proper way of dealing with this question is to look at the claims, & then see what the full description of the invention is, but rather first to read the description of the invention, in order that your mind may be prepared for what it is the inventor is about to claim (LORD HATHERLY, C.).—ARNOLD *v.* BRADBURY (1871), 6 Ch. App. 706, L. C.

Annotations:—**Consd.** Edison-Bell Phonograph Corpn. *v.* Smith (1894), 10 T. L. R. 522. **Refd.** Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239.

PART VI. SECT. 5, SUB-SECT. 3.

l. *General rule.*]—According to the true canons of construction the claim of the patent should not be read without reference to the specification. The whole document must be looked at to see what the claim is.—JOHNSON *v.* OXFORD KNITTING CO. (1915), 15 Exch. C. R. 340; 25 D. L. R. 658.—**CAN.**

m. *Claim for combination — Substantially as described.*]—RICKERBY *v.* DUNCAN (1908), 25 R. P. C. 248.—**SCOT.**

n. —— *Combination must be clear.*]—TEMPLETON *v.* MACFARLANE (1848), 10 Dunl. (Ct. of Sess.) 796; 20 Sc. Jur. 263.—**SCOT.**

Sect. 5.—The claim: Sub-sect. 3.]

1035. —— ——.]—(1) The object of a claim is not to claim anything which is not mentioned in the specification, but to disclaim something which might otherwise be supposed to be claimed, & it must always be construed with reference to the whole context of the specification.

A patentee of an improvement in skates, in his specification described his invention as relating to an improvement in attaching the rollers or runners to the stock or footstand of a skate, whereby the rollers or runners were made to turn or cant by the rocking of the stock or footstand, so as to facilitate the turning of the skate on the ice or floor; & he described also a mode of making the skate applicable to ice by substituting flat runners for rollers, & a mode of securing the runners by clamping them between pairs of discs, the runners having smooth angular edges so that they might be reversed when the inner edges lost their angularity by wear, & a fresh sharp edge obtained, & when both edges of one surface became worn, the runner might be inverted & two more sharp edges obtained; & he claimed first applying rollers or runners to the stock or footstand of a skate as described, so that the rollers or runners might be cramped or turned so as to cause the skate to be moved in a curved line; &, secondly, the mode of securing the runners & making them reversible as above described:—*Held:* the second part of the claim was to be read with reference only to the first part, & not as a substantive claim, & the want of novelty in the second part of the claim did not invalidate the patent.

(2) Where the only substantial evidence of prior publication of an invention lay in the fact that a single copy of an American book had been presented to the Patents Office library, where it had remained uncatalogued & unnoticed:—*Held:* this did not amount to a prior publication.

(3) It is the duty of the judge to construe a specification fairly with a judicial anxiety to support a really useful invention if it can be supported upon a reasonable interpretation of the patent; or as Mr. Aston said, a judge is not to be astute to find flaws in small matters in a specification with a view to overthrow it. . . . When the judge sees that there is a real substantial invention of great merit, & the description is fairly made, so that a competent workman can make the invention, it is not his duty to endeavour to construe the patent so as to make it claim that which it is utterly absurd to suppose would be claimed, because it is so well known as a matter of public notoriety, that nobody would think of claiming such a thing (JESSEL, M.R.).—PLIMPTON *v.* SPILLER (1877), 6 Ch. D. 412; 47 L. J. Ch. 211; 37 L. T. 56; 26 W. R. 285, C. A.

Annotations:—*As to* (1) **Refd.** Cropper *v.* Smith (1884), 1 R. P. C. 81; Edison-Bell Phonograph Corpn. *v.* Smith & Young (1894), 11 R P. C. 389; Electric Construction Co. *v.* Imperial Tram. Co. (1900), 16 R. P. C. 631. *As to* (2) **Distd.** United Horse Nail Co. *v.* Stewart (1885), 2 R. P. C. 122; Harris *v.* Rothwell (1887), 35 Ch. D. 416. **Refd.** United Telephone Co. *v.* Harrison Cox-Walker (1882), 21 Ch. D. 720. *As to* (3) **Refd.** Wegmann *v.* Corcoran (1879), 13 Ch. D. 65; Van Berkel *v.* Simpson (1906), 23 R. P. C. 237.

1036. —— ——.]—Pltf., who brought his action originally in respect of the infringement by defts. of several patents, before & at the trial abandoned all claims except in respect of the inventions specified in claim 2, under his patent No. 1540 of 1874, & in claim 4 under his patent No. 3840 of 1873. At the trial the verdict of the jury on the questions submitted to them in regard to patent No. 3840 was in favour of pltf. but two questions were reserved for further consideration by the judge, viz., (*a*) whether pltf.'s patent No. 3840 was bad on the ground that the first claim in the specification was for three distinct inventions, one of which was admittedly old; (*b*) whether such patent was bad on the ground that the second claim in the specification was for an invention already patented:—*Held:* on the true construction of the specification the first claim was not for three distinct inventions, but for the particular combination therein referred to, the invention claimed in the second claim was not the same as that by which defts. alleged it had been anticipated, &, therefore, pltf.'s patent No. 3840 was good.

I think that it is necessary to look at the whole of the specification, & at the state of knowledge at the time of its publication, in order to decide whether a particular claim is a claim to a combination of several things, some new & some old, or a claim to several distinct inventions (DENMAN, J.).—WESTINGHOUSE *v.* LANCASHIRE & YORKSHIRE RY. CO. (1884), 1 R. P. C. 98; Griffin's Patent Cases (1884–1886), 244.

Annotation:—**Refd.** *Re* Allen (1887), Griffin's Patent Cases (1887).

1037. —— ——.]—Every claim in every patent must be read & construed with reference to the specification & not as if the claim were an isolated sentence having no connection with or reference to what precedes it.

If the language of a specification is clear enough to guide a competent workman & enable him to obtain the desired result, we cannot see how a ct. can hold the language insufficient in point of law. No doubt it is for the ct. & not for a workman to construe the specification; but if a workman says it is a sufficient guide to him & the ct. believes him, the ct. must hold that as regards clearness of description the specification is, in point of law, sufficient (LINDLEY, L.J.).—EDISON & SWAN ELECTRIC LIGHTING CO. *v.* WOODHOUSE & RAWSON (1887), 4 R. P. C. 99; 3 T. L. R. 367; Griffin's Patent Cases (1884–1886) 90, C. A.

Annotations:—**Refd.** Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 T. L. R. 294; Edison-Bell Phonograph Corpn. *v.* Smith & Young (1894), 11 R. P. C. 389; Parkinson *v.* Simon (1894), 11 R. P. C. 493.

1038. —— ——.]—LEADBEATER *v.* KITCHIN, No. 1092, *post.*

1039. —— ——.]—TUBES, LTD. *v.* PERFECTA SEAMLESS STEEL TUBE CO., LTD., No. 735, *ante.*

1040. —— ——.]—Obviously the rest of the specification may be considered in order to assist in comprehending & construing a claim, but the claim must state, either by express words or by plain reference, what is the invention for which perfection is demanded. The idea of allowing a patentee to use perfectly general language in the claim, & subsequently to restrict, or expand, or qualify what is therein expressed by borrowing this or that gloss from other parts of the specification, is wholly inadmissible. I should have thought that it was also a wholly original pretension (LORD LOREBURN, C.).—INGERSOLL SERGEANT DRILL CO. *v.* CONSOLIDATED PNEUMATIC TOOL CO., LTD. (1907), 25 R. P. C. 61, H. L.

Annotations:—**Refd.** British United Shoe Machinery Co. *v.* Collier (1908), 25 T. L. R. 74; Hale *v.* Coombes (1924), 41 R. P. C. 112.

1041. Claim confined to old principle—Though method of application new.]—A patentee in the specification sums up the principle in which his invention consists; if this principle be not new the patent cannot be supported, although it appear that the application of the principle, as described in the specification, is new.—R. *v.*

CUTLER (1816), 1 Stark. 354 ; Web. Pat. Cas. 76, n. ; 1 Carp. Pat. Cas. 351, N. P.

Annotation :—**Refd.** Brooke *v.* Aston (1857), 6 W. R. 42.

1042. Claim limited by preceding description.]—KAY *v.* MARSHALL, No. 354, *ante.*

1043. ——.]—The patentee of an invention of improvements in flats, & in fasteners for securing the card clothing thereon & thereto, brought an action for infringement against defts., also patentees of inventions for a similar object. Defts. denied infringement, & by their pleadings raised the ordinary objections to validity. At the trial they put forward the common dilemma that they had not infringed, or that pltf.'s patent was void, but the question of validity was not really gone into. The old method of attaching card clothing to the flat, & of stretching the foundation of the clothing was by drilling holes in the flat, riveting on the foundation on one side, then stretching the foundation tight by pincers, & riveting it on the other side when stretched. The disadvantages were, the foundation puckered between the rivets, the holes were numerous, & were expensive to make, the rivets collected dirt, & the edges of the foundation being exposed were frayed. In 1877 defts. substituted nicks for the holes, & sewed the foundation to the flat by wires. In 1886 they invented a method of fastening by a strip of metal under the heads of the rivets, turning it down over the edge of the foundation. Neither of these inventions were really successful or practically used. In pltf.'s invention, dated in 1888, the flat was made with a rib at each side of the under surface. The fasteners on each side consisted of a strip of metal, the top edge made in the form of a three sided recess or ⊃, gripping the foundation, the middle part of the fastener being flat, & the lower part bent round & grasping the rib under the flat. The lower part was bent round the rib after the ⊃ had been affixed, & in the process of fixing the fastener the requisite stretch was given to the foundation. In effect, pltf.'s fastener formed a continuous clamp of a special form, encasing the edges of the foundation & of the flat. It was successful in getting rid of the old difficulties. In his specification, pltf. laid great stress on the grip obtained by the ⊃, & also by the lower bent part. The alleged infringement was a third invention of defts. Their fastener was formed of continuous clamps, enclosing part of the foundation, the sides of that & of the flat, & was bent under the flat ; the upper part had a serrated edge ; there was no rib under the flat. One clamp was first fixed on, the foundation was then pushed tight & stretched by a steel comb, & the other clamp fixed on :—*Held :* the pltf.'s invention was for a new mechanical mode of obtaining an old result, viz., to fasten the foundation perfectly flat, & with an even stretch on the flat, that in effect pltf. had claimed the mode & thing he had described, & had, therefore, included in his invention the merit of stretching by the same operation, that the doctrine of mechanical equivalents did not apply, though the invention claimed was no doubt useful, ingenious, & meritorious, defts. had not infringed, as their fastener did not grip the edge of the foundation separately, & they did not stretch in the same manner as pltf.—TWEEDALE *v.* WORTH (1892), 9 R. P. C. 121, H. L.

Annotation :—**Refd.** Hale *v.* Coombes (1925), 42 R. P. C. 328.

1044. ——.]—LYON *v.* GODDARD, No. 561, *ante.*

1045. ——.]—In 1897 a patent was granted to B. for a machine for stropping razors. The patentee claimed : a machine for stropping razors consisting of a reciprocating flexible strop led around a pulley or the like a razor holder pivoted & adapted to be rocked from side to side about its pivot by means of the said strop so as to present the edges of the razor alternately to the strop during the reciprocating motion of the said strop substantially as described. B. brought an action against W. for infringement of the patent. Deft. among other anticipations relied on the previous specification of S. in which a machine to effect the like object was described. He alleged that the patentee's claim included this earlier invention, & that he had insufficiently described in what the novelty of his invention consisted. The two machines differed in certain details :—*Held :* the patentee's claim was confined to the form of machine he had particularly described ; that it did not include the earlier invention ; that there were material differences between the machine of pltf. & the machine of S. ; & that deft. had infringed. An injunction was awarded with costs, & an inquiry as to damages & delivery up of infringing arts. was ordered.—BESTON *v.* WATTS (1908), 25 R. P. C. 19, C. A.

Annotation :—**Refd.** Hale *v.* Coombes (1924), 41 R. P. C. 112.

1046. ——.]—*Held :* (1) (LORD BUCKMASTER) The words substantially as described in Claim 1 could not be ignored &, reading the specification as a whole, the true invention protected by the patent included the attachment of the device to the rear of & outside the head of the missile ; nothing of that kind has been previously disclosed, there was good subject-matter for the invention & that the patent was good as a whole ; (2) (LORD SUMNER) The words substantially as described in Claim 1 referred to the verbal descriptions of the projectile & of the various devices named in the claim, & that, having regard to passages in the specification, the words did not serve to restrict the scope of claim 1 within limits to which prior anticipation & common knowledge would not be a fatal answer.—HALE *v.* COOMBES (1925), 42 R. P. C. 328, H. L.

Annotation :—**Refd.** Tucker *v.* Wandsworth Electrical Manufacturing Co. (1925), 42 R. P. C. 531.

Reference to particular parts of specification.]—*See* Sect. 6, sub-sect. 2, B. (*b*), *post.*

1047. When reference to other part of specification not permissible—Claim primâ facie invalid.]—HINKS & SON *v.* SAFETY LIGHTING CO., No. 984, *ante.*

1048. —— **Claim too general.**] — INGERSOLL SERGEANT DRILL CO. *v.* CONSOLIDATED PNEUMATIC TOOL CO., LTD., No. 1040, *ante.*

1049. —— ——.]—(1) A specification claiming "the improved turning table hereinbefore described" must be construed as claiming the parts or elements of which that table is composed, as well as the table as a whole. A. the patentee obtained a patent for "an improved turning table," all the component parts of which, except one, were comprised in a prior patent, the specification of which was not enrolled until after the date of A.'s patent. A. in his specification claimed "the improved turning table hereinbefore described, "without showing that any part of it was old ; the jury found that the introduction of suspending rods made the table a new instrument :—*Held :* the specification of A.'s patent was bad, & that defts. were entitled to the verdict on an issue respecting the sufficiency of the specification, & pltf. was entitled to the verdict on an issue respecting the novelty of the invention.

(2) Twofold object in requiring a specification, that invention should be given to the public ; &

Sect. 5.—The claim: Sub-sect. 3. *Sect.* 6: *Sub-sect.* 1, *A.*]

that no person should inadvertently infringe the patentee's right.

(3) The claim being "for an improved turning table" will not alone make all that follows a combination. Parts described & not disclaimed must be considered as claimed. Specification construed as claiming all the parts equally.—HOLMES *v.* LONDON & NORTH WESTERN RY. CO. (1852), 12 C. B. 831; Macr. 13, 22 L. J. C. P. 57; 20 L. T. O. S. 112; 17 Jur. 304; 138 E. R. 1132.

Annotations:—As to (1) **Refd.** Platt *v.* Else (1853), 17 Jur. 188; Gittins *v.* Symes (1854), Macr. 300. *As to* (2) **Refd.** Tetley *v.* Easton & Amos (1853), Macr 82.

1050. —— Not limited to single application.]—Pltf. in his specification claimed the application of a shuttle in combination with a needle, as shown in sheet 1 of the drawings, for forming & sewing loops of thread or other substance for the purpose of producing stitches either to unite or ornament various fabrics, whatever may be the means employed for working such shuttle & needle when employed together. By a disclaimer he stated: I do not claim the use in a machine of several needles & shuttles, nor do I claim any of the mechanical parts separately of which the machinery shown in the drawing is composed:—*Held:* pltf.'s claim was not confined to the single application of a shuttle in combination with a needle, as shown in sheet 1; but extended generally to the application of a shuttle in combination with a needle for the purpose of producing the effect stated in the specification.—THOMAS *v.* FOXWELL (1859), 32 L. T. O. S. 374; 6 Jur. N. S. 271.

1051. —— Not limited to combination.]—BOVILL *v.* CRATE (1867), Griffin's Patent Cases (1887), 46.

Annotations:—**Refd.** Bovill *v.* Smith (1868), Griffin's Patent Cases (1887), 49; North British Rubber Co. *v.* Gormully & Jeffory Manufacturing Co. (1894), 12 R. P. C. 17.

1052. —— "Substantially as described."]—The words "substantially as described" follow. It has been said in this ct. in previous cases—& I wish, as far as I am concerned, to repeat it—that when you condescend upon a number of elements in a claim & claim the combination of those elements "substantially as described" you must be taken to mean that the elements upon which you have condescended are to be substantially present in the combination which you say is within your grant (FLETCHER MOULTON, L.J.).—HOLMES *v.* ASSOCIATED NEWSPAPERS, LTD. (1910), 27 R. P. C. 136.

1053. Claim for method of construction—Construed as claim for article.]—BUSH *v.* FOX, No. 616, *ante.*

1054. Claim to subordinate integer—Not to be limited by matter outside claim.] — ELECTRIC CONSTRUCTION CO., LTD. *v.* IMPERIAL TRAMWAYS CO., LTD. (1900), 17 R. P. C. 537.

Annotation:—**Refd.** Van Berkel *v.* Simpson (1907), 24 R. P. C. 117.

1055. Several claims — Must be construed separately.]—The owners of a patent for improvements in boot nailing machines brought an action for infringement. The specification described improvements in details, each of which was made the subject of a separate claim. Pltfs. contended that the whole new machine was designed to accomplish certain specified objects which were new, & that each improvement claimed tended to the furtherance of those objects as a whole, & that therefore the claims should be limited in construction & be held valid. They alleged infringement in respect of the eighth claim only:—*Held:* the claims must be construed separately, & each must stand on its merits; certain of the claims involved no invention & others were anticipated; also on a wide construction the eighth claim would be invalid, while on a narrow construction there was no infringement. Judgment was given for defts.—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* CLAUGHTON (HUGH), LTD. (1906), 23 R. P. C. 321.

1056. Claim to apparatus for playing game.]—NOTES OF OFFICIAL RULINGS 1926 (A) (1926), 43 R. P. C. App. I.

SECT. 6.—CONSTRUCTION.

SUB-SECT. 1.—QUESTION FOR JUDGE OR JURY.

A. In General.

1057. General rule—Question for judge.]—(1) It is unnecessary to trouble you [the jury] with any objection that arises on the face of the patent & the specification, because, as these are matters of construction, &, therefore, matters of law, they cannot in any way be assisted by the verdict, unless, indeed, terms of art are explained by evidence, & then it would be for you to consider whether the evidence produced satisfies you that the terms of art were used in the sense put upon them. Nothing of this kind necessarily arises in this case, & questions arising on the comparison of different parts of the specification with the patent, will be reserved for another occasion (LORD ABINGER, C.B.).

(2) The inaccurate use of words, if sense sufficiently clear, will not vitiate a specification.—DEROSNE *v.* FAIRIE (1835), 2 Cr. M. & R. 476; 1 Web. Pat. Cas. 154; 1 Gale, 109; 1 Mood. & R. 457; 5 Tyr. 393.

Annotation:—Generally, **Mentd.** Crane *v.* Price (1842), 4 Man. & G. 580.

1058. —— ——.]—NEILSON *v.* HARFORD, No. 83, *ante.*

1059. —— —— Identity of two inventions.]—(1) To support a patent it is not necessary that its utility should be such as to exclude everything else of the kind.

(2) Specification sufficient if intelligible to a workman & the claim understood.

(3) The question as to the identity of two inventions described in specifications is for the ct.

(4) A patentee can only claim that which he can give the public the means & facility to use.

(5) A patentee cannot claim a mere subject of speculation not actually invented by him.

(6) Specifications are to be construed in a candid & fair spirit; & if any mistake in one part can be corrected by other parts of the specification such correction should be made.

(7) Full effect should be given to an invention, but not so as to include things not contemplated by the patentee. A patentee is bound to give the public the full benefit of his knowledge on the subject of his invention. By making a general claim, a patentee cannot claim improvements of which he was ignorant at the date of his patent.—TETLEY *v.* EASTON & AMOS (1852), Macr. 47.

1060. —— ——.]—In 1844, G. obtained a patent for "Improvements in grinding wheat & other grain." He described as his invention "the forcing & distributing of atmospheric air from the eye or centre of millstones, for the purpose of cooling the grain during the process of grinding"; this was effected by an air box placed below the millstones, into which air was forced by the rapid rotation of a fan or blower, which caused a current of air perpendicular to the axis of the fan; & the air was conducted by a pipe through the eye of the lower stone to the centre of the two stones, &

there distributed between them by an apparatus provided with fans or arms. In 1846, pltf. obtained a patent for "Improvements in manufacturing wheat & other grain into meal & flour." His invention consisted of the application of ventilating vanes or screws at the centre of the stones for supplying the air between the grinding surfaces; a portable ventilating machine, blowing by a screw vane, which caused a current of air parallel to the axis of the vane, was attached externally to the eye of the upper millstone; the screw vane being set in rapid motion, the air was compelled to pass through the eye into the centre of the two stones, & so find its way out between them. In 1851, deft. obtained a patent for "Improvements in grinding wheat," & his plan was to remove from the centre of both stones a large circular portion of each, & in this space, opposite to the separation of the two stones, to place a fan or blower, by the rapid rotation of which a centrifugal motion was given to the air, & it was driven between the stones:—*Held:* (1) deft.'s invention was no infringement of pltf.'s, but that each was a new method of accomplishing a well known object, viz. the cooling grinding substances by the common principle of obtaining a current of air by a rotating vane; (2) the construction of the specification was a question of law for the ct., & not for the jury.—BOVILL *v.* PIMM & RAND (1856), 11 Exch. 718; 26 L. T. O. S. 312; 156 E. R. 1019.

Annotation:—Generally, **Mentd.** Thomas *v.* Foxwell (1858), 5 Jur. N. S. 37.

1061. —— ——.]—Where the meaning of a document depends upon its terms & not on matters of fact dehors the document, the question will be for the judge, even although the terms are technical or scientific. But where an ambiguity is raised by evidence dehors the document, which is plain upon the face of it, the ambiguity being as to a term which imports one thing in a scientific sense, & another in a commercial sense:—*Qu.:* whether it is for the judge or the jury.

Thus, though the construction of a patent or specification is ordinarily for the judge, yet where pltf.'s specification mentioned the precipitated or hydrated oxides of iron, & there was, on the issue of novelty, a prior patent proved, the specification of which mentioned carbonate of iron, & the scientific evidence showed that real carbonate of iron was so difficult to be preserved that it was not commonly sold in the shops, though it existed as a chemical substance, & what was sold for it would be in fact a hydrate, through absorption, but that carbonate would not be understood chemically as meaning hydrate; the judge having ruled that the specification was to be construed commercially, not scientifically, that carbonate commercially meant the hydrate, & that on the issue of novelty pltf. must be consuited, the ct., after great doubt, set aside the nonsuit, & granted a new trial.—HILLS *v.* LONDON GASLIGHT CO. (1857), 27 L. J. Ex. 60; *subsequent proceedings* (1860), 5 H. & N. 312.

Annotations:—**Dbtd.** Hills *v.* Evans (1861), 6 L. T. 90. **Refd.** Betts *v.* Menzies (1860), 1 E. & E. 1020. **Mentd.** Hills *v.* Liverpool United Gaslight Co. (1862), 32 L. J. Ch. 28; Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 11 T. L. R. 345; *Re* Wylie & Morton's Appln. (1897), 13 R. P. C. 97.

1062. —— ——.]—In 1852, pltf. obtained a patent for an invention of improvements in the manufacture of gas; which was stated in the specification to "consist in the direct use of seeds, leaves, flowers, branches, nuts, fruit, & other substances, & matters, containing oil, or oily or resinous matter," & it was also stated that the mode of using the materials, might be "the same as the apparatus used in the ordinary mode of making gas from coal." The claim was as follows: "I claim for making gas direct from seeds & matter herein named for practical illuminations or other useful purposes, instead of making it from the oils, resins, or gums, previously extracted from such substances." In 1829, H. had obtained a patent for improvements in illuminations or artificial light, & by his specification he proposed to use fatty substances, such as greaves or graves, also the residuum after the oil had been expressed from seeds, such as oil cake, also beech nuts, mast, cocoa nuts & other matters abounding in oil, & he proposed to use these substances separately & in combination. Pltf. having brought an action for the infringement of his patent:—*Held:* (1) H.'s specification showed that the making gas direct from seeds & other oily matters was not new at the date of pltf.'s patent; (2) as the want of novelty appeared distinctly from a written instrument, it was for the ct. & not the jury to determine the identity of the two supposed inventions; (3) the claim, being merely for making gas direct from seeds & matter stated in the specification, without reference to any method of doing it, was too large & general a claim & could not be supported.—BOOTH *v.* KENNARD (1857), 2 H. & N. 84; 26 L. J. Ex. 305; 29 L. T. O. S. 163; 5 W. R. 607.

Annotations:—As to (1) **Refd.** Betts *v.* Menzies (1860), 1 E. & E. 1020. *As to* (2) **Dbtd.** Hills *v.* Evans (1861), 6 L. T. 90. **Refd.** Betts *v.* Menzies (1860), 1 E. & E. 1020.

1063. —— ——.]—Where the question of novelty or infringement depends merely on the construction of the specification, it is one entirely for the judge, but where it also depends on other circumstances, such as the degree of difference, or of similitude between two machines, it is a mixed question of law & fact: what the jurymen find to have been done is the matter of fact; but the judge must apply that fact according to the rules of law, & is entitled & bound to say whether what has been done amounts to an infringement.

Pltf. took out a patent for an improvement in machinery used for roving cotton. His specification appeared to claim the discovery of the application of the principle of centrifugal force for such a purpose, but he filed a disclaimer, declaring that he intended to claim only the application of centrifugal force in the particular manner described in the specification:—*Held:* taking these two instruments together they sustained the patent.

The construction of the specification is for the ct., with the aid of such facts as are admissible, to explain written documents (LORD WENSLEYDALE).—SEED *v.* HIGGINS (1860), 8 H. L. Cas. 550; Macr. 351; 30 L. J. Q. B. 314; 11 E. R. 544; *sub nom.* SEED *v.* HIGGINS, HIGGINS *v.* SEED, 3 L. T. 101; 6 Jur. N. S. 1264, H. L.

Annotations:—**Apld.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 430. **Refd.** Nalder *v.* Clayton & Shuttleworth (1859), Macr. 378. **Mentd.** Potter *v.* Parr (1860), 2 B. & S. 216; Curtis *v.* Platt (1863), 3 Ch. D. 135, n.; Ralston *v.* Smith (1865), 11 H. L. Cas. 223; Daw *v.* Eley (1867), L. R. 3 Eq. 496; Clark *v.* Adie (1877), 2 App. Cas. 315; Plimpton *v.* Spiller (1877), 47 L. J. Ch. 211; Maxim-Nordenfelt Guns & Ammunition Co. & Hiram-Maxim *v.* Anderson (1897), 13 T. L. R. 262.

1064. —— ——.]—HILL *v.* EVANS, No. 593, *ante*.

1065. —— ——.]—EDISON & SWAN ELECTRIC LIGHTING CO. *v.* WOODHOUSE & RAWSON, No. 1037, *ante*.

1066. —— ——.]—WILFLEY ORE CONCENTRATOR SYNDICATE, LTD. *v.* GUTHRIDGE (N.), LTD., No. 653, *ante*.

1067. Expert witnesses—Examination as to construction not permissible.]—The practice of examining & cross-examining expert witnesses as

Sect. 6.—Construction: Sub-sect. 1, *A. & B.; sub-sect.* 2, *A. & B. (a).*]

to the construction of specifications, the existence of invention, & anticipation, is irregular & prejudicial to the proper trial of patent actions.—GRAPHIC ARTS CO. *v.* HUNTERS, LTD. (1910), 27 R. P. C. 677.

1068. Whether specification misleading—Question of fact—Not reviewed on appeal.]—In 1905 a patent was granted for "Internal combustion engines.". One of the claims was afterwards amended. In an action for infringement of the patent, defts. alleged (*inter alia*) that the patent was invalid for want of novelty, several prior specifications being cited, & for want of subject-matter, & that the specification was insufficient. At the trial it was admitted that the drawings & part of the description were incorrect, but it was contended by pltfs. that the errors were not such as would mislead a competent gas engine engineer. In defts.' engine the sleeve that opened & closed the ports had not only a reciprocating movement, but also a simultaneous rotary oscillating movement. Defts. made a counterclaim for revocation of the patent. It was held at the trial that two of the prior specifications described four-stroke cycle engines in which a piston had attached to it a sleeve containing a port which by means of a rotary movement, applied to the piston & sleeve together, registered with a series of inlet & exhaust ports, or with slots placed on one side of the cylinder only, the sleeve making one revolution in four strokes; that the amendment of pltfs.' specification, if it had enlarged the claim, must be rejected as *ultra vires;* that defts.' device had a closer resemblance to the engines described in the two prior specifications than to pltfs.'; & that defts. had not infringed; &, further, that the specification was misleading. The counterclaim for revocation was ordered to stand over, with liberty to apply. Pltfs. appealed to the Ct. of Appeal:—*Held:* (1) defts. had not infringed. (2) (HAMILTON, L.J.) whether the specification was misleading was, in the present case, a question of fact depending upon the evidence given at the trial, & he was not prepared to differ from the finding below.—KNIGHT *v.* ARGYLLS, LTD. (1913), 30 R. P. C. 321, C. A.; *previous proceedings* (1912), 29 R. P. C. 593.

B. What may be left to Jury.

1069. Terms of art.]—DEROSNE *v.* FAIRIE, No. 1057, *ante.*

1070. ——.]—NEILSON *v.* HARFORD, No. 83, *ante.*

1071. ——.]—HILL *v.* EVANS, No. 593, *ante.*

1072. Commercial phrases.]—ELLIOTT *v.* TURNER, No. 1124, *post.*

1073. ——.]—HILL *v.* EVANS, No. 593, *ante.*

1074. Sufficiency of description of invention.]—(1) A patent was granted "for improvements in the manufacture of gelatinous substances, & in the apparatus to be used therein," with the usual proviso as to the enrolment of the specification within six months. Before the expiration of the six months, the grantee assigned all his interest in the patent. He then, by leave of the Solicitor-General, disclaimed that part of the title contained in the words "& in the apparatus to be used therein," a copy of which disclaimer was filed by the Clerk of the Patents of England, the original having been duly certified. In an action by the assignee of the grantee for an infringement, the declaration stated the patent to have been granted for "certain improvements in the manufacture of gelatinous substances & the apparatus to be used therein"; & also stated the specification, the disclaimer, & the assignment. Upon an issue as to the specification of the invention being enrolled:—*Held:* (2) no objection could be taken that the apparatus specified was not new; (2) the disclaimer by the grantee after the assignment was valid as soon as it was entered of record.

(3) Previous to the above patent being granted gelatine was obtained by submitting large pieces of hides to the action of caustic alkali or by reducing them to pulp in a paper machine & employing blood to purify the product. The invention claimed consisted in cutting the hides into shavings, thin slices, or films, whereby the use of blood in the process of purification became unnecessary. The specification did not state whether they were to be cut wet or dry, or to what degree of thinness, or what was the minimum of heat they ought to be subjected to in the subsequent processes. It was proved that they might be cut either wet or dry, & that the thinner they were cut the better if the fibrine texture was preserved, & that the most satisfactory result would be obtained if no more heat was used than would dissolve the gelatine in the shortest period. Deft. cut the hides wet & about twelve to the inch:—*Held:* the invention was the subject of a patent.—WALLINGTON *v.* DALE (1852), 7 Exch. 888; 23 L. J. Ex. 49; 19 L. T. O. S. 187.

Annotations:—Generally, **Mentd.** Roper *v.* Levy (1851), 7 Exch. 55; Chollet *v.* Hoffman (1857), 7 E. & B. 686; Garton *v.* G. W. Ry. (1859), E. B. & E. 846.

1075. Ambiguity of terms—Whether used commercially or scientifically.] — HILLS *v.* LONDON GASLIGHT CO., No. 1061, *ante.*

1076. Results of processes described.]—HILL *v.* EVANS, No. 593, *ante.*

1077. Chemical patent—Ascertainment of chemical equivalents.] — HILL *v.* EVANS, No. 593, *ante.*

1078. Purpose effected by materials prepared & applied in manner described.] — BICKFORD *v.* SKEWES, No. 868, *ante.*

SUB-SECT. 2.—RULES OF CONSTRUCTION.

A. In General.

See, generally, DEEDS, Vol. XVII., pp. 246 *et seq.*

1079. Rules same as for other written documents.]—SIMPSON *v.* HOLLIDAY, No. 808, *ante.*

1080. ——.]—BOVILL *v.* SMITH, 448, *ante.*

1081. ——.]—In construing the specification, we must construe it like all written documents, taking the words & seeing what is the meaning of those words when applied to the subject-matter; & in the case of a specification which is addressed not to the world at large but to a particular class, for instance, skilled mechanicians, possessing a certain amount of knowledge, it is material for the tribunal to put itself in the position of such a class, namely, skilled mechanicians, & to see what the words of the specification mean when applied to such a subject as skilled mechanicians would know, &, as the tribunal has now, by the admission of evidence or otherwise, put itself in a position to understand, & then to say what the words of the

PART VI. SECT. 6, SUB-SECT. 2.—A. o. *Rules same as for other written documents.*]—A patent for invention should be construed in the same way as any other written instrument.—JOHNSON *v.* OXFORD KNITTING CO. (1915), 15 Exch. C. R. 340; 25 D. L. R. 658.—**CAN.**

specification mean when applied to such a subject-matter (LORD BLACKBURN).—CLARK *v.* ADIE (No. 2) (1877), 2 App. Cas. 423; 46 L. J. Ch. 598; 37 L. T. 1; 26 W. R. 47, H. L.; *affg.* S. C. *sub nom.* ADIE *v.* CLARK (1876), 3 Ch. D. 134, C. A.

Annotations:—**Consd.** Jandus Arc Lamps & Electric Co. *v.* Johnson (1900), 17 R. P. C. 361. **Refd.** Crosthwaite *v.* Steel (1889), 6 R. P. C. 190; Ashworth *v.* Law (1890), 7 R. P. C. 231; Van Berkel *v.* Booth (1906), 23 R. P. C. 573; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co. (1919), 36 R. P. C. 95. **Mentd.** Gosnell *v.* Bishop (1888), 4 T. L. R. 397; Eliot *v.* Bristol Corpn. (1894), 71 L. T. 659.

1082. Principle of good faith.]—CARTWRIGHT *v.* EAMER, No. 863, *ante*.

1083. According to state of knowledge at the time.]—CROSSLEY *v.* BEVERLY, No. 924, *ante*.

1084. According to language used.]—LEADBEATER *v.* KITCHIN, No. 1092, *post*.

1085. ——.]—I disclaim putting either a benevolent or malevolent interpretation on the specification, or being astute either to uphold or invalidate the patent. I am of opinion that a specification like any other document should be construed by the ct. according to the fair meaning of the language used after being informed by evidence of the nature of the subject-matter, the state of knowledge at the date of the patent, & the meaning of any scientific or technical words that are found in it (LORD DAVEY).—PATENT EXPLOITATION, LTD. *v.* SIEMENS BROTHERS & CO., LTD. (1904), 21 R. P. C. 541.

1086. Construction of House of Lords conclusive.]—The patentee of an invention for "improvements in flats & in fastenera for securing the card clothing thereon & thereto" sued deft. for infringement. Deft. denied infringement, & pleaded that the matter in controversy was *res judicata*; also that, although admitting that the patent was valid, the claims were restricted to fasteners which stretch the foundation in the manner described in his specification. In 1889 the patentee had brought an action against present deft.'s then firm on this same patent, in which the House of Lords had held that deft. had not infringed. Subsequently deft. varied the form of the fastener & pltfs. brought the present action:—*Held:* the construction placed by the House of Lords on the specification in the previous action was conclusive.—TWEEDALE *v.* ASHWORTH (1900), 17 R. P. C. 620, H. L.

1087. Construction by Court of Appeal—How far conclusive.]—O., as owner of a patent, brought an action for infringement against L., & obtained a judgment in his favour from the Ct. of Appeal, with a certificate of the validity of the patent having come in question in that action. He subsequently commenced an action for infringement against S., who admitted infringement, but alleged that the patent was invalid on the grounds of the insufficiency of the specification & anticipation. Deft. sought to give in evidence, to prove anticipation, a book which was in the Inner Library of the British Museum, but the judge held that as deft. adduced no evidence of such book having been actually used, or of any other copies of it having been introduced into England, it was inadmissible. Ultimately the point for the decision of the ct. was as to the validity or invalidity of the first claim of pltf.'s patent:—*Held:* (1) deft. not being a party to the previous action was not bound by the decision therein; (2) the judge was bound to accept the construction of the specification adopted by the Ct. of Appeal in the first action, except where evidence was given in the second action, which was not before the ct. in the first action; (3) the first claim was valid; (4) anticipation of pltf.'s invention was not proved.—OTTO *v.* STEEL (1885), 3 R. P. C. 109; Griffin's Patent Cases (1884–1886), 179; *subsequent proceedings* (1886), 3 R. P. C. 120, C. A.

1088. Not considered till evidence for whole case given.]—YOUNG *v.* FERNIE, No. 32, *ante*.

1089. Foreign specification—Application of principles governing English specifications.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (B), No. 980, *ante*.

Construction of claim.]—*See* Sect. 5, sub-sect. 3, *ante*.

B. Specification Construed as a Whole.

(*a*) *In General.*

See, generally, DEEDS, Vol. XVII., pp. 259–263, Nos. 713–757.

1090. General rule.]—BEARD *v.* EGERTON, No. 1107, *post*.

1091. ——.]—The patent must be construed in the way in which all documents ought to be construed, by giving the ordinary & natural meaning to the words used, looking at the instrument as a whole, & having an explanation of any technical words requiring explanation; & if, so construing them, I find something old claimed, in clear & unambiguous words, I must read the claim as applying to what is old, even though the result of such a construction, if correct, would be that the patent must be held invalid in any proceedings taken to challenge its validity. If, however, I find the claim fairly capable of two constructions, one of which might be fatal to the validity of the patent, as making it claim something old, but the other of which construction would avoid such invalidation of the patent, I should certainly prefer to put, & should feel bound to put, such a construction upon the claim as would render the patent valid (NORTH, J.).—SUGG *v.* BRAY (1885), Griffin's Patent Cases (1884–1886), 210; 2 R. P. C. 223.

Annotation:—**Mentd.** Sharp *v.* Brauer (1886), Griffin's Patent Cases (1884–1886), 205.

1092. ——.]—The owner of a patent for improvements in protectors, guards or screens for the prevention of accidents where machinery is in motion brought an action for infringement. The specification described guards for machinery where belts & pulleys, & also where geared wheels were used, & referred to figures showing the application of the guard to machinery with belts & pulleys & with geared wheels. The claims were substantially for guards or protectors for the purposes set forth, & of the form & construction set forth & illustrated. Deft. denied infringement, & alleged the invalidity of the patent on the ground of anticipation & want of subject-matter. The evidence showed that the invention was useful for the protection of life & limb, & supplied a want which had existed for a long period. A similar guard had been previously applied to geared wheels:—*Held:* (1) the specification must be construed like any other document according to the language used in it; the whole specification must be looked at & the claim interpreted thereby, & (2) the patentee claimed for guarding geared wheels as well as belt guards, & therefore the patent had been anticipated & was invalid; also (3) even if the claim was only for the guard as applied to belts, it was only for the use of an old thing for a strictly analogous purpose, & the patent was bad on that ground.—LEADBEATER *v.* KITCHIN (1890), 7 R. P. C. 235.

1093. ——.]—Now when you find a patent with several claims in it, you must, if you can, so construe these claims as to give an effective meaning to each of them.

Sect. 6.—*Construction: Sub-sect.* 2, *B.* (*a*) &

How are we to get at what is the real object of the pltf.'s patent? I think it is true to say that you may look for that purpose at the provisional specification (LORD ESHER, M.R.).—PARKINSON *v.* SIMON (1894), 11 R. P. C. 493, C. A.; *affd.*, 12 R. P. C. 403, H. L.

Annotations:—**Consd.** Mergenthaler Linotype Co. *v.* Intertype Co. (1926), 42 T. L. R. 682. **Refd.** Horrocks *v.* Stubbs (1896), 74 L. T. 58.

1094. Correction of error—Correction of one part by another.]—TETLEY *v.* EASTON & AMOS, No. 1059, *ante*.

1095. —— —— Obvious error in drawings.]—Deft. alleged that a patent was invalid because one figure of the drawings showed a double action with only one thread, which would be unworkable:—*Held*: the figure must be looked at with the letterpress & this gave all the necessary information.

You must read the figures which are appended by the light of the text they are intended to illustrate & if you see in a particular figure that there is some error of the draughtsman, which a skilled workman would at once perceive to be an error, & such an error as he could correct, it is nothing more than like the mere misprint of a word which anybody could read, although it was so misprinted (BOWEN, L.J.).—MILLER (H.) & Co. *v.* SCARLE, BARKER & Co. (1893), 10 R. P. C. 106.

1096. —— Apparent on specification or drawings—Or in manufacture of patent.]—SIMPSON *v.* HOLLIDAY, No. 808, *ante*.

Correction of clerical errors.]—*See* Sect. 7, sub-sect. 2, D. (*b*), *post*.

Application of rule to construction of claims.]—*See* Sect. 5, sub-sect. 3, *ante*.

(*b*) *Reference to Particular Parts.*

1097. Title.]—NEWTON *v.* VAUCHER, No. 159, *ante*.

1098. ——.]—OXLEY *v.* HOLDEN, No. 566, *ante*.

1099. Drawings.]—MILLER (H.) & Co. *v.* SCARLE, BARKER & Co., No. 1095, *ante*.

1100. —— When letterpress struck out by amendment.]—Pltf. co., the owners of a patent for "improvements in dobby looms for weaving," sued deft. co. for infringement. It appeared on the evidence that in order to carry out the invention, it was necessary to incline the knife guides in a dobby, which before the date of the invention were always placed parallel to one another, at an angle to one another, & also to alter from their usual positions the centres of certain levers in the dobby known as the balk & jack levers. The specification was amended some time prior to the action, when one of the claims together with the whole of the letterpress relating to the position of the centres of the above levers, was struck out. The drawings attached to the specification, however, were not altered, & showed the centres of the levers in the required position for carrying out the invention:—*Held*: on the true construction of the specification the invention claimed was a dobby with the knife guides inclined to one another & having the system of centreing shown in the drawings, & the claim for this combination was good; the patent had not been anticipated, & was valid.—HATTERSLEY (GEORGE) & SONS, LTD. *v.* HODGSON (GEORGE), LTD. (1906), 23 R. P. C. 192, H. L.

Annotations:—**Apld.** Jandus Arc Lamp & Electric Co. *v.* Arc Lamp Co. (1908), 22 R. P. C. 277; British Vacuum Cleaner Co. *v.* L. & S. W. Ry. (1912), 29 R. P. C. 309; *Re* Serex's Patent (1912), 29 R. P. C. 284; Hale *v.* Coombes (1925), 42 R. P. C. 328. **Refd.** Lake & Elliott *v.* Rotax Motor Accessories (1911), 28 R. P. C. 532.

1101. —— Where not expressly referred to in specification.]—A patent was granted for "An improved bearing pedestal for trams, trollies & the like." The claim was for such a pedestal drop stamped in mild steel, & in the specification it was stated that "The advantages of the pedestal are as follows: Being unbreakable it would prevent accidents, loss of time & waste labour, owing to the large amount of breakages with the present pedestal, which is either cast iron or cast steel & therefore easily broken." At the trial of an action for infringement pltf. contended that the invention was for doing most of the shaping in the top die, as shown by the drawings, & so avoiding air lock. Defts. contended (*inter alia*) that the alleged invention consisted merely in the particular way of making the product, & that it was misleading to make the claim as if it were for the product:—*Held*: in construing a claim such as that in question, the drawings, unless they were, by express reference, imported into the method that was to be employed, must be taken as illustrations only, & the patent could not be confined to the particular form indicated in the drawings, unless the language of the specification had in terms limited it to that form; in the specification of the patent in question there was no such limitation, & the claim was one that could not be made good; & even on a construction of the specification more favourable to pltf., there was not subject-matter in putting the bulk of the shaping on the upper die; & the patent was invalid.—THOMAS *v.* SOUTH WALES COLLIERY TRAMWORKS & ENGINEERING CO., LTD. (1924), 42 R. P. C. 22.

1102. Part struck out by amendment.]—THOMAS *v.* WELCH, No. 915, *ante*.

1103. ——.]—HATTERSLEY (GEORGE) & SONS, LTD. *v.* HODGSON (GEORGE), LTD., No. 1100, *ante*.

1104. ——.]—Where part of a specification is struck out by amendment, it cannot be referred to on a question of construction.—LAKE & ELLIOT *v.* ROTAX MOTOR ACCESSORIES, LTD. (1911), 28 R. P. C. 532, C. A.

C. Fair and Candid Construction.

1105. General rule.]—I think we ought to read this patent without a disposition to upset it, which has been too frequently the case in many instances on such subjects, that we ought to read it fairly, in order to understand what the meaning of the patentee is (PARKE, B.).

If that be the limited construction to be put on the whole of the specification, fairly & clearly & candidly taken together, which I think ought to be the construction put upon patents, we ought not to be understood to deprive people of advantages which their own ingenuity & talents entitle them to receive, we ought to give them a fair & candid construction, certainly not by any means being astute to pick holes in their specifications (ALDERSON, B.).—RUSSELL *v.* COWLEY (1835), 1 Web. Pat. Cas. 465; 1 Cr. M. & R. 864; 1 Carp. Pat. Cas. 557; 149 E. R. 1331.

Annotations:—**Consd.** Beard *v.* Egerton (1849), 8 C. B. 165. **Apld.** Betts *v.* Menzies (1860), 1 E. & E. 1020. **Refd.** Holmes *v.* L. & N. W. Ry. (1852), 12 C. B. 831; Brook & Hirst *v.* Aston (1859), 5 Jur. N. S. 1025. **Mentd.** Russell *v.* Ledsam (1845), 14 M. & W. 574.

.]—A patent was taken out for a certain improvement in a machine for cutting turnips; this improvement consisting in a peculiar diagonal arrangement of knives within a rotary drum cutter, by which arrangement the knives were brought successively into operation, thus obviating several objections to the rotary drum cutter which had previously existed. In an action

brought for an infringement of the patent, it was objected that the terms of the specification were sufficiently comprehensive to include the drum cutter, which was an undoubtedly old invention, as well as the arrangement of the knives above mentioned, or that at all events it must be taken to include every arrangement of the knives on the diagonal principle, & that in either case the patent was void as claiming an old invention :—*Held :* the specification must be read in a fair & candid spirit, with a desire to be instructed by it, & not merely to discover defects in it ; & when so read, the specification must be taken to refer to that peculiar adaptation of the knives to the old invention, which was new, as appeared by the evidence at the trial. If a specification sufficiently explains the whole principle of the invention claimed by the patentee, it is not necessary to set forth the results of that principle.—WEDLAKE *v.* GARDNER (1846), 7 L. T. O. S. 283, Ex. Ch.

1107. ——.]—In the construction of a specification, the whole instrument must be taken together, & a fair & reasonable interpretation given to the words used in it.

A specification of a patent for "a new & improved method of obtaining the spontaneous reproduction of all the images received on the focus of the camera obscura," in describing the process, stated it to be divided into five operations. "The first consists in polishing & cleaning the silver surface of the plate, in order to properly prepare or qualify it for receiving the sensitive layer or coating (iodine), upon which the action of the light traces the design : the second operation is, the applying that sensitive layer or coating to the silver surface : the third, in submitting in the camera obscura the prepared surface or plate to the action of the light, so that it may receive the images : the fourth, in bringing out or making appear the image, picture, or representation which is not visible when the plate is first taken out of the camera obscura : the fifth & last operation is, that of removing the sensitive layer or coating, which would continue to be affected & undergo different changes from the action of light, this would necessarily tend to destroy the design or tracing so obtained in the camera obscura." It then proceeded to give a description of the first operation—preparing the silver surface of the plate ; the concluding part of which directed that nitric acid dissolved in water should be applied three different times, the plate being each time sprinkled with pounce & lightly rubbed with cotton : adding—"When the plate is not intended for inmediate use or operation, the acid may be used only twice upon its surface after being exposed to heat : the first part of the operation, that is, the preparation as far as the second application of the acid, may be done at any time : this will allow of a number of plates being kept prepared up to the last slight operation : it is, however, considered indispensable, that, just before the moment of using the plates in the camera, or the reproducing the design, to put at least once more some acid on the plate, & to rub it lightly with pounce, as before stated : finally, the plate must be cleaned with cotton from all pounce dust which may be on the surface, or its edges." In a subsequent part of the specification, having described the second operation, viz. the application of the iodine, the inventor observed : "After this second operation is completed, the plate is to be passed to the third operation, or that of the camera obscura : whenever it is possible, the one operation should immediately follow the other" :—*Held :* taking the whole specification together, the direction as to the third application of acid, was not to be understood to be a direction to apply the acid after the second operation, viz. the coating the plate with iodine, which, it was proved, would render the whole process abortive, but to apply it as part of the first operation ; & the specification gave sufficient information to an operator of reasonable skill.—BEARD *v.* EGERTON (1849), 8 C. B. 165 ; 19 L. J. C. P. 36 ; 13 L. T. O. S. 426 ; 13 Jur. 1004 ; 137 E. R. 471.

1108. ——.]—I must say that though at first I doubted whether the claim consisted of two parts or of one only, yet, on reading the specification with that candour & indulgence with which a specification should be read, it appears to me to consist of one only (POLLOCK, C.B.).—SELLERS *v.* DICKINSON (1850), 5 Exch. 312 ; 20 L. J. Ex. 417 ; 15 L. T. O. S. 163 ; 155 E. R. 134.

Annotations :—**Refd.** Holmes *v.* L. & N. W. Ry. (1852), 12 C. B. 831 ; Lister *v.* Leather (1858), 8 E. & B. 1004 ; Wren *v.* Weild (1869), L. R. 4 Q. B. 730 ; Thomson *v.* Moore (1889), 6 R. P. C. 426.

1109. ——.]—TETLEY *v.* EASTON & AMOS, No. 1059, *ante.*

1110. ——.]—(1) When a combination of instruments is the invention patented, an infringement of the patent must be an infringement of the combination.

(2) A patentee having altered his specification by disclaimer, lodged a complaint against certain manufacturers for breach of an interdict granted anterior to the disclaimer :—*Held :* the patentee ought to have instituted a new action ; &, although the instrument of the manufacturers was intended to execute the same work, it was no infringement ; & although it was cognate, it had not the characteristic feature of the patentee's invention.

Applt.'s invention as it stood before the disclaimer may have been new, useful, & legal, but it might not have been so under the altered specification. After the disclaimer the question of enforcing the old interdict could not be entertained.

The phrase "colourably" is very apt to mislead in these cases. If part of the property in the invention be really taken, there is an infringement, however much that may be disguised. What is claimed here is the "combination" of three instrumentalities, which are all that are absolutely essential.

(3) Whether it is for the interest of one side or the other, I apprehend the duty of the ct. is fairly & truly to construe the specification, neither favouring the one side nor the other, neither putting an unfair gloss or construction upon the specification for the purpose of saving a patent if it is said that the patent is void, nor putting an unfair gloss or construction upon it in order to extend the patent & make it take in something which you may think was an unhandsome taking of the fruits of his invention from the patentee if it is not really an infringement of the patent (LORD BLACKBURN).—DUDGEON *v.* THOMSON (1877), 3 App. Cas. 34, H. L.

Annotations :—*As to* (1) **Refd.** Miller *v.* Clyde Bridge Steel Co. (1892), 9 R. P. C. 470 ; Ticket Punch & Register Co. *v.* Colley's Patents (1895), 11 T. L. R. 262 ; Wallace *v.* Tullis, Russell (1921), 39 R. P. C. 3. *As to* (2) **Consd.** Automatic Weighing Machine Co. *v.* Knight (1889), 6 R. P. C. 297 ; Thomson *v.* Moore (1889), 6 R. P. C. 426 ; Harrison Patents Co. *v.* Nicholson (1908), 25 R. P. C. 393 ; Higginson & Arundel *v.* Pyman, Same *v.* Same (1926), 43 R. P. C. 291. **Refd.** Ellington *v.* Clark Burnett (1887), 58 L. T. 40. *As to* (3) **Refd.** Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System, (1896), 13 R. P. C. 301. *Generally*, **Refd.** *Re* Konrick & Jefferson's Patent (1911), 29 R. P. C. 25.

1111. ——.]—PLIMPTON *v.* SPILLER, No. 1035, *ante.*

Sect. 6.—*Construction: Sub-sect.* 2, *D. & E.* (*a*) (*b*); *sub-sect.* 3.]

D. Ut res magis valeat quam pereat.

See, generally, DEEDS, Vol. XVII., pp. 287–290, Nos. 988–1015.

1112. Application of rule to specifications.]—HAWORTH *v.* HARDCASTLE (1834), 1 Bing. N. C. 182; 4 Moo. & S. 720; 3 L. J. C. P. 311; 1 Web. Pat. Cas. 480; 131 E. R. 1087.

Annotations:—**Apld.** Tubes *v.* Perfecta Seamless Steel Tube Co. (1902), 20 R. P. C. 77. **Refd.** Beard *v.* Egerton (1849), 8 C. B. 165; Holmes *v.* L. & N. W. Ry. (1852), 12 C. B. 831.

1113. ——.]—HINKS & SON *v.* SAFETY LIGHTING CO., No. 984, *ante*.

1114. ——.]—HARRISON *v.* ANDERSTON FOUNDRY CO., No. 281, *ante*.

1115. ——.]—PLIMPTON *v.* SPILLER, No. 1035, *ante*.

1116. ——.]—OTTO *v.* LINFORD, No. 162, *ante*.

1117. —— **When capable of more than one construction.**]—NEEDHAM & KITE *v.* JOHNSON & CO., No. 190, *ante*.

1118. —— ——.]—SUGG *v.* BRAY, No. 1091, *ante*.

1119. ——.]—Reference has been made to an old principle of construction, which is not at all special to the subject-matter of patents, but applies to all documents . . . to the effect that the interpretation of a written document ought to be benevolent & benign (BOWEN, L.J.).—CROPPER *v.* SMITH (1884), as reported in 1 R. P. C. 81; Griffin's Patent Cases (1884–1886), 60, C. A.; *on appeal* (1885), 10 App. Cas. 249, H. L.

Annotations:—*Generally*, **Refd.** Shoe Machinery Co. *v.* Cutlan, [1896] 1 Ch. 108. **Mentd.** *Re* Crighton & Law Car & General Insce. Corpn., [1910] 2 K. B. 738; Pirie *v.* Richardson (No. 1) (1926), 70 Sol. Jo. 1023.

1120. —— **Where several claims.**]—PARKINSON *v.* SIMON, No. 1093, *ante*.

1121. ——.]—Benevolent construction is not the proper way of construing a specification; it should be construed fairly to give its true meaning.—TOLSON & TOLSON *v.* SPEIGHT (JOHN) & SONS (1896), 13 R. P. C. 718.

1122. ——.]—If upon a fair construction of the specification, with the assistance of experts & other admissible evidence, you find it contains matters that are not new, you must give effect to it. You are not to put a forced construction on the specification, as not intending to claim something that is old, because it was foolish or suicidal of the patentee to claim it (LORD DAVEY).—KYNOCH & CO., LTD. *v.* WEBB (1899), 17 R. P. C. 100, H. L.

Annotations:—**Refd.** Beston *v.* Watts (1907), 24 R. P. C. 219; British United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 368, 631.

1123. ——.]—PATENT EXPLOITATION, LTD. *v.* SIEMENS BROTHERS & CO., LTD., No. 1085, *ante*.

E. Meaning of Words.

(*a*) *In General.*

1124. General rule—Construed according to ordinary meaning.]—The words of a specification are to be construed according to their ordinary & proper meaning, unless it be shown by something in the context, which may be explained by evidence, that a different construction ought to be adopted.

In covenant on an indenture by which B. was licensed to make & sell buttons according to A.'s patent, the issue was whether certain buttons made by B. were made under the licence. The specification described the invention to consist in the application to the covering of buttons, of such figured woven fabrics "wherein the ground, or the face of the ground thereof, is produced by a warp of soft or organzine silk, such as is used in weaving satin & the classes of fabrics produced therefrom." The jury asked how they were to understand the word "or" in the specification; whether it was used disjunctively, or, whether "organzine" was the construction of the word "soft." The judge told them that, in his opinion, unless the silk were organzine, it was not within the patent:—*Held:* this direction was erroneous; for, the judge should not have told the jury that, in his opinion, soft & organzine silk were absolutely the same, but that the words were capable of being so construed, if the jury were satisfied that, at the date of the patent, there was only one description of soft silk, & that, organzine, used in satin weaving; but, otherwise the proper & ordinary sense of the word "or" was to be adopted, & the patent held to apply to every species of soft silk, as well as to organzine silk.—ELLIOTT *v.* TURNER (1845), 2 C. B. 446; 15 L. J. C. P. 49; 6 L. T. O. S. 219; 135 E. R. 1019, Ex. Ch.

Annotation:—**Refd.** Nickels *v.* Ross (1849), 8 C. B. 679.

1125. —— ——.]—HARRISON *v.* ANDERSTON FOUNDRY CO., No. 281, *ante*.

1126. —— ——.]—SUGG *v.* BRAY, No. 1091, *ante*.

1127. —— ——.]—A patent was granted for "Improvements in receivers for use in wireless telegraphy." Claim 3 of the specification was as follows: "A vacuum tube containing a hot filament, a grid formed as a closed cylinder completely surrounding the filament & a third electrode in the form of a cylinder surrounding the grid substantially as described." In an action for infringement of that patent, & of another patent not material for the purpose of this report, pltfs. alleged infringement of claim 3. Defts. denied infringement, & alleged that the manufacture & sale complained of had been, in part, by defts. as agents or contractors for His Majesty's Govt. They alleged that the patent was invalid by reason of (*inter alia*) want of novelty, & subject-matter. At the trial, defts. contended that the anode, as well as the grid, must be in the form of a closed cylinder completely surrounding the filament, & that their grid, which was a loose, open-ended cylinder, was not in that form. Pltfs. contended that the word "closed" meant "electrically closed," not "physically" or geometrically closed:—*Held:* it was impossible to read the word "closed" in the claim except in its ordinary & natural meaning, physically or geometrically closed.—MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* MULLARD RADIO VALVE CO., LTD. (1924), 41 R. P. C. 323, H. L.

Annotation:—**Mentd.** Brown *v.* Sperry Gyroscope Co. (1925), 42 R. P. C. 111.

1128. Terms of art—Same terms used on two specifications—How far first construction binding.]—BETTS *v.* MENZIES, No. 170, *ante*.

(*b*) *Particular Instances.*

1129. "Any other known means"—Compression of air—Construed to cover two methods.]—COCHRANE & GALLOWAY (LORD) *v.* BRAITHWAITE & ERICSSON (1830), 1 Carp. Pat. Cas. 493.

1130. "Manufacture"—The machine or mode of constructing it.]—MORGAN *v.* SEAWARD, No. 442, *ante*.

1131. "Float"—Term used in weaving—Not construed in technical sense.]—In 1888 letters patent were granted to L. & R. for "Improve-

ments in the manufacture of velvet," & in 1889 letters patent were granted to R. for "improvements in the manufacture of double pile fabrics," the first claim being for a "double pile fabric each cloth of which has its wefts held between two sets of ground warps & the pile warps tied into the ground by a single pick of weft only & in which in addition the backs of the pile warps are covered by a warp or warps floated over them substantially as described." In 1897 the owners of these patents commenced an action against a firm of D., for infringement of the same. In the course of the trial the case upon the 1888 patent was withdrawn. Defts. contended that the word "float" as used in weaving of warps was a technical term signifying a passing over more than one weft, & alleged that the alleged infringing cloth had no floating warps & did not infringe the 1889 patent:—*Held:* the word "float" in the specification of the 1889 patent was used to describe the position of the backing warps relatively to the pile warps, & defts. infringed.—LISTER & CO., LTD. *v.* DIX BROTHERS (1898), 16 R. P. C. 89.

1132. "Aggregate co-efficient of expansion"—Manufacture of electric lamps—Construed to refer to lateral expansion.]—Letters patent were granted for "Improvements in & relating to evacuated vitreous containers having sealed-in conductors." Two of the claims were as follows: "(*a*) A container or envelope of vitreous material having a leading-in wire sealed therein provided with a coating of metal, the oxide of which is soluble in the vitreous material at a relatively low temperature, said composite wire having substantially the same co-efficient of expansion as the material. (*b*) A container having a composite leading-in wire sealed therein as claimed in claim (*a*), the outer coating of said composite leading-in wire being of copper." In the specification it was stated that, in carrying the invention into effect, a base metal, such as tungsten, might be coated with a metal, such as copper, the core & sleeve being so proportioned that its aggregate co-efficient of expansion was about the same as that of the glass in which it was to be sealed. In an action for infringement of the patent, pltfs. complained, in particular, of the sale by defts. of certain incandescent wire drawn electric lamps. Pltfs. alleged that the invention had resulted in a great economy in lamp making, by making it possible to avoid the necessity for using the expensive metal, platinum, for the leading-in wires. They contended that defts.' leading-in wires, which were composed of copper coated nickel iron wire, were infringements. Defts. contended that the patent was invalid for want of novelty, subject-matter & utility, & by reason of the ambiguity & insufficiency of the specification in that (*inter alia*) it did not give any directions as to whether the expansion of the wire was to be measured in the radial or the longitudinal direction:—*Held:* the patentees, in using the expression "aggregate co-efficient" must have been referring to the lateral expansion of the wire, not to its longitudinal expansion, &, on that construction, the lamps complained of were infringements of claims (*a*) & (*b*), the leading-in wires being constructed in accordance with the directions in the specification; & the patent was valid.—BRITISH THOMSON-HOUSTON CO., LTD. *v.* CORONA LAMP WORKS, LTD. (No. 2) (1922), 39 R. P. C. 212.

1133. "Closed"—Whether use ordinary or technical—Manufacture of wireless telegraphic instruments.]—MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* MULLARD RADIO VALVE CO., LTD., No. 1127, *ante*.

SUB-SECT. 3.—ADMISSIBILITY OF EXTRINSIC EVIDENCE.

See, generally, DEEDS, Vol. XVII., pp. 302–348, Nos. 1144–1588.

1134. Whether invention stated with sufficient precision—Evidence of persons acquainted with usual modes of manufacture.]—The specification of an invention, which consists in the use of known materials in new proportions, is not necessarily bad for uncertainty, though the patentee does not limit himself to the precise proportions recommended.

A specification stated in substance that the usual practice in the manufacture of type was to employ lead & antimony, & in some cases to add a small percentage of tin; that the object of the invention was to obtain tougher metal by employing tin in large proportions with antimony, greatly reducing or wholly omitting the use of lead; that the best proportions were seventy-five of tin & twenty-five of antimony, but that this might be, to some extent, varied; & that if lead were used it must not exceed fifty per cent. of the whole—one part of antimony to three of tin, or tin & lead, being the best:—*Held:* the specification was not bad on the face of it for uncertainty, & the evidence of persons acquainted with the usual modes of manufacture was necessary to determine whether the invention was stated with sufficient precision.—PATENT TYPE FOUNDING CO. *v.* RICHARD (1859), John. 381; 6 Jur. N. S. 39; 70 E. R. 470.

1135. —— ——.]—BOVILL *v.* SMITH, No. 448, *ante*.

1136. Facts admissible to explain written documents.]—SEED *v.* HIGGINS, No. 1063, *ante*.

1137. Evidence of patentee—To show intention.]—KAYE *v.* CHUBB & SONS, LTD., No. 543, *ante*.

1138. Provisional specification.]—MACKELCAN *v.* RENNIE, No. 86, *ante*.

1139. To explain technical terms.]—HILL *v.* EVANS, No. 593, *ante*.

1140. ——.]—HARRISON *v.* ANDERSTON FOUNDRY CO., No. 281, *ante*.

1141. ——.]—CLARK *v.* ADIE (No. 2), No. 1081, *ante*.

1142. ——.]—SUGG *v.* BRAY, No. 1091, *ante*.

1143. ——.]—PATENT EXPLOITATION, LTD. *v.* SIEMENS BROTHERS & CO., LTD., No. 1085, *ante*.

1144. —— Evidence of experts.]—GADD & MASON *v.* MANCHESTER CORPN., No. 921, *ante*.

1145. Results of processes described.]—HILL *v.* EVANS, No. 593, *ante*.

1146. Chemical equivalents.]—HILL *v.* EVANS, No. 593, *ante*.

1147. Former patents.]—It is true to say that if there be any doubt on the construction of pltf.'s patent you may look at former patents for the purpose of seeing what is the proper construction of pltf.'s patent (LORD ESHER, M.R.).—COUCHMAN *v.* GREENER (1883), as reported in 1 R. P. C. 197, C. A.; *affd.* (1884), 1 R. P. C. 202, H. L.

Annotation:—**Refd.** Crosthwaite *v.* Steel (1889), 6 R. P. C. 190.

1148. State of knowledge—Where claim ambiguous.]—WESTINGHOUSE *v.* LANCASHIRE & YORKSHIRE RY. CO., No. 1036, *ante*.

1149. —— ——.]—In an action on a licencing agreement, evidence as to the state of general public knowledge at the date of the patent is inadmissible, except in cases where the licencor's specification is ambiguous & requires explanation.—CROSTHWAITE *v.* STEEL (1889), 6 R. P. C. 190.

Annotation:—**Refd.** Ashworth *v.* Law (1890), 7 R. P. C. 231.

1150. —— ——.]—NOBEL'S EXPLOSIVES CO., LTD. *v.* ANDERSON, No. 180, *ante*.

Sect. 6.—*Construction: Sub-sect.* 3. *Sect.* 7: *Sub-sects.* 1 & 2, *A.*]

1151. —— To limit claim.]—GANDY *v.* REDDAWAY, No. 803, *ante.*

1152. —— ——.]—Licencees may refer to prior knowledge to show the true ambit of the claims of a specification.—YOUNG & BEILBY *v.* HERMAND OIL CO., LTD. (1892), 9 R. P. C. 373.

1153. ——.]—UNWIN *v.* HEATH, No. 902, *ante.*

1154. ——.]—A specification must be construed by critically examining what is said in the specification, illustrated by the common knowledge at the date of the patent.—INCANDESCENT GAS LIGHT CO., LTD. *v.* DE MARE INCANDESCENT GAS LIGHT SYSTEM, LTD. (1896), 12 T. L. R. 495; 13 R. P. C. 559, C. A.

Annotation:—**Refd.** Crosfield *v.* Techno-Chemical Laboratories (1913), 29 T. L. R. 378.

1155. ——.]—PATENT EXPLOITATION, LTD. *v.* SIEMENS BROTHERS & CO., LTD., No. 1085, *ante.*

1156. Nature of subject-matter.] — PATENT EXPLOITATION, LTD. *v.* SIEMENS BROTHERS & CO., LTD., No. 1085, *ante.*

SECT. 7.—AMENDMENT.

SUB-SECT. 1.—AT INSTANCE OF COMPTROLLER.

See Patents & Designs Acts, 1907 (c. 29), ss. 3 (2), (3), 6 (2), (3), (4), 7, 8, 73, & 1919 (c. 80), sched.; Patents Rules, 1920, rr. 13, 30–36, 110.

1157. Power of Comptroller—Subject to appeal to law officer.]—*Re* C.'S APPLICATION, No. 712, *ante.*

1158. —— Amendment to prevent ambiguity.]—*Re* FRANCIS' APPLICATION, No. 1454, *post.*

1159. —— Amendment amounting to re-casting or re-writing specification.]—*Re* FRANCIS' APPLICATION, No. 1454, *post.*

1160. Reference to prior invention—Requirement of specific reference—Where prior patent expired.]—*Re* HALL & HALL'S PATENT (1888), 5 R. P. C. 283.

1161. —— —— ——.]—*Re* RINFRETT'S APPLICATION (1918), 36 R. P. C. 21.

1162. —— —— ——.]—*Re* RICHARDS (GEORGE) & CO., LTD.'S APPLICATION (1924), 41 R. P. C. 321.

1163. —— —— Similar inventions.] — The Comptroller required the insertion of a specific reference to a prior patent. On appeal, the law officer held that there was not sufficient identity to justify a specific reference, but that a disclaiming statement should be inserted following the terms of the claim of the prior patent, on which the opposition was based, without citing name, number, & date.—*Re* NEWTON'S APPLICATION (1899), 17 R. P. C. 123.

1164. —— —— ——.]—*Re* BROWN & BARLOW'S APPLICATION (1918), 36 R. P. C. 26.

1165. —— —— Specification published after date of foreign patent—But before date of application.]—A German co. applied in this country for a patent on Aug. 4, 1905, asking that the patent might be dated Aug. 13, 1904, which was the date of their German application. The Chief Examiner, acting for the Comptroller-General, decided under the Patents Act, 1902 (c. 34), to insert in appcts.' specification a reference to a specification which was accepted & published on May 11, 1905, on an application made on May 12, 1904. Appcts. appealed:—*Held:* the Chief Examiner's decision to be affirmed.—*Re* DEUTSCHE GOLD & SILBER-SCHEIDE ANSTALT VORM. RÖSSLER'S APPLICATION (1906), 24 R. P. C. 209.

1166. —— Form of reference.]—On an application for a patent the Chief Examiner acting for the Comptroller held that a reference, in the form prescribed by Patent Rules, 1905, r. 10, to a prior specification should be inserted in appct.'s specification, although appct. was prepared to insert a specific reference of his own to this prior specification.—*Re* P.'S APPLICATION (1906), 23 R. P. C. 644.

1167. —— Application for order to insert—What may be considered — Prior user.] — The question of prior user cannot be gone into for the purpose of defeating a claim on the part of an opponent that a specific reference should be inserted in appct.'s specification (SIR ERNEST M. POLLOCK, S.-G.).—*Re* BARRACLOUGH'S APPLICATION (1919), 37 R. P. C. 105.

1168. —— —— —— Disconformity between provisional & complete specifications of prior patent.]—In considering whether a reference to a prior specification ought to be inserted in a later specification under Patents & Designs Acts, 1907 (c. 29), & 1919 (c. 80), s. 8, on the ground that the invention claimed in the later specification has been wholly or in part claimed in the prior specification, the question of disconformity between the provisional & complete specifications of the prior patent is not a matter into which the law officer or the Comptroller ought to enter.—*Re* HANDLEY PAGE & HANDLEY PAGE, LTD.'S APPLICATION (1924), 41 R. P. C. 109.

Amendment ordered on opposition to grant.]—*See* Part VII., Sect. 2, *post.*

SUB-SECT. 2.—AT INSTANCE OF APPLICANT OR PATENTEE.

A. Forms and Function of Amendment.

See Patents & Designs Acts, 1907 (c. 29), ss. 21, 22, & 1919 (c. 80), sched.

1169. Disclaimer—Function of—Protection of patentee & public.]—*Re* GUEST & BARROW'S PATENT (1888), 5 R. P. C. 312.

Annotation:—**Refd.** *Re* Brockie's Patents (1908), 25 R. P. C. 813.

1170. —— —— To excise parts imperilling patent.]—Where there are obligations that go only to a small & insignificant part of a patent, which, if sustained, would defeat it altogether, the patentee may relieve himself of the difficulty by a disclaimer (MAULE, J.).—R. *v.* MILL (1850), 10 C. B. 379; 1 L. M. & P. 695; 20 L. J. C. P. 16; 16 L. T. O. S. 214; 15 Jur. 59; 138 E. R. 153; *subsequent proceedings* (1851), 14 Beav. 312.

Annotations:—**Refd.** Wallington *v.* Dale (1852), 7 Exch. 888; Ralston *v.* Smith (1860), 9 C. B. N. S. 117.

1171. —— —— ——.]—RALSTON *v.* SMITH, No. 97, *ante.*

1172. —— —— ——.]—The question, however, in this particular case is, what is the proper course to be adopted where appct. desires to omit a part of his invention as covered by his original title prior to the time that the complete specification has been accepted by the office.

If appct. merely desires to omit part of the invention described in the original title & provisional specification, I do not see that any amendment of title & provisional specification is, of necessity, required, as I think that a proper disclaiming clause might be inserted in the complete indicating that part only of the invention originally covered by the title of the provisional was intended to be claimed, but should appct. think that some risk to the validity of his patent might be occasioned by such a course being adopted it is open

to him to lodge a complete, omitting the part desired to be left out, & open to the Patent Office, under the powers of Patents, Designs & Trade Marks Act, 1883 (c. 57), ss. 7 & 9, to permit the original application & provisional to be amended by striking out the part which it is not longer desired to retain.

It must, however, be distinctly understood that such an amendment in the title & provisional ought, in my opinion, to be confined to excision only, & not to amendment or other explanation, & the excision must be such as does not extend the scope of the title (SIR RICHARD WEBSTER, A.-G.).—*Re* DART'S PATENT (1885), Griffin's Patent Cases (1884–1886), 307.

1173. —— —— ——.]—(1) If appct. has good subject-matter & the invention is not identically the same as that of the opponent appct. is entitled to have his patent sealed though an action for infringement may be with success brought by the opponent. I am not here to stop patents at the instigation of an opponent because there is some general principle of patent law which is infringed. I do not decide that in no case would such a point be taken notice of. I think, however, that the law officer might reasonably indicate to appct. as I do now that it would be well to consider such a point, but I do not express any considered opinion that I have jurisdiction to stop a patent on some objection taken by an opponent apart from the opponent's individual rights. There is, however, one other principle which must not be lost sight of, & that is that the law officer has always recognised that where there is an existing patent & he sees fair ground for supposing that the construction of the latter specification might interfere with the rights under the existing patent, the existing patentee is entitled to protection. That is commonly done by some disclaiming clause on the face of the later specification (SIR RICHARD WEBSTER, A.-G.).

(2) I leave entirely to appcts. the question of whether they will consider the difference between the provisional & complete. I do not consider that it is for me, & I shall not at any rate on the present occasion put any terms upon them as to the alteration of their complete on that ground (SIR RICHARD WEBSTER, A.-G.).—*Re* NEWMAN'S APPLICATION (1887), Griffin's Patent Cases (1887), 40; 5 R. P. C. 271; *subsequent proceedings* (1888), 5 R. P. C. 279.

1174. —— —— **Whether explanatory—Of parts not struck out.**]—A patentee describing his invention in the specification, is to be taken to claim as part of his invention all that he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention.

Pltf. obtained a patent for "certain improvements in machinery for raising & impelling water & other liquids"; & by his specification he described a machine for raising & impelling water by centrifugal force, the material parts of which were as follows:—"*g g* is an iron case made air-tight. In the interior of the case *g g* is placed a hollow wheel, having hollow spokes or radial arms, of which *q q* are two: *r r* I call the nave, which is hollow; & *s s* are two hollow shafts, one at each side of the wheel. In the interior of the nave *r* there is a boss or plate of metal, marked *u*, which is cast in at the time the wheel is cast, & which carries the wheel. The shaft *i i* passes through the centre of this plate, & is firmly keyed in." "In reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes, but in some cases, propose to substitute circular discs, with a narrow water channel between them, & a valve or flexible valve or valves on the circumference, so as to have a channel or channels in the interior thereof for the passage of liquids, & adapted to neutralise the effects of suction, by having a corresponding or proportionate degree of suction at each side." "I shall now proceed to explain more particularly what I claim as my invention or inventions. I do not claim to be the discoverer that liquids may be raised by centrifugal force, nor do I claim in any way the sole application of machinery for raising water or other liquids by centrifugal force." He then introduced nine several distinct claims, the whole of which were subsequently by two memoranda of disclaimer struck out, except the following: "I claim as my invention & application the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides." By one of the memoranda of disclaimer, pltf. stated,—"I disclaim any exclusive right to wheels, whether consisting of hollow spokes or of a channel or channels between discs, when considered apart or separately from the machinery described: I also disclaim any exclusive right to the parts of the machinery when they are each considered apart or separate from the machinery described":—*Held:* the effect of a disclaimer is, merely to strike out from the specification those parts of the machinery which are disclaimed: it cannot be read as explanatory of that which remains.—TETLEY *v.* EASTON (1857), 2 C. B. N. S. 706; 26 L. J. C. P. 269; 30 L. T. O. S. 133; 140 E. R. 593.

Annotations:—**Refd.** Patent Bottle Envelope Co. *v.* Seymour (1858), 5 C. B. N. S. 164; Harwood *v.* G. N. Ry. (1862), 2 B. & S. 222: Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. **Mentd.** Newall *v.* Elliott (1864), 13 W. R. 11.

1175. —— —— —— ——.] — *Re* DART'S PATENT, No. 1172, *ante*.

1176. —— —— **Not to extend invention.**]—FOXWELL *v.* BOSTOCK, No. 909, *ante*.

1177. —— —— ——.]—*Re* DART'S PATENT, No. 1172, *ante*.

1178. —— —— ——.]—Appcts. sought to amend their specification by converting the claims therein from claims to a monopoly in the working of all forms of coherent tungsten under the influence of heat into claims to a monopoly of so working certain forms only of coherent tungsten. The proposed amendment disclaimed any right of monopoly in respect of forms of agglomerated tungsten other than those specified in the amendment. The question was whether the specification as amended would claim an invention substantially different from the invention claimed by the specification as it stood before the amendment within Patents & Designs Act, 1907 (c. 29), s. 22:—*Held:* the real effect of the proposed amendment was to import into the specification for the first time the element of selection by rendering essential to the invention claimed that which in the original specification was only one of several means by which the coherent product might be obtained; & it was a device whereby contrary to Patents & Designs Act, 1907 (c. 29), s. 22, an amended specification would be produced which would claim an invention substantially different from that originally claimed.

The allowance or disallowance of an amendment is in the discretion of the ct. (WARRINGTON, L.J.). — *Re* BRITISH THOMSON-HOUSTON CO., LTD.'S PATENT (1919), 89 L. J. Ch. 194; 121 L. T. 323; 35 T. L. R. 582; 36 R. P. C. 251, C. A.

1179. —— —— **To make insufficient description sufficient.**]—Disclaimer is not to be used solely

B. Jurisdiction of Court.

See Patents & Designs Acts, 1907 (c. 29), s. 21 ; 1919 (c. 80), sched. ; Patents Rules, 1920, rr. 64–68.

1182. Discretion of the court.]—*Re* BRITISH THOMSON-HOUSTON CO., LTD.'S PATENT, No. 1178, *ante*.

1183. Amendment must be allowed in cases of doubt.]—*Re* BATEMAN & MOORE'S DISCLAIMER (1854), Macr. 116.

1184. Jurisdiction of Master of Rolls—To expunge memorandum of alteration.]—Extent of the jurisdiction of the Master of the Rolls to alter the enrolments of the specifications of patents.

Under 5 & 6 Will. 4, c. 83, a patentee by the authority of the Solicitor-General, entered a memorandum of alteration of the enrolment of the specification, which it was alleged extended the patent & infringed upon another patent granted to petitioner :—*Held :* the Master of the Rolls had no jurisdiction to order such memorandum of alteration to be expunged.

Except for the purpose of correcting mere verbal or clerical errors, proved to have arisen from mistake or inadvertence, I am of opinion that I have no authority to make any alteration in the enrolment of the patent or specification (LORD LANGDALE, M.R.).—*Re* SHARP'S PATENT, *Ex p.* WORDSWORTH (1840), 3 Beav. 245 ; 1 Web. Pat. Cas. 641 ; 10 L. J. Ch. 86 ; 49 E. R. 96.

Annotation :—**Distd.** *Re* Berdan's Patent (1875), L. R. 20 Eq. 346.

1185. —— To take disclaimer off file—Where filed without consent of patentee.]—Where a disclaimer had been filed without the consent of the patentee : —*Held :* the Master of the Rolls had jurisdiction without bill filed to order it to be taken off the file.—*Re* BERDAN'S PATENT (1875), L. R. 20 Eq. 346 ; 44 L. J. Ch. 544 ; *sub nom. Re* BIRDAN'S PATENTS, 23 W. R. 823.

Annotation :—**Reld.** Andrew *v.* Crossley, Crossley *v.* Andrew, [1892] 1 Ch. 492.

Annotations :—**Reld.** Yates *v.* Armstrong, *Re* Armstrong's Patent (1897), 77 L. T. 267. **Mentd.** Field *v.* Ommanney (1920), 36 T. L. R. 695.

1188. —— —— Subject to review.]—The discretion reposed in the ct. or a judge, by Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, to grant liberty to a patentee to apply at the Patent Office for leave to amend his specification by way of disclaimer, will not be interfered with by the Ct. of Appeal, unless that ct. be clearly of opinion that such discretion has been exercised upon a wrong principle.—YATES *v.* ARMSTRONG, *Re* ARMSTRONG'S PATENT (1897), 77 L. T. 267 ; 14 R. P. C. 747, C. A.

Annotations :—**Reld.** *Re* Owen's Patent, [1899] 1 Ch. 157 ; *Re* Alsop's Patent, [1906] 1 Ch. 85 ; Porter *v.* Freudenberg, Kreglinger *v.* Samuel & Rosenfeld, *Re* Merten's Patents, [1915] 1 K. B. 857.

To impose conditions on allowing amendment.]—*See* Sub-sect. 2, E. (*a*), *post*.

C. The Application.

(a) In General.

See Patents & Designs Act, 1907 (c. 29), ss. 21, 22 ; Patents & Designs Act, 1919 (c. 80), s. 20, sched. ; Patents Rules, 1920, rr. 64–68 ; R. S. C., Ord. 53A, r. 21.

1189. Patents & Designs Act, 1907 (c. 29), ss. 21, 22—Construction & application.]—Patents, Designs & Trade Marks Act, 1883 (c. 57), ss. 18, 19 [replaced by Patents & Designs Act, 1907 (c. 29), ss. 21, 22], which relate to the amendment of a specification, must be read together. Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18, states what appct. may do before litigation, & Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, states what he may do while in litigation ; & if appct., whilst litigation is pending & without leave of the ct. under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, amends his specification under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18, by leave of the comptroller, the amendment is irregular & void notwithstanding

PART VI. SECT. 7, SUB-SECT. 2.—B.

p. *Amendment not allowed at trial—After communication of opposing application.*]—The ct., in allowing deft. to make a proposed amendment at the trial, after he had had communication of pltf.'s application, would be giving him an unfair & oppressive advantage over pltf. Such a judgment would be against the very spirit & letter of the Patent Act, which requires absolute secrecy until the full completion of the application.—PERMUTIT CO. *v.* BORROWMAN, [1924] Exch. C. R. 6, 8.—CAN.

PART VI. SECT. 7, SUB-SECT. 2.—C. (a).

q. *Barred by concurrent revocation proceedings.*]—Patents, Designs, & Trade Marks Act, 1889, s. 30 (8), has the effect of preventing an application under that sect. for leave to amend a

Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18 (9).

Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18 (10) [replaced by Patents & Designs Act, 1907 (c. 29), s. 21 (8)], is not limited to litigation pending between the same parties at the time when the application to amend is made, but refers to any action for infringement or petition for revocation pending at that time in relation to the patent.—BROOKS (J. B.) & CO., LTD. *v.* LYCETT'S SADDLE & MOTOR ACCESSORY CO., LTD., [1904] 1 Ch. 512; 73 L. J. Ch. 319.

1190. —— When proceedings to be under sect. 21.]—*Re* GARE'S PATENT, No. 1186, *ante*.

1191. Matters to be considered on application—Only words of specification.]—*Re* BATEMAN & MOORE'S DISCLAIMER, No. 1183, *ante*.

1192. —— Disconformity.] — *Re* NEWMAN'S APPLICATION, No. 1173, *ante*.

1193. Second application—After previous application refused—No appeal from first refusal.]—*Re* ARNOLD (1887), Griffin's Patent Cases (1887), 5.

1194. —— On fresh particulars of objections.]—CHATWOOD'S PATENT SAFE & LOCK CO. *v.* MERCANTILE BANK OF LANCASHIRE, LTD. (1899), 17 R. P. C. 23.

1195. Necessity for advertisement—Amendment before publication of specification.] — *Re* JONES' PATENT (1885), Griffin's Patent Cases (1884–1886), 313.

1196. ——.]—(1) An application under Patents & Designs Act, 1907 (c. 29), s. 22, for leave to amend a specification does not fall within Patents & Designs Act, 1907 (c. 29), s. 92 (2), & therefore does not require to be made to the patent judge.

(2) Notice of an application under Patents & Designs Act, 1907 (c. 29), s. 22, must be given to the Comptroller, & the proposed amendments must be advertised in the Official Journal, before the amendments are considered by the ct.; & the Comptroller will be entitled to his costs of appearing on the application.

(3) When amendments are allowed it will, as a general rule, be a term of the order that no injunction shall be asked in any action brought for infringement of the patent in respect of articles made prior to the date of the order allowing the amendments, unless the patentee shall establish to the satisfaction of the ct. that his original claim was framed in good faith & with reasonable skill & knowledge.—*Re* KLABER & STEINBERG'S PATENT, [1908] 1 Ch. 847; 77 L. J. Ch. 569; 99 L. T. 87; 24 T. L. R. 352, 482.

1197. Notice of motion—Whether service on Comptroller necessary.]—*Re* KLABER & STEINBERG'S PATENT, No. 1196, *ante*.

1198. Application defective for want of proper parties—Proper parties present at hearing—Application proceeded with.]—*Re* GOLTSTEIN'S APPLICATION, No. 8, *ante*.

1199. Subject-matter of specification not subject for patent.]—An application, under Patents & Designs Act, 1907 (c. 29), s. 21, for leave to amend a specification was opposed on the ground that the amendments proposed would make the specification, as amended, claim an invention substantially larger than or different from the invention originally claimed. The specification had been considered both by the High Ct., the Ct. of Appeal, & the House of Lords with the result that the patent was held to be invalid. Amendment was refused by the Chief Examiner, acting on behalf of the Comptroller-General, in the exercise of his discretion on the ground that he ought not to allow the specification to be amended as the House of Lords had arrived at the conclusion that the matter described in the specification was not a subject for patent.—*Re* HENNEBIQUE'S PATENT (1910), 28 R. P. C. 41.

(*b*) *By and to Whom Made.*

See Patents & Designs Act, 1907 (c. 29), ss. 21, 22; Patents Rules, 1920, r. 64; R. S. C., Ord. 53A, r. 21; Patents & Designs Act, 1919 (c. 80), s. 20, sched.

1200. Who may make application—Patentee having parted with all interest.]—(1) The assignees of letters patent, in respect of which a disclaimer had been enrolled by a grantee, who, at the time of doing so, did not possess the entire patent, may maintain an action for infringement.

(2) A grantee of letters patent, though having entirely parted with his interest, may enter a disclaimer.—SPILSBURY *v.* CLOUGH (1842), 2 Q. B. 466; 1 Web. Pat. Cas. 255; 2 Gal. & Dav. 17; 11 L. J. Q. B. 109; 6 Jur. 579; 114 E. R. 184.

Annotation:—**Refd.** Ledsam *v.* Russell (1847), 16 M. & W. 63.

1201. —— Alien enemy.]—Where the resp. to a petition for revocation of a patent is an alien enemy, that is no objection to an application by him under Patents & Designs Act, 1907 (c. 29). s. 22, for leave to amend his specification by way of disclaimer, inasmuch as the application is by way of defence to the petition.

Semble: a patentee who is an alien enemy cannot make an initiative application under Patents & Designs Act, 1907 (c. 29), s. 21, for leave to amend.—*Re* STAHLWERK BECKER AKT'S. PATENT, [1917] 2 Ch. 272; 86 L. J. Ch. 670; 117 L. T. 216; 33 T. L. R. 339; 61 Sol. Jo. 479; 34 R. P. C. 332.

1202. To whom application made—The Comptroller.]—Pltf. can apply to the Patent Office for leave to amend the specification by way of disclaimer without any leave from me (NORTH, J.).—LAWRENCE *v.* PERRY & CO., LTD. (1885), 2 R. P. C. 179; Griffin's Patent Cases (1884–1886), 143.

1203. —— —— Where proceedings pending for infringement or revocation—Petition for revocation after application.]—An application for leave to amend the specification of a patent having been made to the Comptroller under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18:—*Held:* the subsequent presentation of a petition for revocation of the patent, before the Comptroller had given his decision, did not, by virtue of Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18 (10), operate to suspend his jurisdiction, but he could, notwithstanding the pendency of the petition, grant leave to amend. — WOOLFE *v.* AUTOMATIC PICTURE GALLERY, LTD., [1903] 1 Ch. 18; 72 L. J. Ch. 34; 87 L. T. 539; 19 T. L. R. 94, C. A.

Annotation:—**Consd.** Brooks *v.* Lycett's Saddle & Motor Accessory Co., [1904] 1 Ch. 512.

1204. —— —— ——.]—BROOKS (J. B.) & CO., LTD. *v.* LYCETT'S SADDLE & MOTOR ACCESSORY CO., LTD., No. 1189, *ante*.

specification from being proceeded with when a proceeding for revocation of the patent has been commenced, except with the leave of the ct. or a judge, under sect. 31, notwithstanding that the application under sect. 30 has been put in before, & was pending at the time of the commencement of, the proceeding for revocation.—*Re* CASSEL GOLD-EXTRACTING CO.'S PATENT (1896), 14 N. Z. L. R. 457.—**N.Z.**

r. *Who may oppose—Attorney-General.*]—The A.-G. is both a "person" & a "person entitled to be heard" in opposition to an application for leave to amend a specification, within Patents, Designs, & Trade Marks Act, 1889, s. 30 (3).—*Re* CASSEL GOLD-EXTRACTING CO.'S PATENT (1897), 15 N. Z. L. R. 741.—**N.Z.**

Sect. 7.—Amendment: Sub-sect. 2, C. (b), (c) & (d), D. (a).]

1205. —— —— —— Effect of leave from Comptroller.]—*Re* OWEN'S PATENT, No. 1181, *ante*.

1206. —— The court—When proceedings pending for infringement or revocation.] — Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, applies to an action for infringement of a patent which was pending at the commencement of the Act, namely Jan. 1, 1884, & the ct. in any such action has power under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, to give pltf. liberty to apply to the Patent Office for leave to amend his specification by way of disclaimer.—SINGER *v.* HASSON (1884), 50 L. T. 326; *varied*, *sub nom.* SINGER *v.* STASSEN, 1 R. P. C. 121; Griffin's Patent Cases (1884–1886), 207, C. A.

Annotations:—**Consd.** Bray *v.* Gardner (1887), 34 Ch. D. 668; Fusee Vesta Co. *v.* Bryant & May (1887), 34 Ch. D. 458; *Re* Woolfe's Patent, Woolfe *v.* Automatic Picture Gallery (1902), 87 L. T. 95. **Refd.** *Re* Hearson's Patent (1884), Griffin's Patent Cases (1884–1886), 309; Haslam Foundry & Engineering Co. *v.* Goodfellow & Matthews (1887), 57 L. T. 788.

1207. —— —— ——.] — An action having been commenced under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 32, for an injunction to restrain patentees from issuing threats of legal proceedings & for damages, the patentees brought a cross action for infringement of their patent. The patentees then applied in the cross action & obtained a judge's order under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, giving them liberty to apply to the Comptroller-General for leave to amend their specification by way of disclaimer. Upon an application for a writ of prohibition to the Comptroller-General to prevent him from hearing the application upon the order:—*Held:* the judge had jurisdiction to make the order, notwithstanding that the action under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 32, had not been concluded, & the application for a prohibition must be refused.—*Re* HALL (1888), 21 Q. B. D. 137; 57 L. J. Q. B. 494; 59 L. T. 37; 36 W. R. 892, D. C.

Annotation:—**Mentd.** R. *v.* Electricity Comrs., *Ex p.* London Electricity Joint Committee Co. (1920), Ltd., [1924] 1 K. B. 171.

1208. —— —— ——.]—GILLETTE SAFETY RAZOR CO. *v.* GAMAGE (A. W.), LTD. (1909), 25 T. L. R. 808; 26 R. P. C. 745.

Annotation:—**Refd.** Gillette Safety Razor Co. *v.* Luna Safety Razor Co., [1910] 2 Ch. 373.

1209. —— —— —— What amounts to "pending."]—In an action for infringement of their patent, pltfs. obtained a judgment against defts. S. & H., but on appeal, that judgment was reversed as against S., but maintained as against H. Pltfs. afterwards applied under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18, for leave to amend their specification by way of disclaimer, which application was opposed by defts. Subsequently, H. lodged an appeal in the House of Lords against the decision of the Ct. of Appeal. The Comptroller-General then declined to proceed with pltfs.' application until the opinion of the ct. had been taken under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, as he doubted whether or not the appeal to the House of Lords was a pending litigation within Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18 (10), & pltfs. thereupon took out a summons that they might be at liberty to disclaim:—*Held:* the words "other legal proceeding in relation to a patent," in Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18 (10), refer to a proceeding for the revocation of a patent, & an "action for infringement . . . pending" means an action before judgment, & that being so there was no action for infringement or other legal proceeding pending, & the summons was dismissed.—CROPPER *v.* SMITH (No. 2) (1884), 28 Ch. D. 148; 54 L. J. Ch. 287; 52 L. T. 94; 33 W. R. 338; Griffin's Patent Cases (1884–1886), p. 72; 1 R. P. C. 254.

Annotations:—**Refd.** *Re* Hall (1888), 21 Q. B. D. 137. **Mentd.** Dowler *v.* Keeling (1898), 14 T. L. R. 257.

1210. —— —— —— What amounts to "proceedings."]—BROOKS (J. B.) & CO., LTD. *v.* LYCETT'S SADDLE & MOTOR ACCESSORY CO., LTD., No. 1189, *ante*.

1211. —— —— —— Suspension of judgment.]—The owners of a patent relating to a refrigerative apparatus brought an action for alleged infringement. Defts. denied infringement, & alleged that the patent was invalid on the grounds of anticipation & want of subject-matter. Before pltfs. became the owners of the patent, they had in various proceedings, either disputed, or made preparations for disputing its validity:—*Held:* the second claim had been anticipated by the B. machine, but the residue was new, & had been infringed. Pltfs. applying for leave to disclaim, judgment suspended, until a decision on such application.—HASLAM & CO. *v.* HALL (1887), 5 R. P. C. 1; *on appeal*, 20 Q. B. D. 491, C. A.

Annotations:—**Mentd.** Kane *v.* Guest (1899), 16 R. P. C. 433; Acetylene Illuminating Co. *v.* United Alkali Co., [1902] 1 Ch. 494.

1212. —— —— —— Commencement & discontinuance of action.]—In an action for infringement of a patent (there had been an amendment by disclaimer) for producing dyes, deft. denied infringement & by his particulars objected that owing to a previous specification the invention was not good subject-matter, that the invention shown in the original specification was enlarged by the disclaimer & that the specification contained misleading statements. At the trial he asked for a nonsuit on the ground that pltfs. had not proved infringement; he also objected that the amendment allowed was not that originally advertised & that the proceedings for amendment were vitiated by the commencement & discontinuance of an action during those proceedings:—*Held:* all these several objections were bad, infringement was proved, & an injunction was granted.—FARBENFABRIKEN VORM FR. BAYER & CO. *v.* BOWKER (1891), 8 R. P. C. 389.

Annotations:—**Distd.** Australian Gold Recovery Co. *v.* Lake View Consols (1900), 83 L. T. 541; Brooks *v.* Lycett's Saddle & Motor Accessory Co., [1904] 1 Ch. 512. **Refd.** Woolfe *v.* Automatic Picture Gallery (1902), 46 Sol. Jo. 633.

1213. —— —— —— Nature of proposed amendment.]—Upon an application by a patentee to the ct. under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, for liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, the ct. is not concerned with the terms of the proposed amendment except for the purpose of guiding it in the exercise of its discretion under the sect.

Consequently the ct. will not refuse an application under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, upon the ground that the proposed amendment is not an amendment by way of disclaimer as distinguished from correction or explanation unless it is satisfied that this is so by a mere perusal of the specification.—*Re* ALSOP'S PATENT, [1906] 1 Ch. 85; 75 L. J. Ch. 134; 94 L. T. 38; 54 W. R. 323; 22 T. L. R. 157; 23 R. P. C. 65, C. A.; *subsequent proceedings* (1907), 24 R. P. C. 733.

1214. —— —— Necessity for application to

patent judge.] — *Re* KLABER & STEINBERG'S PATENT, No. 1196, *ante*.

(*c*) *In Proceedings for Infringement or Revocation.*

Patents & Designs Acts, 1907 (c. 29), s. 22, & 1919 (c. 80), sched.; R. S. C., Ord. 53A, r. 21; & *see* Nos. 1203–1214, *ante*.

(*d*) *Time for Making.*

See Patents & Designs Acts, 1907 (c. 29), s. 21, & 1919 (c. 80), sched.

1215. After adverse judgment.]—DEROSNE *v.* FAIRIE, No. 1057, *ante*.

1216. —— Petition for revocation pending.]—A petition for revocation of a patent relating to certain process & apparatus for copying, duplicating, & printing writings, etc., by means of a transmitting printing sheet coated with a substance impervious to ink, having been presented, the owners of the patent applied to the ct. for liberty to apply to the Comptroller for leave to amend by way of disclaimer. On the application coming before the ct. appcts. contended that no terms except the usual terms as to costs should be imposed on them as a condition for granted liberty; resps. contended that in the special circumstances of the case a term should be imposed that no action for infringement should be brought against them or their customers. The patent was granted in 1887, & the specification contained originally fourteen claims. After threatening legal proceedings against resps. between 1892 & 1898 the owners of the patent amended, reducing the claims to five, & commenced proceedings against resps. for infringement; the patent was held at the trial to be bad, & an appeal was dismissed. The petition for revocation was then presented. The leave asked for was granted on the terms that no action should be brought against resps. or their customers in respect of certain paper used or sold up to the date of the hearing of the application, or in respect of any such paper bought or ordered before the date of the notice of motion, whether waxed or not, &, on the usual terms as to costs, leave to appeal being given. Appcts. appealed:—*Held:* the terms were within the jurisdiction of & a matter for the discretion of the judge before whom the application came, & his discretion should not be overruled.—*Re* ALLISON'S PATENT (1900), 17 R. P. C. 513, C. A.

1217. After assignment of patent.]—WALLINGTON *v.* DALE, No. 1074, *ante*.

1218. Effect of lapse of time—Four years.]—An application for the amendment of a patent granted in 1856 by rectifying an error in the spelling of the name of the patentee was refused on the ground of lapse of time.

Qu.: whether the ct. has power to make such an order under Patent Law Amendment Act, 1852 (c. 83), s. 15.—*Re* BLAMOUD (1860), 3 L. T. 800, L. C.

1219. ——.]—(1) In an old patent like this I am very indisposed to make any alteration in the specification, but I do think that in this particular case justice does entitle appct. to have one. Fig. 3 stood upon the complete specification ever since it was filed, & looking at the provisional, I am satisfied that would include it. Therefore I think I shall not be wrong in allowing the description of that drawing to be inserted. I am clear that I am not entitled to allow any extended claim, & if it was not that I think that the original claim does cover it, I should not have allowed it (SIR RICHARD WEBSTER, A.-G.).

(2) Application was made for a return of the stamp on the notice of appeal.

This was a case in which the Comptroller-General was quite right in declining to allow it in the first instance & to leave it to the law officer. There was quite sufficient difficulty about it. It is a ten year old patent & therefore I should not be disposed to make a special order (SIR RICHARD WEBSTER, A.-G.).—*Re* MORGAN (1886), Griffin's Patent Cases (1887), 17

D. What Amendments Allowed.

(*a*) *Substantial Alteration of Original.*

See Patents & Designs Act, 1907 (c. 29), ss. 21 (*c*), 22 & 1919 (c. 80), s. 20, sched.

1220. Amendment not allowed.]—*Re* SHARP'S PATENT, *Ex p.* WORDSWORTH, No. 1184, *ante*.

1221. ——.]—*Re* WALKER (1887), Griffin's Patent Cases (1887), 22.

1222. ——.]—*Re* CHEESBROUGH'S PATENT (1884), Griffin's Patent Cases (1884–1886), 303.

1223. ——.]—I am of opinion that I ought not to allow the amendments to be made, for in my judgment the specification, assuming it to be amended in the way now proposed, would be substantially different from the original specification (SIR E. CLARKE, S.-G.).—*Re* HEATH & FROST'S PATENT (1886), Griffin's Patent Cases (1884–1886), 310.

1224. ——.]—*Re* MORGAN, No. 1219, *ante*.

1225. ——.]—*Re* COCHRANE'S PATENT (1885), Griffin's Patent Cases (1884–1886), 304.

Annotations:—**Consd.** *Re* Goltstein's Appln. (1910), 27 R. P. C. 289. **Refd.** *Re* Hattersley & Jackson's Patent (1904), 21 R. P. C. 233.

1226. ——.]—Under ordinary circumstances it rests with appct. to take the responsibility of the question whether a proposed amendment will invalidate his patent. No doubt under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18 (8), the law officer is bound to see that the amendment would not make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before amendment, & of course if there is fairly substantial & clear evidence before the Comptroller-General or the law officer that the consequence of the amendment will be within the vice pointed out in that subsection he ought to decline to allow the amendment. But in any question of doubt it certainly is not the duty in my opinion of the law officer to disallow the amendment, because he may thereby deprive the patentee of valuable rights & if the patentee persists in an amendment he persists at

PART VI. SECT. 7, SUB-SECT. 2.—D. (a).

1220 i. *Amendment not allowed.*]—Whether the invention claimed in the proposed amendments of the specification is the discovery of a new principle or a mere working direction for the use of existing apparatus, if it is substantially different from that claimed by the original specification, & within the prohibition of Patents Act, 1903, s. 78.—NEILSON *v.* MINISTER OF PUBLIC WORKS FOR NEW SOUTH WALES (1914), 18 C. L. R. 423.—**AUS.**

1220 ii. ——.]—Where an amendment would not make the specification, as amended, claim an invention substantially larger than or substantially different from that originally claimed; it ought to be allowed, even if its effect would be, by cutting down the claim, to turn the claim, bad as being too wide, into a good claim.—*Re* CASSEL GOLD-EXTRACTING CO.'S PATENT (1897), 15 N. Z. L. R. 741.—**N.Z.**

1220 iii. ——.]—*Re* WHEELER'S APPLICATION (1892), 12 N. Z. L. R. 193.—**N.Z.**

1220 iv. ——.]—The only valid objection which can be taken to a proposed amendment of a specification is that it will make the specification claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before amendment, contrary to Patents, Designs, & Trade Marks Act, 1889, s. 30 (6).—*Re* OSBORNE'S PATENT (1894), 13 N. Z. L. R. 172.—**N.Z.**

Sect. 7.—Amendment: Sub-sect. 2, D. (a), (b), (c)

his peril, & if the patent is bad so much the worse for him (WEBSTER, A.-G.).—*Re* LAKE (1887), Griffin's Patent Cases (1887), 16.

1227. ——.]—*Re* ALLEN, No. 1247, *post.*

1228. ——.]—*Ex p.* SIMON, No. 720, *ante.*

1229. ——.]—*Re* GAULARD & GIBBS' PATENT, No. 1231, *post.*

1230. ——.]—In an opposition to the grant, extensive amendments are not to be encouraged.—*Re* GARNETT'S APPLICATION (1899), 16 R. P. C. 154.

1231. ——.]—G. & G. obtained a patent for a new system of distributing electricity for the production of light & power, claiming the employment of an alternating current of high tension for the generation in an unlimited number of secondary generators of induced currents individually utilised, & also claiming the special construction of the secondary generators described, which were induction coils having divided cores consisting of iron wires. F. presented a petition for revocation of this patent, alleging that the invention was devoid of novelty & utility, & had been anticipated, & that the complete specification was not in conformity with the provisional, & was insufficient in itself. G. & G. then, by leave, amended their specification, & struck out the word unlimited, & also the claim for the special generators. On the hearing of the petition the learned judge declared the patent void on account of the insufficiency of the complete specification. The Ct. of Appeal held the invention was useful & had not been anticipated, but that the patent was void because there was a discrepancy between the provisional & complete specifications, & because the amendment had extended the scope of the invention. The patentees having appealed to the House of Lords:—*Held:* the appeal must be dismissed with costs, two Lords holding, having regard to the prior specifications & state of public knowledge, there was no subject-matter for a patent in the alleged invention, & the third holding that the invention described in the complete specification after the amendment was not the same as that described in the provisional.—*Re* GAULARD & GIBBS' PATENT (1890), 7 R. P. C. 367, H. L.

Annotations:—**Apld.** *Re* Bridge's Appln. (1901), 18 R. P. C. 257. **Refd.** *Re* Owen's Patent, [1899] 1 Ch. 157; Donnersmarckhütte oberschlesische Eisen und Kolenwerke Gesellschaft *v.* Electric Construction Co. (1910), 27 R. P. C. 774; Holmes *v.* Associated Newspapers (1910), 27 R. P. C. 136.

1232. ——.]—*Re* LANG'S PATENT (1890), 7 R. P. C. 469.

Annotation:—**Consd.** *Re* Owen's Patent, [1899] 1 Ch. 157.

1233. ——.]—*Re* NAIRN'S PATENT (1891), 8 R. P. C. 444.

1234. ——.]—LANE FOX *v.* KENSINGTON & KNIGHTSBRIDGE ELECTRIC LIGHTING CO., No. 117, *ante.*

1235. ——.]—MARSDEN *v.* MOSER, No. 1248, *post.*

1236. ——.]—The amendment would make the specification claim an invention substantially different from that originally claimed, & was also, by the indefiniteness of its language, such as ought not to be allowed.—*Re* PARKINSON'S PATENT (1896), 13 R. P. C. 509.

Annotations:—**Apld.** *Re* British Thomson-Houston Co. (1919), 35 T. L. R. 469. **Refd.** A Ruling by the Comptroller, 1911 (A) (1911), 28 R. P. C. App. 1.

1237. ——.]—*Re* JOHNSON'S PATENT, No. 1179, *ante.*

1238. ——.]—*Re* VIDAL'S PATENT (1898), 15 R. P. C. 721.

1239. ——.]—*Re* CRIST'S APPLICATION (1903), 20 R. P. C. 475.

1240. ——.]—Application for leave to amend specification. Opposition thereto on the ground that the amendment proposed would make the specification, as amended, claim an invention substantially larger than or different from the invention originally claimed:—*Held:* the amendment would make the specification claim an invention substantially different from that originally claimed, there being no claim to the combination asked for on amendment, all reference to one part of the combination having been omitted by an amendment already made.—*Re* HATTERSLEY & JACKSON'S PATENT (1904), 21 R. P. C. 233.

Annotations:—**Apld.** *Re* British Thomson-Houston Co. (1919), 35 T. L. R. 469. **Refd.** *Re* Goltstein's Appln. (1910), 27 R. P. C. 289.

1241. ——.]—KNIGHT *v.* ARGYLLS, LTD., No. 1068, *ante.*

1242. ——.]—*Re* BAMBER & CROPPER & CO., LTD.'S APPLICATION (1924), 41 R. P. C. 417.

(*b*) *Correction of Clerical Errors.*

See Patents Rules, 1920, r. 96.

1243. Clerical error corrected — Reference numbers of figures.]—*Re* REDMUND'S PATENT (1828), 1 Web. Pat. Cas. 649, n.; 5 Russ. 44; 6 L. J. O. S. Ch. 183; 38 E. R. 943.

Annotation:—**Distd.** *Re* Sharp's Patent (1840), 3 Beav. 245.

1244. —— Date of grant.]—*Re* RUBERRY'S PATENT (1837), 1 Web. Pat. Cas. 649, n.

Annotation:—**Apld.** *Re* Dismore (1854), 18 Beav. 538.

1245. —— "Recovering" for "covering."]—Where letters patent for an invention & the enrolment contain the same error, the Master of the Rolls has no authority to order the enrolment to be amended until a corresponding amendment has been made in the letters patent & they have been resealed.

An application having been made to the Crown for the grant of a patent for an invention of machinery for covering fibrous substances, etc., & the Solicitor-General having certified in favour of such grant, the invention was, by a mistake of the copying clerk in the Home Office, misdescribed in the Queen's Warrant by inserting the word "recovering" for the word "covering"; & the error was adopted, without being observed, in the Queen's Bill, the Privy Seal Bill, & the letters patent. After the letters patent had been enrolled, the error was discovered, & the patentee having procured the Queen's Warrant, the Queen's Bill, & the Privy Seal Bill to be duly amended by the proper officers of the Crown, presented a petition to the Master of the Rolls, as Keeper of the Public Records, praying that the enrolment might be made to accord with the Privy Seal Bill as so amended; & the Master of the Rolls made an order accordingly. But, upon an appeal to the Lord Chancellor by a party, against whom the patentee had previously commenced an action for the infringement of the patent:—*Held:* the enrolment could on no account be allowed to represent what the letters patent did not contain; & the appeal petition was directed to stand over, with liberty to the patentee to make such application to the Lord Chancellor as he should be advised.—*Re* NICKEL'S PATENT (1841), 1 Ph. 36; 4 Beav. 563; 1 Web. Pat. Cas. 656; 5 Jur. 882; 41 E. R. 544, L. C.; *subsequent proceedings* (1843), 2 L. T. O. S. 245, L. C.

1246. —— Christian name.]—Clerical error, consisting of the insertion of the name of "Charles" instead of "George" in the inrolment of a patent,

ordered to be amended.—*Re* DISMORE (1854), 18 Beav. 538 ; 52 E. R. 211.

(*c*) *Amendments to Remove Ambiguity.*

1247. General rule.]—I think that my business in this case is to look at the specification, to take into consideration the declaration which has been made by the patentee as to the way in which he drew it up & as to his intention, & to exercise my judgment as to what I should fairly have considered upon reading the specification he intended to claim. I find no description anywhere of the novel form of these pipes. The pipes as described in the specification are certainly not of novel form. The first & the third are quite ordinary pipes, the second, the vertical taper pipe, was perfectly well known at the date of the patent. However clumsily the specification was expressed, I think that substantially it claimed the arrangement of the pipes & not the form of the particular pipes ; & I therefore think that the amendment will not enlarge the claim & will not make it a claim for a different invention, but will remove ambiguity rather than defect in the original claim. Therefore I shall allow the amendment to be made, but inasmuch as these proceedings have been rendered necessary by the misfortune, to say the least of it, of the patentee in preparing his specification in the way he did, of course I shall say nothing about costs (SIR EDWARD CLARKE, S.-G.).—*Re* ALLEN (1887), Griffin's Patent Cases (1887), 3.

1248. ——.]—Where a specification has been amended the regularity of the amendment cannot be questioned, except on the ground of fraud.

The owner of a patent, communicated from abroad, the specification of which had been amended for raising fabrics, such as flannelettes, brought an action for infringement. Deft. alleged that the patent was invalid, on the ground of want of subject-matter, anticipation, & extension of the claim by amendment ; & also alleged that the patentee had added part of the invention, & should have declared this on making his application. It was held at the trial that the invention could not be subject-matter of a patent, & that the amendment had enlarged the scope of the claim, & thereby invalidated the patent, & the action was dismissed, with costs. Pltf. appealed to the Ct. of Appeal. It was held, on appeal, that pltf. had discovered a new mode of using the old raising machine by altering it, & in so doing had shown great inventive power & ingenuity, & his patent was therefore good ; that the amendment only removed an ambiguity, & did not enlarge the claim, & the appeal was allowed. Deft. appealed to the House of Lords :—*Held :* the amendment of the specification had not enlarged the claim ; the claim of the amended specification was not too wide ; the patent was valid ; & that the appeal must be dismissed, with costs.—MARSDEN *v.* MOSER (1895), 73 L. T. 667 ; *sub nom.* MOSER *v.* MARSDEN, 13 R. P. C. 24, H. L. ; *affg.* S. C. *sub nom.* MOSER *v.* (1893), 9 T. L. R. 584, C. A.

Annotations :—**Consd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429 ; *Re* Dellwick's Patent, [1896] 2 Ch. 705 ; *Re* Parkinson's Patent (1896), 13 R. P. C. 509 ; Stepney Spare Motor Wheel Co. *v.* Hall, [1911] 1 Ch. 514. **Refd.** Australian Gold Recovery Co. *v.* Lake View Consols (1900), 83 L. T. 541 ; Jandus Arc Lamp & Electric Co. *v.* Arc Lamps (1905), 21 T. L. R. 308 ; Avery *v.* Ashworth (1915), 32 R. P. C. 463, 561.

1249. Limitation of claim to one of two possible constructions.]—*Re* RYLAND'S PATENT (1888), 5 R. P. C. 665.

1250. Intention of patentee to be considered—Amendment by way of explanation.]—Application under Patents & Designs Act, 1907 (c. 29), s. 21, to amend a specification by way of explanation. Opposition to amendment on the ground that the proposed amendments would make the specification, as amended, claim an invention substantially different from the invention claimed originally. The Comptroller-General refused to allow amendment. On appeal, amendment was allowed.—*Re* JOHNSON'S APPLICATION (1909), 26 R. P. C. 780.

(*d*) *Other Cases.*

See Patents & Designs Act, 1907 (c. 29), s. 21 (6).

1251. Refusal on grounds for refusing grant.]—On an application for leave to amend a specification the Comptroller may refuse the application on similar grounds to those acted on in refusing the grant in opposition cases, including want of subject-matter.—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1911 (A) (1911), 28 R. P. C. App. i.

1252. Subsequently ascertained knowledge — Adaptation of invention to engines not mentioned in original.]—Appct. very frankly admits that a good deal of this information is necessitated by the development of the discovery of the gas engine or by gas engines being more largely used & developed. My idea of the function of an explanation within Patents, Designs & Trades Marks Act, 1883 (c. 57), s. 18, is to explain more clearly what is necessary to understand the meaning of the patentee at the time he patented the invention. I do not think it is intended that he should put in subsequently ascertained knowledge. I do not mean to lay down a hard & fast rule, but speaking broadly it was intended to permit a man to amend, correct & explain the enunciation of his invention as he intended originally to give it (SIR RICHARD WEBSTER, A.-G.).—*Re* BECK & JUSTICE (1886), Griffin's Patent Cases (1887), 10.

Annotation :—**Consd.** *Re* Johnson's Appln. (1909), 26 R. P. C. 780.

1253. Unnecessary amendments.]—Now the amendment is sought to be justified on two grounds. It is first stated that it is desirable to put in some proportions, but appct. does not wish to be limited to those proportions, but would prefer to insert a statement that he did not limit himself to those quantities. It would not make any difference in my decision whether the statement had been put in or not if I had been prepared to allow the amendment ; I should have allowed appct. to insert the limiting words or not as he thought desirable. The other point in respect of which the amendment is requested is as to the character of the alloy in which the aluminium may be introduced if not introduced pure. To allow either of these amendments would be highly dangerous, & I consider that no case has been made for them. The ground is stated to be that the patentee desires the principle upon which his invention is based to be fully understood. Now if it was an invention, & for this purpose I will assume that it was, or rather a discovery that aluminium when put into the molten iron lowered the boiling point in such a way that the iron became practically superheated instantaneously or within a short space of time I think that the specification discloses a very valuable invention. I cannot, of course, tell, & I have not the least idea whether that is the true state of things or whether this is a case in which a known scientific fact or principle has been patented. If the putting in the aluminium into the molten iron or steel was the proper subject-matter of an invention & was not a mere example of a known scientific fact, as far as I can judge the specification is sufficiently

Sect. 7.—Amendment: Sub-sect. 2, D. (d), & E. (a) (b) i. & ii.]

describes & claims the invention, but under any circumstances, whether that be so or not, it is the duty of the patentee to fulfil the condition of the patent & to file a proper & sufficient specification. Of course I am well aware that when a disclaimer is required it is because there is a defect upon the face of the specification, but in my opinion that defect must be one which must be consistent with the patentee intending to fulfil the condition of the grant by properly describing his invention, & I cannot see if that condition has been fulfilled in this case that the first amendment is required. The same observations apply to the second amendment (SIR RICHARD WEBSTER, A.C.).—*Re* NORDENFELT (1887), Griffin's Patent Cases (1887), 18.

1254. Striking out original claim—Substituting claim for subordinate arrangement.]—*Re* SERRELL'S PATENT (1888), 6 R. P. C. 101.

1255. Excision of some claim.]—A petition for the revocation of Alsop's Patent, No. 14006 of 1903, was presented by the Flour Oxidizing Co., Ltd., & in the course of the proceedings liberty was granted by the Ct. of Appeal to the Alsop Flour Process, Ltd., to apply at the Patent Office under Patents, Designs & Trade Marks Act, 1883 (c. 57), for leave to amend the specification by way of disclaimer. The co. then applied to the Comptroller-General for leave. The amendments proposed were to excise certain of the claims & parts of the description relating thereto, such description & claims purporting to relate to a certain result of the process described in the specification which result did not in fact actually occur. The application was opposed. The Comptroller allowed the application as far as the excision of the claims was concerned but refused that part of the application which related to the excision of parts of the description.—*Re* APPLICATION TO AMEND THE SPECIFICATION OF ALSOP'S PATENT (1907), 24 R. P. C. 684.

1256. Combination of separate claims into one claim.]—A patent was granted for "a telescope ladder for domestic & other purposes." The invention consisted of two distinct ladders of equal length, one drawing up out of the other by pulling a cord, both ends of which were attached to the inner or sliding ladder, which could be adjusted at any height by means of a lever bracket, on which any of the steps of the sliding ladder could rest, thus keeping that ladder fixed in its place. The specification claimed—"(*a*) The two ladders occupying the space of one only. (*b*) The ready means of working by the cord. (*c*) The simple bracket lever by which the ladder is secured at any required length." The patentee afterwards obtained leave to amend his specification, & he amended it by striking out the whole of the claims numbered (*a*), (*b*), (*c*), & substituting for them the following as his claim: "The combination in a telescope ladder as herein described of means for raising, lowering, & stopping, all as herein described, & shown in accompanying drawings." In an action for the infringement of the patent:—*Held:* upon the construction of the whole specification as it stood before the amendment, the claim was really for a combination, &, consequently, the amendment was only a "correction or explanation," within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 18, & did not "make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by" the original specification, &, consequently, the amendment did not render the patent invalid.—KELLY *v.* HEATHMAN (1890), 45 Ch. D. 256; 60 L. J. Ch. 22; 63 L. T. 517; 39 W. R. 91; 7 R. P. C. 343.

Annotations:—**Distd.** *Re* Hattersley & Jackson's Patent (1904), 21 R. P. C. 233. **Refd.** *Re* Goltstein's Appln. (1910), 27 R. P. C. 289.

1257. ——.]—*Re* GOLTSTEIN'S APPLICATION, No. 8, *ante*.

1258. Amendment of letter press or drawings—Addition of new drawings.]—*Re* LANG'S PATENT (1890), 7 R. P. C. 469.

Annotation:—**Consd.** *Re* Owen's Patent, [1899] 1 Ch. 157.

1259. Substitution of distinctive matter—Invention anticipated by previous patent.] — Appct. whose claim as originally drawn is anticipated by the patent relied on by the opponent, but whose specification contains something that may distinguish his alleged invention from such patent will not be allowed to amend his claim by substituting such distinctive matter.—*Re* MILLS'S APPLICATION (1901), 18 R. P. C. 322.

1260. Excision of parts of description.] — *Re* APPLICATION TO AMEND THE SPECIFICATION OF ALSOP'S PATENT, No. 1255, *ante*.

1261. Explanation distinguishing invention from prior patent.] — *Re* SEFTON-JONES' APPLICATION (1918), 36 R. P. C. 23.

E. Conditions Imposed on Allowing Amendments.

(a) Jurisdiction of Court to Impose Conditions.

See Patents & Designs Acts, 1907 (c. 29), ss. 21 (5), 22; 1919 (c. 80), Sched. R. S. C., Ord. 53A, r. 21.

1262. Discretion of court.] — *Re* HEARSON'S PATENT, No. 1285, *post*.

1263. ——.]—ALLEN *v.* DOULTON & Co. (1887), 3 T. L. R. 655; 4 R. P. C. 377, C. A.

Annotations:—**Apld.** Lang *v.* Whitecross Co. (1889), 62 L. T. 119. **Refd.** Gaulard *v.* Lindsay (1888), 38 Ch. D. 38.

1264. ——.]—An application to amend the specification of a patent was opposed mainly on the ground of alleged want of *bona fides* in appcts. Special terms were asked for by opponents:—*Held:* there was power to impose special terms by way of condition.—*Re* AINSWORTH'S PATENT (1896), 13 R. P. C. 76.

Annotation:—**Refd.** Notes of Rulings by the Comptroller-General, 1911 (A) (1911), 28 R. P. C. App. i.

1265. ——.]—Opposition by H. to an application by S. S. M. W., Ltd., for leave to amend a specification. Contention by H. that the amendment if allowed, should be allowed only on condition that the amended specification be not used in an infringement action commenced by S. S. M. W., Ltd., against H. after the application for leave to amend. Certain amendments were allowed by the Comptroller-General unconditionally. The opponent appealed to the Law Officer:—*Held:* the decision of the Comptroller-General was right.—*Re* DAVIES & DAVIES' PATENT (1910), 28 R. P. C. 50.

1266. —— **When subject to review.**] — The owners of a patent brought an action for infringement against defts. After delivery of the defence pltfs. sought for leave to apply at the Patent Office to amend their specification by way of disclaimer under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 19. The judge at chambers gave leave to apply & to put the amended specification in evidence on condition that no damages be recovered, or claim for injunction founded on anything done before disclaimer, the costs of the action up to the time, if disclaimer used, to be, deft.'s costs in the cause; the costs of the application & the costs caused in the action by the disclaimer to be deft.'s in any event, proceedings to

be stayed pending the disclaimer:—*Held:* under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 19, the judge had the widest possible discretion as to the terms on which leave to apply for amendment should be granted, & that discretion should not be interfered with unless it had been exercised on absolutely wrong grounds, & in the present case it seemed to have been exercised properly.—LANG *v.* WHITECROSS WIRE & IRON CO. (1890), 7 R. P. C. 389, H. L.

1267. —— ——.]—*Re* ALLISON'S PATENT, No. 1216, *ante*.

1268. —— ——.]—In a proceeding for revocation of a patent, the Ct. of Appeal will not review the exercise by a judge of the discretion given to him by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 19, as to the terms & conditions of an order for revocation where the judge has exercised his discretion with a full knowledge of all the circumstances of the case.—*Re* GEIPEL'S PATENT, [1904] 1 Ch. 239; 73 L. J. Ch. 215; 90 L. T. 70; 52 W. R. 339; 48 Sol. Jo. 245; 21 R. P. C. 379, C. A.

Annotations:—**Refd.** *Re* Alsop's Patent, [1906] 1 Ch. 85; *Re* Klaber & Steinberg's Letters Patent (No. 2) (1907), 24 T. L. R. 482; *Re* Klaber & Steinberg's Patent, [1908] 1 Ch. 847; Gillette Safety Razor Co. *v.* Luna Safety Razor Co., [1910] 2 Ch. 373.

(*b*) *What Conditions may be Imposed.*

i. *Amended Specification Not Receivable in Evidence.*

1269. Whether condition imposed.]—Pltf. in the action applied under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 19, for liberty to apply at the Patent Office for leave to amend the specification of his patent by way of disclaimer, & that in the meantime the trial of the action might be postponed. It appeared that pltf. had previously made an application to the Comptroller for leave to disclaim which was refused on the ground that the action was pending, & no leave to disclaim had been obtained from the ct.:—*Held:* the liberty applied for should be granted upon the terms that the specification when amended should not be given in evidence at the trial of the action, & that no evidence should be given of any infringement prior to the date of the filing of the amended specification, & that the costs of the motion & of the previous application to the Comptroller, & thrown away by reason of the amendment, be paid by pltf.—*Re* CODD'S PATENT, CODD *v.* BRATBY & HINCLIFFE (1884), 1 R. P. C. 209; Griffin's Patent Cases (1884–1886), 56.

1270. ——.]—ALLEN *v.* DOULTON & CO., No. 1263, *ante*.

1271. ——.]—Where pltf. in an action for infringement of a patent asks for leave to apply at the Patent Office to amend his specification by way of disclaimer, the ct. will as a general rule impose the condition that the amended specification shall not be receivable in evidence in the action, though in particular cases less stringent terms may be imposed.—BRAY *v.* GARDNER (1887), 34 Ch. D. 668; 56 L. J. Ch. 497; 56 L. T. 292; 35 W. R. 341; 3 T. L. R. 352; 4 R. P. C. 40, C. A.

Annotations:—**Consd.** Allen *v.* Doulton (1887), 3 T. L. R. 655; Gaulard *v.* Lindsay (1888), 38 Ch. D. 38. **Refd.** Lang *v.* Whitecross Co. (1889), 62 L. T. 119.

ii. *Payment of Costs.*

1272. Whether condition imposed.]—ALLEN *v.* DOULTON & CO., No. 1263, *ante*.

1273. —— **Costs of motion—& previous application.**]—*Re* CODD'S PATENT, CODD *v.* BRATBY & HINCLIFFE, No. 1269, *ante*.

1274. —— —— **& action.**]—Pltfs. in 1883 began an action in the Palatine Ct. for infringement of their patent, & after the pleadings were closed moved, in 1884, for liberty to apply to the Patent Office under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, for leave to amend their specification by way of disclaimer:—*Held:* (1) the Palatine Ct. has jurisdiction to entertain such a motion; (2) such a motion could be made in an action commenced before the Act came into operation; (3) the liberty moved for ought to be granted upon pltfs. paying defts. the taxed costs of the motion & of the action, up to & inclusive of the hearing of the motion; (4) the proceedings in the action should be stayed pending the application to the Patent Office.—WINTER & IVERS *v.* BAYBUT, MADELEY & CO. (1884), 1 R. P. C. 76.

1275. —— —— ——.]—In a patent action for infringement, after all the pleadings had been delivered so that nothing remained to be done but to prepare the evidence for trial, pltfs. asked, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 19, for liberty to apply for leave to disclaim one of the claims of their specification. The application was granted on the following terms: (1) Pltfs. to pay in any event the costs of the application, & the costs of action up to & occasioned by the disclaimer, except only so far as the proceedings in the action might be utilised for the purposes of the amended action.

(2) Pltfs. & defts. to be allowed to make all necessary amendments in their pleadings after disclaimer. (3) Pltfs. to undertake forthwith to amend their pleadings, confining the action to the specification as amended by the disclaimer or to consent to the action being dismissed with costs. (4) In the event of trial all other questions of costs reserved.—HASLAM FOUNDRY & ENGINEERING CO. *v.* GOODFELLOW (1887), 37 Ch. D. 118; 57 L. J. Ch. 245; 57 L. T. 788; 36 W. R. 391.

Annotations:—*As to* (1) **Refd.** Ludington Cigarette Machine Co. *v.* Baron Cigarette Machine Co. (1900), 82 L. T. 173. *Generally*, **Refd.** Goulard *v.* Lindsay (1888), 59 L. T. 44; Lang *v.* Whitecross Co. (1889), 62 L. T. 119.

1276. —— —— ——.]—LANG *v.* WHITECROSS WIRE & IRON CO., No. 1266, *ante*.

1277. —— ——.]—In 1903 a patent was granted for "Improvements in or connected with appliances used in manifold writing," & in 1904 an injunction was granted against the M. co. in an action for the infringement of the patent. In 1911 a petition for revocation of the patent was presented by the M. co., ltd., the successors in business of the M. co. The patentees applied for leave to make certain amendments in their specification, & an order was made that they should be at liberty to proceed with their application. At the hearing of the application, the M. co. ltd. contended that leave ought not to be given, except upon condition that the injunction should be dissolved, & on other terms:—*Held:* appcts. should have leave to amend upon the terms of paying the costs of the application, & upon other terms specified, including an undertaking to submit to a dissolution of the injunction.—*Re* KENRICK & JEFFERSON'S APPLICATION (1911), 29 R. P. C. 25.

1278. —— **Defendant's party & party costs.**]—On a motion under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, by pltfs. in an action for infringement of their patent dated in 1885, for liberty to apply at the Patent Office for leave to amend their specification by disclaimer, an order was made granting the leave asked for on the following terms, no statement of claim or defence having yet been delivered:—(1) No further proceedings to be taken in the action until the disclaimer had been properly made, &, if so made, pltfs. to pay defts.' party & party costs of the action up to disclaimer; (2) pltfs. to undertake

Annotation :—**Reld.** *Re* Alsop's Patent, [1906] 1 Ch. 85.

1281. ——— ———.]—As a general rule the ct. will not in the exercise of its discretion in allowing an amendment of a patent under Patents & Designs Act, 1907 (c. 29), s. 22, impose a condition, in the absence of special circumstances, preventing appct. from maintaining any actions whatever in respect to matters prior to the date at which leave to amend is given ; but it will in some cases declare that, in addition to the restriction on recovery of damages provided by Patents & Designs Act, 1907 (c. 29), s. 23, the patentee shall not sue for an injunction in respect of the use of the invention before disclaimer, unless he establishes that his original claim was framed in good faith & with reasonable skill & knowledge.

Pltfs. in an action for infringement of their patent applied by motion for an order that they might be at liberty to amend their specification by way of disclaimer & that the specification so amended might be used in evidence at the trial of the action upon such terms as the ct. might think fit. On Nov. 26, 1909, an order was made by consent whereby, pltfs. undertaking not to proceed with &, if required, to consent to orders staying (pending the application) all proceedings in all their other pending actions for infringement of their patent, & to abide by the order of the ct. as to the terms which the ct. might thereafter think fit to impose as to the matters mentioned in R. S. C., Ord. 53A, r. 23 (*b*), including terms as to the costs of the action & all the other pending actions for infringement of the patent, & not in the meantime to threaten actions for infringement, & to give notice of this order to all defts. in the other pending actions for infringement, the ct. ordered that appcts. should be at liberty to proceed with their application for leave to amend, & that the application should be heard on affidavit evidence. The application now came on for hearing :—*Held :* (1) the proposed amendments came within Patents & Designs Act, 1907 (c. 29), s. 22, & they ought to be allowed upon the terms that appcts. should pay the costs of & occasioned by the application to amend, including costs of persons who had served notice of opposition under R. S. C., Ord. 53A, r. 23 ; (2) by consent all the other pending actions for infringement brought by appcts. should be discontinued, with the usual

See Patents & Designs Act, 1907 (c. 29), s. 23 ; Patents & Designs Act, 1919 (c. 80), s. 20, sched.

1283. Infringement prior to amendment.]—*Re* NICKEL'S PATENT (1843), 2 L. T. O. S. 245.

1284. ———.]—*Re* HARRISON'S PATENT (1853), Macr. 32.

1285. ———.]—*Re* HEARSON'S PATENT (1884), Griffin's Patent Cases (1884–1886), 309 ; 1 R. P. C. 213.

Annotation :—**Reld.** *Re* Ashworth (1886), Griffin's Patent Cases (1884–1886), 6.

1286. ———.]—GAULARD *v.* LINDSAY, No. 1282, *ante*.

1287. ———.]—LANG *v.* WHITECROSS WIRE & IRON CO., No. 1266, *ante*.

1288. ———.]—Under the peculiar circumstances of this case I think it would be right further to order, that if the specification be amended, no action shall be brought for infringement of the patent in respect of any guns or parts of guns made prior to the date when the hearing of this appeal was concluded (LORD HERSCHELL).—DEELEY *v.* PERKES, [1896] A. C. 496 ; 65 L. J. Ch. 912 ; 75 L. T. 233 ; 12 T. L. R. 547 ; 13 R. P. C. 581, H. L.

Annotations :—**Consd.** Ludington Cigarette Machine Co. *v.* Baron Cigarette Machine Co., [1900] 1 Ch. 508 ; *Re* Geipel's Patent, [1903] 2 Ch. 715. **Reld.** *Re* Dellwick's Patent, [1896] 2 Ch. 705 ; Shoe Machinery Co. *v.* Cutlan, [1896] 1 Ch. 108 ; *Re* Justice's Patent (1901), 18 R. P. C. 241 ; *Re* Ralston's Patent, *Re* Preston & Ralston's Patent (1909), 100 L. T. 386 ; Porter *v.* Freudenberg, Kreglinger *v.* Samuel & Rosenfold, *Re* Morton's Patents, [1915] 1 K. B. 857.

1289. ———.]—*Re* ALLISON'S PATENT, No. 1216, *ante*.

1290. ———.]—The owners of a patent for a machine having brought an action for its infringement, defts. presented a petition for its revocation. Pltfs. then asked for liberty to apply at the Patent Office for leave to amend their specification by way of disclaimer :—*Held :* under the special circumstances of the case, the ct. in giving the liberty asked for, ought to impose the condition that pltfs. should not bring or maintain any action for infringement of the patent in respect of any machines or parts of machines made prior to the date of the order.—LUDINGTON CIGARETTE MACHINE CO. *v.* BARON CIGARETTE MACHINE CO., *Re* PITT'S PATENT, [1900] 1 Ch. 508 ; 69 L. J. Ch. 321 ; 82 L. T. 173 ; 48 W. R. 505 ; 44 Sol. Jo.

293 ; 17 R. P. C. 215, C. A. ; *on appeal*, 17 R. P. C. 745, H. L.

Annotations :—**Refd.** *Re* Allison's Patent (1900), 17 R. P. C. 298 ; *Re* Geipel's Patent, [1903] 2 Ch. 715 ; Jandus Arc Lamp & Electric Co. *v.* Arc Lamp Co. (1903), 21 R. P. C. 115.

1291. ——.]—CORRIGALL *v.* ARMSTRONG, WHITWORTH & Co. (1903), 20 R. P. C. 523.

1292. ——.]—*Re* GEIPEL'S PATENT, No. 1268, *ante*.

1293. ——.]—*Re* KLABER & STEINBERG'S PATENT, No. 1196, *ante*.

1294. —— **Discretion of court.**]—GILLETTE SAFETY RAZOR CO. *v.* LUNA SAFETY RAZOR CO., No. 1281, *ante*.

1295. —— **Condition not confined to present opponents.**]—All the provisoes in Patent Law (Amendment) Act, 1852 (c. 83), s. 39, are, I think, intended to be enactments & I am of opinion that this sect. applies to all cases, & that it is for the law officer to certify in his fiat, should he so think fit, that an action may be brought in respect of infringements prior to the filing of the disclaimer ; but I shall only allow this disclaimer upon condition that an undertaking be given that no action shall be brought in respect of anything done prior to the hearing of this application for the disclaimer. This undertaking must be in the usual form, & must be general enough to include not only the present opponents, but every one. All are entitled to the same immunity, but I cannot go so far as to prevent the patentee from bringing an action in respect of any infringement committed after this date.—*Re* SMITH'S DISCLAIMER (1855), Macr. 232.

1296. —— **On opponent furnishing statement of articles in use.**]—*Re* WESTINGHOUSE'S PATENT (1885), Griffin's Patent Cases (1884–1886), 315.

1297. —— ——.]—I do not see why lamps made prior to Jan. 1 & unsold should not be protected. If the opponents had been making lamps after notice that the patentee was going to disclaim, there would be a great deal to be said for not protecting lamps in stock. But, supposing before they had any idea of any disclaimer on the part of the patentee, & at a time when the patentee could not have stopped it under his patent, the opponents had made lamps *bonâ fide*, they would now be left on their hands as useless, & they would be put to expense, so the equity of the thing would seem to be rather in favour of their being protected (SIR F. HERSCHELL, S.-G.). —*Re* CHEESBROUGH'S PATENT (1884), Griffin's Patent Cases (1884–1886), 303.

1298. —— **Protection of continued user of infringing articles.**]—*Re* CHEESBROUGH'S PATENT, No. 1297, *ante*.

1299. —— —— **User by trade & by public.**]—GILLETTE SAFETY RAZOR CO. *v.* LUNA SAFETY RAZOR CO., No. 1281, *ante*.

1300. —— **Protection of sale of unsold infringing articles.**]—*Re* CHEESBROUGH'S PATENT, No. 1297, *ante*.

1301. —— **Whether necessary condition.**]—*Re* ASHWORTH (1886), Griffin's Patent Cases (1837), 6.

Annotation :—**Refd.** *Re* Davies & Davies' Patent (1910), 28 R. P. C. 50.

1302. —— **Action for damages.**] — GILLETTE SAFETY RAZOR CO. *v.* LUNA SAFETY RAZOR CO., No. 1281, *ante*.

1303. —— **Action for injunction—Original claim passed in good faith—With reasonable skill & knowledge.**]—GILLETTE SAFETY RAZOR CO. *v.* LUNA SAFETY RAZOR CO., No. 1281, *ante*.

1304. Infringement after amendment.] — *Re* SMITH'S DISCLAIMER, No. 1295, *ante*.

1305. Abandonment of pending action.] — *Re* NICKEL'S PATENT (1843), 2 L. T. O. S. 245.

1306. Action during continuance of patent.]—*Re* MEDLOCK'S PATENT (1865), cited in Halsbury's Laws of England, Vol. XXII, p. 172.

iv. *Stay or Discontinuance of Proceedings.*

1307. Proceedings for infringement—Stay.]—WINTER & IVERS *v.* BAYBUT, MADELEY & CO., No. 1274, *ante*.

1308. —— ——.]—FUSEE VESTA CO. *v.* BRYANT & MAY, LTD., No. 1278, *ante*.

1309. —— **Discontinuance.**]—GILLETTE SAFETY RAZOR CO. *v.* LUNA SAFETY RAZOR CO., No. 1281, *ante*.

v. *Other Cases.*

1310. Limitation of pending action to amended specification.]—HASLAM FOUNDRY & ENGINEERING CO. *v.* GOODFELLOW, No. 1275, *ante*.

1311. ——.]—FUSEE VESTA CO. *v.* BRYANT & MAY, LTD., No. 1278, *ante*.

1312. Diligent prosecution of proceedings to amend.]—FUSEE VESTA CO. *v.* BRYANT & MAY, LTD., No. 1278, *ante*.

1313. ——.]—*Re* GAULARD & GIBBS' PATENT, No. 1279, *ante*.

1314. Amendment of pleadings after disclaimer.] —HASLAM FOUNDRY & ENGINEERING CO. *v.* GOODFELLOW, No. 1275, *ante*.

1315. No proceedings to be threatened—Pending application.]—*Re* ANDREWS' PATENT, ALSOP FLOUR PROCESS, LTD. *v.* FLOUR OXIDIZING CO., LTD. (1908), 25 R. P. C. 477, H. L.

Annotations :—**Consd.** Watson, Laidlaw *v.* Pott, Cassels & Williamson (1909), 26 R. P. C. 349. **Refd.** Flour Oxidising Co. *v.* Hutchinson (1909), 26 R. P. C. 597.

1316. Submission to dissolution of existing injunction.]—*Re* KENRICK & JEFFERSON'S APPLICATION, No. 1277, *ante*.

F. Effect of Amendment.

See Patents & Designs Act, 1907 (c. 29), s. 21 (7) ; Patents & Designs Act, 1919 (c. 80), s. 20, sched.

1317. Effect of disclaimer—On subsequent breach of injunction—Injunction granted before disclaimer.]—DUDGEON *v.* THOMSON, No. 1110, *ante*.

1318. —— **To render subsequent patent void.**]—A declaration stated the grant of letters patent, dated in 1836, to pltf., with the usual averment of the enrolment of a specification within six months ; that in 1844 pltf. disclaimed a part, & that after he had done so deft. infringed the part undisclaimed. Plea, that in 1840, & after the grant to pltf., but before his disclaimer, letters patent for certain improvements in water closets & stuffing boxes applicable to pumps were granted to B., who granted a licence to deft., & that the grievances complained of were the making, using, etc., the improvements in pumps, for which the letters patent were granted to B., & the licence was granted to deft. :—*Held :* (1) a patent granted after the date of a prior patent for the same thing, part of which is subsequently disclaimed, is void, inasmuch as the original patent is rendered valid from its original date by the disclaimer ; (2) the disclaimer only entitled the patentee to maintain actions in respect of acts done subsequently to the disclaimer.

Semble : the entering of a disclaimer is not an admission that the original patent was bad, as it

t. *Original specification voidable.*]—PEARSON *v.* SANATIVE CO. (1896), 14 N. Z. L. R. 548.—N.Z.

Sect. 7.—Amendment: Sub-sect. 2, F., G. & H. Part VII. Sect. 1.]

may be entered to obviate a doubt.—STOCKER *v.* WARNER (1845), 1 C. & B. 148; 14 L. J. C. P. 90; 4 L. T. O. S. 315; 9 Jur. 136; 135 E. R. 493.

1319. —— To entitle patentee to maintain action.]—STOCKER *v.* WARNER, No. 1318, *ante*.

1320. —— No admission original patent bad.]—STOCKER *v.* WARNER, No. 1318, *ante*.

1321. Original specification constituting valid patent—Damages for infringement prior to amendment.]—Pltf. brought an action for infringement of a patent for "improvement in distributing electricity, & in apparatus to be employed for that purpose." In pltf.'s system there were two dynamos in series, which supplied two systems of appliances consuming electricity placed also in series between the main conductors with a third conductor connecting a point between the dynamos with points between the two systems of consuming appliances. Pltf. contended that on the true construction of the specification his invention was confined to cases in which the electricity was supplied to the consumers at a constant pressure or potential. Defts. alleged that it included a case of two or more arc lamps in series, lighted by a current from two dynamos in series, with a third conductor joining a point between the dynamos to the conductor between the lamps in series, & that it had been anticipated. They also contended that the directions as to necessity of the dynamos being coupled rigidly were insufficient, & that a regulator which was also claimed would not work in certain cases, constructed as described in the specification:—*Held:* the patent was valid & defts. failed on all points; the specification was, in its unamended form, framed with reasonable skill & knowledge. The usual relief was granted with costs on the higher scale.—HOPKINSON *v.* ST. JAMES'S & PALL-MALL ELECTRIC LIGHTING CO. (1893), 9 T. L. R. 173; 10 R. P. C. 46.

1322. Amendment cannot be questioned—Except on grounds of fraud.]—MARSDEN *v.* MOSER, No. 1248, *ante*.

1323. ——.] — FARBENFABRIKEN VORM FR. BAYER & CO. *v.* BOWKER, No. 1212, *ante*.

1324. Amended specification takes place of original.]—Where, in an action for infringement of their patent, patentees have amended the original specification by way of disclaimer under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 19, & established at the trial their claim for an infringement of the amended specification as it stands, the ct. will not, for the purpose of certifying under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 20, that the original specification was framed in good faith & with reasonable skill & knowledge, read the erased portions of the specification; to do so would be in effect to allow the plaintiffs to raise a fresh issue after judgment.—JANDUS ARC LAMP & ELECTRIC CO., LTD. *v.* ARC LAMPS, LTD. (1905), 92 L. T. 447; 21 T. L. R. 308; 22 R. P. C. 277.

1325. ——.]—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* FUSSELL (A.) & SONS, LTD., No. 969, *ante*.

1326. ——.]—Where the writ in an action for infringement of a patent is issued after the patentee has applied to the Comptroller for leave to amend his specification, & leave to amend is granted to him after the issue of the writ, the proper specification to put in evidence & to refer to at the trial as a description of the invention is the specification as it stands after amendment.—STEPNEY SPARE MOTOR WHEEL CO., LTD. *v.* HALL, [1911] 1 Ch. 514; 80 L. J. Ch. 391; 104 L. T. 665; 27 T. L. R. 283.

G. Time from which Amendment Operative.

1327. Whether retrospective.]—Where a patent is originally void, but amended under 5 & 6 Will. 4, c. 83, by filing a disclaimer of part of the invention, that act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer.—PERRY *v.* SKINNER (1837), 2 M. & W. 471; Murp. & H. 122; 6 L. J. Ex. 124; 1 Jur. 433; 1 Web. Pat. Cas. 250; 150 E. R. 843.

Annotation:—**Consd.** Stocker *v.* Warner (1845), 1 C. B. 148; R. *v.* Mill (1850), 10 C. B. 379; Wallington *v.* Dale (1852), 7 Exch. 888; Woolfe *v.* Automatic Picture Gallery, [1903] 1 Ch. 18. **Refd.** *Re* Sharp's Patent (1840), 3 Beav. 245; Stead *v.* Carey (1845), 1 C. B. 496; Mid. Ry. *v.* Pye (1861), 10 C. B. N. S. 179; Bray *v.* Gardner (1887), 34 Ch. D. 668.

1328. ——.]—*Re* LUCAS' DISCLAIMER (1854), Macr. 234.

1329. ——.]—On June 9, 1890, the Comptroller gave C. leave to amend a specification, on condition, to which C. had assented, that C. should not sue A., who had opposed the amendment, for any infringement committed before 1884. On June 11, C. brought an action against A. for infringements alleged to have been committed since 1883. Subsequently the Patent Office sent C. a form of undertaking to observe the condition. C. signed the form, & the amendment was formally made on Aug. 26:—*Held:* the specification must be treated as having been amended on June 9; the Comptroller was not, under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 18 (10), precluded, by reason of the pendency of the action, from formally completing the amendment; & the amended specification was admissible in evidence in the action.—ANDREW *v.* CROSSLEY, CROSSLEY *v.* ANDREW, [1892] 1 Ch. 492; 61 L. J. Ch. 437; 66 L. T. 571; 40 W. R. 586; 8 T. L. R. 344; 36 Sol. Jo. 291; 9 R. P. C. 165, C. A.

Annotations:—**Consd.** Stepney Spare Motor Wheel Co. *v.* Hall, [1911] 1 Ch. 514. **Refd.** Woolfe *v.* Automatic Picture Gallery (1902), 46 Sol. Jo. 633.

H. Costs.

1330. Costs of appeals—From refusal to allow amendment.]—*Re* MORGAN, No. 1219, *ante*.

1331. —— Second appeal—First appeal withdrawn.]—*Re* CHANDLER'S PATENT (1886), Griffin's Patent Cases (1884–86), 270.

1332. ——.]—*Re* HADDAN'S PATENT, No. 725, *ante*.

1333. Costs of proceedings to amend—Jurisdiction of law officer.]—A law officer of the Crown refusing leave to enter a disclaimer of part of the specification of a patent, under 5 & 6 Will. 4, c. 83, s. 1, has no jurisdiction to order appct. to pay costs.—KYNOCH *v.* NATIONAL ARMS CO., LTD. (1877), 37 L. T. 31; 26 W. R. 22, C. A.

1334. —— ——.]—*Re* PIETSCHMANN'S PATENT (1884), Griffin's Patent Cases (1884–86), 314.

1335. —— Second disclaimer.]—*Re* HADDAN'S PATENT, No. 725, *ante*.

1336. —— Proceedings caused by fault of patentee.]—*Re* ALLEN, No. 1247, *ante*.

1337. —— Comptroller's costs when appearing.]—*Re* KLABER & STEINBERG'S PATENT, No. 1196 *ante*.

Payment of costs as condition imposed on leave to amend.]—*See* Sub-sect. 2, E. (*b*) ii., *ante*.

Part VII.—Grant of Patent.

SECT. 1.—IN GENERAL.

See Patents & Designs Act, 1907 (c. 29), ss. 12, 13, 14, 37, 44; Patents & Designs Act, 1919 (c. 80), s. 5, sched.; Patents Rules, 1920, rr. 50, 51.

1338. Grant of two patents—Partial identity—Between existing & proposed patents.]—Where the law officer has reported that part of an invention for which a patent is sought is identical with part of an invention which is the subject of an existing patent, a second patent will not, except under special circumstances, be granted for that part, although the validity of the first patent is disputed.—*Ex p.* MANCEAUX (1870), 6 Ch. App. 272; 18 W. R. 1184, L. C.

Annotation:—**Refd.** *Ex p.* Sheffield (1872), 8 Ch. App. 237.

1339. —— Patent already granted to master—Priority of servant's provisional specification.]—Where a servant filed a provisional specification for an invention, after which the master filed a provisional specification for a similar invention, & subsequently filed a complete specification & obtained letters patent:—*Held:* under the circumstances, the Great Seal might be affixed to the latters patent for the servant's invention, & the letters patent might bear the date of his provisional specification.—*Ex p.* SCOTT & YOUNG (1871), 6 Ch. App. 274; 19 W. R. 425, L. C.

Annotation:—**Refd.** Saxby *v.* Hennett (1873), 28 L. T. 639.

1340. —— Of same date.]—Where rival appcts. had applied on the same day for patents, & had afterwards mutually agreed to withdraw opposition, letters patent, bearing date the day of application, were granted to one appct., although letters patent bearing that date had already been granted to the other.—*Re* GETHING (1874), 9 Ch. App. 633, L. C.

1341. —— To same applicant—For same invention.]—The Patents Acts do not appear to contemplate & provide for a situation such as has arisen in this case & I infer from the absence of provisions that it was not intended to allow one man to have two grants for the same invention. . . . To do so would lead to considerable public inconvenience & possibly to public damage (SIR THOMAS INSKIP, S.-G.).—*Re* DREYFUS' APPLICATIONS (1927), 44 R. P. C. 291.

1342. Grant of joint patent—Where not wholly invention of applicant.]—*Re* EADIE'S APPLICATION (1885), Griffin's Patent Cases (1884–1886), 279.

1343. Invention result of co-operation—Grant to one party—Prior application—Procedure for repeal.]—L. & W. were the inventors & patentees of certain machines, & were engaged in making experiments with them, when an accident happened, which suggested to both of them an improvement in the making of wheels. At the time of the accident neither expressed to the other any intention of acting upon what was so suggested, though they subsequently talked of an improvement, in furtherance of such suggestion. Two years afterwards L. applied for a patent, against the sealing of which W. entered a caveat:—*Held:* neither had a right to prevent the other from getting his patent sealed though the patent might be repealed by *sci. fa.*—*Re* LOWE'S PATENT (1856), 25 L. J. Ch. 454; 27 L. T. O. S. 49; 4 W. R. 429, L. C.

1344. Date of grant—Date of notice to proceed.]—In Mar. 1872, B. applied for letters patent for an invention for regulating heat. In Apr. C. applied for letters patent for an invention of a pyrometer. B. gave notice of his intention to proceed on May 21. Letters patent for C.'s invention were sealed on May 22, & on May 29 he entered a caveat against B. In Sept. B. presented a petition to have the Great Seal affixed to letters patent for his invention, & that they might bear date Mar. 30, 1872. That petition was now heard:—*Held:* the two inventions differed materially, although there was reasonable ground for supposing that B.'s specification covered part of C.'s invention; B. might have his letters patent bearing date May 21, the day when he gave notice to proceed.—*Ex p.* BAILEY (1872), 8 Ch. App. 60; 42 L. J. Ch. 264; 27 L. T. 430; 21 W. R. 31, L. C.

Annotation:—**Refd.** Kurtz *v.* Spence (1887), 58 L. T. 438.

1345. —— Date of application—Unaffected by prior sealing.]—Two patents for the same invention were applied for on July 20, & July 23, 1867, respectively. The patent applied for on July 23 was actually sealed before that applied for on July 20, but each patent was dated as of the day of application:—*Held:* under Patent Law Amendment Act, 1852 (c. 83), s. 24, the patents took effect as upon the days on which they were applied for respectively, & therefore acts done by virtue of the patent applied for on July 22 were infringements of the patent applied for on July 20. —SAXBY *v.* HENNETT (1873), L. R. 8 Exch. 210; 42 L. J. Ex. 137; 28 L. T. 639; 22 W. R. 16.

1346. —— Date of patent—Not date of seal.]—By Patent Law Amendment Act, 1852 (c. 83), s. 25, it is enacted that where foreign letters patent are granted for a foreign invention before the grant of a patent for such invention in the United Kingdom, the rights under the English patent shall cease on the determination of the foreign patent. An English patent for a foreign invention was dated Sept. 17, but sealed on Dec. 17, & between the two dates a foreign patent was granted:—*Held:* the patent must be taken to have been

PART VII. SECT. 1.

a. *Interpretation of grant.*]—The granting of letters patent to inventors is not the creation of an unjust monopoly, nor the concession of a privilege by mere gratuitous favour, but it is a contract between the State & the discoverer, which, in favour of the latter, ought to receive a liberal interpretation.—BARTER *v.* SMITH (1877), 2 Exch. C. R. 455.—**CAN.**

b. *Delivery of model—Time for—Whether before or after grant.*]—35 Vict. c. 26 (D) does not require delivery of a model prior to the issue of a patent of invention.—R. *v.* SMITH (1885), 7 O. R. 440.—**CAN.**

c. *Exclusive jurisdiction of Minister of Agriculture—To decide upon expiration of patent.*]—TELEPHONE MANUFACTURING CO. OF TORONTO *v.* BELL TELEPHONE CO. OF CANADA (1886), 18 R. L. O. S. 463; 9 L. N. 27.—**CAN.**

d. *Presumption of validity of subject-matter of patent.*]—The issue of a patent of invention raises a presumption in favour of the patentee that the article is a valid subject-matter of a patent. The *onus* of proof is on the party who attacks the patent to establish the contrary.—ELECTRIC FIRE-PROOFING CO. *v.* ELECTRIC FIRE-PROOFING CO. OF CANADA (1907), Q. R. 31 S. C. 34.—**CAN.**

e. *Whether Patent Act, 1923, retroactive.*]—DANNER *v.* UNITED DRUG CO., [1924] Exch. C. R. 141.—**CAN.**

f. *Application of Patents Act, 1870.*]—Sect. 8 of the above Act requiring every invention protected by letters patent issued under the Act to be brought into actual & public use within the colony within the space of two years from the date of such letters patent, applies to an invention protected by letters of registration (issued under sect. 20 of the Act) of letters patent issued in some other country.—BRISCOE & CO. *v.* WASHBURN & MOEN MANUFACTURING CO. (1891), 10 N. Z. L. R. 85.—**N.Z.**

granted on Sept. 17, & therefore that sect. 25 was not applicable.—HOLSTE *v.* ROBERTSON (1876), 4 Ch. D. 9; 46 L. J. Ch. 1; 35 L. T. 457; 25 W. R. 35, C. A.

1347. Contemporaneous applications—Priority of patent first sealed.]—*Ex p.* DYER (1812), Holroyd on Patents, 59, n.

1348. Refusal to seal—Effect of.]—Unless a patent is clearly bad, the L. C. will not refuse to seal it, as the effect of such refusal, if erroneous, would be irremediable, whereas the sealing of a bad patent leaves everyone at liberty to dispute it. —*Re* SPENCE'S PATENT (1859), 3 De G. & J. 523; 32 L. T. O. S. 326; 7 W. R. 157; 44 E. R. 1370, L. C.

1349. Delay in sealing—Not caused by opposition —Or by appeal.]—Sealing of patent after the proper time had elapsed under Patent Law Amendment Act, 1852 (c. 83), s. 20. Though the delay in sealing the patent was not caused by a caveat, or by an application to the Lord Chancellor within the terms of the provisions contained in Patent Law Amendment Act, 1852 (c. 83), s. 20, the Lord Chancellor considered that he might, in this case, order it to be sealed, special circumstances having brought it within them according to an equitable construction of the Act.—*Re* MACINTOSH'S PATENT (1856), 28 L. T. O. S. 280; 2 Jur. N. S. 1242; 5 W. R. 194, L. C.

1350. —— —— ——.]—*Re* NOVOCRETES, LTD., CASE, & GARROW'S APPLICATION, No. 709, *ante*.

1351. —— **Applicant's carelessness.**]—*Re* A. & B.'S APPLICATION (1896), 13 R. P. C. 63.

1352. —— **Delay purposely caused—For ulterior object.**]—*Re* A. B.'S APPLICATION (1902), 19 R. P. C. 556.

SECT. 2.—OPPOSITION TO GRANT.

SUB-SECT. 1.—WHO MAY OPPOSE.

See Patents & Designs Act, 1907 (c. 29), s. 11 (1); Patents & Designs Act, 1919 (c. 80), s. 4.

1353. Question for law officer.] — (1) The question whether a person who has, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 11 (1), given notice of opposition to the grant of a patent on the ground that the alleged invention has been patented in this country on an application of prior date, may be heard before the Comptroller-General, is one to be decided ultimately by the law officer of the Crown.

(2) Where the Comptroller-General, after consulting the law officer, declined to hear such a person on the ground that he had no interest in the prior patent, the ct. refused to compel him by *mandamus* to do so.—R. *v.* COMPTROLLER-GENERAL OF PATENTS, [1899] 1 Q. B. 909; 68 L. J. Q. B. 568; 80 L. T. 777; 47 W. R. 567; 15 T. L. R. 310; 16 R. P. C. 233, C. A.

Annotations :—*As to* (1) **Apld.** R. *v.* Comptroller-General of Patents, *Ex p.* Muntz (1922), 38 T. L. R. 652. *Generally*, **Refd.** *Re* A. & B.'s Appln. (1910), 28 R. P. C. 454.

1354. Persons having interest—Member of the public.]—It seems to me to be perfectly clear from the Act that members of the public, as such, are not entitled to be heard in opposition before me. The Act expressly says that it must be the person giving notice, & being in the opinion of the law officer entitled to be heard in opposition, so that besides being a person who gives notice of opposition, you must also be a person who for some reason or other comes within the class of those persons entitled to be heard. It appears to me that by sect. 11 it is quite clear that the only class of persons who are entitled to be heard in opposition before the law officer are persons who are interested with a legitimate & real interest in the prior patent upon which an application is opposed, or persons who while they have not patented the invention have yet been the originators of it, from whom the person seeking the patent has obtained it. Therefore, I am sorry I must debar myself from hearing you on the substance of this application, by holding you are not a person entitled to be heard (CLARKE, S.-G.). —*Re* HEATH & FROST'S PATENT (1886), Griffin's Patent Cases (1884–1886), 288.

Annotations :—**Apld.** *Re* Hookham (1886), Griffin's Patent Cases (1887), 32. **Consd.** *Re* Bell (1887), Griffin's Patent Cases (1887), 10. **Foll'd.** *Re* Bairstow's Patent (1888), 5 R. P. C. 286. **Apld.** *Re* Stewart's Appln. (1896), 13 R. P. C. 627. **Consd.** R. *v.* Comptroller-General of Patents, *Ex p.* Tomlinson (1899), 68 L. J. Q. B. 568.

1355. —— ——.]—*Re* BELL (1887), Griffin's Patent Cases (1887) 10.

Annotation :—**Refd.** R. *v.* Comptroller-General of Patents, *Ex p.* Tomlinson (1899), 16 R. P. C. 233.

1356. —— ——.]—I should not allow any person who merely comes forward as one of the public to claim to strike out certain paragraphs of a specification on the ground that it was included in a prior patent in which he had no interest (WEBSTER, A.-G.).—*Re* HOOKHAM (1886), Griffin's Patent Cases (1887), 32.

Annotations :—**Apld.** *Re* Stewart's Appln. (1896), 13 R. P. C. 627. **Consd.** R. *v.* Comptroller-General of Patents, *Ex p.* Tomlinson (1899), 68 L. J. Q. B. 568.

1357. —— **In patent applied for—Or prior identical patent.**]—R. *v.* COMPTROLLER-GENERAL OF PATENTS, No. 1353, *ante*.

1358. —— **In prior patents.**]—*Re* BELL, No. 1355, *ante*.

1359. —— —— **Existing or lapsed.**]—(1) Persons properly appearing before the Comptroller or the law officer to oppose may rely in support of their opposition upon specifications other than those in which they are interested.

(2) The persons entitled to be heard before the law officer, on appeal, in opposition to a grant, are the same as those entitled to be heard, on appeal, before the Comptroller.

(3) Prior patents on which an opposition is based may be subsisting, or may have lapsed or expired.

(4) Person entitled to appear & oppose must have, or have had, an interest in patents existing or lapsed.—*Re* STEWART'S APPLICATION (1896), 13 R. P. C. 627.

Annotations :—*As to* (1) **Consd.** Ruling of the Comptroller-General, 1911 (B) (1911), 28 R. P. C. App. iii. *As to* (4) **Consd.** R. *v.* Comptroller-General of Patents, [1899] 1 Q. B. 909.

1360. —— **Person intending to work expired patent.**]—Opposition to sealing on the grounds (*a*) that the invention had been obtained from the opponent, & (*b*) that the invention had been patented on application of prior date.—*Re* BAIRSTOW'S PATENT (1888), 5 R. P. C. 286.

Annotation :—**Refd.** Ruling by the Comptroller-General, 1911 (B) (1911), 28 R. P. C. App. iii.

g. *Effect of decision of Supreme Court.*]—A decision by the Supreme Ct., on appeal from the Registrar of Patents, under Patents, Designs & Trade Marks Act, 1889, s. 16, that the atent applied for ought to be granted, has the same effect only as a similar decision by the Registrar unappealed against, *i.e.* it amounts only to a decision that a sufficient *primâ facie* case has been made out for sealing the grant, & leaves appct. in a position of having to litigate the validity of the grant against all comers, including the person who has under sect. 16 opposed the application.—*Re* CAMPBELL'S APPLICATION (1891), 10 N. Z. L. R. 197.—**N.Z.**

1361. —— Prior complete specification accepted.]—*Re* L'OISEAU & PIERRARD (1887), Griffin's Patent Cases (1887), 36.

Annotations :—**Apld.** *Re* Main's Patent (1888), 7 R. P. C. 13. **Refd.** Ruling by the Comptroller-General, 1912 (A) (1912), 29 R. P. C. App. i.

1362. —— Manufacturing interest — Within specification.]—*Held :* the opponents had established such a manufacturing interest that they were entitled to oppose under Patents & Designs Act, 1907 (c. 29), s. 11 (1) (*b*). *Locus standi* to oppose a grant must be allowed to any one who gives proof of the *bonâ fide* manufacture of an article or carrying on of a process which *primâ facie* appears to come within the claims of the specification.—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1911 (B) (1911), 28 R. P. C. App. iii.

Annotation :—**Refd.** Notes of Rulings by the Comptroller-General, 1912 (B) (1912), 29 R. P. C. App. v.

1363. —— ——.]—Opposition to sealing of patent on the ground of the invention being comprised in prior patents by a person having no interest in such patents, but who had manufactured under one of them :—*Held :* such person was not entitled to oppose.—*Re* MACEVOY'S PATENT (1888), 5 R. P. C. 285.

Annotation :—**Consd.** Ruling by the Comptroller-General, 1911 (B) (1911), 28 R. P. C. App. iii.

1364. —— Trading interest—Real, definite, & substantial.]—A trading interest is sufficient to allow an opponent to be heard in opposition, provided the interest is real, definite & substantial. The question as to whether there is a real, definite & substantial interest must be decided on the facts of each case.—*Re* WHEELER'S APPLICATION (1925), 42 R. P. C. 509.

1365. —— Existing interest prejudicially affected.]—M. applied for a patent, the grant of which was opposed by T. on the ground that the alleged invention had been patented in this country on two applications of prior date—viz., one in 1879 & the other in 1897. T. had no legal or beneficial interest in the patents which were granted upon such applications. The Comptroller required evidence as to the facts, & it appeared that T. began to work under one of the prior patents, but being unable to continue without a license he stopped working, and under a search discovered the patent of 1879. He desired in his opposition to set up the contention that the invention, the subject of the present application, was identical with that described in the patents of 1879 & 1897. The Comptroller decided that the opponent had no right to be heard in opposition to the grant. On appeal, the Law Officer held that on the evidence the opponent was entitled to be heard A *bonâ fide* attempt to carry out the invention sought to be protected by a person who desires to oppose a patent, & proof that he may be damnified by the application which he desires to oppose, entitles such person to oppose the grant.—*Re* MEYER'S APPLICATION (1899), 16 R. P. C. 526.

Annotation :—**Apld.** Ruling by the Comptroller-General, 1911 (B) (1911), 28 R. P. C. App. iii.

1366. —— ——.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1912 (B) (1912), 29 R. P. C. App. v.

Annotation :—**Refd.** Notes of Rulings by the Comptroller-General, 1912 (C) (1912), 29 R. P. C. App. vii.

1367. —— ——.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1912 (C) (1912), 29 R. P. C. App. vii.

1368. —— Possessor of article for which patent claimed.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1913 (B) (1913), 30 R. P. C. App. iii.

1369. —— ——.]—On an opposition to the grant of a patent on grounds (*b*) & (*c*) of Patents & Designs Act, 1907 (c. 29), s. 11 (1), the Comptroller-General, following the broad principle laid down in Rulings 1912 (B) & 1912 (C) that any person, who is *bonâ fide* & honestly in possession of an article which may reasonably be held to fall within the scope or claims of the specification of the patent applied for, has a sufficient interest to oppose the grant of the patent, held that as in this case there was no reason for doubting that the opponent had become possessed of such an article in the ordinary course of business, he had a sufficient interest to be heard in opposition to the grant :—*Held :* although the interest which an opponent must show in order to bring himself within the class of persons qualified to oppose under Patents & Designs Act, 1907 (c. 29), s. 11, is not confined to what is called a manufacturing interest, the interest must be a real, definite, & substantial interest, & must not arise from something the opponent proposes to do. The mere fact that a man is in possession of a particular article said to be covered by the patent applied for is insufficient.—*Re* NEW THINGS, LTD.'S APPLICATION (1913), 31 R. P. C. 45.

1370. Purchaser of prior patent—Though patent expired.]—*Re* GLOSSOP'S PATENT, No. 1493, *post*.

1371. Prior applicant in United Kingdom.]—I am of opinion that the only persons who can oppose under these words patented, etc., are persons who have made an application in the United Kingdom of prior date to the date of appct.'s patent. It is said that that will not give full effect to sect. 103, & that the date of the French application must also be taken as being the date of the application in England for the purposes of all proceedings under the English patent law (WEBSTER, A.-G.).—*Re* EVERITT (1888), Griffin's Patent Cases (1887), 28.

1372. ——.]—Appcts. for a patent under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 103, sought to oppose, under sect. 11 of the Act, on the ground of prior patenting, an application for another patent made in this country at a date earlier than their application in this country, but later than the date claimed by them for their patent under sect. 103. The Chief Examiner, acting for the Comptroller-General, decided that the Act restricts opposition on the ground of prior patenting to an application in this country of prior date, held that the opponents had no *locus standi* to oppose, & dismissed the opposition :—*Held :* the application of prior date on which an opposition can be grounded means an application in this country.—*Re* JOHNSON'S APPLICATION (1907), 24 R. P. C. 694.

1373. ——.]—On opposition, under sect. 11 of the Patents, etc. Acts of 1883–1902, to the grant of a patent on the grounds that the invention had been obtained from the opponent in Germany, & was the subject-matter of applications of the opponent which, although made after the date of appct.'s application, were entitled under the International Convention to prior dates, the opposition was dismissed by Chief Examiner, acting for the Comptroller, on the ground that the opponent had no *locus standi*, & a patent was directed to be sealed. The opponent appealed from this decision so far as regards the first ground of opposition :—*Held :* the Chief Examiner's decision was right.—*Re* MEURS-GERKIN'S APPLICATION (1910), 27 R. P. C. 565.

Annotation :—**Apld.** Ruling by the Controller-General, 1912 (A) (1912), 29 R. P. C. App. i.

1374. Subsequent applicant for patent—Invention not included in provisional specification.]—

Sect. 2.—Opposition to grant: Sub-sects. 1 & 2, A. (a) & (b), & B. (a).]

Re ANDERSON & ANDERSON'S PATENT, No. 1475, *post.*

1375. —— In respect to same subject-matter.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1912 (C), No. 1367, *ante.*

1376. Legal representative—Assignee of prior patents.]—Opposition to sealing of patent by assignee of prior patents with benefit of improvements. Suggestion that the application included improvements of the inventions in the prior patents made by the prior patentee & communicated by him to appct. in fraud of his assignees. Opponents held not to be the legal representatives. —*Re* SPIEL'S PATENT (1888), 5 R. P. C. 281.

Annotations:—**Consd.** *Re* Gascoigne's Appln. (1909), 27 R. P. C. 78. **Refd.** *Re* McNeil & Pearson Fire Alarm's Appln. (1907), 24 R. P. C. 680.

1377. —— Person having power of attorney.]—*Re* EDMUNDS' PATENT, No. 70, *ante.*

SUB-SECT. 2.—GROUNDS OF OPPOSITION.

A. Invention Obtained from Opponent.

(a) In General.

See Patents & Designs Act, 1907 (c. 29), s. 11 (1) (*a*).

1378. Whether good ground of opposition—General rule.]—*Re* LOTT'S APPLICATION (1853), cited Halsbury's Laws of England, Vol. XXII. at p. 175.

1379. —— ——.]—*Re* MACFARLANE'S APPLICATION (1883), cited Halsbury's Laws of England, Vol. XXII. at p. 175.

1380. —— ——.]—*Re* MARSHALL'S APPLICATION (1888), 5 R. P. C. 661.

1381. ——.]—*Re* GRIFFIN'S APPLICATION (1888), 6 R. P. C. 296.

1382. —— Different method.]—*Re* ANDERTON (1886), Griffin's Patent Cases (1887), 25.

1383. —— Invention arrived at independently.]—*Re* ANDERSON & ANDERSON'S PATENT, No. 1475, *post.*

1384. What amounts to obtaining.]—I read those words ["obtained the invention" in Patents, Designs & Trade Marks Act, 1853 (c. 57), s. 11 (1)] to mean "obtained the invention which is purported to be patented," meaning thereby to refer to the identity of the invention, not the right of the person from whom it was obtained to be regarded as the first & true inventor (SIR RICHARD WEBSTER, A.-G.).—*Re* THWAITE'S APPLICATION (1892), 9 R. P. C. 515.

1385. ——.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (A) (1910), 27 R. P. C. App. i.

1386. ——.]—COMMERCIAL SOLVENTS CORPN. *v.* SYNTHETIC PRODUCTS CO., LTD. (1926), 43 R. P. C. 185.

1387. Addition to opponent's patent.] — *Re* PATERSON'S PATENTS, *Re* DUNDON'S PATENT (1886), Griffin's Patent Cases (1884–1886), 295.

1388. ——.]—*Re* DUNDON'S PATENT (1885), Griffin's Patent Cases (1884–1886), 278.

1389. Patent obtained by fraud—Fraud outside United Kingdom.]—*Re* HIGGINS' PATENT (1891), 9 R. P. C. 74.

1390. —— ——.]—Opposition to grant of patent for improvements in electric fire alarms & thermo-indicators on the grounds (*a*) that appcts. obtained the invention from the opponent, & (*b*) prior patenting of the invention. The Chief Examiner, acting for the Comptroller-General, decided to seal a patent. He held that he had no jurisdiction to enter into allegations of fraud abroad, & that the invention claimed by appcts. had not been patented on the prior application relied on by the opponent. The opponent appealed. The law officer affirmed the decision of the Chief Examiner on both grounds, & dismissed the appeal with costs.—*Re* MCNEIL & PEARSON FIRE ALARM, LTD.'S APPLICATION (1907), 24 R. P. C. 680.

1391. Incidental claim to opponent's patent—In applicant's specification—Order to erase or amend.]—Incidental reference by appct. in his specification to an invention of opponents, & untrue statement that it was his own. Contention by appct. that as that invention was not claimed by him, the opponents had no *locus standi*. The Comptroller-General refused to seal until the incorrect description & drawings were erased or amended. — *Re* HETHERINGTON'S APPLICATION (1890), 7 R. P. C. 419.

Annotation:—**Refd.** *Re* Wadham's Appln. (1909), 27 R. P. C. 172.

1392. Patent obtained abroad.] — *Re* LAKE'S PATENT (1888), 5 R. P. C. 415.

1393. ——.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1912 (A) (1912), 29 R. P. C. App. i.

1394. Novelty of invention—Prior specification to be considered.]—*Held:* (1) where an invention has been obtained from an opponent the novelty of such invention must be considered in the light of prior specifications; (2) the remedy will differ according to the importance or novelty of the part communicated, & may take the form either of giving a share of the patent to the opponent, or of deleting the part obtained from him, or making a complete disclaimer of such portion; (3) in the case of prior public user an opponent can have no personal remedy & the Comptroller's jurisdiction must be limited, where necessary, to confining appct. to his special improvements by a disclaimer or omission of the parts publicly used; (4) in the present case the opponent had a *primâ facie* right to some protection as the combination disclosed by a design which he had submitted to appcts. at their request, was novel, & had been incorporated by appcts. into their specification; (5) the opponent was not disentitled to protection because a machine made according to his design had been sold by him to applicants, & used at their instance, for some time at the Bolton Sewage Works; (6) having regard to the special facts appcts. must be restricted to claiming in their specification only the improvements they had made on the opponent's machine.—*Re* ASHTON & KNOWLES' APPLICATION (1910), 27 R. P. C. 181.

1395. Prior sale to applicant—Of machine made according to opponent's design.]—*Re* ASHTON & KNOWLES' APPLICATION, No. 1394. *ante.*

1396. Prior publication admitted by applicant.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1912 (E) (1912), 29 R. P. C. App. xi.

(b) Remedies of Opponent.

1397. Share of patent.] — *Re* ASHTON & KNOWLES' APPLICATION, No. 1394, *ante.*

1398. Deletion of part obtained.]—*Re* ASHTON & KNOWLES' APPLICATION, No. 1394, *ante.*

1381 i. *Whether good ground of opposition.*]—DUNLOP *v.* COOPER (1908), 7 C. L. R. 146.—**AUS.**

1399. Disclaimer of part obtained.]—*Re* ASHTON & KNOWLES' APPLICATION, No. 1394, *ante*.

1400. Effect of prior public user.]—*Re* ASHTON & KNOWLES' APPLICATION, No. 1394, *ante*.

B. Prior Publication.

(*a*) *Prior Specification.*

See Patents & Designs Acts, 1907 (c 29), s. 11, (1) (*b*); 1919 (c. 80), s. 4.

1401. Whether good ground of opposition—Only in clear cases.]—The simple question before me is, has Mr. McH. in his specification patented an invention similar to that which has been patented, in this country, on an application of prior date? Now, I have oftan expressed the opinion in my decisions that it is only in clear cases that the law officer is justified in interfering, so as to prevent letters patent from including a claim to an invention which is covered by an earlier specification; but in a clear case the law officer cannot avoid the responsibility of acting (SIR RICHARD WEBSTER, A.-G.).—*Re* MCHARDY'S PATENT (1891), 8 R. P. C. 431.

1402. —— Prior provisional specification.]—*Re* BAILEY'S PATENT (1884), Griffin's Patent Cases (1884–1886), 269.

1403. —— —— Where invention not described.]—Where the provisional specification of the prior patent does not describe the invention it might be unjust to appct. to refuse the grant. Dates of filing provisional & complete specifications to be carefully considered.—*Re* BARTLETT'S APPLICATION (1892), 9 R. P. C. 511.

1404. —— Prior patent granted—Though patent expired.]—It makes no difference whether the patent has expired or not. The Act allows an application for a patent to be opposed on the ground that the invention has been previously patented (SIR JOHN GORST, S.-G.).—*Re* LANCASTER'S PATENT (1884), Griffin's Patent Cases (1884–1886), 293.

Annotations:—**Refd.** *Re* Stewart's Appln. (1806), 13 R. P. C. 627; Notes of Rulings by the Comptroller-General, 1911 (B) (1911), 28 R. P. C. App. iii.

1405. —— —— ——.]—*Re* STEWART'S APPLICATION, No. 1359, *ante*.

1406. —— —— Though all parts of applicant's invention not included.]—The opponents' provisional was first in order of time, & therefore they were entitled to have their patent sealed as of the earlier date. It is said that the opponents have included in their complete [specification] subject-matter which was not in their provisional. If that is so, that is an objection to the validity of the opponents' patent, which will be available to appct. or to anybody else in the event of any proceedings being taken; but it is wholly impossible for me on the present application to alter, deal with, or interfere with the specification of the opponents' patent, as allowed. It may be a misfortune, but appct. is unfortunately in the position in which other appcts. have been. It may be that appct. will thereby lose the benefit of protection for something which he invented. That is a matter which I say again I cannot deal with. I can only deal with the application before me. Now, under sect. 11, if an application for a patent is opposed on the ground that the invention has been patented in this country on an application of prior date, the opposition to that extent will be successful if proved. It is not denied that the opponents' patent does not include the parts of appct.'s invention objected to. In fact his very fair argument before me is that the appeal is grounded not so much upon the reasons that those parts are not included by the opponents' patent, but that if the opponents' patent stands with its present specification appct. will not be able to get a patent for those particular parts. As I have said already, that may be a misfortune which has fallen upon him, but I cannot deal with it (SIR RICHARD WEBSTER, A.-G.).—*Re* GREEN'S PATENT (1885), Griffin's Patent Cases (1884–1886), 286.

1407. —— —— Where question of scientific anticipation.]—*Re* LAKE'S PATENT, No. 1452, *post*.

1408. —— ——.]—(1) Opposition to the grant of a patent on the ground that the invention had been patented upon applications of prior date. The Comptroller-General held that none of the claims could be allowed in their existing form, but permitted an amendment of one of them to more precisely define the invention, & then, subject to the insertion of a disclaimer, decided to seal a patent on the application:—*Held*: the Comptroller-General's decision be reversed & a patent be refused.

(2) A patent cannot be allowed for something absolutely different from what is described in the provisional specification.—*Re* LANCASTER'S APPLICATION (1902), 20 R. P. C. 366.

1409. —— Inventions identical.]—*Re* STUBBS' PATENT, No. 1512, *post*.

1410. —— Inventions substantially the same—Slight difference.]—*Re* CUMMING'S PATENT (1884), Griffin's Patent Cases (1884–1886), 277.

1411. —— ——.]—Where the law officer is forced to the conclusion that there is no substantial difference between the invention or combination described in appct.'s specification & an earlier specification, it has not only been the practice but it is the duty of the law officer to refuse the patent (SIR RICHARD WEBSTER, A.-G.).—*Re* TODD'S APPLICATION (1892), 9 R. P. C. 487.

1412. —— —— Mechanical equivalent.]—The only question before me is whether the matter which appct. brings forward as the subject of a patent is covered by the previous patent. In my opinion it is. It appears to me that the advantage of this joint is, to say the least of it, problematical, & I think it really is a mechanical equivalent, & is therefore covered by the words of the previous patent (SIR R. B. FINLAY, S.-G.).—*Re* WHITTAKER'S APPLICATION (1896), 13 R. P. C. 580.

1413. —— —— Mere lack of novelty not sufficient.]—It is not sufficient in order to stop a subsequent patent for an explosive that the range of proportions in a previous specification should be large enough to include what is sought to be patented. The main consideration for a patent is the information given to the public of the advantages possessed by the invention. A patent cannot be stopped merely on the ground that the

PART VII. SECT. 2, SUB-SECT. 2.—B. (a).

1402 i. *Whether good ground of opposition—Prior provisional specification.*]—MOORE & HESKETH *v.* PHILLIPS (1907), 4 C. L. R. 1411.—**AUS.**

1402 ii. —— ——.]—INTERNATIONAL HARVESTER CO. OF AMERICA *v.* PEACOCK (1908), 25 R. P. C. 765.—**AUS.**

1402 iii. —— ——.]—BARTER *v.* HOWLAND (1878), 26 Gr. 135.—**CAN.**

1402 iv. —— ——.]—A former patent, while in force, operates as a bar to the application for a new patent, & the only remedy open to appct., if he is in a position to invoke it, is to apply for a re-issue of the former patent.—*Re* LEONARD'S PATENT (1913), 13 E. L. R. 280; 14 D. L. R. 364; 14 Exch. C. R. 351; 49 C. L. J. N. S. 752.—**CAN.**

1402 v. —— ——.]—PERMUTIT CO. *v.* BORROWMAN (1926), 43 R. P. C. 356.—**CAN.**

h. —— *User in America before patentee's invention.*]—WRIGHT *v.* BRAKE SERVICE, LTD., [1926] 3 D. L. R. 502; [1926] S. C. R. 434.—**CAN.**

Sect. 2.—Opposition to grant: Sub-sect. 2, B. (a), (b) & (c) i.]

invention is not new.—*Re* NAHNSEN'S APPLICATION (1900), 17 R. P. C. 203.

Annotation :—**Refd.** Notes of Rulings by the Comptroller-General, 1911 (B) (1911), 28 R. P. C. App. iii.

1414. —— ——.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1912 (D) (1912), 29 R. P. C. App. ix.

1415. —— **Claim inviting public to infringe prior patent.**]—*Re* WEBSTER'S PATENT (1888), 6 R. P. C. 163.

1416. —— **Invention covered by combination of different specifications.**]—Where an opposition on the ground that the invention has been previously patented is supported by combining & piecing together claims in different specifications, a very clear case will be required to be made to stop the grant.—*Re* ROSS' PATENT (1891), 8 R. P. C. 477.

1417. —— ——.]—B. applied for a patent for a movable partition for schoolrooms, etc. The grant was opposed by W. The Comptroller held that the invention consisted of a combination of parts, all of which, taken separately, had been previously patented by the opponent & by others. He decided to seal a patent subject to amendment of the specification & claims. On appeal, the law officer held that there was no invention in putting the parts together in a combination where they were each only applied to what had been their original object.—*Re* BRIDGE'S APPLICATION (1901), 18 R. P. C. 257.

Annotations :—**Distd.** *Re* Fried-Krupp Akt. Germaniawerft's Appln. (1908), 25 R. P. C. 809. **Refd.** Notes of Rulings by the Comptroller-General, 1911 (A) (1911), 28 R. P. C. App. i.

1418. —— ——.]—K. applied for a patent for improvements in ships or other vessels for carrying loose cargoes. The grant was opposed by M. on the ground that the invention had been patented on certain prior applications. The Comptroller held that as the subject-matter was of some magnitude there might be an invention of great practical value in combining known elements in the manner suggested. He decided to seal a patent, subject to the insertion of certain specific references or to amendment of the specification & claim.—*Re* FRIED KRUPP AKT. GERMANIAWERFT'S APPLICATION (1908), 25 R. P. C. 809.

1419. —— **Invention covered by prior specification—No special advantage shown.**]—*Held :* the patent should be refused, as no invention was shown in appcts.' process, for all they had done was to take one of many salts of chromium & one of many salts of iron from those covered by the opponent's specification, & no particular advantage was shown.—*Re* WYLIE & MORTON'S APPLICATION (1896), 13 R. P. C. 97.

Annotation :—**Apld.** *Re* Deutsche Gasglühlicht Akt. Appln. (1908), 26 R. P. C. 101.

1420. —— —— **Selection of element.**]—Opposition to the grant of a patent on the ground that the invention had been patented in this country on an application of prior date ; the Chief Examiner, acting for the Comptroller-General, allowed the grant. On appeal the grant was refused on the ground that the alleged invention was merely the selection of the better of two known elements for carrying out a process.—*Re* DEUTSCHE GASGLÜHLICHT AKT.'S APPLICATION (1908), 26 R. P. C. 101.

Annotation :—**Expld.** *Re* Bosch's Appln. (1909), 26 R. P. C. 710.

1421. —— **Improvement on prior patent—Validity of prior patent immaterial.**]—*Re* THORNBOROUGH & WILKS' PATENT, No. 1462, *post*.

1422. —— ——.]—The Chief Examiner, acting for the Comptroller-General, decided to seal a patent on the application, with certain amendments in the specification, including an extension of a disclaiming clause. The opponents appealed : —*Held :* the Chief Examiner's decision be varied by striking out some of the claims. Where the invention is an improvement on previously patented inventions general words, which may in any sense be taken to include anything that has been previously patented, are not to be used in the claims.—*Re* HAMILTON, HAMILTON & HAMILTON'S APPLICATION (1901), 19 R. P. C. 33.

1423. —— ——.]—Opposition to grant of a patent for " improvements in double walled vessels with a space for a vacuum between the walls " on the ground that the invention had been patented on applications of prior date. The Comptroller-General decided in favour of the grant subject to amendment :—*Held :* there was no patentable invention in reducing a number of supports to a single support in a vacuum insulated vessel & the patent should be refused.—*Re* VAN WYE'S APPLICATION (1909), 26 R. P. C. 490.

Annotation :—**Refd.** Notes of Rulings by the Comptroller-General, 1911 (A) (1911), 28 R. P. C. App. i.

1424. —— **Invention partially claimed in prior specification.**]—*Re* WADHAM'S APPLICATION, No. 1488, *post*.

1425. Identity of specifications—Question for law officer.]—Where the sealing of a patent is objected to on the ground that the invention is a colourable imitation of one which is the subject of an existing patent, a reference will be made to the law officer whether, having regard to the prior patent, the seal ought to be affixed to the patent as applied for.—*Ex p.* YATES (1869), 5 Ch. App. 1 ; *sub nom. Re* YATES' PATENT, 18 W. R. 1, L. C.

Annotations :—**Folld.** *Ex p.* Manceaux (1870), 5 Ch. App. 518. **Refd.** Saxby *v.* Hennett (1873), 28 L. T. 639.

1426. —— ——.]—*Re* WALLIS & RATCLIFF'S APPLICATION (1888), 5 R. P. C. 347.

1427. What must be considered—Words of claim.]—Now it is a rule long established & of obvious justice & importance that only that is patented which the inventor claims. Sect. 5 of the Act requires that a complete [specification] shall end with a distinct statement of the invention claimed. Now on referring to Von Welsbach's complete I find he claims (the S.-G. read the claim). I am not at liberty to speculate as to the reason of these words being chosen. They may have been used inadvertently & it may have been intended to patent the gas appliance in its fullest sense, that is to say, the mode by which the cap is supported as well as the cap itself. But the words are there : I have no power to amend them or to give them anything but their plain & direct meaning, & I must therefore hold that the invention claimed by Von Buch had not been patented by Von Welsbach & I direct the patent to be sealed (SIR EDWARD CLARKE, S.-G.).—*Re* VON BUCH (1888), Griffin's Patent Cases (1887), 40.

1428. —— **Dates of provisional & complete specifications.**]—*Re* BARTLETT'S APPLICATION, No. 1403, *ante*.

1429. Application by foreign patentee—Right to prior date.]—Appct. alleged his right to have his application antedated under the International Convention. Opponent denied that appct. had such a right, because appct.'s foreign application was made before the country in which it was made had come under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 103 :—*Held :* appct. had a right to the prior date.—*Re* MAIN'S PATENT (1888), 7 R. P. C. 13.

1430. —— —— **Invention obtained from applicant abroad.**]—Opposition on the ground of a

prior claim in the specification of a patent antedated under the International Convention. Allegation that the opponent obtained the invention from appct. abroad, & that in the foreign Patent Office it was held that appct., & not the opponent, was entitled to priority of date. The Comptroller-General decided to grant a patent with a statutory reference to the specification of the opponent's patent. Form of Order to be made under Patents & Designs Act, 1907 (c. 29), s. 11, where on an opposition a case of prior patenting is established. —*Re* HALSEY'S APPLICATION (1913), 31 R. P. C. 101.

1431. Duty of tribunal—To see opponent's specification not covered.]—*Re* CURTIS & ANDRE'S PATENT (1892), 9 R. P. C. 495.

1432. What specifications may be relied on—Interest of opponent not necessary.]—*Re* STEWART'S APPLICATION, No. 1359, *ante*.

1433. What evidence must be adduced by opponent—Single affidavit not sufficient.]—In a case where there was but one affidavit distinctly swearing to public use & sale of an alleged invention prior to the date of the application for a patent, the Great Seal was ordered to be affixed to the patent.—*Re* TOLHAUSEN'S PATENT (1866), 14 W. R. 551, C. A.

1434. —— State of knowledge.]—(1) At the hearing of an opposition to the grant of a patent on the ground that the invention had been patented on an application of prior date, the Chief Examiner ordered the insertion of a general disclaiming clause. The opponent appealed:—*Held:* the Chief Examiner's decision should be affirmed.

(2) An opponent to a grant who desires his patent to be construed as being a master patent & for a pioneer invention, must bring the state of knowledge before the Comptroller by evidence. —*Re* SOUTHWELL & HEAD'S APPLICATION (1899), 16 R. P. C. 361.

1435. Form of order.]—*Re* HALSEY'S APPLICATION, No. 1430, *ante*.

(*b*) *Document making Invention Available to Public.*

See Patents & Designs Acts, 1907 (c. 29), s. 11 (1) (*b*), & 1919 (c. 80), s. 4.

1436. What constitutes.]—A document which in the ordinary sense of patent law has been published has been made available to the public if it reaches some party in a non-confidential manner in the ordinary course of business, as in this case (SIR HENRY SLESSER, S.-G.).—*Re* UNDERFEED STOKER CO., LTD. & ROBEY'S APPLICATION (1924), 41 R. P. C. 622.

1437. ——.]—Opposition to the grant of a patent on the ground of Patents & Designs Acts, 1907 (c. 29), & 1919 (c. 80), s. 11 (1) (*b*):—*Held:* "made available to the public" means something more than mere publication in the strictly legal sense, even if the publication is unaccompanied by any bond of secrecy either expressed or implied. —*Re* WEIR (G. & J.), LTD.'S APPLICATION (1925), 43 R. P. C. 39.

1438. ——.]—*Re* WOOD (E. D.) & CO. (PRINTERS), LTD.'S APPLICATION (1926), 43 R. P. C. 377.

1439. ——.]—Opposition to the grant on ground (*b*) of sect. 11 (1) of Patents & Designs Acts, 1907 & 1919, plant embodying the invention was exhibited publicly by appcts. & a descriptive pamphlet was distributed to the public prior to the application. The invention was also described & illustrated in a trade journal. An application for a patent was made by the contractors who built the plant, prior to its exhibition & unknown to the applicants. Grant refused despite argument that having regard to sect. 15 (1) the patent, if granted, might possibly be valid. Appeal dismissed with costs.—*Re* DICKINSON'S APPLICATION (1926), 44 R. P. C. 79.

1440. ——.]—I feel bound to hold that the invention was made available to the public by publication in the tracings sent to Mr. P., with which the blue print above mentioned was identical. The very purpose for which the tracing was sent was to spread the knowledge of the new device of a protection bolt, & incidentally, as I have decided, of the present invention, in those circles whose interest & duty it was to become acquainted with it. Obviously the expression "the public" does not require the inclusion of the whole world. I have therefore come to the conclusion that the words of sect. 11 (i) (*b*) [of Patents & Designs Acts, 1907 & 1919] are satisfied by the facts in this case (SIR THOMAS INSKIP, S.-G.).—*Re* MOONEY'S APPLICATION (1927), 44 R. P. C. 294.

(*c*) *Remedies of Opponent.*

i. *Disclaimer.*

1441. Principles governing insertion.] — The principles upon which the law officers have acted now for some years in allowing disclaiming clauses, are (*a*) if it appears that upon the invention claimed by the prior patentee there will be a repetition of the claim to the earlier invention in the later specification; & (*b*) if it is clear that the public would be misled by the later specification without disclaimer.—*Re* STELL'S PATENT (1891), 8 R. P. C. 235.

Annotation:—**Refd.** *Re* Brockie's Applns. (1908), 25 R. P. C. 813.

1442. When ordered to be inserted—General rule.]—Patent sealed where opponents' & appcts.' patents were nearly identical on a disclaiming clause being inserted in specification.—*Re* WELCH'S PATENT (1884), Griffin's Patent Cases (1884–86), 300.

1443. —— ——.]—Opposition to sealing on the ground that the invention had been previously patented:—*Held:* a certain disclaiming reference to previous patents should be inserted.—*Re* GOZNEY'S APPLICATION (1888), 5 R. P. C. 597.

1444. —— ——.]—*Re* SIELAFF'S APPLICATION (1888), 5 R. P. C. 484.

1445. —— ——.]—*Re* AIREY'S APPLICATION (1888), 5 R. P. C. 348.

1446. —— ——.]—*Re* WELCH'S PATENT (1889), 8 R. P. C. 442.

1447. —— ——.]—*Re* BRAND'S APPLICATION (1894), 12 R. P. C. 102.

1448. —— ——.]—The Comptroller decided to seal a patent, but required the insertion of a general disclaimer in appct.'s specification. The law officer, on appeal, ordered the addition to the general disclaimer of a specific reference to one of the patents cited in opposition.—*Re* ADAM'S APPLICATION (1896), 13 R. P. C. 548.

1449. —— ——.]—*Re* SOUTHWELL & HEAD'S APPLICATION, No. 1434, *ante*.

1450. —— Slight variation in claims.] — *Re* LYNDE'S PATENT (1888), 5 R. P. C. 663.

1451. —— ——.]—*Re* TATTERSALL'S PATENT (1891), 9 R. P. C. 150.

1452. —— Question of scientific anticipation.]—A patent will not be stopped where there is a strongly controverted question of scientific anticipation. Opposition to grant on the ground that the invention had been previously patented:—*Held:* a patent be sealed subject to the insertion

Sect. 2.—*Opposition to grant: Sub-sect.* 2, *B.* (*c*) *i. & ii., C. & D.: sub-sect.* 3.]

of a disclaimer.—*Re* LAKE'S PATENT (1889), 6 R. P. C. 548.

1453. —— Where no subject matter remaining.]—Opposition to grant of patent on the ground that the invention had been patented on prior application :—*Held :* a patent be refused, as, after eliminating matters already in use, nothing remained which could form the subject of a patent. 's APPLICATION (1895), 12 R. P. C. 136.

Annotation :—**Refd.** Rulings by the Comptroller-General, 1911 (A) (1911), 28 R. P. C. App. i.

1454. —— Opponent's invention included in description but not in claim.]—Opposition to grant of a patent on ground of Patents & Designs Act, 1907 (c. 29), s. 11 (1) (*b*). It was alleged that the opponent's invention was included in the description of the appcts.' invention though not in the claims :—*Held :* (1) the Comptroller has jurisdiction to require at any stage when the case comes before him any amendment of a specification which he considers necessary to prevent ambiguity ; (2) in the present case certain verbal obscurities in the statement of the invention & the claims must be removed by amendment ; (3) a specification which includes irrelevant matter does not contain a "fair" description of the invention ; (4) in the present case a disclaimer must be inserted in the specification of such parts of the description as were not relevant to the claims. *Semble :* alterations amounting to a recasting or rewriting of a specification should not be ordered by the Comptroller.—*Re* FRANCIS' APPLICATION (1909), 27 R. P. C. 86.

1455. Sufficiency of disclaimer.]—*Re* KILNER'S PATENT (1889), 8 R. P. C. 35.

1456. Form of disclaimer—Where other prior specifications.]—*Re* WELCH'S PATENT, No. 1442, *ante*.

ii. *Specific Reference to Prior Patent.*

1457. Principle governing insertion.]—*Re* HOPKINS' PATENT (1909), 27 R. P. C. 72.

1458. When ordered to be inserted—Where substantial difference.]—*Re* ANDERSON & MCKINNEL (1887), Griffin's Patent Cases (1888), 23.

When necessary for protection of public.]—I am always unwilling to insert a special reference unless there are such strong grounds for it that I think it is right that the public should be protected by their attention being called specifically to the named patents (SIR RICHARD WEBSTER, A.-G.).—*Re* KILNER'S PATENT (1889), 8 R. P. C. 35.

1460. ——.]—Opposition to grant of patent on the ground that the invention had been patented on an application of prior date. The Chief Examiner decided to seal the patent provided a reference to the opponent's patent were inserted in appct.'s specification.—*Re* BOULT'S APPLICATION (1893), 10 R. P. C. 275.

1461. ——.]—Opposition to grant of patent on the ground that the invention had been patented on an application of prior date. The Chief Examiner decided to seal the patent provided a reference to the opponent's patent were inserted in appct.'s specification.—*Re* MAXIM & SILVERMAN'S APPLICATION (1894), 11 R. P. C. 314.

Though former patent invalidated.]—(1) Opposition to grant of patent on the ground that the invention had been patented in this country on an application of prior date. The Comptroller-General was of opinion that the invention had not been patented as alleged ; but that, in the interests of the public, a general disclaimer should be inserted in appcts.' specification : —*Held :* a reference to the opponents' patent should be inserted in appcts.' specification.

(2) When a subsequent patent is opposed on the ground that a prior patent covers the whole or part of the invention which such subsequent patent is applied for, it is immaterial whether the prior patent is good or bad.—*Re* THORNBOROUGH & WILKS' PATENT (1896), 13 R. P. C. 115.

Annotations :—**Consd.** Rulings by the Comptroller-General, 1911 (C) (1911), 28 R. P. C. App. viii ; *Re* Barraclough's Appln. (1920), 37 R. P. C. 105.

1463. —— When application might otherwise be refused.]—*Re* MARSDEN'S PATENT (1896), 14 R. P. C. 174.

Annotation :—**Consd.** *Re* Brockie's Applns. (1908), 25 R. P. C. 813.

1464. —— —— On refusal of applicant to insert.]—I was referred to the case of *Marsden's Patent*, No. 1463, *ante*. I think probably what it really does mean is this—that if the law officer is in such doubt that he would say to himself : I am not at all sure that I ought to allow the patent to go, but if I do allow it to go, I must direct the appct. to insert a specific reference, then if appct. refused to do so, the law officer might say : Well, upon the whole I will not allow this patent to go (SIR S. T. EVANS, S.-G.).—*Re* BROCKIE'S APPLICATIONS (1908), 25 R. P. C. 813.

1465. —— Not when different process.]—Opposition to the grant of letters patent for a process for producing sulphur dye stuffs on the ground of prior patenting of the invention. The Chief Examiner decided to seal a patent. He held that appct.'s process had not been patented by the patent on which the opponents' relied, & that, under the circumstances of the case, he would not be justified in requiring a reference to the opponents' patent.—*Re* MEYENBERG & CLAYTON ANILINE CO.'S APPLICATION (1905), 22 R. P. C. 353.

1466. ——.]—*Re* FRIED KRUPP AKT. GERMANIAWERFT'S APPLICATION, No. 1418, *ante*.

1467. —— Patent antedated under Patents & Designs Act, 1907 (c. 29), s. 91.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1913 (C) (1913), 30 R. P. C. App. v.

1468. —— When absence would cause misunderstanding.]—*Re* WAKFER & PECK'S APPLICATION (1915), 32 R. P. C. 199.

1469. Effect of insertion.]—*Re* HOFFMAN'S PATENT (1890), 7 R. P. C. 92.

1470. Insertion in lieu of disclaimer.]—Opposition to grant on the ground that the patent invention had been patented on application of prior date. The Comptroller required the insertion of a clause disclaiming anything claimed in the prior patent. On appeal, the law officer decided that a reference to the existence of the prior patent should be inserted instead of the disclaimer.—*Re* VAN GELDER'S PATENT (1892), 9 R. P. C. 325.

1471. Insertion in addition to general disclaimer.]—*Re* ADAM'S APPLICATION, No. 1448, *ante*.

1472. Concurrent applications—Order to be conditional on grant of patent to earlier applicant.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (G) (1910), 27 R. P. C. App. viii.

C. Insufficient Description in Complete Specification.

See Patents & Designs Act, 1907 (c. 29), s. 11 (1) (*c*).

1473. Specification confused & complicated—Amendment ordered—Where invention discernible.]

—If, in a specification of confused & complicated form, an invention that is sufficiently & fairly described can be discovered, the grant of a patent should not be refused simply because it is easy to see how much more clearly & how much more simply the invention might have been described.

The law officer allowed a patent to be granted, after amendment of the specification, by way of reference & omission of a certain passage.—*Re* SCHWARZKOPF'S APPLICATION (1914), 31 R. P. C. 437.

1474. Specification claiming several matters—References to provisional specifications of different dates—Patents & Designs Act, 1907 (c. 29), s. 16 (2).] —If it be necessary, as I think it is, to separate the various matters comprehended in the complete specification & relate them to the proper provisional specification &, if it is not possible to find any provisional specification which includes the element in the complete specification which is in question, I do not think it is possible to give any greater benefit to the opponent than he would have received if there had not been disconformity (SIR THOMAS INSKIP, S.-G.).—*Re* ROUND'S APPLICATION (1927), 44 R. P. C. 309.

D. Opponent's Invention Incorporated in Complete Specification.

See Patents & Designs Act, 1907) (c. 29), s. 11 (1) (*d*).

1475. Whether ground for opposition.]—Opposition to grant on the grounds (*a*) that the complete specification describes & claims an invention other than that described in the provisional specification, & that such other invention forms the subject of an application filed by the opponents in the interval between the leaving of the provisional specification by appcts. & the leaving of the complete specification, (*b*) that the invention was obtained from opponents:—*Held:* (1) opponents had *locus standi*; (2) appcts. had arrived at the invention independently; (3) the complete specification did not exceed the provisional.—*Re* ANDERSON & ANDERSON'S PATENT (1890), 7 R. P. C. 323.

1476. ——.]—Opposition to grant on the ground that the complete specification described & claimed an invention other than that described in the provisional specification, & that such other invention formed the subject of an application made by the opponent in the interval between the leaving of the provisional & complete specifications:—*Held:* the opposition failed.—*Re* BIRT'S APPLICATION (1892), 9 R. P. C. 489.

1477. —— **Development of prior specification.**]—Opposition to grant on the ground that the complete specification described & claimed an invention other than that described in the provisional specification, & that such other invention formed the subject of an application made by the opponent in the interval between the leaving of the provisional specification & the leaving of the complete specification:—*Held:* the complete specification did not describe an invention other than that described in the provisional specification; 51 & 52 Vict. c. 50, makes no alteration in the law that appct. for a patent may develop his invention before lodging his complete specification.—*Re* EDWARDS' PATENT (1894), 11 R. P. C. 461.

1478. ——.]—Opposition to grant of patent on the ground that the complete specification describes or claims an invention other than that described in the provisional specification, & that such other invention forms the subject of an application made by the opponent, in the interval between the leaving of the provisional specification & the complete specification:—*Held:* the complete specification did not describe an invention other than that described in the provisional specification.—*Re* MILLAR'S & MILLER'S APPLICATION (1898), 15 R. P. C. 718.

1479. Remedy of opponent—Amendment of specification.]—*Re* WILSON'S APPLICATION (1892), 9 R. P. C. 512, n.

1480. Opponent's application made in interval—Meaning of—Specification filed under Patents & Designs Act, 1907 (c. 29), s. 91.] — NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1913 (A) (1913), 30 R. P. C. App. i.

SUB-SECT. 3.—POWERS OF COMPTROLLER.

See Patents & Designs Acts, 1907 (c. 29), ss. 73–75; 1919 (c. 80), s. 17; Patents Rules, 1920, rr. 104–107, 110, 111, 114.

1481. Power to cross-examine witnesses.]—*Re* ANDERTON, No. 1382, *ante*.

1482. Power to direct examiner to report.]—*Re* PATERSON'S PATENTS, *Re* DUNDON'S PATENT, No. 1387, *ante*.

1483. Power to allow amendment.]—*Re* AIREY'S APPLICATION (1888), 5 R. P. C. 348.

1484. —— **Of notice of opposition—Substitution of name of opponent—On death of party originally named.**]—*Re* LAKE (1887), Griffin's Patent Cases (1887), 35.

1485. —— —— **Insertion of further specifications — After expiry of time limit.**] — NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (C) (1910), 27 R. P. C. App. ii.

1486. Power to refuse hearing.] — R. *v.* COMPTROLLER-GENERAL OF PATENTS, No. 1353, *ante*.

1487. Power to order amendment of specification —In public interest.]—*Re* FRIED KRUPP AKT. GERMANIAWERFT'S APPLICATION, No. 1418, *ante*.

1488. ——.]—Opposition to the grant of a patent on ground (*b*) of Patents & Designs Act, 1907 (c. 29), s. 11. The Comptroller considered that certain amendments of the specification were necessary. Appct. objected to the insertion of these amendments on the ground that they related to the descriptive part of the specification & did not affect the claims. The Comptroller refused to allow the grant of a patent unless the specification was amended.

In my view, therefore, provided that the opponent can show that the whole specification read together, description & claims, puts forward an invention which either wholly, partly, or in some definite way embodies or is dependent on, inventions claimed in prior specifications, he is entitled to ask for relief under this sub-sect. if his interests or the public interests are affected (COMPTROLLER-GENERAL).—*Re* WADHAM'S APPLICATION (1909), 27 R. P. C. 172.

1489. Power to consider prior specifications—Though not relied on by opponents.]—Patent

PART VII. SECT. 2, SUB-SECT. 3.

1488 i. *Power to order amendment of specification.*]—GRIFFITH *v.* NEILSON (1911), 13 C. L. R. 131.—**AUS.**

k. *Re-issue of patent—Jurisdiction of commissioner.*]—To give the comr. jurisdiction to authorise the re-issue of a patent it is not necessary that the patent be defective or inoperative for some one of the reasons specified in Patent Act, s. 23. It is sufficient to support his jurisdiction that he deems the patent defective or inoperative for any such reasons, & his decision as to that is final & conclusive.—AUER INCANDESCENT LIGHT MANUFACTURING CO. *v.* O'BRIEN (1897), 5 Exch. C. R. 243.—**CAN.**

Sect. 2.—*Opposition to grant: Sub-sects.* 3, 4, 5 & 6.]

refused by Comptroller on the ground that the invention had been patented on another application of prior date to which his attention had been directed by the Examiner. Appeal by appcts. :—*Held:* the Comptroller's decision be affirmed.—*Re* HUGHES & KENNAUGH'S APPLICATION (1910), 27 R. P. C. 281.

——.]—*See, further*, Part VI., Sect. 7, sub-sect. 1, *ante*.

1490. Power to determine that invention obtained from opponent abroad—Application under international convention.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1912 (A), No. 1393, *ante*.

1491. Power to determine prior publication—Or prior user.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1912 (E), No. 1396, *ante*.

SUB-SECT. 4.—APPEAL TO LAW OFFICER.

See Patents & Designs Act, 1907 (c. 29), ss. 11 (3), 40; Patents Rules, 1920, Appendix.

1492. Regarded as rehearing.] — *Re* STUBBS' PATENT, No. 1512, *post*.

1493. Jurisdiction of law officer—To interfere with Comptroller's decision—Only in clear cases.]—In the present case the opponent purchased a prior patent which he says has anticipated the present invention, & he has been working under it, & he is a manufacturer who has been working machines in accordance with that patent. Although that patent has now become public property, I do not think that I ought to hold, whatever might be my view upon the first point, that he is a person not entitled to be heard. The question then comes whether the decision of the Comptroller ought to be affirmed. Now I own the case is to my mind by no means free from doubt. I think it is well open to argument, looking at the language at the earlier specification & seeing what must be included in the claim, that the present invention is an independent invention. But, at the same time, when the matter has been before the Comptroller & the Comptroller has allowed the grant, it is clear that, on an appeal of this description, the law officer ought not to interfere with the decision unless it is clearly established that the decision was wrong. I am not so clearly satisfied that the decision of the Comptroller was wrong as to justify me in reversing that decision & depriving appct. of his right to the patent. By leaving the decision standing I do not deprive the opponent entirely of his rights, because he will have a right of course to use all that he has used hitherto under the former patent, & if that be a mere mechanical equivalent, if the second patent be not a good one, he will be in no practical danger from the existence of the patent. I quite agree, that if the things were clearly the same, I ought on that ground to allow the second patent to proceed; but where the matter is in doubt & where the Comptroller has allowed the patent, I think I ought not to disallow the patent & reverse his decision unless the case is a perfectly clear one (HERSCHELL, S.-G.).—*Re* GLOSSOP'S PATENT (1884), Griffin's Patent Cases (1884–1886), 285.

Annotations:—**Consd.** *Re* Heath & Frost's Patent (1886), Griffin's Patent Cases (1884–1886), 288; R. *v.* Comptroller-General of Patents, [1899] 1 Q. B. 909. **Refd.** *Re* Hookham (1886), Griffin's Patent Cases (1887), 32; *Re* Bell (1887), Griffin's Patent Cases (1887), 10; *Re* Bairstow's Patent (1888), 5 R. P. C. 286; *Re* Stewart's Appln. (1896), 13 R. P. C. 627; Ruling by the Comptroller-General, 1911 (B) (1911), 28 R. P. C. App. iii.

1494. —— —— —— Technical questions.]—I wish it to be understood that in cases of this character it is impossible for the law officer to approach the arguments which might be raised before a more expert tribunal in exactly the same way as such a tribunal would. I conceive [his] duties to be rather more limited; they are, to consider whether the Comptroller has made a mistake in interpreting or applying the law as contained in the Patents Acts. Where it can be demonstrated plainly to the law officer that the Comptroller has made a mistake on some technical matter, it is no doubt the duty of the law officer to express his own opinion; but it is not, I think, required of the law officer that he should undertake the decision of purely technical questions which are more fit to be considered by the Comptroller (SIR THOMAS INSKIP, S.-G.).—*Re* ZUCKER'S APPLICATION, *Re* TAKAHASHI'S APPLICATION (1927), 44 R. P. C. 257.

1495. —— To impose terms.]—*Re* L'OISEAU & PIERRARD (1887), Griffin's Patent Cases (1887), 36.

Annotations:—**Refd.** *Re* Main's Patent (1888), 7 R. P. C. 13; Ruling by the Controller-General, 1912 (A) (1912), 29 R. P. C. App. i.

1496. —— To stop letters patent.]—I have the power of stopping the letters patent altogether . . . & I can let the letters patent go upon a specification, even if it is of a doubtful character (SIR EDWARD CLARKE, S.-G.).—*Re* LYNDE'S PATENT (1888), 5 R. P. C. 663.

1497. Admissibility of evidence—When not filed—Allegation of fraud.]—*Re* HUTH'S PATENT (1884), Griffin's Patent Cases (1884–1886), 292.

1498. Who entitled to be heard—Same persons as entitled to be heard before Comptroller.]—*Re* STEWART'S APPLICATION, No. 1359, *ante*.

Costs of appeal.]—*See* Sect. 2, sub-sect. 6, *post*.

SUB-SECT. 5.—PRACTICE.

See Patents & Designs Act, 1907 (c. 29), s. 11; Patents Rules, 1920, rr. 42–48.

1499. Opposition entered out of time—Affidavits not admissible.]—Where a petition to have the Great Seal affixed to a patent had been filed, & resps. served with notice two months before the first day of Michaelmas term, for which day the petition was answered, & resps. only filed affidavits on the morning of that day:—*Held:* they could not be read; & the patent was ordered to be sealed. —*Re* M'KEAN'S PATENT (1859), 1 De G. F. & J. 2; 45 E. R. 259; *sub nom. Re* MACKEAN'S PETITION, 1 L. T. 19; 8 W. R. 1, L. C.

1500. —— When leave to oppose given—Delay accounted for.]—Leave was given to oppose the granting of letters patent, notwithstanding the time for entering an opposition had expired, the reason for the delay in entering such opposition being accounted for.—*Re* BRENNARD'S PATENT (1861), 3 De G. F. & J. 695; 4 L. T. 456; 7 Jur. N. S. 690; 45 E. R. 1048, L. C.

PART VII. SECT. 2, SUB-SECT. 5.

l. *Onus of proof of want of novelty.*]—When an application for a patent is opposed on the ground of want of novelty under Patents Act, 1903, s. 56, the *onus* is on the opponent to establish that the patent granted would be clearly bad on that ground.—MCGLASHAN *v.* RABETT (1909), 9 C. L. R. 223.—**AUS.**

m. *Further objections — When allowed.*]—Where a person opposing the grant of a patent has given notice stating the grounds of his objection, & afterwards appct. for the patent has been allowed to amend his specification, the objector will be allowed to put in further objections to the application as amended.—*Re* WHEELER'S APPLICATION (No. 2) (1893), 12 N. Z. L. R. 682.—**N.Z.**

n. *Jurisdiction of Supreme Court*—

1501. Declarations—Effect of multiplicity.]—The costs will be the costs of resps., but I wish to say something with regard to these declarations. It appears to me that the case has been overlaid with declarations which have not been of the slightest assistance to us—at least, they have not to me. The counsel who has very skilfully laid this case before me explained the whole matter before he had alluded to any one of the declarations; indeed, when he referred to them, he referred to them generally with an apology for such reference, & pointed out that they raised matters which are not really material to the issue. I think it is well that I should give warning of the course that I shall pursue whenever these matters come before me in relation to this multiplicity of declarations. I shall endeavour, so far as I can, to fix the costs & the responsibility of these declarations on the persons who I feel are responsible for them. They have been of absolutely no service in this case. I do not make any special order in relation to the costs of this matter, because in this case it appears to me the fault is on both sides, & probably no warning, such as I am endeavouring to give now, has ever been given; but it is a warning which I hope will be attended to, because it is a warning which, eventually, as far as I am concerned, will be acted upon (SIR FRANK LOCKWOOD, S.-G.).—*Re* BRAND'S APPLICATION (1894), 12 R. P. C. 102.

1502. Proof of utility—Not to be required.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (D) (1910), 27 R. P. C. App. iv.

1503. Statement of opponent—Right to specify alternative courses.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (H) (1910), 27 R. P. C. App. x.

1504. Citation of foreign specification—To invalidate opponent's claim—Not permissible.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1911 (C) (1911), 28 R. P. C. App. viii.

1505. Counter-statement of applicant—Effect of failure to file.]—NOTES OF OFFICIAL RULINGS, 1927 (A) (1927), 44 R. P. C. App. i.

Amendment of notice.]—*See* Sect. 2, sub-sect. 3, *ante*.

SUB-SECT. 6.—COSTS.

See Patents & Designs Acts, 1907 (c. 29), s. 39, & 1919 (c. 80), s. 12; Patents Rules, 1920, r. 49.

1506. Unsuccessful opposition—Opposition not unreasonable—No costs awarded.]—Patent granted for an improved steam engine as not infringing upon an existing patent. If the improvements could not be used without the engine, for which a patent had been granted, they must wait the expiration of that patent. No costs, where the caveat was not unreasonable.—*Ex p.* FOX (1812), 1 Ves. & B. 67; 35 E. R. 26, L. C.

Annotations:—**Refd.** *Re* Prosser's Patent, *Re* Pinkus's Patent (1845), 4 L. T. O. S. 409; *Re* Fawcett's Patent (1852), 2 De G. M. & G. 439; Poupard *v.* Fardell (1869), 21 L. T. 696.

1507. —— Payment ordered before sealing.]—Costs incurred by a party opposing a patent in certain proceedings successfully prosecuted before the law officers of the Crown, were ordered to be paid before the patent was sealed.—*Re* TILLIE & HENDERSON'S PATENT (1854), 24 L. T. O. S. 29, L. C.

1508. Successful opposition—Right of opponent to costs.]—*Re* WESTRUPP & GIBBINS' PATENT, No. 599, *ante*.

1509. Withdrawal of opposition—Costs payable by opponent—Costs of petition.]—Objections to the issue of a patent had been filed, & subsequently withdrawn, & in consequence thereof the sealing of the letters patent were presented. The ct. on a petition for the sealing of the letters patent & for an extension of the time for filing the specification, ordered the objector to pay the costs.—*Re* ASHENHURST'S PATENT (1853), 22 L. T. O. S. 109; 2 W. R. 3, L. C.

1510. —— —— ——.]—Notice of objections to the sealing a patent were filed & afterwards withdrawn. The costs of the objections & of the petition rendered necessary by them were ordered to be paid by the objector.—*Re* COBLEY'S PATENT (1861), 31 L. J. Ch. 333; 5 L. T. 387; 8 Jur. N. S. 106, L. C.

1511. Opposition successful on alternative claim—Costs payable by applicant.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (H), No. 1503, *ante*.

1512. Costs of appeal to law officer—General rule—Costs follow event.]—As this is the first case I have had to deal with, I should like to explain what I mean to do in these cases. Of course I need not remind you that stopping a patent is a very serious step, because there are no means whatever of an appct. getting that which he applies for if I stop it, & it must be distinctly understood that I shall not stop the patent unless I am satisfied that the inventions are identical. I shall not hesitate to stop it if I can see clearly they are identical. I further desire to say that I regard these appeals as rehearings. In cases before me where there is no fresh evidence, or where on the merits either the opponent succeeds or appct. succeeds, I shall, as a general rule, allow costs to follow the event, because I think it only right that, apart from special circumstances, costs should follow the event, but I wish it to be understood that that will not apply to cases where there may be further evidence brought forward, or special matters which ought to influence the judgment of the law officer (SIR RICHARD WEBSTER, A.-G.).—*Re* STUBBS' PATENT (1884), Griffin's Patent Cases (1884–1886), 298.

Annotation:—**Refd.** *Re* Haythornthwaite's Appln. (1889), 7 R. P. C. 70.

1513. —— —— ——.]—*Re* ANDERTON, No. 1382, *ante*.

1514. —— When disallowed—Absence of good faith.]—*Re* ANDERTON, No. 1382, *ante*.

1515. —— —— Mistake.]—*Re* WOODHEAD (1887), Griffin's Patent Cases (1887), 44.

1516. —— —— Indefinite result.]—I do not think there can be considered to be any such definite result of the appeal as would entitle either party to costs (SIR EDWARD CLARKE, S.-G.).—*Re* AIREY'S APPLICATION (1888), 5 R. P. C. 348.

1517. —— —— Reasonable case for discussion.]—*Re* LYNDE'S PATENT (1888), 5 R. P. C. 663.

1518. —— —— ——.]—*Re* BRIDGE'S APPLICATION, No. 1417, *ante*.

1519. —— Liability of opponent—Appeal withdrawn.]—*Re* KNIGHT (1886), Griffin's Patent Cases (1887), 35.

To make order extending time for sealing patent.]—*Re* OSBORNE'S APPLICATION (1894), 13 N. Z. L. R. 523.—**N.Z.**

o. *Appeal from registrar—Time for.*]—*Re* GAZE'S APPLICATION (1896), 14 N. Z. L. R. 434.—**N.Z.**

p. —— *Whether petition necessary.*]—*Semble:* the appeal [in the case of opposition to the grant of a patent] from the registrar of patents to the Supreme Ct. which is provided for in Patents, Designs, & Trade Marks Act, 1889, ss. 115 & 116, must be brought by petition.—SAUNDERS *v.* CAMPBELL (1907), 27 N. Z. L. R. 454.—**N.Z.**

Part VIII.—Register of Patents.

See Patents & Designs Acts, 1907 (c. 29), ss. 28, 66, 67, 70–72, 79, 1919 (c. 80), s. 16; Patents Rules, 1920, 86–96.

1520. What may be registered—Equitable assignment of patent.]—An equitable assignment of a patent or a share or interest in it may be put upon the Register. A. & B., joint owners of certain patents, wrote to C. as follows. In consideration of your services as the practical manager in working both our patents . . . we hereby agree to give you one-third share of the patents, the same to take effect from this date. A. & B. afterwards deposited the letters patent with C. to assist him in effecting a sale of the patents, which, however, did not take place. C. registered the above letter, & claimed to retain possession of the letters patent as co-owner of a third share therein:—*Held:* Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 85 only excluded notices of trusts; & the letter was an immediate equitable assignment of an interest in the patent, not defective for want of consideration, & was properly entered on the Register.—*Re* CASEY'S PATENTS, STEWART *v.* CASEY, [1892] 1 Ch. 104; 61 L. J. Ch. 61; 66 L. T. 93; 40 W. R. 180; 36 . Jo. 77; 9 R. P. C. 9. C. A.

1521. —— Share or interest in patent.]—*Re* CASEY'S PATENTS, STEWART *v.* CASEY, No. 1520,

1522. —— Notice of trust.] — *Re* CASEY'S PATENTS, STEWART *v.* CASEY, No. 1520, *ante*.

1523. Rectification of Register — Person aggrieved.]—S. agreed to purchase one-fourth share of M.'s patent, but, after paying part of the purchase-money, made default & became bkpt. P. paid the balance of the purchase-money & took from M. & S. an assignment of the one-fourth share, which was subsequently entered in the Register of Patents. C., who had subsequently agreed to purchase from M. one-eighth share in the patent, took out a summons asking that the Register might be rectified by expunging the entry of the assignment on the ground (*inter alia*) that it was executed by S. without the authority of the Ct. of Bkpcy. After the issue of the summons the trustee in bkpcy. assigned his interest in the patent to P., who denied that C. was a person aggrieved by the entry on the Register, & opposed the application:—*Held:* C. was a person aggrieved by the entry, which was originally wrongly made, but, the trustees having since confirmed the transaction, the application ought to be refused with costs.—*Re* MANNING'S PATENT (1902), 20 R. P. C. 74.

1524. —— Jurisdiction of court.]—The jurisdiction over the Register of patent proprietors which was conferred on the Master of the Rolls by Patent Law Amendment Act, 1852 (c. 83)] s. 38, is assigned to the High Ct. of Justice by Jud. Act, 1813 (c. 66), s. 16 (1), & is not retained by the Master of the Rolls under Jud. Act, 1873 (c. 66), s. 17 (6).—*Re* MORGAN'S PATENTS (1876), 24 W. R. 2

1525. —— ——.]—*Re* MYER'S PATENT, [1882] W. N. 53.

Part IX.—Maintenance of Patent.

See Patents & Designs Acts, 1907 (c. 29), ss. 17 (1) (2), 20, & 1919 (c. 80), s. 6, sched., Patents Rules, 1920, rr. 58–63.

1526. Lapse through non-payment of fees—Order for restoration—Unintentional omission.]—The holder of a patent in respect of an invention applied for a fresh patent in respect of improvements on it, intending to include in it the old invention. Under the erroneous impression that the new patent would protect the original invention & that the patent already protecting it might be allowed to lapse, he omitted to pay the fee in respect of it & allowed it to lapse. On an application for restoration of the lapsed patent:—*Held:* the omission was not an "unintentional" one within Patents & Designs Act, 1907 (c. 29), s. 20, & the ct. had no jurisdiction to restore the patent.

Qu.: whether there is an appeal from the Comptroller-General until after there has been advertisement & opposition under Patents & Designs Act, 1907 (c. 29), s. 20 (3).—*Re* LAND'S PATENT, [1910] 2 Ch. 236; 79 L. J. Ch. 594; 103 L. T. 102; 54 Sol. Jo. 680; 27 R. P. C. 481.

1527. —— —— Appeal from order.] — *Re* LAND'S PATENT, No. 1526, *ante*.

1528. —— —— Provisions for compensation—Treaty of Peace Act, 1919 (c. 33), s. 1.]—(1) An order, made under above Act, & under the Orders authorised by that Act, for the restoration of a lapsed patent, need not include such provisions for compensation as are provided for in the Patents Rules, 1908, r. 59.

(2) Where the patent is for a combination of manufactured parts & where the restoration order contains a provision protecting infringements between the date of the lapse & the date of the restoration, such provision does not protect the assembling, after the date of the restoration order, of parts manufactured between the date of the lapse & the date of the restoration order.—COOKSLEY *v.* CROWTHORNE ENGINEERING CO., LTD. (1921), 37 T. L. R. 864; 38 R. P. C. 294.

1529. —— —— Protection of infringements—Patent for combination.] — COOKSLEY *v.* CROWTHORNE ENGINEERING CO., LTD., No. 1528, *ante*.

PART VIII.

q. *Sale of patent right for Canada—Right of seller to register in America.*]—The sale of a patentable right for Canada does not deprive the seller of the privilege of registering it in his own name in the United States.—WARRELL *v.* RAILWAY ASBESTOS PACKING CO., LTD. (Que.) (1916), 22 R. L. N. S. 512.—**CAN.**

r. *What is date of patent—Date of filing provisional specification.*]—SMITH *v.* DAVIDSON (1857), 19 Dunl. (Ct. of Sess.) 691; 29 Sc. Jur. 327.—**SCOT.**

Part X.—Assignment and Devolution of Patents.

SECT. 1.—IN GENERAL.

Assignment of choses in action generally, *see* CHOSES IN ACTION, Vol. VIII., pp. 424 *et seq.*

1530. Power to assign—Given by Crown.]—All monopolies are illegal unless allowed by a patent, which cannot be assigned at all unless power to that effect is given by the Crown (LITTLEDALE, J.).—DUVERGIER *v.* FELLOWS (1830), 10 B. & C. 826; L. & Welsb. 344; 8 L. J. O. S. K. B. 270; 109 E. R. 655; *on appeal* (1832), 1 Cl. & Fin. 39, H. L.

Annotations:—**Refd.** *Re* Mexican & South American Co., *Re* Aston (1859), 27 Beav. 474. **Mentd.** Blundell *v.* Winsor (1837), 8 Sim. 601; London Grand Junction Ry. *v.* Freeman (1841), 2 Man. & G. 606; Garrard *v.* Hardey (1843), 5 Man. & G. 471; Harrison *v.* Heathorn (1843), 6 Man. & G. 81; Sheppard *v.* Oxenford (1855), 1 K. & J. 491.

1531. Local assignment.]—In 1888 a German co. was incorporated for the purpose of purchasing & working certain patents belonging to R., relating to the grooving of cardboard. R. stipulated that he would transfer to the co. all further inventions or improvements or additional or independent patents having "reference to" these grooving patents which might be made by him before the expiration of such patents. In 1892, R. obtained two patents, Nos. 12043 & 23735 of 1892, for improvements in bending strawboard. In Jan. 1893, R. agreed to grant a licence to T. to work one of these patents. He subsequently granted T. several temporary licences to use both the bending patents. In 1899 [illegible] obtained orders of L. S. assigned it to a co., which went into liquidation. The liquidator assigned it to T. In 1899 the German co. commenced proceedings against R. in Germany. They were unsuccessful in the ct. of first instance, but in the Superior Ct., & in the ultimate Ct. of App. they obtained judgments for transfer of the two bending patents. R. consequently assigned them, & the German co. brought an action for infringement of the patents against T. T. set up his equity to a licence & the local assignment through S. He also denied infringements, & attacked the validity of the patents: —*Held:* (1) T. had failed to establish the existence of a right on his part to the licence he claimed as regards both patents, but was entitled to rely on the legal title he had acquired through S. to patent No. 12043 of 1892 in the district of L.: s. 14 (1).

1532. Assignment by agent—Necessity for authority by deed.]—HAZLEHURST *v.* RYLANDS, No. 1554, *post.*

1533. Assignment subject to licence—Licencee not necessary party.]—On July 17, 1902, D. & M. agreed to purchase from F. for £2,500 patent rights in a certain system. On July 21, 1902, F. obtained an option for a sole licence under the four patents. On Nov. 7, 1902, by an agreement to which the patentee was a party, D. & M. agree to pay the unpaid balance of the £2,500 on F. tendering the licence above referred to. On Oct. 24, 1902, the patents had been transferred to J. H. H. subject to the rights of F. under the agreement of July 21, 1902. D. & M. refused to pay the unpaid balance unless the licence tendered was executed by J. H. H. In an action by F. to recover the balance:—*Held:* it was not necessary that the licence should be executed by J. H. H., & pltf. was entitled to succeed.—FRENTZELL *v.* DOUGILL (1904), 21 R. P. C. 641.

1534. Assignment before grant — Equitable assignment.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (E) (1910), 27 R. P. C. App. vi.

SECT. 2.—WHAT MAY BE ASSIGNED.

1535. Share of patent.]—It is competent to the assignee of a separate & distinct portion of a patent to sue for an infringement of that part, without joining one who has an interest in another part.—DUNNICLIFF & BAGLEY *v.* MALLET, DUNNICLIFF & BAGLEY *v.* BIRKIN (1859), 7 C. B. N. S. 209; 29 L. J. C. P. 70; 1 L. T. 514; 6 Jur. N. S. 252; 8 W. R. 260; 141 E. R. 795.

Annotation:—**Folld.** Walton *v.* Lavater (1860), 8 C. B. N. S. 162.

1536. ——.]—(1) The assignee of two several moieties of a patent has a sufficient legal interest in the patent to sue for its infringement.

(2) Deft., a patentee, assigned a moiety of the patent to pltf. at one time, & the remaining moiety to a third person at another time; pltf., having afterwards acquired, by assignment, such remaining moiety, was held entitled to sue deft. for a subsequent infringement without giving him previous notice of such last assignment.

(3) Evidence of importation & sale of articles in imitation of the patented articles, known to the importer to have been made from the patent, is evidence against him of an infringement. It would equally be evidence of an infringement, although the importer had not had such knowledge.

(4) The assignor of a patent who has sold it as valid, cannot, as between himself & the assignee to whom he sold it, raise any question as to the patent being void for want of novelty.—WALTON *v.* LAVATER (1860), 8 C. B. N. S. 162; 29 L. J. C. P. 275; 3 L. T. 272; 6 Jur. N. S. 1251; 141 E. R. 1127.

Annotations:—*As to* (1) **Refd.** National Soc. for Distribution of Electricity by Secondary Generators *v.* Gibbs, [1899] 2 Ch. 289. *Generally,* **Refd.** Elwood *v.* Christy (1865), 18 [illegible]

PART X. SECT. 1.

t. *Whether contract to give assignment need be in writing.*]—DALGLEISH *v.* CONBOY (1876), 26 C. P. 254.—**CAN.**

a. *Right to recover—Under assignment of invalid patent.*]—The mere attaching of the support of the handle of a pump higher or lower in position than that formerly in use, is not the subject of a patent; but P. having obtained a patent therefor, which he assigned to pltf., who again assigned to deft. subject to certain royalties:—*Held:* notwithstanding the invalidity of the patent he was entitled to recover the amounts payable to him under the agreement during the currency thereof. —OWENS *v.* TAYLOR (1881), 29 Gr. 210. —**CAN.**

b. *Obligation to sell—After expiration of two years.*]—Under Canadian Patent Act the holder of a patent is obliged, after the expiration of two years from its date, or an authorised extension of that period, to sell his invention to any person desiring to obtain it & cannot claim the right merely to lease it or license its use.—HILDRETH *v.* MCCORMICK MANUFACTURING CO., LTD. (1907), 39 S. C. R. 499.—**CAN.**

Sect. 2.—What may be assigned. Sect. 3.]

1537. Future patent rights—Of like nature.]—An agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy.—PRINTING & NUMERICAL REGISTERING CO. *v.* SAMPSON (1875), L. R. 19 Eq. 462; 44 L. J. Ch. 705; 32 L. T. 354; 23 W. R. 463.

Annotations:—**Refd.** Macdonald *v.* Eyles, [1921] 1 Ch. 631. **Mentd.** Rousillon *v.* Rousillon (1880), 14 Ch. D. 351; Badische Anilin Und Soda Fabrik *v.* Schott, Segner, [1892] 3 Ch. 447; Tullis *v.* Jacson, [1892] 3 Ch. 441; Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; Lamson Pneumatic Tube Co. *v.* Phillips (1904), 91 L. T. 363; Spiers *v.* Hunt, [1908] 1 K. B. 720; Wilson *v.* Carnley, [1908] 1 K. B. 729; Millers *v.* Steedman (1915), 84 L. J. K. B. 2057; Morris *v.* Saxelby, [1915] 2 Ch. 57; Horwood *v.* Millar's Timber & Trading Co., [1916] 2 K. B. 44; Weld-Blundell *v.* Stephens, [1919] 1 K. B. 520; Attwood *v.* Lamont, [1920] 2 K. B. 146; British Concrete Co. *v.* Schelff, [1921] 2 Ch. 563.

1538. Prospective patent—Where precisely described.]—It is very easy to imagine a document, executed immediately before the letters patent are issued, so clear & so precise as to leave no doubt whatever as to the proposed patent referred to in it (NORTH, J.).—*Re* PARNELL'S PATENT, HALKETT'S APPLICATION (1888), 4 T. L. R. 197; 5 R. P. C. 126.

1539. Future improvements on patent—Beneficial interest in improvements—Improvements patented by third party.]—D., a patentee, assigned certain inventions & the patents for the same to P., & covenanted that any improvement on the inventions which he should during the continuance of the patents become possessed of, should be held to be a part of the property assigned, & should be duly communicated by D. to P., & D. should do all necessary acts & deeds that might be required of him by P. to patent & vest the improvements in P. D. subsequently became, by purchase, interested with other persons, in two patents, not for his inventions, which it had been agreed between him & the other persons should be resold to a limited co. to be promoted. Pltfs., who had become possessed of P.'s interests, brought an action against D., asking that he might be ordered to assign the two patents to pltfs., & they now moved that he might be restrained from parting or dealing with the two patents:—*Held:* the covenant did not apply to the two patents.—PNEUMATIC TYRE CO., LTD. *v.* DUNLOP (1896), 12 T. L. R. 620; 13 R. P. C. 553, C. A.

1540. —— What amounts to improvement.]—In 1893, D. agreed to sell to the V. G. E. Syndicate, Ltd., certain patents & the benefits of all inventions which D. might then have have made, or be entitled to, or which he might thereafter make, being for improvements upon the inventions the subject of any of the patents, or applications for the same, thereby agreed to be assigned. The patents comprised two patents of D., of 1891, for "improvements in gas engines" & "improvements in gas or vapour engines" respectively, & the benefit of an application by C. in 1892 for a patent for "improvements in gas engines." In 1895, a patent was granted to D. for "improvements in oil engines." Actions were brought by D. against the syndicate & others, and by the syndicate against D., in both of which the question arose whether the syndicate was entitled to the patent of 1895. In the course of the trial D. was allowed to raise a claim to have the agreement rectified; but in the view taken by the judge it became unnecessary to decide the question so raised:—*Held:* the 1895 patent was for an improvement.—VALVELESS GAS ENGINE SYNDICATE, LTD. *v.* DAY (1898), 16 R. P. C. 97, C. A.

1541. —— ——.]—D. was the inventor of a new gunpowder for blasting purposes, afterwards known as "Argus" powder, in respect of which a provisional specification was lodged in Apr. 1898. In Jan. 1899, an agreement was made between D. & C. H. & co., Ltd., by which C. H. & co. agreed to pay D. during the continuance of the agreement, royalties on the manufacture of the "Argus" powder, & it was provided that improvements in & additions to D.'s invention should be within the agreement. C. & others were afterwards granted letters patent in respect of another gunpowder which afterwards came to be known as "Bulldog" powder. C. H. & co. proceeded to manufacture & sell this "Bulldog" powder. D. thereupon brought an action for royalties under the agreement contending that "Bulldog" was identical in composition with "Argus" powder, or, alternatively, was an improved modification of "Argus" & was subject to the agreement. At the trial it was held, that the use of lignite instead of ordinary charcoal as the source of carbon in the composition of the "Argus" powder was of the essence of pltf.'s patented invention & that defts. in manufacturing "Bulldog" powder without using lignite were only doing what all the world were entitled to do & without infringing D.'s patent; & the such manufacture did not come within the agreement; & also that "Bulldog" powder was not an improvement in or addition to the "Argus" invention:—*Held:* the essence of pltf.'s invention was the use of lignite, or lignite subjected to a carbonising operation, & that defts.' "Bulldog" powder was not an infringement of pltfs.' or an improvement, or addition to his invention.—DAVIES *v.* CURTIS & HARVEY, LTD. (1903), 20 R. P. C. 561, C. A.

1542. —— ——.]—L. & M., Ltd., who were the owners of patents for certain stereotype casting machinery, by deed, agreed with H., who was the owner of certain other patents, that in consideration of a ceaser of competition, H. granting an exclusive licence to make & sell his machine, they would pay royalties on all machines manufactured under either set of patents, or other machines of a similar type. H. also undertook to grant an exclusive licence to use any improvements in or additions to his machine. H. took out two subsequent patents for inventions, which could be used in connection with his machine. In an action by L. & M., Ltd., for a declaration of their right to use & for an exclusive licence to use these inventions, it was held at the trial, that the question whether the new inventions were infringements of the H. patents was not the test to be applied, but that they were improvements in or additions to the H. machine within the meaning of the deed of agreement, & a declaration was made accordingly; & an exclusive licence was directed to be granted pltfs. Deft. appealed. On

PART X. SECT. 2.

1540 i. *Future improvements on patent—What amounts to improvement.*]—JONES & MCGINTY *v.* RUSSELL (1896), 1 N. B. Eq. Rep. 232.—**CAN.**

1540 ii. —— ——.]—WATSON *v.* HARRIS (1899), 31 O. R. 134.—**CAN.**

1540 iii. —— ——.]—WILSON *v.* BARBOUR (1888), 5 R. P. C. 245, 675.—**IR.**

c. *Right to obtain patent in Canada.*]—The person who has taken out a patent for his invention in any other country may, without assigning or parting with his patent, assign to another person his right to obtain a patent in this country, & the holder by assignment of such right may obtain letters patent for Newfoundland, & is entitled to recover damages for infringement & to obtain an injunction.—CABOT S. WHALING CO. *v.* NEWFOUNDLAND S. WHALING CO. (1905), 9 Nfld. L. R. 122.—**NFLD.**

appeal it was contended that the word "improvement" could not be read to include a difference sufficient to protect on a claim for infringement:—*Held:* (1) an improvement of a patented machine includes any machine which, while retaining some of those essential or characteristic parts of the machine which are the subject of the monopoly claims, yet by addition, omission, or alteration better achieves the same or better results, whether such improvements infringe the monopoly claims for the patented machine or not; (2) the inventions in the two subsequent patents of H. were improvements on his original machine: an exclusive licence to use them must be given to L. & M., Ltd.—HOPKINS *v.* LINOTYPE & MACHINERY, LTD. (1910), 101 L. T. 898; 26 T. L. R. 229; 27 R. P. C. 109, H. L.; *affg.* S. C. *sub nom.* LINOTYPE & MACHINERY, LTD. *v.* HOPKINS (1908), 25 R. P. C. 665, C. A.

1543. —— ——.]—In 1903, letters patent were granted to pltf. for "improvements in & relating to water tube boilers." This patent was assigned by pltf. to deft. co. in 1905, & he covenanted that he would assign to the co. all improvements in the invention, & also that deft. co. should be entitled to inventions, useful in the manufacture of boilers, which he might make whilst in a certain employment, which ceased on or before Nov. 14, 1906. In 1907 pltf. took out letters patent for an invention of "improvements in & relating to water tube boilers," & deft. co. claimed this patent under both parts of the covenant. The action was brought by the patentee for a decision on these questions. Defts. counterclaimed & claimed the 1907 patent:—*Held:* the patent of 1907 was not an improvement on the patent of 1903, but was for a separate & distinct invention; the invention was made after Nov. 14, 1906.—DAVIES *v.* DAVIES' PATENT BOILER, LTD. (1908), 25 R. P. C. 23.

1544. —— ——.]—In 1912, a patent, hereinafter called patent No. 1, was granted under International Convention to a German co. for an "improvement relating to electric incandescent lamps." In 1913 a patent, hereinafter called patent No. 2, was granted under International Convention to the German co. for a "process & device for the production of electric glow lamp bulbs with reflectors." In 1914, a patent, hereinafter called patent No. 3, was applied for, under International Convention by the German co. for "improvements in & relating to electric incandescent lamps." On the outbreak of war the patents Nos. 1 & 2 were vested in, & the patent No. 3 was granted to, the Public Trustee as custodian. A British co. brought an action against the Public Trustee for a declaration that pltfs. were the beneficial owners of the patents, & for an order directing deft. to execute an assignment of the patents to pltfs. Pltfs. alleged that they were entitled to have the patents transferred to them under an agreement between the German co. & others, the vendors, & pltfs., the purchasers, by which agreement the vendors agreed to sell to pltfs. certain specified patents for inventions in connection with the manufacture of wolfram or molybdenum lamps, & any improvements on those inventions, & to communicate to pltfs., the experiences of the German co. in connection with the manufacture of lamps. Deft. contended that the patents were not within the scope of the agreement:—*Held:* all of the patents were within the scope of the agreement. It was ordered that deft. should transfer the patents to pltfs.—OSRAM-ROBERTSON LAMP WORKS, LTD. *v.* PUBLIC TRUSTEE (1920), 37 R. P. C. 189.

SECT. 3.—CONSTRUCTION OF ASSIGNMENT.

1545. Covenant for payment of royalties by assignees—While patent subsisting—No obligation to maintain patent — Or manufacture article patented.]—On the sale of a patent by the patentees to a limited co. a deed of assignment was executed by the parties, by which, after a recital that the patentees had agreed to sell the patent to the company for £250 "& for the other considerations therein appearing," the patentees assigned the patent to the co. absolutely: & after covenants for title by the patentees, including a covenant for quiet enjoyment of the patent "during the term subsisting herein," the co. covenanted to pay to the patentees a royalty for every article "which should be manufactured or sold by the co." under the patent "while subsisting," & also a proportion of the profits arising from the manufacture or sale & from licenses granted for the manufacture or sale of articles to be manufactured under the patent "while subsisting." The deed contained no express covenant by the co. to keep the patent on foot or to manufacture or sell articles under the patent. On the expiration of the first four years of the patent the co. duly paid the first renewal fee under Patents, Designs, & Trade Marks Act, 1883 (c. 57), but on the expiration of the fifth year they, through inadvertence, omitted to pay the second renewal fee within the time required by the Act & the rules thereunder, & consequently the patent lapsed. After an ineffectual attempt to obtain a private Act of Parliament to revive the patent, the company passed resolutions for a voluntary winding up, & the patentees thereupon sent in a claim for damages for the loss, through the lapse of the patent, of the royalties reserved by the assignment, contending that a covenant to keep the patent on foot should be implied in the assignment:—*Held:* no such covenant could be implied; & even if it could, the patentees could not obtain more than nominal damages, the co. being under no obligation, either express or implied, to manufacture the patented articles & being no longer able to carry on business.—*Re* RAILWAY & ELECTRIC APPLIANCES CO. (1888), 38 Ch. D. 597; 57 L. J. Ch. 1027; 36 W. R. 730; *sub nom. Re* RAILWAY & ELECTRIC APPLIANCES CO., LTD., *Ex p.* GILBERT & SINCLAIR, 59 L. T.

Annotation:—**Mentd.** Measures *v.* Measures, [1910] 2 Ch. 248.

1546. Covenant restricting manufacture by assignor — Validity.] — A patentee & manufacturer of guns & ammunition for purposes of war covenanted with a co. to which his patents & business had been transferred that he would not for twenty-five years engage except on behalf of the co. either directly or indirectly in the business of a manufacturer of guns or ammunition:—*Held:* the covenant though unrestricted as to space was not, having regard to the nature of the business & the limited number of the customers, namely the Govts. of this & other countries, wider than was necessary for the protection of the co., nor injurious to the public interests of this country; it was therefore valid & might be enforced by injunction.—NORDENFELT *v.* MAXIM NORDENFELT GUNS & AMMUNITION CO., [1894] A. C. 535; 63 L. J. Ch. 908; 71 L. T. 489; 10 T. L. R. 636; 11 R. 1, H. L.; *affg.* S. C. *sub nom.* MAXIM NORDENFELT GUNS & AMMUNITION CO. *v.* NORDENFELT, [1893] 1 Ch. 630, C. A.

Annotations:—**Refd.** Haynes *v.* Doman, [1899] 2 Ch. 13; Underwood *v.* Barker, [1899] 1 Ch. 300; Lamson Pneumatic Tube Co. *v.* Phillips (1904), 91 L. T. 363; Tivoli, Manchester *v.* Colley (1904), 52 W. R. 632; Hooper & Ashby *v.* Willis (1906), 94 L. T. 624; Mouchell *v.* Cubitt

Sect. 3.—*Construction of assignment.*]

(1907), 24 R. P. C. 194; Bromley *v.* Smith (1909), 78 L. J. K. B. 745; Leng *v.* Andrews, [1909] 1 Ch. 763; United Shoe Manufacturing Co. of Canada *v.* Brunet, [1909] A. C. 330; Morris *v.* Ryle (1910), 103 L. T. 545; Russell *v.* Carpenters & Joiners Amalgamated Soc., [1910] 1 K. B. 506; A.-G. of Australia *v.* Adelaide S.S. Co., [1913] A. C. 781; Continental Tyre & Rubber (Great Britain) Co. *v.* Heath (1913), 29 T. L. R. 308; Mason *v.* Provident Clothing & Supply Co., [1913] A. C. 724; Eastes *v.* Russ, [1914] 1 Ch. 468; Goldsoll *v.* Goldman, [1914] 2 Ch. 603; North Western Salt Co. *v.* Electrolytic Alkali Co., [1914] A. C. 461; Millers *v.* Steedman (1915), 84 L. J. K. B. 2057; Morris *v.* Saxelby, [1916] 1 A. C. 688; Evans *v.* Heathcote, [1917] 2 K. B. 336; Horwood *v.* Millar's Timber & Trading Co., [1917] 1 K. B. 305; Naylor, Benzon *v.* Krainische Industrie Gesellschaft, [1918] 1 K. B. 331; Whitmore *v.* King (1918), 87 L. J. Ch. 647; McEllistrim *v.* Ballymacelligott Co-op. Agricultural & Dairy Soc., [1919] A. C. 548; Rodriguez *v.* Speyer, [1919] A. C. 59; Ropeways *v.* Hoyle (1919), 120 L. T. 538; Attwood *v.* Lamont, [1920] 3 K. B. 571; Dewes *v.* Fitch, [1920] 2 Ch. 159; Hepworth Manufacturing Co. *v.* Ryott, [1920] 1 Ch. 1; British Concrete Co. *v.* Schelff, [1921] 2 Ch. 563; Rawlings *v.* General Trading Co., [1921] 1 K. B. 635. **Mentd.** Dubowski *v.* Goldstein, [1896] 1 Q. B. 478; Robinson *v.* Heuer (1898), 67 L. J. Ch. 644; *Re* Hollis' Hospital Trustees & Hague's Contract, [1899] 2 Ch. 540; Elliman *v.* Carrington (1901), 84 L. T. 858: *Re* Beard, Reversionary & General Securities Co. *v.* Hall, *Re* Beard, Beard *v.* Hall, [1908] 1 Ch. 383; Wilson *v.* Carnley, [1908] 1 K. B. 729; Stuart & Simpson *v.* Halstead (1911), 55 Sol. Jo. 598; Woodbridge *v.* Bellamy, [1911] 1 Ch. 326; Denny's Trustee *v.* Denny & Warr, [1919] 1 K. B. 583; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

See, further, TRADE & TRADE UNIONS.

1547. Covenant reserving right of manufacture & sale to assignor—Limited to exercise personally or by agents.]—S. assigned two patents to B. by separate deeds, reserving in each case a right to work the patent personally, which right was not to be transferable. After B.'s death, his business, including the patents, became vested in pltf. co. S. entered into partnership with E. & J., & by an agreement between S. & his firm he agreed to employ the firm, on certain specified terms, to manufacture articles under the patents on his behalf, & to sell them for him, which they did. Pltf. co. commenced an action against the firm for infringement of the two patents by working under said agreement:—*Held:* according to the true construction of the agreement, although the firm were the agents of S. as far as selling was concerned, they were manufacturing not as his agents, but as contractors for him, & had thereby infringed pltf.'s rights.—HOWARD & BULLOUGH, LTD. *v.* TWEEDALES & SMALLEY (1895), 12 T. L. R. 28; 40 Sol. Jo. 32; 12 R. P. C. 519.

1548. Validity of patent—Assignor bound by deed.]—OLDHAM *v.* LANGMEAD (1789), cited in 3 Term Rep. at p. 439; 100 E. R. 665.

Annotations:—**Distd.** Hayne *v.* Maltby (1789), 3 Term Rep. 438. **Refd.** Bowman *v.* Taylor (1834), 2 Ad. & El. 278.

1549. —— ——.]—WALTON *v.* LAVATER, No. 1536, *ante*.

1550. —— **Right of assignee to dispute—In absence of fraud.**]—An agreement between pltf. & defts. recited that pltf. had invented a method for the prevention of boiler explosions, & had obtained a patent for it, & assigned away half of his interest in it, & pltf. was desirous of taking out patents for other countries; & it provided that defts. should proceed to take out such patents, & should pay the sum of £2,500 in such manner as should be mutually agreed upon; in consideration whereof pltf. transferred to defts. the half of those patents when they should be obtained, & the remaining half of the English patent. A declaration, founded on this agreement averred, for a first breach that, though a reasonable time had elapsed, defts. refused to pay the money on request; &, for a second breach, that though a reasonable time had elapsed, defts. had refused to enter into any agreement as to the manner of payment. Defts. pleaded, first, as to the first breach, that when the action commenced no agreement had been made as to the manner in which the money was to be paid; secondly, to all the breaches, that the invention was not new in England & was worthless, & pltf. was not the first inventor; &, thirdly, to all the breaches, that, after agreement & before breach, defts., under a new agreement, paid, & pltf. received £200, as a balance in satisfaction:—*Held:* (1) there was in the agreement no warranty, express or implied, that the patent was indefeasible; & no fraud being alleged, & defts. having the same means of knowledge as to the novelty & value of the patent as pltf., the second plea was bad; (2) the second breach in the declaration was good, because, even if the entering into an agreement with respect to the manner of payment was a condition, the refusal by defts. to enter into such an agreement rendered the performance impossible; (3) the third plea, to all the breaches, was bad; it was not a traverse of the first breach, & was no answer, since that breach treated the money as payable immediately; (4) *semble:* the first plea to the first breach was bad, because, if no mode of payment was agreed on, the money, being then due, was payable as the law directs where there is no stipulation as to mode of payment.—HALL *v.* CONDER (1857), 2 C. B. N. S. 22; 26 L. J. C. P. 288; 29 L. T. O. S. 108, 389; 3 Jur. N. S. 963; 5 W. R. 742; 140 E. R. 318, Ex. Ch.

Annotations:—*As to* (1) **Folld.** Bessimer *v.* Wright (1858), 31 L. T. O. S. 213; Smith *v.* Scott (1859), 6 C. B. N. S. 771. **Apld.** Trotman *v.* Wood (1864), 16 C. B. N. S. 479. **Refd.** Smith *v.* Neale (1857), 2 C. B. N. S. 67; Eichholz *v.* Bannister (1864), 17 C. B. N. S. 708; Smith *v.* Buckingham (1870), 21 L. T. 819.

1551. —— ——.]—In an action to enforce a contract for the sale of a patent without warranty, it is not open to deft. by way of defence to put in issue the validity of the patent.—LIARDET *v.* HAMMOND ELECTRIC LIGHT & POWER CO. (1883), 31 W. R. 710, L. JJ.

—— ——.]—*See* ESTOPPEL, Vol. XXI., pp. 257, 284, Nos. 810, 994.

1552. —— **Patent invalid—Right to repudiate assignment.**]—The owner of a patent for automatic drain valves for use in steam engines entered into an agreement to sell it. The vendor in the agree-

PART X. SECT. 3.

1550 i. *Validity of patent—Right of assignee to dispute—In absence of fraud.*]—VERMILYEA *v.* CANNIFF (1886), 12 O. R. 164.—**CAN.**

d. —— *Whether warranty of validity implied.*]—Where no express agreement or special circumstances exist which might give rise to an implied warranty, an assignment of "all the right, title & interest" of the assignor in a patent of invention does not import any warranty on the part of the assignor as to the validity of the patent.—ELECTRIC FIREPROOFING CO. OF CANADA *v.* ELECTRIC FIREPROOFING CO. (1910), 43 S. C. R. 182; 30 C. L. T. 632.—**CAN.**

e. *Covenant to terminate contract—On lapse of patent.*]—A contract by which rights in a patent for an invention are assigned on condition, among other considerations, that the assignee shall account for his sales of the invention, with a covenant that the lapse of the patent shall give him the right to terminate the contract forthwith, is binding up to the time of notice by him to so terminate it for that reason.—MERGENTHALER LINOTYPE CO. *v.* DOUGALL, Q. R. 32 S. C. 187.—**CAN.**

f. *Construction of covenants—To bring patent into use.*]—STOVIN *v.* DEAN (1867), 26 U. C. R. 600.—**CAN.**

g. *Construction of covenant to release—After assignment.*]—MCGIVERIN *v.* TURNBULL (1872), 32 U. C. R. 407.—**CAN.**

h. *Change in name of invention—By assignee—Without consent of assignor.*]—WANDBY *v.* HEWITT (1877), 27 C. P. 571.—**CAN.**

k. *What warranty implied—Invention*

ment guaranteed the patent to be valid & in full force. The patent was to be sold, together with the rights, privileges, & benefits appertaining thereto, further improvements, & the full & unrestricted use of the vendor's name in connection therewith for the sum of £500, one moiety of which was to be paid at once & the other some months afterwards. The vendor was not to part absolutely with his patent until the whole of the price had been paid. The vendor also undertook to give all possible assistance to the purchaser in his business for a certain time. The purchaser paid £250 & took over the business, letter books, & books of orders. He carried on the business for some months, but on discovering that other similar valves had been previously in the market repudiated the agreement. In an action by the patentee for £250, the balance of the £500, deft. alleged that there was a breach of warranty as to the validity of the patent, which was invalid for want of novelty, utility, & subject-matter, & also that the agreement applied only to the patent rights. He counterclaimed for a declaration that the agreement was not binding on him, & for a return of the £250, or, in the alternative, damages :—*Held :* the patent was invalid & pltf. could not recover the £250 ; deft. was not entitled to rescission of the contract, but, as the business was only worth £240, he was entitled to £10 damages with costs.—BERCHEM *v.* WREN (1904), 21 R. P. C. 683.

1553. —— —— ——.]—The owner of certain patents entered into an agreement to sell them for a price to be paid partly in cash & partly in shares of a co. to be formed by the purchasers before the date fixed for completion. The assurance to the purchasers was to contain a covenant by the vendor guaranteeing the validity of the patents ; the purchasers were to buy some of the patented machines from the vendor. Some of these machines were delivered, & the purchasers by arrangement gave certain promissory notes for the part of the purchase moneys for the patents payable in cash. In consolidated actions by the vendor for the price of the machines delivered & on the promissory notes, defts. alleged that the guarantee of validity of the patents was in the nature of a condition, & that the same were invalid as having been anticipated & for want of subject-matter :—*Held :* the basis of the transaction was that the patents were valid so that deft. was entitled to contest their validity ; but they were invalid.—NADEL *v.* MARTIN (1905), 23 R. P. C. 41, H. L.

Annotation :—**Folld.** Henderson *v.* Shiels (1906), 24 R. P. C. 108.

1554. Assignment conditional on validity of patent—Construed as agreement to assign.]—(1) Patents having been granted to W. & L., W., & & W. & E., respectively, W. & L. authorised E. to negotiate a sale of their patents to R. E. negotiated such sales. By an indenture dated Nov. 2, 1889, expressed to be between W. & E. of the one part & R. of the other part, in consideration of £100 paid to W. & E., & of a further payment of £2,650 within the next twenty-eight days, which latter payment R. agreed to make immediately he had satisfied himself that the patents were valid, W. & E. assigned the patents to R., covenanting for validity. This indenture was executed by E. for W. & self. On Oct. 23, 1889, a payment of fees in respect of one patent was due. This was never made. R., after investigation being satisfied that the patents were not valid, declined to proceed further in the matter. W. & E. then commenced an action against R., claiming specific performance of the agreement for sale :—*Held :* the indenture was merely contractual so far as it related to the patents of W., & W. & L., the sum of £2,650 was not to be paid by R. if the patents, or any one of them, were invalid.

(2) An agent authorised to make a legal assignment of a patent must be authorised by deed (FRY, L.J.).—HAZLEHURST *v.* RYLANDS (1890), 9 R. P. C. 1, C. A.

1555. Agreement for assignment—Signature of specification by patentee—Condition precedent to assignment.] — The declaration stated that a petition had been presented by pltfs., at the request of deft., for the granting to deft. of a patent, that pltfs. had filed a provisional specification, at their own expense, upon condition that defts. should complete the specification within six months, & that afterwards it was agreed that deft. should sell to pltfs. his right in respect of the patent for the sum of £5, to be paid by pltfs. to deft. on their having completed at their own expense the patent ; that it thereupon became necessary in order to enable pltfs. to complete the patent in pursuance of the agreement, that deft. should sign & seal a complete specification ; that pltfs. tendered to deft. a complete specification for his signature. Deft. would not sign it :—*Held :* deft. was bound under this agreement, to sign the specification.—LEWIN *v.* BROWN (1866), 14 W. R. 640.

1556. —— **Of improvements & future inventions —Right of assignees to enforce.**]—By an agreement, made in 1914, the grantee of (*inter alia*) a patent of 1910 for an "Improved construction of lock-nut fastening" agreed to sell & a co. agreed to purchase certain patents & the benefit of all improvements & future inventions that should be made by the grantee in connection with the patented inventions, & the patents to be sold were assigned to the co. In 1921 the grantee obtained a patent for improvements in lock-nuts, & later he had an idea of a further invention that he ultimately admitted to be an improvement in connection with the patented inventions assigned to the co. In an action by the co. against the grantee for performance of deft.'s covenant by the assignment of the patent of 1921 & by the communication of information as to deft.'s idea of a further invention, deft. alleged that the specification of 1921 contemplated a form of spigot & socket different from that in the specification of 1910, & that the later invention was not an improvement upon the earlier invention. Also he contended that pltfs. had, by their alleged refusal to consider the later invention, estopped themselves from obtaining the relief claimed :—*Held :* the matter turned very largely upon the construction of the specifications of 1910 & 1921 ; the specification of 1910 extended to lock-nuts of

new & useful.]—The sale of the right to use an invention contains a warranty that the invention is new & useful.—DERY *v.* HAMEL (1884), 7 L. N. 405.—**CAN.**

l. *Right to extension of term—As well as current term.*]—PECK *v.* POWELL, POWELL *v.* PECK (1885), 11 S. C. R. 494.—**CAN.**

m. *Patent not actually granted—Mistake of one party to assignment.*]—CHISHOLM *v.* PETERS (1898), 31 N. S. R. 16.—**CAN.**

n. *Part of purchase-money paid—Refusal of assignee to pay rest—Variation from caveat—On application for American patent.*]—BINGHAM *v.* MCMURRY (1899), 30 S. C. R. 159.—**CAN.**

o. *Assignment for limited period—Whether right to sell exists after limited period.*]—A person who is the assignee of a patented right for a limited period, with a right of purchase, but who at the expiration of such period elects not to purchase, & reassigns the patent, cannot thereafter sell the patented article, though made during the time he was assignee, his right to make & sell being restricted to such limited period. — BENNETT *v.* WORTMAN

Sect. 3.—*Construction of assignment. Sects.* 4 & 5.]

a type similar to that covered by the 1921 specification, & the 1921 invention was an improvement upon the 1910 invention: & pltfs.' conduct had not been such that there was any estoppel & deft., undertaking to furnish to pltfs. information as to the further invention, should assign to them the patent of 1921, & pay the costs of the action.—VISLOK, LTD. *v.* PETERS (1927), 44 R. P. C. 235.

1557. —— Assignee undertaking maintenance—Assignment condition precedent.]—By an agreement between A. & B., it was agreed that A. should do all acts necessary, except the advance of money, for the purpose of procuring & perfecting certain letters patent, & should immediately after the same were procured execute an assignment of one-third share therein to B.; & B. agreed to pay all fees & disbursements that might be necessary for procuring the letters patent, enrolling the specification, & otherwise in perfecting the same. By 16 & 17 Vict. c. 5, s. 2, it is enacted that all letters patent shall be made subject to the condition that the same shall be void, & the privileges thereby granted shall cease & determine, at the end of three years & seven years respectively, unless there be paid before the expiration of the said three & seven years respectively two several sums of £50 & £100 as therein mentioned:—*Held:* the execution of an assignment by A. was the whole consideration for the undertaking of B. to pay the sums mentioned in that sect.; &, consequently, a condition precedent to his right to sue B. for the non-payment thereof.—HILL *v.* MOUNT (1856), 18 C. B. 72; 25 L. J. C. P. 190; 27 L. T. O. S. 107; 4 W. R. 563; 139 E. R. 1291.

SECT. 4.—**ASSIGNEE WITH NOTICE.**

1558. Contract by prior assignee—With assignor—For account of profits.]—A patentee assigned letters patent to A. & B. who covenanted with him that they, their exors. administrators, & assigns would use their best endeavours to introduce the invention by granting licences or working the patent or selling it, & that the patentee should be entitled to receive 5 per cent. of all net profits, whether arising from royalties, sale, or otherwise, which should be received by A. & B. or the survivor of them, or the exors. or administrators of the survivor, their or his assigns & that an account of profits should be rendered yearly to the patentee, & his share of profits paid to him by A. & B. & the survivor of them, & the exors. or administrators of such survivor, their or his assigns, with a proviso that after a sale had been made of the patent the interest of the patentee in the profits should cease, & a final account be come to.

A. & B. had taken the assignment with a view to forming a co. to work the patent. The co. was formed & the patent made over to them. The patentee sued the co. for an account of profits. The co. demurred, on the ground that there was no privity between them & pltf., & that pltf.'s right if any, was against A. & B. only:—*Held:* pltf. could sue the co. for an account of profits, for the stipulations of the assignment to A. & B. amounted to a contract that the owners for the time being of the patent should account for & pay to pltf. a share of profits unless a sale within the meaning of the deed was effected, & no person taking the patent with notice of this contract could refuse to give effect to it.—WERDERMAN *v.* SOCIÉTÉ GÉNÉRALÉ D'ÉLECTRICITÈ (1881), 19 Ch. D. 246; 45 L. T. 514; 30 W. R. 33, C. A.

Annotations:—**Expld.** Bagot Pneumatic Tyre Co. *v.* Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146. **Folld.** Dansk Rekylriffel Syndikat Akt. *v.* Snell, [1908] 2 Ch. 127. **Expld.** Barker *v.* Stickney, [1919] 1 K. B. 121. **Mentd.** Abouloff *v.* Oppenheimer (1882), 47 L. T. 702; Pilley *v.* Robinson (1887), 20 Q. B. D. 155.

—— —— **For payment of royalties.**]—*See* CONTRACT, Vol. XII., p. 348, No. 2893.

SECT. 5.—**REGISTRATION OF ASSIGNMENT.**

See Patents & Designs Acts, 1907 (c. 29), s. 71, & 1919 (c. 80), s. 16; Patents Rules, 1920, rr. 86–95.

1559. Necessity for.]—To a declaration for infringement of a patent, brought by an alleged assignee by indenture of the patent, deft. pleaded, by denying the assignment *modo et formâ*. On the trial, it appeared that an instrument of assignment had been executed by the patentee, but that it had not been registered under Patent Law (Amendment) Act, 1852 (c. 83):—*Held:* as, by Patent Law Amendment Act, 1852 (c. 83), s. 35, the original patentee was until the entry of the registration, to be deemed & taken to be the sole & exclusive proprietor of the patent, deft. was entitled to a verdict.—CHOLLET *v.* HOFFMAN (1857), 7 E. & B. 686; 26 L. J. Q. B. 249; 29 L. T. O. S. 158; 3 Jur. N. S. 935; 5 W. R. 573; 119 E. R. 1400.

Annotations:—**Consd.** Hassall *v.* Wright (1870), 40 L. J. Ch. 145. **Refd.** Myers *v.* Baker (1858), 28 L. J. Ex. 90; Bowden's Patents Syndicate *v.* Herbert Smith, (1904), 73 L. J. Ch. 522.

1560. What may be registered—Legal assignment.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (E), No. 1534, *ante*.

1561. —— Documents executed before grant.]—(1) Before the date of the grant of a patent to P., P. & H. signed a document referring to certain proposed dealings with patents to be obtained for a process said to be the invention for which the patent was granted. H. requested the Comptroller to enter his name on the Register of Patents as claiming to be entitled to one-half share of the patent under this document. The Comptroller refused to comply with this request on the ground that the document was dated before the grant of the patent. H. then moved that an entry of the document might be made on the Register of Patents as affecting the proprietorship of the patent:—*Held:* the motion must be refused with costs.

(2) *Semble:* there may be documents dated before the date of the grant of the patent which ought to be entered on the Register.—*Re* PARNELL'S PATENT, HALKETT'S APPLICATION (1888), 4 T. L. R. 197; 5 R. P. C. 126.

1562. —— Interest of mortgagee.]—V., the registered assignee of a patent, mortgaged it, & the mtgee. was registered "as mtgee." After

(1901), 2 O. L. R. 292; 21 C. L. T. 527.—**CAN.**

p. *Agreement for assignment—Concurrent conditions—Failure of performance of conditions by one party.*]—SUTHERLAND *v.* WESTHAVER (1906), 39 N. S. R. 52.—**CAN.**

PART X. SECT. 5.

Effect of non-registration—Of ...ive transfers of patents.]—Non-registration, in the patent office at Ottawa, of successive transfers of a patent has not the effect of rendering the transfers null as between the parties thereto, the only effect of such want of registration being that the unregistered transfers or sales cannot be invoked against any subsequent transferee of the patent.—DOYON *v.* CANADIAN FIRE EXTINGUISHING CO. (1898), Q. R. 14 S. C. 367.—**CAN.**

r. *Whether registration necessary—Conditional sale.*]—The patentee of a

this, V. sued an infringer without making the mtgee. a party. Deft. pleaded that V. was not the proprietor & could not sue. The mtgee. declined to be made a co-pltf., & was not added as deft. :—*Held :* (1) as the mtgee. was not registered as assignee or proprietor, Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 87, did not apply, & the case must be decided according to the general law as to mtges., & V. could sue without making the mtgee. a co-pltf. ; (2) *Semble :* even if the mtgee. had been registered as assignee or proprietor, Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 87, would not be read as taking away the mtgor.'s right to sue for infringement of the patent ; (3) if it had been necessary to have the mtgee. before the ct., it would not have been right to dismiss the action on the ground of his absence, but the ct. ought to have made him a party under Order 16, r. 11 ; (4) it was not necessary at present to have him before the ct.—VAN GELDER, APSIMON & CO. *v.* SOWERBY BRIDGE UNITED DISTRICT FLOUR SOCIETY (1890), 44 Ch. D. 374 ; 59 L. J. Ch. 583 ; 63 L. T. 132 ; 38 W. R. 625 ; 6 T. L. R. 338 ; 7 R. P. C. 208, C. A.

Annotation :—**Refd.** *Re* Goltstein's Appln. (1910), 27 R. P. C. 289.

1563. —— Document affecting proprietorship —Incomplete document.]—(1) Where there is no right of specific performance of an agreement relating to the sale of patents, & for division of the proceeds of sale, an injunction restraining the registered owner of the patents from dealing with them ought not to be granted.

(2) An entry on the Register of Patents of an agreement relating to a patent after the date of a modification of the agreement without any reference in the entry relating to the modification held to be clearly wrong & ordered to be expunged. —*Re* HUTCHINSON'S PATENT, HASLETT *v.* HUTCHINSON (1891), 8 R. P. C. 457, C. A.

Annotation :—*As to* (1) **Apld.** *Re* Fletcher's Patent (1893), 62 L. J. Ch. 938.

1564. —— —— ——.]—A patentee signed a letter agreeing to grant to L. exclusive licence to use his patent, on payment of a royalty to be mutually agreed upon. L. registered the document under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 23 :—*Held :* as the incomplete document did not give to L. any legal or equitable interest in or affect the proprietorship of the patent, it ought not to have been registered, & it was immaterial whether the amount of the royalty had in fact been subsequently agreed by parol.—*Re* FLETCHER'S PATENT (1893), 62 L. J. Ch. 938 ; 10 R. P. C. 252 ; 37 Sol. Jo. 509 ; 3 R. 626 ; *sub nom. Re* FLETCHER'S PATENT, LUMLEY *v.* FLETCHER, 69 L. T. 129.

1565. —— —— Equitable assignment.] Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 23, in conjunction with Patents Rules, 1883, rr. 65 & 68, an equitable assignment of a patent, or of a share or interest in a patent, may be entered in the Register of Patents as a document affecting the proprietorship of the patent.

(2) "Assignment" in Patents Rules, 1883, r. 65, includes an equitable assignment : but *semble :* "assignment" in Patents, Designs, & Trade Marks Act, 1883 (c. 57), ss. 23 & 87, refers to legal assignment only.

(3) Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 87, only prohibits registration of simple notices of trusts. Documents which affect the proprietorship of a patent, whether by creating trusts or otherwise, are not excluded.—*Re* CASEY'S PATENTS, STEWART *v.* CASEY, [1892] 1 Ch. 104 ; 61 L. J. Ch. 61 ; 66 L. T. 93 ; 40 W. R. 180 ; 36 Sol. Jo. 77 ; 9 R. P. C. 9, C. A.

1566. Agreement to assign—Prior registration of licencee—Prior equity of assignee.]—Where the owner of a patent has entered into an agreement to assign it for value, & express notice of such agreement has been given to persons who subsequently obtain a licence from the owner for value, & register it before the registration of the agreement, the fact of such notice will enable the assignees of the patent under the agreement to set up their prior equity against the licensees, by virtue of the proviso in Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 87, which proviso keeps open all equities in respect of registered patents, so that they may be enforced in like manner as in respect of other personal property.—NEW IXION TYRE & CYCLE CO. *v.* SPILSBURY, [1898] 2 Ch. 484 ; 67 L. J. Ch. 557 ; 79 L. T. 229, C. A.

1567. Registration retrospective—To date of assignment.]—(1) W., a patentee, agreed with H. that H. should be the sole manufacturer under the patent. This agreement was embodied in a deed, which was prepared by the solr. of W., H. employing no legal adviser. The deed was not registered in compliance with the Patent Law Amendment Act, 1852 (c. 83), s. 35, until after bill filed. Subsequently W. granted a right of manufacture to M., who had full notice of the previous agreement with H. The grant to M. was also unregistered :—*Held :* under the circumstances W. could not avail himself of an objection based upon the non-registration of the agreement with H., & as the grant to M. was also unregistered, M. also was not entitled to take the objection.

(2) *Semble :* the subsequent registration had relation back to the date of the agreement.—HASSALL *v.* WRIGHT (1870), L. R. 10 Eq. 509 ; 40 L. J. Ch. 145 ; 18 W. R. 821.

Annotations :—*Generally,* **Refd.** Ihlee *v.* Henshaw (1886), 55 L. J. Ch. 273 ; New Ixion Tyre & Cycle Co. *v.* Spilsbury, [1898] 2 Ch. 137.

1568. Effect of non-registration—Where notice of assignment given.]—HASSALL *v.* WRIGHT, No. 1567, *ante.*

1569. Registration of fraudulent assignment—Reference to prior assignment inserted.]—(1) As to the jurisdiction of the ct. to "expunge, vacate & vary" entries on the "Register of Proprietors" of patents under Patent Law (Amendment) Act, 1852 (c. 83), s. 38, the ct. can, on motion, expunge an entry fraudulently made, & can direct any facts relating to the proprietorship to be inserted on the register ; but not the legal inferences to be drawn from them.

(2) A patentee assigned half the patent to A., & afterwards he assigned the whole to B., by a deed, reciting that he had already granted a licence to work & use to A. B.'s assignment was first registered :—*Held :* B. had constructive notice of A.'s rights, & an entry was ordered, on motion, to be made in the register that the licence referred to in B.'s assignment was the deed of assignment to A., subsequently entered.—*Re* MOREY'S PATENT

machine & a certain firm executed an agreement (the patentee signing by an agent) by which the patentee agreed to sell & the firm agreed to purchase the patent upon the terms & subject to the conditions afterwards set forth. The purchase-money was to be payable on the performance of the conditions, which were that the vendor was to erect one of the machines, & it was to be tested on behalf of the purchasers ; & the vendor guaranteed a certain result :—*Held :* this was a conditional sale only, & the purchasers were not entitled to registration under Patents, Designs, & Trade Marks Act, 1889, s. 111.—*Re* MUNSON'S PATENT (1896), 14 N. Z. L. R. 421.—N.Z.

Sect. 5.—*Registration of assignment. Sects.* 6, 7, 8, 9 & 10. *Part XI. Sect.* 1: *Sub-sect.* 1.]

(1858), 25 Beav. 581; 6 W. R. 612; 53 E. R. 759.

Annotation:—*As to* (2) **Refd.** New Ixion Tyre & Cycle Co. *v.* Spilsbury, [1898] 2 Ch. 137.

1570. Validity of deed of assignment—Right of Comptroller to decide—On application for registration.]—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL, 1910 (E), No. 1534, *ante.*

Assignment by executors—Assignment registered before probate.]—*See* EXECUTORS, Vol. XXIII., p. 62, No. 424.

1571. Notice of application to register—Practice of Patent Office.]—VIOLA *v.* SHARPE (1904), 22 R. P. C. 23.

1572. Rectification of register—On ground of fraud & lack of consideration.]—A. as assignee, under an assignment from P. of a half share of a patent granted to P. & V., brought an action against the O. co. & P. for infringement, & moved for an *interim* injunction. The O. co. & P. thereupon moved to rectify the Register of Patents by expunging A.'s name, on the ground that the signature to the assignment was not P.'s, or if his, was obtained by fraud & without consideration:—*Held:* on the evidence pltf. was entitled to an injunction.—ANDERSON *v.* PATENT OXONITE CO., LTD. (1886), 3 R. P. C. 279.

SECT. 6.—RIGHTS OF ASSIGNEES.

See Partnership Acts, 1907 (c. 29), s. 71, & 1919 (c. 80), s. 16.

Right to sue for infringement.]—*See* Part XIV., Sect. 2, *post.*

Right to extension of terms.]—*See* Part XII., Sect. 2, *post.*

Right to apply for revocation.]—*See* Part XIII., *post.*

SECT. 7.—BANKRUPTCY OR INSOLVENCY OF PATENTEE.

1573. Effect of assignment to trustees—Patent not avoided.]—A patent is not avoided by an assignment to trustees for the benefit of creditors of the patentee, exceeding twelve in number.—M'ALPINE *v.* MANGNALL (1846), 3 C. B. 496; 15 L. J. C. P. 298; 7 L. T. O. S. 284; 136 E. R. 198, Ex. Ch.

Annotations:—**Mentd.** Beard *v.* Egerton (1849), 8 C. B. 165; Anderson *v.* Fitzgerald (1853), 4 H. L. Cas. 484; Gregory *v.* Cotterell (1855), 5 E. & B. 571; Cox *v.* Hickman (1860), 8 H. L. Cas. 268.

., pp. 660, 724, 727, Nos. 5877, 6292, 6308.

SECT. 8.—DEATH OF PATENTEE.

See Patents Acts, 1907 (c. 29), ss. 37, 43, 71, & 1919 (c. 80), s. 16.

SECT. 9.—VESTING ORDER.

1574. Where no assignment made.] — The liquidators of a limited co. in process of winding up contracted to sell certain letters patent to a purchaser. The purchase-money was paid, but, by inadvertence, the co. was dissolved before the letters patent were assigned. A petition was presented asking for an order under Trustee Act, 1893 (c. 53), vesting the letters patent in the purchaser for all the estate of the co. therein:—*Held:* the legal estate in the letters patent having vested in the Crown, the ct. had no jurisdiction to make such an order.—*Re* TAYLOR'S AGREEMENT TRUSTS, [1904] 2 Ch. 737; 73 L. J. Ch. 557; 52 W. R. 602; 48 Sol. Jo. 560; *sub nom. Re* NIGER PATENT ELASTIC ENAMEL CO., 48 Sol. Jo. 476.

Annotations:—**Distd.** *Re* No. 9 Bomore Road, [1906] 1 Ch. 359. **N.F.** *Re* Dutton's Patents (1923), 67 Sol. Jo. 403. **Refd.** Hastings Corpn. *v.* Letton, [1908] 1 K. B. 378.

1575. ——.]—Letters patent for two inventions relating to "Improvements in call bells, audible automatic heat indicators, & burglar alarms & lamps & bells" were granted to H. By an agreement, dated May 24, 1911, H. had agreed with J. & W., in consideration of a sum of money, to use his best endeavours to obtain letters patent, &, when obtained, to execute a legal assignment of the same to them. The consideration money was paid, but no assignment was executed by H., who disappeared. J. & W. applied to the ct. for a vesting order under Trustee Act, 1893 (c. 53), s. 35, & Patents & Designs Act, 1907 (c. 29), s. 72:—*Held:* a patentee's right was a chose in action & entirely distinct from the right of property in a chattel. A vesting order was accordingly made.—*Re* HEATH'S PATENT (1912), 56 Sol. Jo. 538; 29 R. P. C. 389.

1576. ——.]—A. co., to which letters patent, dealing with an invention for improvements in connection with light railways, had been granted, was dissolved after agreeing to assign all its assets to a new co. The patent was, however, inadvertently not transferred to the new co. The new co., therefore, applied to the ct. by petition for a vesting order in respect of the patent:—*Held:* as the patent was a chose in action & had not ceased to exist, although it had become vested in the Crown, & as this was a case where a trustee could not be found, the new co. was entitled to a vesting order.—*Re* DUTTON'S PATENTS (1923), 67 Sol. Jo. 403; 40 R. P. C. 84.

See, also, TRUSTS & TRUSTEES.

SECT. 10.—STAMPS.

See, generally, REVENUE.

1577. Necessity for stamp—Foreign patent.]—A share in a patent granted in New South Wales, & a sole licence to use in a district of that colony the invention protected by the patent, are "property" within Stamp Act, 1891 (c. 39), s. 59 (1), & do not come within the exception of "property locally situate out of the United Kingdom." An agreement made in England for the sale of such a share or licence is, therefore, liable to *ad valorem* stamp duty under Stamp Act, 1891 (c. 39), s. 59 (1),

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PART X. SECT. 6.

t. *Right to sue assignor for breach of warranty—Of fitness of patent for purpose bought.*]—The purchaser of a patent for things which for a number of years have been publicly used can recover damages from the vendor if he shows that the process for which he has bought the patent is unfit for the purpose for which he destined it, that it is not, & was not, worth anything at the time of the sale, & that it is of no practical utility.—DERY *v.* HAMEL (1884), 13 R. L. O. S. 50; 11 Q. L. R. 24.—**CAN.**

PART X. SECT. 8.

a. *General rule.*]—The grant of letters patent for an invention is a grant of a right to exclude others from manufacturing or using the particular invention within the territory of the State under whose laws it is granted, & the title to the right must devolve, as in the case of land, according to the laws of that State.—POTTER *v.* BROKEN HILL PROPRIETARY CO., LTD. 3 C. L. R. 479.—**AUS.**

as though it were an actual conveyance on sale.—SMELTING CO. OF AUSTRALIA *v.* INLAND REVENUE COMRS., [1897] 1 Q. B. 175; 66 L. J. Q. B. 137; 75 L. T. 534; 61 J. P. 116; 45 W. R. 203; 13 T. L. R. 84, C. A.

Annotations :—**Apld.** Danubian Sugar Factories *v.* I. R. Comrs., [1901] 1 K. B. 245. **Consd.** I. R. Comrs. *v.* Muller's Margarine, [1901] A. C. 217. **Folld.** Urban *v.* I. R. Comrs. (1913), 29 T. L. R. 476. **Apld.** Velazquez *v.* I. R. Comrs., [1914] 3 K. B. 458. **Refd.** New York Life Insce. *v.* Public Trustee, [1924] 2 Ch. 101.

1578. —— ——.]—Patent rights in foreign countries & the colonies are not "property locally situate out of the United Kingdom" within the exception in Stamp Act, 1891 (c. 39), s. 59 (1), & therefore a memorandum agreement of sale of such rights made in this country is liable to an *ad valorem* conveyancing duty.—URBAN *v.* INLAND REVENUE COMRS. (1913), 29 T. L. R. 476, C. A.

Annotation :—**Refd.** Velazquez *v.* I. R. Comrs., [1914] 2 K. B. 404.

Part XI.—Licences.

SECT. 1.—VOLUNTARY LICENCE.

SUB-SECT. 1.—EXPRESS LICENCE.

1579. General licence—"Use & exercise."]—The words "use & exercise" in the grant of a licence confer, in the absence of anything limiting the construction of them, a full licence on the licencee.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* NORTH BRITISH RUBBER CO., LTD. (1904), 21 R. P. C. 161, C. A.

1580. Limited licence—As to place.]—Defts., who were the owners of patents in Belgium & England for an invention for making glass lamp globes, by a deed executed in Belgium granted a licence to pltfs. to manufacture articles under their invention in Belgium, but not elsewhere. The deed contained a clause for submitting disputes to arbn. Pltfs. under this licence manufactured articles in Belgium & sold them in England. Defts. issued a circular warning persons engaged in the trade that the importation & sale of articles made in foreign countries under their invention, except by themselves, would be a violation of their patent. Pltfs. brought an action to restrain the issue of this circular until the matters in dispute had been determined by arbn. :—*Held :* the grant of the licence to use the patent in Belgium did not imply permission to sell the manufactured article in England in violation of defts.' English patent.—SOCIÉTÉ ANONYME DES MANUFACTURES DE GLACES *v.* TILGHMAN'S PATENT SAND BLAST CO. (1883), 25 Ch. D. 1; 53 L. J. Ch. 1; 49 L. T. 451; 48 J. P. 68; 32 W. R. 71; Griffin's Patent Cases (1884–1886), 209, C. A.

Annotations :—**Refd.** Household & Rosher *v.* Fairburn & Hall (1884), 51 L. T. 498; National Phonograph Co. of Australia *v.* Menck, [1911] A. C. 336.

1581. —— **As to manufacture alone.**]—G., a patentee of inventions relating to "gigantic wheels," entered into an agreement with B., giving him, subject to an existing licence, the sole right to construct wheels in accordance with the patents, subject as therein mentioned: if the patentee or persons claiming under or through him were desirous of erecting a wheel, they were to furnish B. with the specifications & B. was to have a certain time to say whether he would construct the works according to the specifications; if not, then others might be employed to do so: the price was to be settled by arbn. in the event of a difference. B. entered into negotiations with the B. W. G. co. for the construction of a wheel & the co. agreed to grant a lease of certain land to a projected co., to be nominated by B., which co. was to construct a gigantic wheel on such land. B. alleged that the wheel he was about to construct was not to be constructed in accordance with the patent. G. & his trustee in bkpcy. then brought an action against B. & the B. W. G. co., claiming an injunction to restrain defts., or either of them, from constructing or contracting to construct any wheel according to pltf.'s invention, except under the agreement or, in the alternative, an injunction against infringement :—*Held :* (1) B. had an absolute licence under the agreement to construct, but not to use, gigantic wheels; (2) the arbn. clause in the agreement did not include contracts by B. with third parties to construct wheels for them; (3) the declarations in the original order of the Ct. of Appeal ought to be varied, & the injunction thereby granted changed to an injunction restraining B. from constructing a wheel in accordance with the patents, except under the agreement.—BASSET *v.* GRAYDON (1897), 14 R. P. C. 701, H. L.

1582. —— **As to use in particular manner.**]—L. & B. the owners of a patent for improvements in lamps, granted a licence to H. to manufacture lamps according to the patent. Subsequently L. & B. began to apply their patented lamp to stoves. The licencee claimed that he was entitled under the licence to use the lamps in the stoves :—*Held :* on the true construction of the agreement, the licence was limited to the manufacture of lamps only, & an injunction granted to restrain the licencee from manufacturing anything under the licence except the lamp.—SOCIÉTÉ ANONYME POUR LA FABRICATION D'APPAREILS D'ECLAIRAGE *v.* MIDLAND LIGHTING CO., LTD., & ALTENDORF & WRIGHT (1897), 14 R. P. C. 419.

1583. —— **As to time—Coterminous with patent.**]—In 1903 pltf. granted to defts. a licence by deed to use, within a certain district, the inventions protected by three patents granted to H. in 1897 & relating to the employment of ferro-concrete in the construction of buildings. The deed contained a covenant by defts. that they would not at any time, without the written consent of pltf., carry out, or contract to carry out, & ferro-concrete or similar work which might be an infringement of the patents or be in competition with them. In an action to restrain breaches of the covenant, defts., who were builders having a large business both in, & outside of, the district, alleged that the covenant, if valid, would prevent them using at all in the United Kingdom in their business the modes of building construction which they had used before the date of the licence; they contended that the covenant was wider than was necessary for the protection of the patentee & injurious to the public interest, & was in undue restraint of trade, & void. They tendered evidence to show the scope of the patents, the modes of building

[illegible] *Limited licence—As to place.*]—IMPERIAL SUPPLY CO. *v.* GRAND TRUNK RY. CO. (1912), 11 E. L. R. 340; 14 [illegible]. R. 88.—CAN.

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prior to, & subsequent to, the date of the patents, the extent & nature of defts.' business at the date of the licence, & the effect which the covenant would have upon their business, & what, having regard to the nature of the patents, was necessary for the protection of the patentee. Defts. also contended that pltf. was, as the agent of H., incompetent to sue:—*Held:* pltf. was competent to sue; the restraint under the covenant continued only during the existence of the licence, which was coterminous with the patents, & did not extend beyond what was reasonably necessary for the protection of the trade of the covenantee, & was valid.—MOUCHEL *v.* CUBITT & CO. (1907), 24 R. P. C. 194.

1584. Exclusive licence—Nature of.]—An exclusive licence is a leave to do a thing, & a contract not to allow any one else to do the thing; but, unless coupled with a grant, it confers, no more than any other licence, any interest or property in the thing, & the licencee has no title to sue in his own name.

A patentee of machinery, by deed duly registered under the Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 23, granted to pltf. the full & exclusive licence to use & exercise the patented invention within a specified district for a limited period, & covenanted during that period not to sell or to grant any licence to exercise or use the invention to any other person in the same district; & in case the patent should be infringed, he covenanted to take all necessary proceedings for defending the same, & that in default of his so doing it should be lawful for pltf. to take such proceedings in his, the patentee's, name. The patentee afterwards sold two of the patented machines to firms outside the specified district, & these firms sold them to defts., who used them within the district; & it was in dispute whether or not defts. had actual notice of the exclusive licence at the time of their purchase:—*Held:* (1) actual notice had not been proved against defts.; (2) the exclusive licence, being simply an authority to do lawfully that which would otherwise have been unlawful, & not being a licence coupled with or equivalent to a grant, did not entitle the licencee to sue in his own name without joining the patentee.—HEAP *v.* HARTLEY (1889), 42 Ch. D. 461; 58 L. J. Ch. 790; 61 L. T. 538; 38 W. R. 136; 5 T. L. R. 710; 6 R. P. C. 495, C. A.

Annotations:—As to (1) **Refd.** *Re* Apollinaris Co.'s Trade Marks "Apollinaris," "Friedrichshall," & "Hunyadi Janos" (1890), 63 L. T. 162; Scottish Vacuum Cleaner Co. *v.* Provincial Cinematograph Theatres (1915), 32 R. P. C. 353. *As to* (2) **Refd.** London Printing & Publishing Alliance *v.* Cox, [1891] 3 Ch. 291; Smelting Co. of Australia *v.* I. R. Comrs., [1896] 2 Q. B. 179; Fitzgerald *v.* Firbank, [1897] 2 Ch. 96; Neilson *v.* Horniman (1909), 26 T. L. R. 188; National Phonograph Co. of Australia *v.* Menck, [1911] A. C. 336; British Assocn. of Glass Bottle Manufacturers *v.* Forster (1917), 86 L. J. Ch. 489; British Actors Film Co. *v.* Glover, [1918] 1 K. B. 299.

1585. —— Number of licencees immaterial.]—The grant of an exclusive licence to use a patent does not invalidate the patent itself, although the patent may be vested in twelve persons; & it is wholly immaterial to its validity, in what number of persons such a licence is vested, whether exclusive or not. Such a licence would not be invalid, if the districts or district covered by the licence included the whole extent of the patent.—PROTHEROE *v.* MAY (1839), 5 M. & W. 675; 1 Web. Pat. Cas. 414; 9 L. J. Ex. 121; 151 E. R. 286; *previous proceedings*, 2 Coop. *temp.* Cott. 60.

Annotation:—**Refd.** Bower *v.* Hodges (1853), 13 C. B. 765.

1586. —— Extent of licence immaterial.]—PROTHEROE *v.* MAY, No. 1585, *ante*.

1587. —— Irrevocable.]—A patentee, in consideration of a sum of money paid down & of royalties thereafter to be paid, by deed granted an exclusive licence for the manufacture & sale of the patented articles manufactured according to the patent. The licencees covenanted to pay the royalties & to push the invention, & were authorised to grant sub-licences. They had express power to revoke the licence, but no such power was reserved to the patentee. Disputes arose in consequence of improvements made by the licencees in the patented invention to which the patentee objected as deviations from the patent, & the royalty was withheld; thereupon the patentee by notice in writing purported to revoke the licence:—*Held:* (1) the licence was not revocable at the will of the patentee; (2) there had been no such breach of the conditions contained in the deed as would justify a revocation.—GUYOT *v.* THOMSON, [1894] 3 Ch. 388; 64 L. J. Ch. 32; 71 L. T. 124; 11 R. P. C. 541; 8 R. 810 *on appeal*, 71 L. T. 416, C. A.

SUB-SECT. 2.—IMPLIED LICENCE.

1588. Licence to use—Implied from unconditional sale.]—(1) In a suit to restrain the sale of a patented article, it is incumbent on pltf. not only to prove the sale, but to prove that the article was not made by himself or his agents. (2) Where the owner of a patent manufactures & sells the patented article in a foreign country as well as in England, the sale of the article in one country implies a licence to use it in the other. But if he has assigned his patent in either country, the article cannot be sold so as to defeat the rights of the assignee. The owner of an English patent manufactured the patented article in France as well as in England. In a suit to restrain the sale of the article in England, pltf. proved that it was not made at his manufactory in England, but could not prove that it was not made at his manufactory in France. The bill was dismissed with costs.—BETTS *v.* WILLMOTT (1871), 6 Ch. App. 239; 25 L. T. 188; 19 W. R. 369; Goodeve's Patent Cases, 61, C. A.

Annotations:—Generally, **Consd.** National Phonograph Co. of Australia *v.* Menck, [1911] A. C. 336. **Refd.** Soc. Anon. des Manufactures de Glaces *v.* Tilghman's Patent Sand Blast Co. (1883), 25 Ch. D. 1; Badische Anilin und Soda Fabrik *v.* Isler, [1906] 1 Ch. 605; Scottish Vacuum Cleaner Co. *v.* Provincial Cinematograph Theatres & British Vacuum Cleaner Co. (1915), 32 R. P. C. 353.

1589. —— ——.]—The course of business of pltfs. in an action for infringement was to sell only through agents, whose dealings were restricted to their respective localities. Defts. employed a friend, who resided within the district of pltfs.' London agent, to purchase from that agent certain goods. After these were paid for by his friend, &, at request of the latter, consigned direct to deft. in the Isle of Wight, he first discovered, on unpacking, that each box had a notice on it containing certain restrictions as to the use of the goods. Deft. covered up the notices with his own labels, & resold the goods to his customers. His friend, when buying, never saw the boxes or the notices:—*Held:* deft. had not infringed.

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b. *Licence to use—Whether implied from stamping of article.*]—12 Vict. c. 24, s. 16, only requires the date of the patent to be stamped on articles sold or offered for sale, & does not make such stamping *per se* amount to a licence to use the invention.—SMITH *v.* MUTCHMORE (1861), 10 C. P. 391.—**CAN.**

That sale carried the right to use the mantles in any way deft. wished, unless he knew of the restrictions, which, if he knew at the time of the sale, would bind him (WILLS, J.).—INCANDESCENT GAS LIGHT CO., LTD. *v.* CANTELO (1895), 11 T. L. R. 381 ; 12 R. P. C. 262.

Annotations :—**Apld.** Badische Anilin und Soda Fabrik *v.* Isler, [1906] 1 Ch. 605 ; National Phonograph Co. of Australia *v.* Menck, [1911] A. C. 336. *Generally*, **Refd.** Scottish Vacuum Cleaner Co. *v.* Provincial Cinematograph Theatres & British Vacuum Cleaner Co. (1915), 32 R. P. C. 353.

1590. —— —— Rebuttal of implication.] While a patentee is entitled by virtue of his statutory monopoly to impose conditions upon the sale of his patented article, the imposition of such conditions is not presumed, but, on the contrary, a sale having occurred, the presumption is that the full right of ownership was meant to be vested in the purchaser. The latter's right in the patented article will, however, be limited if there is brought home to him the knowledge of the conditions imposed, by the patentee or those representing the patentee, upon him at the time of sale.—NATIONAL PHONOGRAPH CO. OF AUSTRALIA, LTD. *v.* MENCK, [1911] A. C. 336 ; 80 L. J. P. C. 105 ; 104 L. T. 5 ; 27 T. L. R. 239, P. C.

Annotations :—**Consd.** Columbia Gramophone Co. *v.* Vanner (1916), 33 R. P. C. 104 ; Barker *v.* Stickney, [1918] 2 K. B. 356. **Apld.** Columbia Gramophone Co. *v.* Murray (1922), 39 R. P. C. 239. **Refd.** Scottish Vacuum Cleaner Co. *v.* Provincial Cinematograph Theatres & British Vacuum Cleaner Co. (1915), 32 R. P. C. 253.

1591. Licence to sell—Implied from licence to manufacture.]—A licence to A. to manufacture a patent article is an authority to his vendees to vend it without the consent of the patentee. THOMAS *v.* HUNT (1864), 17 C. B. N. S. 183 ; 144 E. R. 74.

Annotation :—**Refd.** Badische Anilin und Soda Fabrik *v.* Isler, [1906] 1 Ch. 605.

SUB-SECT. 3.—FORMALITIES.

1592. Writing not under seal.]—*Assumpsit* for the price of a licence granted by pltf. to deft. to use an invention for a patent furnace. Pltf. having obtained the patent, granted defts. a licence, which was in writing, but not under seal, to use the patent ; & defts., having received the licence, kept it, & used the invention, but, when called upon to pay the price agreed upon, objected to pay for it, on the ground that it was void, as not being under seal. By the terms of the letters patent, all persons were commanded not to "make, use, or put in practice the said invention, or any part of the same, nor in anywise counterfeit, imitate, or resemble the same, not make, or cause to be made, any addition thereunto or subtraction from the same, whereby to pretend himself or themselves to be the inventor or inventors, deviser or devisers thereof, without the licence, consent, or agreement of the said C. the patentee, his exors., etc., in writing, under his or their hands & seals, first had & obtained," upon pain of a contempt of the royal command, & of being answerable to pltf. in damages :—*Held :* (1) defts., having obtained the licence they had bargained for, & kept it, were bound to pay for it ; (2) the licence was not void as not being under seal.—CHANTER *v.* DEWHURST (1844), 12 M. & W. 823 ; 13 L. J. Ex. 198 ; 3 L. T. O. S. 104 ; 152 E. R. 1432.

1593. Constructive agreement for licence—No formal deed.]—This was an action for a declaration that defts. were licencees under pltf.'s patent, which was for an invention of improvements in flats, & in fasteners for securing the card clothing thereon & thereto, & for an account of royalties. Defts. denied that they were licencees & that they made flats according to pltf.'s invention. According to the evidence, negotiations were entered into between pltf. & defts. which, in pltf.'s view, resulted in an arrangement for a licence ; defts. admittedly make flats for some time under pltf.'s patent & paid royalties, but they denied that they had ever actually taken a licence & alleged that they had paid all royalties due for flats made under pltf.'s patent ; that if there was a licence it was determinable at will, & had been determined ; they further alleged that the flats they were now making were not made according to pltf.'s invention, relying on certain prior specifications to give a limited construction to pltf.'s claim :—*Held :* (1) there was an agreement by defts. to pay, up to a certain date, royalties at a rate mentioned for all flats made under pltf.'s patent, which, in effect, constituted a licence ; (2) defts.' flats were a colourable imitation of pltf.'s, & a declaration was granted that defts. were licencees, that their flats apart from the licence was an infringement & defts. were bound to account.—TWEEDALE *v.* HOWARD & BULLOUGH, LTD. (1896), 13 R. P. C. 522.

1594. Verbal agreement.]—CROSSLEY *v.* DIXON, No. 1609, *post.*

1595. ——.]—C., being the patentee & owner of an invention, entered into the employ of L. under an arrangement whereby L. purchased C.'s stock of the patented goods, & was to be entitled to make & sell the patented articles. C. subsequently left L.'s employ, & commenced an action for infringement of the patent against L., & a second action also against P., who claimed to be the assignee of L.'s business. On behalf of L. & P., it was contended that C. had granted an irrevocable licence to manufacture & sell the patented articles :—*Held :* so far as the licence to L. was by parol, it was *primâ facie* revocable, & was in fact intended to be revocable, & the documentary evidence confirmed this view, & C. having revoked the licence, L. & P. must be restrained from infringing the patent.—COPPIN *v.* LLOYD, COPPIN *v.* PALMER (1898), 15 R. P. C. 373.

1596. ——.]—In 1913 a patent was granted for "improvements in winches for operating the rope of a duplex derrick." Between the times of the filing of the provisional & complete specifications, the patentee, under a verbal agreement, entered the service of a co. engaged in making windlasses as technical adviser & engineer draughtsman ; & the co. while the patentee was in their employment made & sold the patented windlasses. In 1919 the patentee commenced an action against the co. alleging that it was a term of the verbal agreement that, during pltf.'s service, the co. should have pltf.'s licence to make & sell windlasses under the patent, at a reasonable royalty, &, failing agreement between the parties, at such royalty as might be settled by arbn. He contended that he would have received at least 5 per cent. on the selling price of the windlasses. Defts. denied that they had agreed to accept a licence from pltf. :—*Held :* (1) pltf. had proved that the agreement for a licence had been made ; he was entitled to a reasonable royalty ; (2) as the agreement was verbal & defts. refused to refer the matter to arbn., the matter could not go to arbn. ; the matter should be referred to an official referee for inquiry & report under Arbitration Act, 1889 (c. 49), s. 13, & the costs up to the judgment should be paid to pltf., & the cost of the

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inquiry should be reserved.—FLEMING *v.* DOIG (J. S.) (GRIMSBY), LTD. (1921), 38 R. P. C. 57.

1597. Necessity for stamp.]—*Semble:* a licence, under seal, to use a patented article, does not require a stamp.—CHANTER *v.* JOHNSON (1845), 14 M. & W. 408; 14 L. J. Ex. 289; 5 L. T. O. S. 331; 153 E. R. 534.

1598. ——.]—WILSON *v.* UNION OIL MILLS CO., LTD. (1891), 9 R. P. C. 57.

1599. ——.]—SMELTING CO. OF AUSTRALIA *v.* INLAND REVENUE COMRS., No. 1577, *ante*.

1600. Registration of licence—Right against prior assignee.]—NEW IXION TYRE & CYCLE CO. *v.* SPILSBURY, No. 1566, *ante*.

SUB-SECT. 4.—CONDITIONS.

1601. Termination of licence—On declaration of invalidity.]—CHEETHAM *v.* NUTHALL (1893), 10 R. P. C. 321.

1602. Condition limiting manner of use.]—D. co. were the owners of the Welch patent for "Improvements in rubber tyres & metal rims or felloes of wheels for cycles & light vehicles." The mode of fastening the tyre on to the rim was by means of an endless inextensible wire. In 1893 & 1899 they licenced the N. co. to make tyres under this patent, but to fasten them on by overlapping the ends of the wires & passing them through holes in the rim, where they were to be secured by nuts. The deposited tyres & the drawing showed the holes in the shoulder of the rim. In 1900 the D. co. brought an action for infringement of the patent against the B. & A. co., who were selling tyres fastened by means of passing the ends through holes in the centre of the rim. They had purchased these tyres from the N. co. Defts. claimed to be entitled under the terms of the licence to sell such tyres, but pltfs. alleged that defts.' tyres were not covered by the licence:—*Held:* the licencees were not limited to using the tyres on any particular rim, & they were not bound by the words "mode of fastening" or otherwise to put the holes at any particular place in the cross-section of the rim.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* BUCKINGHAM & ADAMS CYCLE & MOTOR CO., LTD. (1901), 18 R. P. C. 423, C. A.

1603. Prohibited condition—Requiring purchase from grantor—Of article unprotected by patent.]—(1) The insertion in a licence to work a patented process of a condition requiring the licencee to purchase from the patentee an article not protected by the patent so far as it is required for use in the patented process is null & void under Patents & Designs Act, 1907 (c. 29), s. 38 (1) (*b*).

(2) The insertion by the patentee in a licence of such a condition is by Patents & Designs Act, 1907 (c. 29), s. 38 (4), available to any person as a defence to an action for infringement of the patent.—SARASON *v.* FRÉNAY, [1914] 2 Ch. 474; 83 L. J. Ch. 909; 111 L. T. 919, C. A.

Patents & Designs Act, 1907 (c. 29), s. 38.

SUB-SECT. 5.—RIGHTS OF LICENCEES.

A. Right to Sue.

See Part XIV., Sect. 2, sub-sect. 1, A., *post*.

B. Right to Deny Validity of Patent.

1604. General rule.]—N. obtained a patent for the application of the principle of smelting iron by the use of heated air applied to furnaces. B. obtained a licence from him to use this process, on the payment of 1*s.* per ton on the iron thus smelted. Disputes, & then litigation, arose between them, & it was agreed by an instrument in writing, dated Nov. 11, 1833, which recited the previous circumstances, that both parties should withdraw their law processes; that, "in consideration of the present payment of £400 to be accepted by N. in full of 1*s.* per ton on the whole iron smelted from the erection of B.'s works up to the 11th day of Nov. current, & in consideration of the payment of 1*s.* per ton upon the whole iron which shall be smelted from the 11th of Nov. current till the expiry of the letters patent, by the use of heated air in any of the modes heretofore applied, or in any other mode falling under the said patent," N. should grant to B. a licence, which further on in the agreement was described to relate to "the application or use of heated air in any of the modes heretofore practised at B.'s works, or in any other mode falling under the description in said patent, or in the specification thereof." N. afterwards instituted a suit to compel B. to perform this agreement. B. instituted a cross-suit to suspend N.'s proceedings, on the ground that the process of smelting by heated air, used at B.'s works, did not fall within the patent:—*Held:* after this agreement, B. could not set up such a defence to the claim of N. —BAIRD *v.* NEILSON (1842), 8 Cl. & Fin. 726; 8 E. R. 285, H. L.

1605. ——.]—In an action of covenant, the deed was set forth on *oyer*, reciting a former deed between pltf. & deft., whereby pltf. licenced deft. to use a patent, of which pltf. appeared by the deed, as recited, to have obtained a regular grant. *Qu.:* whether deft. was estopped by the latter deed from denying that the patent was valid, as recited in the earlier deed, or only from denying that a deed alleging that fact was executed. By the earlier deed, pltf. licenced deft. to use his patent during a term, paying a stated royalty. By the deed declared upon, reciting the earlier deed & a subsequent contract of deft. with pltf. for purchase of half the patent, subject to the former deed but with benefit to deft. of half the royalty, pltf., in pursuance of the contract, & in consideration of £2,200 to be paid to him by deft., assigned the patent to a trustee, subject to the previous indenture, & in trust to apply the sums accruing from licences to use the patent, & like-

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1602 i. *Condition limiting manner of use.*]—MACLAUGHLIN *v.* LAKE ERIE & DETROIT RIVER RY. CO. (1902), 3 O. L. R. 706; 22 C. L. T. 202; 1 O. W. R. 428.—**CAN.**

c. *Option to purchase patent rights.*]—FIRE EXTINGUISHER CO. *v.* NORTH WESTERN (BABCOCK) FIRE EXTINGUISHER CO. (1873), 20 Gr. 625.—**CAN.**

d. *Licence to manufacture—Right of licencee to terminate.*]—NOXON *v.* NOXON (1894), 24 O. R. 401.—**CAN.**

e. *Restrictive conditions as to sale—Sale of articles second hand—Whether conditions affected.*]—EDISON (THOMAS A.), LTD. *v.* STOCKDALE, [1919] N. Z. L. R. 276.—**N.Z.**

PART XI. SECT. 1, SUB-SECT. 5.—B.

1604 i. *General rule.*]—BEAM *v.* MERNER (1887), 14 O. R. 412.—**CAN.**

1604 ii. ——.]—*Re* ACT XV. OF 1859, *Re* MOSES (1888), I. L. R. 15 Calc. 244.—**IND.**

1604 iii. ——.]—An agreement to purchase a licence to use a patent will not, in equity, preclude a party from disputing its validity.—BAXTER *v.* COMBE (1850), 1 I. Ch. R. 284; 3 Ir. Jur. 27.—**IR.**

1604 iv. ——.]—CUMMINGS *v.* STEWART (No. 2), [1913] 1 I. R. 95.—**IR.**

wise to apply the royalties, for or under the direction of pltf. & deft. respectively, in specified proportions, & to stand possessed, as to one moiety of the letters patent, for pltf., as to the other, for deft. Pltf. covenanted that, for & notwithstanding any thing done, etc., by him, the patent was valid, & should be held & enforced by the trustee without lawful let, etc. by pltf., or any claiming under him, or by his act or default. Deft. covenanted with pltf. to pay him the £2,200 by instalments. To a declaration in covenant for non-payment of such instalments deft. pleaded, after *oyer* of the deed declared upon, that pltf. was not the first inventor; by reason whereof the patent, before the supposed breach of covenant, was void. Replication; estoppel:—*Held:* the plea was bad; no eviction was stated; &, in fact, the matter pleaded did not go to the whole consideration; since, even if the patent was void, the first executed deed would have bound deft., by estoppel, to payment of the royalty; &, by the later deed, he became entitled to half the royalty; the covenant to pay the £2,200 was an independent covenant, & capable of being enforced whether pltf.'s covenants were performed or not. —CUTLER *v.* BOWER (1848), 11 Q. B. 973; 17 L. J. Q. B. 217; 11 L. T. O. S. 173; 12 Jur. 721; 116 E. R. 736.

1606. ——.]—To an action to recover a sum of money payable by an agreement for a licence, not exclusive, to use a patent, which contained no warranty that the patent was good or any covenant by grantor to protect the patent, the licencee cannot plead that the patent was void.—BESSIMER *v.* WRIGHT (1858), 31 L. T. O. S. 213; 6 W. R. 719.

1607. ——.]—The declaration stated, that, by deed, reciting that pltf. had obtained a grant of letters patent for his invention of certain improvements in manufacturing & getting up wire rope, it was witnessed that pltf. did thereby grant to deft. full & exclusive licence & authority to use, exercise, & put in practice the said invention, & to sell the wire rope so to be made by him, within a given district in England, & deft. covenanted, amongst other things, "that he would well & truly pay to pltf. £1 per ton for all wire rope manufactured by him by the aid of the machinery of pltf. under & by virtue of the patent process," at the end of every three months; "that he would make & deliver to pltf. at the expiration of every three months a true statement in writing of the number of tons of rope so manufactured by him as aforesaid; & also should & would permit & suffer pltf. at all reasonable time to examine his books & accounts, for the purpose of ascertaining the accuracy of the statement thereby covenanted to be delivered:" & pltf. by the deed also covenanted with deft., that during the continuance of the grant thereby made he would not, without the consent in writing of deft., use, exercise, or put in practice, or vend, or grant to any other person or persons licence or authority to use, exercise, or vend wire rope manufactured as aforesaid within the district thereinbefore mentioned, but "that within such limits deft. should have & be entitled to the exclusive right, liberty, & privilege of manufacturing, vending, & disposing of wire rope made under & by virtue of said patent process." The breaches assigned were, (*a*) non-payment of the stipulated £1 per ton, (*b*) non-delivery of trimonthly accounts, (*c*) refusal to permit pltf. to examine deft.'s books & accounts. Deft. pleaded, fifthly that pltf. did not give, nor did deft. take or have, such exclusive licence within such district, as by the deed provided for, eleventhly, that the said invention was worthless & of no public utility or advantage, & was not new as to the public use thereof in England, & that pltf. was not the true & first inventor thereof; that deft. never got or took any advantage or benefit under said deed in regard to said invention; & that, at the time of the making of the deed, pltf. knew the matters aforesaid, & deft. did not, & had no notice or knowledge thereof:—*Held:* the fifth plea was bad, as traversing the effect of the deed; & the eleventh plea was also bad as a plea of failure of consideration, the licence being by deed, & not amounting to a plea of fraud.—SMITH *v.* SCOTT (1859), 6 C. B. N. S. 771; 28 L. J. C. P. 325; 5 Jur. N. S. 1356; 141 E. R. 654.

Annotation:—**Apld.** Grover & Baker Sewing Machine Co. *v.* Millard (1862), 8 Jur. N. S. 713.

1608. ——.]—If a patentee, in consideration of a royalty, grants to another a licence to use the patent invention, & the latter uses it, he cannot plead, as a defence to an action for the royalty, that the invention was not new, or that the patentee was not the first inventor.—NOTON *v.* BROOKS (1861), 7 H. & N. 499; 8 Jur. N. S. 155; 10 W. R. 111; 158 E. R. 569.

Annotation:—**Apld.** Grover & Baker Sewing Machine Co. *v.* Millard (1862), 8 Jur. N. S. 713.

1609. ——.]—The licencee under a patentee is estopped from disputing the validity of the patent during the continuance of the licence.

Applts. were the owners of patents for manufacture of carpets. Resp. applied for a licence to use the patents, & it was agreed that certain machines, embodying the inventions of applts., should be prepared under their superintendence, resp. paying for the machines, & also paying certain agreed royalties upon the carpets manufactured therewith. This agreement was acted upon, & whilst being acted upon resp. obtained, from a different quarter, other machines, which also embodied applts.' inventions, & used these machines as well as those supplied by applts. Applts. filed a bill in Chancery for an account of royalties in respect of the user of both sets of machines, whereupon resp., by way of defence to applts.' claims in respect of the machines not obtained from them, disputed the validity of applts.' patents:—*Held:* (1) the agreement constituted resp. a licencee of applts., &, so long as he thought fit to claim the benefit of the agreement in respect of the machines supplied by applts., he was estopped from denying the validity of the patents, & must pay royalties in respect of the user of both sets of machines; (2) no term being stipulated for the continuance of the agreement, resp. might, if he chose, decline to pay royalties thereunder altogether, leaving applts. to their remedy for infringement in respect of the use of any of the machines.—CROSSLEY *v.* DIXON (1863), 10 H. L. Cas. 293; 1 New Rep. 540; 32 L. J. Ch. 617; 8 L. T. 260; 9 Jur. N. S. 607; 11 W. R. 716; 11 E. R. 1039, L. C.

Annotations:—*As to* (1) **Distd.** Wren *v.* Weild (1869), 10 B. & S. 51; Axmann *v.* Lund (1874), L. R. 18 Eq. 330. **Refd.** Bovill *v.* Hadley (1864), 17 C. B. N. S. 435; British Motor Syndicate *v.* Taylor, [1900] 1 Ch. 577. *As to* (2) **Foll.** Redges *v.* Mulliner (1892), 10 R. P. C. 21. *Generally*, **Refd.** Whitehead & Poole *v.* Farmer (1918), 35 R. P. C. 241.

1610. ——.]—(1) One who makes a patent article under a licence from the inventor, cannot, in an action against him for royalties, set up any objection to the novelty or utility of the invention or the validity of the specification.

(2) If the claim in the specification is susceptible of two constructions, one of which would make the specification bad & the other and more natural one would make it good, it is competent to him

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to insist that the latter is the true construction.—TROTMAN *v.* WOOD (1864), 16 C. B. N. S. 479; 143 E. R. 1214; *subsequent proceedings, sub nom. Re* TROTMAN'S PATENT (1866), 3 Moo. P. C. C. N. S. 488, P. C.

Annotation:—*As to* (2) **Refd.** Adie *v.* Clark (1876), 3 Ch. D. 134.

1611. ——.]—(1) Pltf., as assignee of a patent for "Improvements in breechloading small arms," had by deed granted deft. a licence to use part of the invention comprised in such patent; & deft. by the same deed covenanted to pay certain royalties on all sporting guns and double rifles made under the licence & by means of the invention. Pltf. brought an action against deft. on the ground that certain guns manufactured by deft. which deft. denied were within the terms of the deed, were, in fact, made according to the patented invention, & came within the terms of the deed:—*Held:* deft. had not used pltf.'s invention in manufacturing the guns complained of.

(2) He has taken a licence under that patent, & for the purpose of this case pltf.'s patent must be considered as a good patent, & deft. cannot deny its goodness (BRETT, M.R.).—COUCHMAN *v.* GREENER (1884), 1 R. P. C. 197; Griffin's Patent Cases (1884–1886), 58, H. L.

Annotation:—*As to* (1) **Distd.** Crosthwaite *v.* Steel (1889), 6 R. P. C. 190.

1612. ——.]—USEFUL PATENTS CO., LTD. *v.* RYLANDS (1885), 2 R. P. C. 255; Griffin's Patent Cases (1884–1886), 234.

Annotation:—**Apld.** Ashworth *v.* Law (1890), 7 R. P. C. 231.

1613. ——.]—ASHWORTH *v.* LAW (1890), 7 R. P. C. 231.

——.] — *See, also,* ESTOPPEL, Vol. XXI., pp. 257, 284, Nos. 810, 811, 994.

1614. In absence of fraud.]—Action for a sum agreed to be paid to pltf. for each ton of an article manufactured & sold by defts. by the permission of pltf. to them given at their request, pltf. having letters patent for the sole manufacture & sale of that article. Plea, that the letters patent were void, & defts. had a right to make & sell the article without pltf.'s permission. On demurrer:—*Held:* a bad plea; for, the invention having actually been used by the permission of pltf., & there being no allegation of fraud, or of anything equivalent to eviction, defts. were not at liberty to set up as a defence that the patent was void.—LAWES *v.* PURSER (1856), 6 E. & B. 930; 26 L. J. Q. B. 25; 28 L. T. O. S. 84; 3 Jur. N. S. 182; 5 W. R. 43; 119 E. R. 1110.

Annotations:—**Apld.** Smith *v.* Scott (1859), 6 C. B. N. S. 771. **Refd.** Hall *v.* Conder (1857), 5 W. R. 742; Oxley *v.* Holden (1860), 8 C. B. N. S. 666. **Mentd.** Rowland *v.* Divall, [1923] 2 K. B. 500.

1615. ——.] — Pltf., a patentee, granted to defts. a licence of his patent for an improved method of securing elastic tyres on wheel rims. At the date of the licence pltf. had obtained provisional protection only. The licence was for a term of one year from Dec. 1, 1886, & further from year to year during the continuance of the letters patent to be granted, if granted, for the invention or any prolongation or extension thereof. Defts. paid the royalties for the first year, but refused to pay any further royalties on the ground that pltf. had agreed in the licence to complete the letters patent for the whole invention described in the provisional specification, & this he had failed to do. Defts. alleged that pltf. was compelled before the Comptroller to amend his specification, & to admit that he knew of the claims of certain prior patentees to be the true & first inventors, of the use of tyres with a helical spring core, & of the introduction into an india-rubber tyre of a core of corrugated spring wire, & to abandon his claim thereto. The claim so abandoned formed, on the contention of defts., the whole substance of pltf.'s invention as described in the provisional specification, & defts. alleged that it was the use of the invention so disclaimed that they desired & intended to obtain in taking the licence:—*Held:* (1) the licence ought not to be declared void, consideration having passed, & there being no misrepresentation in the deed by which the licence was granted; (2) defts.' attempt to show that there was a warranty for the whole invention which might by any chance be comprised in the provisional specification could not prevail, there being no warranty, but merely a covenant to complete the letters patent; (3) according to the deed itself, the bargain was that the royalty should be paid, & pltf. was therefore entitled to have an account of what was due for royalties.—OTTO *v.* SINGER (1889), 62 L. T. 220; 6 T. L. R. 52; 7 R. P. C. 7.

1616. Where validity guaranteed.]—Pltf. having agreed to procure the grant to deft. of a licence under a patent, & having agreed to guarantee the validity of the patent, & the contract being still executory, it was held that deft. was not estopped from alleging that the patent was invalid.—HENDERSON *v.* SHIELS (1906), 24 R. P. C. 108.

1617. Validity condition precedent.]—WILSON *v.* UNION OIL MILLS CO., LTD., No. 1598, *ante.*

1618. Patent unused by licencee.]—The declaration stated, that by a memorandum of agreement between pltf. of the one part, & defts. of the other, after reciting that by a certain other agreement between pltf. & defts., pltf. did not agree with defts. for the sale of W.'s patent furnace, & that pltf. & C. had obtained a patent for an improvement in generating the steam, & pltf. & one J. a patent for a metallic wheel & revolving axle, & that pltf. was solely interested in a patent for a new mode of abstracting heat from steam vapour; & that pltf. & one G. had obtained a patent for an improved furnace; it was agreed between the parties, that it should be lawful for defts. exclusively to use, manufacture sell & dispose of any or all of aforesaid patent inventions, upon this, among other considerations, that defts. should pay to pltf. £400 a year during the existence of said agreement. Breach, non-payment. Pleas, as to the patent for the supposed improvement in furnaces, that it was not a new invention, & that the supposed improvement in furnaces was not invented or found out by pltf.:—*Held:* as it did not appear by the declaration that defts. ever enjoyed any part of the patents, which was the consideration for their agreeing to pay £400 a year, or that sum could in any way be apportioned among the different patents, the plea impeaching the consideration was good, to avoid the whole contract.—CHANTER *v.* LEESE (1838), 4 M. & W. 295; 1 Horn & H. 224; 8 L. J. Ex. 58; 150 E. R. 1440; *affd.* (1839), 5 M. & W. 698, Ex. Ch.

Annotations:—**Distd.** Hall *v.* Conder (1857), 2 C. B. N. S. 22; Besseman *v.* Wright (1858), 6 W. R. 719. **Consd.** Smith *v.* Scott (1859), 6 C. B. N. S. 771; Cummings *v.* Stewart (1912), 30 R. P. C. 1. **Mentd.** Ellen *v.* Topp (1851), 20 L. J. Ex. 241; White *v.* Beeton (1861), 7 H. & N. 42.

1619. Equitable assignee of exclusive licence.]—A bill was filed by a patentee, against parties who had agreed to purchase from the sole licencee all his interest in the patent, & who were then carrying it on; & an injunction was moved for to prevent them from violating the covenants of the deed of licence. They denied the utility of the patent, &

stated that they did not intend to use it. The motion stood over, with liberty for pltf. to bring an action at law :—*Held :* he was not entitled to any admissions from the defts. as to the validity of the patent, or as to their being licencees. —PIDDING *v.* FRANKS (1849), 1 H. & Tw. 220 ; 1 Mac. & G. 56 ; 18 L. J. Ch. 295 ; 13 Jur. 593 ; 47 E. R. 1392, L. C.

SUB-SECT. 6.—ASSIGNMENT OF LICENCE.

1620. General rule.]—A licence is not really assignable. The assignment acts only as an estoppel between the parties (JERVIS, C.J.)—BOWER *v.* HODGES (1853), 13 C. B. 765 ; 1 C. L. R. 807 ; 22 L. J. C. P. 194 ; 17 Jur. 1057 ; 138 E. R. 1402.

Annotation :—**Apld.** Lawson *v.* Macpherson (1897), 14 R. P. C. 696.

1621. Acceptance of royalties by patentee—From assignees—After assignment.]—The owner of a patent granted a licence to a licencee who traded as D. M. & Co. The licencee subsequently assigned the benefit of the licence to a limited co., known as D. M. & Co., Ltd. The co. paid royalties accrued due subsequently to the assignment by its own cheque :—*Held :* the patentee was estopped by the acceptance of the royalties from the limited co. from disputing the validity of the assignment. —LAWSON *v.* MACPHERSON & Co. (1897), 14 R. P. C. 696.

1622. Assignment to limited company—Constituted by original licencees.]—Pltf., owner of a patent for improvements in the bearings of bicycles, in 1885 granted to a firm of bicycle manufacturers a licence to use the invention within the United Kingdom, the Channel Islands & the Isle of Man, for the purpose of applying the invention to the wheels of bicycles, etc., manufactured for sale or use or otherwise by the licencees, or by persons employed by them, but not in any other manner, with a proviso that the licence should not be construed to permit the licencees to make or sell the patent bearings to be applied to the wheels of bicycles, etc., manufactured by any person or co. other than the licencees, or by persons employed by them ; & that the licence should not authorise the use of the invention by the licencees individually or separately, but only by the licencees jointly or such two or one of them as should continue to carry on the business hitherto carried on by the three licencees at Beeston, or the person or persons or co. from time to time carrying on such business.

In 1887 defts. were registered as a limited co. to acquire & carry on the business of the licencees & various other businesses at other places. Defts. claimed under the licence the right to manufacture the patent bearings at all the places where they carried on businesses, & also to apply the patent bearings to bicycles, etc., manufactured by them, at Beeston or elsewhere. Pltf. contended that the licence only authorised defts to manufacture the patent bearings at Beeston in connection with the business of the original licencees ; & secondly, only to apply the patent bearings to bicycles, etc., manufactured by them at Beeston in connection with the business ; & pltf. brought an action & moved for an injunction to restrain defts. from using the patent otherwise than according to pltf.'s construction of the licence :—*Held :* defts. as carrying on the original business of the licencees at Beeston, were entitled to start other businesses elsewhere, & to apply the patent bearings to any bicycles, etc., manufactured by them in such other businesses, & the action should be dismissed with costs.—BOWN *v.* HUMBER & Co., LTD. (1888), 6 R. P. C. 9.

1623. —— —— Liability to patentees.]—By an agreement of Mar. 3, 1897, made between pltf. co. & P., pltf. co. agreed to grant to P. an exclusive licence to use a patent in consideration of an annual payment to be made to pltf. co. by a co. in the course of formation by P. & on Mar. 4 the licence was granted to P. & was expressed to be in consideration of the agreement, & the payment therein agreed upon. By an agreement of Mar. 5, P. agreed to sell to a trustee for the intended co., which subsequently became deft. co., the agreement of Mar. 3 & the licence, & by an agreement of Apr. 8 under the seal of deft. co. the agreement of Mar. 5 was adopted by that co. Deft. co. acted in the belief that it was bound to pltf. co. to perform the obligations of the agreement of Mar. 3. In an action by pltf. co. against deft. co. to restrain an alleged breach of that agreement :—*Held :* (1) the ct. ought not to infer a contract between pltf. co. & deft. co., & there was no privity of contract between them ; (2) the obligations imposed by the agreement of Mar. 3 were not a burden attaching to the licence itself in the hands of any persons taking with notice.—BAGOT PNEUMATIC TYRE Co. *v.* CLIPPER PNEUMATIC TYRE Co., [1902] 1 Ch. 146 ; 71 L. J. Ch. 158 ; 85 L. T. 652 ; 50 W. R. 177 ; 18 T. L. R. 161 ; 46 Sol. Jo. 121 ; 9 Mans. 56 ; 19 R. P. C. 69, C. A.

Annotations :—As to (2) **Apld.** Barker *v.* Stickney, [1919] 1 K. B. 121. **Refd.** Dansk Rekylriffel Syndikat Akt. *v.* Snell, [1908] 2 Ch. 127 ; Macdonald *v.* Eyles, [1921] 1 Ch. 631.

SUB-SECT. 7.—REVOCATION OF LICENCE.

1624. Licence under seal—Not revocable at will.]—The owners of a patent granted a licence for the use & manufacture of their invention upon certain terms & conditions, no express power of revocation being reserved by the deed. Some of the terms & conditions were not complied with. Pltfs. thereupon gave notice to the licencees by letter dated Oct. 7, 1886, that the licence was determined : this was not assented to by defts., & pltfs. brought an action claiming a declaration that the licence had been determined & an injunction & accounts, & alleging fraudulent dealing on the part of defts. Defts. denied that they had wilfully or in fact broken any of the terms & conditions of the deed, & alleged in the alternative knowledge of & acquiescence in the breaches, if any, on the part of pltfs., & also denied that the licence had been determined :—*Held :* (1) the licence was one coupled with an interest, &, therefore, not revocable at will, but that it was liable to forfeiture in the event of the terms & conditions contained in the deed being broken ; (2) there had, in fact, been breaches of the terms & conditions of the licence, & pltfs. thereupon became entitled to treat the licence as forfeited, & to determine it ; (3) pltfs. had not by their conduct or otherwise deprived themselves of their right to treat the licence as forfeited & determined ; (4) the letter of Oct. 7, 1886, sufficiently indicated pltfs.' intention to treat the licence as determined, & an

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PART XI. SECT. 1, SUB-SECT. 7.

f. *Right of licencee to revoke—Licence to Government.*]—WESTRALIAN POWELL WOOD PROCESS, LTD. *v.* R. (1921), 29 C. L. R. 458.—**AUS.**

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instrument under seal was not necessary for this purpose.—WARD *v.* LIVESEY (1887), 5 R. P. C. 102.

Annotation:—**Refd.** Guyot *v.* Thomson (1894), 71 L. T. 416.

1625. Right of grantor to revoke—On breach by licencee — Sufficiency of notice.] — —— *v.* —— (1843), 1 L. T. O. S. 251.

1626. —— —— **Default in payment of rent.**]—Pltfs., the assignees of a patent, granted a licence to deft. to use the patent upon the terms of his paying an annual rent of £2000, to be made up at the end of each year, & reserved to themselves the power of determining the licence in the event of default being made in payment of this rent. Deft. failed in paying the rent; but pltfs., notwithstanding, for several years allowed deft. to use the patent, & received from him a less annual sum than that stipulated. At length, however, they determined the licence, having, subsequently to the expiration of the previous year, received from deft. payments on the footing of the reduced rent:—*Held:* by so doing, pltfs. had elected not to treat the previous breach as a forfeiture of the licence, & consequently they were not entitled to an injunction restraining deft. from using the patent.—WARWICK *v.* HOOPER (1850), 3 Mac. & G. 60; 17 L. T. O. S. 228; 42 E. R. 183.

1627. —— —— **Mutual obligations.**]—GUYOT *v.* THOMSON, No. 1587, *ante*.

1628. —— ——.]—WARD *v.* LIVESEY, No. 1624, *ante*.

1629. —— **Parol licence.**]—COPPIN *v.* LLOYD, COPPIN *v.* PALMER, No. 1595, *ante*.

1630. Right of licencee to revoke—No term fixed by licence.]—CROSSLEY *v.* DIXON, No. 1609, *ante*.

1631. —— ——.]—The owner of a patent, by agreement in writing, granted a licence to manufacture broughams under his patent, & the licencee covenanted to pay £5 for each carriage manufactured by him under the patent, the royalty to be paid on each carriage being built, & an account to be given before any carriage was completed. The patentee subsequently, on the licencee declining to pay royalties, commenced an action for an account of royalties, an injunction to restrain deft. from using pltf.'s invention except on the terms of the agreement, & damages. Deft. at first pleaded that the patent was invalid, but subsequently amended his defence, admitting manufacture of a certain number of carriages, & paying royalties into ct. for them, together with a sum for interest & damages, but denying that interest or damages were due, & stated that he had by notice determined the licence. Pltf. pleaded that the licence was for the life of the patent, & that the licencee could not determine the licence:—*Held:* pltf. was, if he desired it, entitled to an account of royalties due with interest, but at his risk as to costs; (2) deft. was entitled to terminate the licence.—REDGES *v.* MULLINER (1892), 10 R. P. C. 21.

1632. —— **Right only reserved to licencor.**]—Two similar agreements were, in 1891, entered into between pltf. & defts., by each of which pltf. agreed to let on hire & defts. agreed to take one of pltf.'s patented machines. Defts. thereby agreed to pay "by way of licence rent for the use of the "machinery" a monthly rent "during the continuance of this licence," & the licence contained numerous clauses, one of which defined the "licence term" as meaning "not only the terms of the letters patent mentioned in the second schedule hereto, but also any extension or prolongation thereof respectively, & the term of any letters patent to which F. C. shall or may become entitled for any improvement, alteration, or addition to the machinery during the licenced term." Defts. in 1894, asked pltf. to take back the machines, but he refused, & in 1896, commenced a county ct. action to recover arrears of rent. Defts. contended (*inter alia*) that they were not liable to pay the monthly rent after they had discontinued the use of the machines. Judgment was given for pltf. Defts. appealed. The Div. Ct. held that the licences were determinable at any time by the licencees on reasonable notice:—*Held:* on the true construction of the agreement & as it was thereby provided that pltf. might determine the licence, but there was no provision that the licencee might do so, the licence was not determinable by the licencees on reasonable notice.—CUTLAN *v.* DAWSON (1897), 14 R. P. C. 249; 13 T. L. R. 213, C. A.

1633. On six months' notice—Sufficiency of notice.]—On Oct. 9, 1914, a full, sole & exclusive licence was granted under a patent during the term & any extended term thereof subject to the following provision for revocation:—"Each party to this agreement shall be at liberty upon giving notice in writing before June 30, 1917, to the other party to determine these presents upon Dec. 31, 1917, & these presents shall thereupon cease & determine. Either party shall further be entitled at any time after June 30, 1917, to determine these presents upon giving six months' notice in writing of its intention so to do." The licencors by letter dated Dec. 24, 1919, posted in the United States, purported to give notice to determine the licence. This letter was received by the licencees on Jan. 6, 1920. The licencees brought an action for a declaration (*inter alia*) that this purported notice of determination of the licence was wholly void & inoperative & that the licence had not been determined thereby or at all & remained binding on first defts. Upon delivery of the statement of claim & before delivery of the defences defts. obtained an order under Ord. 34, r. 2, to the effect that the question of law whether the licence was determined by the letter &, if so, on what date, should be set down to be argued before the ct. & that all other proceedings in the action should be stayed until after the determination of such question. When the case came on for argument the points argued were, first, whether the words "six months" in the clause of the licence quoted above meant lunar months or calendar months, &, secondly, whether, on the construction of the letter, it was a notice to determine the licence on July 1, 1920:—*Held:* having regard to the context "six months" meant six calendar months & the letter was a notice to determine the licence on July 1, 1920, & was not a good notice.—ERITH ENGINEERING CO., LTD. *v.* SANFORD RILEY STOKER CO. & BABCOCK & WILCOX, LTD. (1920), 37 R. P. C. 217, C. A.

Annotation:—**Mentd.** Schiller *v.* Petersen, [1924] 1 Ch. 394.

SUB-SECT. 8.—ROYALTIES.

1634. Suspension of royalties—During period of infringement by third parties—Necessity for notice of infringement to patentee.]—Pltf., being possessed of a patent, granted to defts. the exclusive licence to work it in a certain district, by a deed by which the latter covenanted to pay certain royalties, & to give every information the better to enable the patentee to support the letters

patent; & the patentee covenanted for quiet enjoyment of the patent by defts., & that, "in case any person should work the patented processes, the patentee would at his own costs commence & carry on all such actions, etc., as should be necessary to establish the validity of the patent, & to put a stop to the working of the patented processes by such person; & that, in case the patentee should fail or neglect so to establish or maintain the validity of the patent, & to put a stop to the working of the patented processes by such other person he, the patentee, would not call upon defts., nor should defts. be liable thenceforth to pay any royalty, until the patentee should by authority of law or otherwise have restrained such person from working under the letters patent":—*Held:* the condition for suspension of payment of the royalties did not come into operation until the patentee had notice of an infringement, & until the lapse of a reasonable time to allow him an opportunity of instituting proceedings to restrain it.—HENDERSON *v.* MOSTYN COPPER CO., LTD. (1868), L. R. 3 C. P. 202.

1635. Right to royalties disputed—Right of patentee to injunction restraining use of patent.]—The bill stated that pltf. had granted a licence to defts. to use a patent on payment of royalties, & prayed an account, & that, if defts. should dispute the right of pltf. to payment of the royalties, then that defts. might in the meantime be restrained from using the patent. Defts. demurred. Demurrer overruled, on the ground, that, if the licence was void, pltf. was entitled to the injunction.—HADDAN *v.* SMITH (1847), 16 Sim. 42; 17 L. J. Ch. 43; 10 L. T. O. S. 154; 11 Jur. 959; 60 E. R. 788.

1636. —— Action on covenant—Right of licencee to particulars.]—In an action by a patentee against his licencee on a covenant to pay for roving machines made with pltf.'s invention, & to make none without,—breach, in not paying for roving machines made with the invention; & in making machines without it; deft. having in answer to the interrogatories, admitted the making of many hundreds of roving machines, but not with pltf.'s invention, & declared that he could not state to whom they were sold, nor give any further information about them, without disclosing his own evidence; & pltf. claiming in respect of all the machines deft. had made, under one or other of the covenants, & asserting that he had seen some of them, which had his invention applied:—*Held:* deft. was entitled to such particulars as should describe those portions of the machines to which pltf. contended that his invention had been applied, so as to enable deft. to understand, as far as possible, the nature of the machines as to which he was to be charged under either of the covenants, & it was no answer to the application for such particulars that deft.'s answer to the interrogatories was insufficient to enable pltf. to furnish the particulars, for if the answers were insufficient, they should have been objected to.—JONES *v.* LEES (1856), 25 L. J. Ex. 241; *subsequent proceedings*, 1 H. & N. 189.

1637. Defences to demand for royalties—In validity of patent established in action against third party.]—The fact of a patent having been found invalid at law, upon proceedings between the patentee & third parties, is no answer to a suit, based upon the same patent, for an injunction & consequent relief against a licencee who has covenanted to pay royalties, & is selling the invention, contrary to his covenant, without payment of the royalties.—GROVER & BAKER SEWING MACHINE CO. *v.* MILLARD (1862), 8 Jur. N. S. 713.

1638. —— Failure of patentee to maintain patent.]—MILLS *v.* CARSON (1892), 10 R. P. C. 9; 9 T. L. R. 80; 37 Sol. Jo. 64, C. A.

Annotation:—**Mentd.** Lines *v.* Usher (1897), 14 R. P. C. 206.

1639. —— Expiry of patent.]—The owner of several patents granted a licence to use the patents during all the residues unexpired of the terms for which they wer granted, the licencees covenanting to pay a royalty for all steel produced by them during the continuance of the licence in the production of which any of the inventions were used; & it was also provided that the royalties should continue until the expiration of all the terms of years respectively granted by the patents. Subsequently the patentees brought an action for royalties, alleging that all the patents had not expired, & that defts. were using the inventions & refused to pay royalties. Defts. denied infringement, & contended that, at any rate, royalties were only paid in respect of the patents still in force:—*Held:* the royalties must be paid for the use of the inventions so long as any of the patents were subsisting, but defts. were not using the inventions.—SIEMANS *v.* TAYLOR (1892), 9 R. P. C. 393.

1640. —— ——.]—Pltfs. were the owners of certain English & foreign patents for apparatus used in duplex telegraphy, granted to defts. licences to use the apparatus on payment of royalties for the whole period during which the patents should last. Pltfs. sued for royalties due on Sept. 29 & Dec. 25, 1891, which defts. refused to pay on the ground that on July 1, 1891, all the patents had expired. Pltfs. contended that an American patent granted Nov. 16, 1880, for 17 years to plft. A. was still subsisting. By American law every patent granted for an invention previously patented in a foreign country where the foreign patent was taken out by the American patentee or by some person with his knowledge & consent, should be so limited as to expire at the same time with the foreign patents. Defts. alleged that pltfs.' American patent was for the same invention as was comprised in an English patent, No. 2564, granted June 20, 1876, to pltf. J. & therefore expired on June 20, 1890. In answer to this pltfs. contended (*a*) that the defence that the American patent had expired by reason of the expiration of a prior English patent for the same invention was an attack on the validity of the patent, & could not be raised by defts., being licencees; (*b*) that by the agreement the obligation on defts. was to continue during the whole period for which the patents should last, & that that meant as long as the patents lasted on the face of them; (*c*) that as the American patent was granted to A. & the English patent to J., under the American law, the American patent did not expire with the English patent; (*d*) that it

PART XI. SECT. 1, SUB-SECT. 8.

1638 i. *Defences to demand for royalties—Failure of patentee to maintain patent.*]—CUMMINGS *v.* STEWART (NO. 2), [1913] 1 I. R. 95.—**IR.**

g. —— *Plea of want of novelty.*]—GRAY *v.* BILLINGTON (1871), 21 C. P. 288.—**CAN.**

h. —— *Unreasonable demand—How determined.*]—INTERNATIONAL CONE CO., LTD. *v.* CONSOLIDATED WAFER CO., [1926] 2 D. L. R. 1015; [1926] Exch. C. R. 143.—**CAN.**

k. *Income tax on royalties—Liability of licencor.*]—*Re* POPE ALLIANCE CORPN., LTD., [1926] 4 D. L. R. 1152.—**CAN.**

l. *Extent of licencee's liability—Royalty on articles sold by order of court—At instance of creditor.*]—A

Sect. 1.—*Voluntary licence: Sub-sect.* 8.]

was not proper nor convenient for the English cts. to decide the question of American law, whether the American patent had expired, in the absence of an American decision:—*Held:* it was settled American law that though an American patent on the face of it was not limited so as to expire on the expiration of a previous foreign patent for the same invention, but contained an express grant for seventeen years, nevertheless it did so expire by operation of law; the American patent was not void *ab initio*, because the grant was not limited as it ought to have been, but was a good grant expiring at the date of the foreign patent, & no American judicial proceedings were required to bring about such expiration; it was permissible for defts., though licencees, following the analogy of lessor & lessee to show that the licencor's right had expired; & by the agreement royalties were payable as long only as the patents lasted as patents according to law, & there was no estoppel to prevent defts. from showing the true effect of the patent according to the American law; the English patent was granted with the knowledge & consent of A. & therefore the American law of expiration would apply if the patents were in fact for the same invention; as by art. 9 of the agreement it was provided that the contract was to be read as an English contract, & all questions arising thereon were to be decided by an English tribunal, to the jurisdiction of which the parties submitted, the ct. ought to decide the point whether the American patent had expired, though it involved questions of American law.—MUIRHEAD *v.* COMMERCIAL CABLE CO. (1894), 11 R. P. C. 317; *affd. on appeal*, 12 R. P. C. 39.

1641. —— Cancellation of patent.]—Where a patentee has, in consideration of royalties, given a licence to use the patent, the mere cancellation of the patent, after the agreement has been partly performed, does not release the licencee from his obligation to pay royalties.—AFRICAN GOLD RECOVERY CO., LTD. *v.* SHEBA GOLD MINING CO., LTD. (1897), 2 Com. Cas. 277; 14 R. P. C. 660.

1642. —— Misrepresentation.]—A licencee who is counterclaiming for rescission of his licence, on the ground of misrepresentation as to what were "controlling patents," may not put in evidence the specification of prior patents to show the state of public general knowledge at the date of the licence.—JANDUS ARC LAMP & ELECTRIC LIGHT CO. *v.* JOHNSON (1900), 17 R. P. C. 361.

1643. Licence from assignee—Duty of licencee to account to assignor.]—E. being owner of one-third of an American patent, assigned his interest therein to N., the legal owner of the other two-thirds, in consideration of receiving one-fifth of the profits to arise from sale of the invention in America, for which N. agreed to account to him, & he deprived himself of all right to interfere in arrangements made for licencing such sales. N. was in this transaction the agent of a co. who were beneficial owners of the two-thirds of the American patent, & of an English patent for the same invention, & was the exclusive manufacturer of the invention in England, but bound to supply his manufacture to the co. only. The co. granted to G. an exclusive licence for the sale of the invention in America, supplying him with machines at certain prices higher than those at which they bought from N., & receiving from G. one-third of the net profits arising from the American sales:—*Held:* (1) G. was not liable to account to E. for his profits; (2) the co. were bound to account to E. for profits arising from the sales to G. at higher prices than were paid to N.; (3) N. was not bound to account to E. for the profits arising from the manufacture of the invention.—EDWARDS *v.* NORMANDY (1864), 3 New Rep. 562; 12 W. R. 548.

1644. Assignment of share of royalties—Right of assignee to account.]—When an assignment is made of a share of profits, arising, *e.g.*, from the working of a patent by licencees, the assignee is entitled to an account from the licencee, but the account must be taken once for all in the presence of all the parties interested. The licencee is not bound to account to the assignor & to each assignee of a share separately. The assignee who asks for an account must place himself in the position of the assignor by offering to pay to the accounting party anything which may be due to him by the assignor. An account of profits will not be directed if it is clear that no profits have been made.—BERGMANN *v.* MACMILLAN (1881), 17 Ch. D. 423; 44 L. T. 794; 29 W. R. 890.

Annotation:—**Mentd.** Public Trustee *v.* Elder, [1926] Ch. 776.

1645. Recovery of royalties paid by licencee—Patent allowed to lapse by patentee.]—By an agreement, A. & B., patentees, granted an exclusive licence to C. & D. for three years & thenceforward until determined, & A. & B. covenanted during the continuance of the agreement to protect & defend the patent from all infringements, & in default of their so doing the royalty should cease to be payable. The patent lapsed at the end of three years, but C. & D. paid royalties for another year, when they terminated the agreement by notice. They then discovered the lapse of the patent, & brought this action to recover the royalties paid after the lapse. It appeared that B. had assigned all his interest to A. & that A. had agreed, as between himself & B., to keep up the patents & pay the renewal fees:—*Held:* the case depended on the construction of the agreement; by clause 6, defts. were obliged to defend the patent against infringers, & therefore to keep the patent in such a position that they were able to do so; defts. had therefore broken their contract, & the clause provided that in that case the royalties should cease to be payable; pltfs. were therefore entitled to recover them back.—LINES *v.* USHER (1897), 14 R. P. C. 206, C. A.; *previous proceedings*, 13 R. P. C. 685.

1646. Royalties payable to servant—Termination of employment by servant.]—In an action for royalties in respect of certain patents, relating particularly to the electric lighting of railway trains, pltf. contended that his rights were governed by the last of three agreements made by him with his employers, defts.; that a notice given by him had only the effect of determining his managership; & that, under that agreement, he was entitled, in respect of combination claims, to royalty on the price of the whole combination. Alternatively, he claimed a declaration as to the

person who is under an obligation to pay a royalty on all patented articles sold by him, is liable for the royalty on such as may be sold while in his possession by authority of justice, at the instance of a creditor.—DOYON *v.* CANADIAN FIRE EXTINGUISHING CO. (1898), Q. R. 14 S. C. 367.—**CAN.**

m. —— *Royalty on articles sold otherwise than under licence.*]—NEIL *v.* MACDONALD, MACDONALD *v.* NEIL (1903), 20 R. P. C. 213.—**SCOT.**

n. *Assignment by licencee — Judgment against licencee for royalties received—Unsatisfied—Right of licencor to account.*]—HOFFMAN *v.* MCCLOY (1916), 38 O. L. R. 446.—**CAN.**

o. *Whether agent liable—Agent for sale—Entitled to use patent article in*

manner in which royalty should be calculated. He also claimed a declaration that defts. were not entitled to grant licences under the patents without his consent. Defts. contended that the notice had determined the third agreement, & that pltf.'s rights were governed by the first of the agreements. They alleged that the devices protected by the later patents were combinations consisting of the systems covered by the earlier patents with small modifications, & contended that pltf. was only entitled to royalty on the parts that were new. Evidence was given on that issue. Defts. made a counterclaim for a declaration that they were entitled to an assignment of the patents:—*Held:* (1) pltf.'s notice had merely determined his managership, the third agreement was still subsisting, & pltf. was entitled to royalty on the footing of that agreement; (2) defts. were only entitled to grant licences upon such terms as they & pltf. thought fit; (3) defts. were entitled to have an assignment of the patents.—GILL *v.* STONE & CO., LTD. (1911), 28 R. P. C. 329.

1647. —— Verbal agreement.] — FLEMING *v.* DOIG (J. S.) (GRIMSBY), LTD., No. 1596, *ante*.

1648. Implied covenant to pay—Statute of Limitations.]—In 1898 letters patent were granted to G. for an invention relating to machines for folding & filling with cigarettes cardboard slides & enclosing them within outer cases or shells. In 1901, G. applied for two patents, one in respect of an invention relating to machines for making the outer cases or shells above referred to, & the other in respect of an invention relating to a hopper to be used for the purpose of filling the slides above referred to with cigarettes. On Aug. 13, 1902, G. entered into two agreements with S. In the first of them it was recited that G. had invented a combined shell & slide making & cigarette packing with tinfoil covering appliance, & that the patent of 1898 had been granted on part of such machine & that the two British applications had been made by him on further parts of such machine & that an United States application had been made by him for such combined machine, & G. agreed to sell to S. for £4,000 a tenth share in the said invention & of all patents, British, foreign & colonial relating thereto as well granted as to be granted & in all improvements & additions thereto & of & in all profits arising therefrom; provision was made for the maintenance of the patents, the funds to be found by the parties in proportion to their shares with provisions, on the refusal of either party, giving the other the right to maintain with a charge on the other party's share of his proportion with interest. G. was to employ a reasonable amount of his time in manufacturing & selling machines & was not to invent, dispose of, or construct any other machine "of a like nature." By the second agreement S. agreed to grant to G., so far as S.'s interest in the patents, a licence for the residue of the term of the patents, subject to royalties on machines sold. By a deed of Apr. 28, 1904, G. assigned to S. one-tenth part of the said inventions & British patents & of all improvements or additions to said inventions & of or in all rights, etc., in respect of the British patents or any of them, & S. confirmed to G. the licence granted or agreed to be granted subject to the royalty. A patent of 1902 was granted to G. in respect of an invention relating to the wrapping of cigarettes in tinfoil. This was not a success & G. obtained a patent in 1904 for an improved apparatus, but this was not designed to form part of the combined machine, but was a separate machine. In 1905, G. rendered to S. an account of machines, three in number, admitted to come within the agreement, but, by mistake, omitted one machine. None of the combined machines were afterwards sold, but G. continued to manufacture & sell the machines covered by the patent of 1904, but paid no royalties to S. on them. In 1906 & 1907, S. pressed for an account. In 1910, G. applied for a patent for an invention consisting of a machine designed to make a double or single packet without any slide or shell & without any tinfoil wrapping, & to fill such packet with cigarettes. In 1917, after other applications for an account, S. commenced an action against G. claiming a declaration that (*inter alia*) the patents of 1904 & 1910 were for improvements within the meaning of the agreements & deed, damages for breach of the agreements & in particular by reason of G. inventing, constructing, or disposing of other machines "of a like nature" within the first agreement, & by reason of deft. having allowed some of the patents to lapse & for an account & payment. Deft. denied that the patents of 1904 & 1910 were improvements & he set up the Stat. Limitations & paid money into ct. with a denial of liability. In the course of the trial, however, the invention of 1904 was admitted to be within the agreements as an improvement on that of 1902. Pltf. in reply, alleged fraud:—*Held:* the charge of fraud was wholly unfounded; the invention covered by the patent of 1910 was not an improvement or addition to the invention of a combined shell & slide making & cigarette packing machine with a tinfoil covering appliance, or to the invention of any one or more of the parts of such machine; machines made under it were not machines of "a like nature" within the first agreement; even if they were, pltf. had suffered no damage by the alleged breach, & at the utmost would be entitled merely to nominal damages; although the deed imposed an obligation on deft. to contribute his proportion of the renewal fees in respect of the British patents, pltf. had, in any case, suffered no damage by the lapse of them, & at the utmost was only entitled to merely nominal damages, which were assessed at £2; as regards the foreign & colonial patents there was an express obligation under the first agreement on deft. to provide his proportion of funds to maintain them, but as regards any that lapsed before Sept. 1911, Stat. Limitations was a defence, & as regards any that may have lapsed afterwards, pltf. had suffered no damage, & the nominal damages were covered by the £2; as regards the royalties, which deft. ought to have paid, there was a net balance of £320, & pltf. was a specialty creditor, by reason of the confirmation in the deed of 1904 of the licence, as deft. must be held to have impliedly covenanted to pay the royalties reserved by the licence of 1902.—SADGROVE *v.* GODFREY (1919), 37 R. P. C. 7.

1649. Non-payment of royalties—Operating as termination of licence—Rights of sub-licencees.]—By a series of licences & assignments of licences to use certain patents a co. became licencors in respect of a licence hereinafter called the head licence. That licence having been determined by reason of non-payment of royalties, the licencors brought actions against two sub-licencees

own trade.]—Where an agent for the sale of a patent article is entitled to use it in his own trade, he is not bound to account for the nett profits of each job in which he so uses it, but only for the market value of the article itself as fixed by the patentee.—GILKISON *v.* RAMAGE & SON (1851), 1 Stuart, 88.—SCOT.

Sect. 1.—*Voluntary licence: Sub-sect.* 8. *Sect.* 2: *Sub-sect.* 1.]

for (*inter alia*) an order to restrain defts. from holding themselves out as licencees or sub-licencees. On the hearing of motions, which were treated as the trial of the actions, defts. contended that pltfs. had no right to maintain the actions, that their proper course would have been to bring infringement actions, that it had not been shown that defts. knew the terms of the head licence, & that defts. had expended large sums of money in working the patents, & were entitled to equitable relief against forfeiture. Pltfs. contended that there was no privity between the licencors & the sub-licencees, & that pltfs. had not any knowledge of the expenditure of defts. :—*Held:* the relations of the parties were to be determined by the contract into which the parties had entered; defts. had probably known what was the licence under which the head licencees were purporting to grant the sub-licences; the terms of the deeds by which the head licence had been granted showed that none of the parties had contemplated that, if an intermediate licence was dropped out, the antecedent licencor was subjected to the obligations created in favour of the sub-licencee; & in the events that had happened, the sub-licences had ceased to operate simultaneously with the putting an end to the head licence.—BALDWIN (A.) & CO., LTD. *v.* GREENWOOD & BATLEY, LTD., BALDWIN (A.) & CO., LTD. *v.* MAGNETIC CAR CO., LTD. (1925), 42 R. P. C. 454.

1650. Income tax on royalties—Cesser of royalties before year of assessment.]—Finance Act, 1907 (c. 13), s. 25 (1) does not apply where by arrangement between the person owning & the person using the patent all royalties & other sums in respect of the user thereof have ceased to be payable before the year of assessment.—LANSTON MONOTYPE CORPN., LTD. *v.* ANDERSON, [1911] 2 K. B. 1019; 80 L. J. K. B. 1351; 105 L. T. 398; 5 Tax Cas. 675, C. A.

SECT. 2.—COMPULSORY LICENCE.

SUB-SECT. 1.—IN GENERAL.

See, now, Patents & Designs Act, 1919 (c. 80), ss. 1, 2; Patent Rules, 1920, rr. 69–75.

1651. "Reasonable requirements of public"—Meaning of.]—In 1886 letters patent were granted to B., B., & S. for "improvements in arrangements & mechanism to facilitate the rapid application of type representing late news or matter to & the printing of the same by newspaper printing machines," & in 1888 letters patent were granted to the same persons for improvements relating to the same class of machinery & having a like object. The first patent became vested in a firm of T., G., & Co., who also became equitably entitled to the 1888 patent. In Nov. 1897, H. & co. presented a petition to the Board of Trade for an Order for the grant of a compulsory licence under the patents, & the petition was heard before a referee appointed by the Board of Trade. One of the patentees had been served but did not appear. It appeared from the evidence that T., G., & co. had granted licences to newspapers in various towns, but for Manchester & district they had granted an exclusive licence to use the inventions to an evening paper with which they had certain commercial relations. Petitioners were the owners of another evening newspaper in Manchester, & alleged that, by reason of the default of the patentees to grant licences on reasonable terms, the reasonable requirements of the public with respect to the inventions could not be supplied. T., G., & co. had refused to grant a licence to petitioners owing to the contract with their exclusive licencee. It was contended for petitioners that, whether the public formed of the persons who wished to use the invention, or the public constituted by the readers of petitioners' newspaper, were regarded, the reasonable requirements of the public could not be supplied. For resps., it was contended that, as regards the first class, the evidence only showed an individual complaint on the part of petitioners, & that, as regards the second class, the benefit of the invention was open to the members of it, since they could obtain the benefit by purchasing the newspaper licenced by resps. The highest royalty charged by resps. had been £15 per machine. The referee having reported to the Board of Trade, an Order was made for the grant by the patentees, which expression included the members of the firm of T., G., & co., to petitioners of a licence to use the inventions claimed in the patents at a royalty of £20 per machine.—*Re* HULTON & BLEAKLEY'S PETITION (1898), 15 R. P. C. 749.

1652. —— Default in supplying—To individual.]—(1) The object of Patents & Designs Act, 1907 (c. 29), s. 24, relating to the grant of a compulsory licence is to meet failure on the part of the patentee to satisfy the reasonable requirements of the public as distinct from those of particular individuals.

(2) Mere default in supplying the patented article or granting a licence to an individual does not necessarily amount to default in supplying the patented article or granting licences within Patents & Designs Act, 1907 (c. 29), s. 24 (5) (*a*).

(3) The expression "trade or industry" in Patents & Designs Act, 1907 (c. 29), s. 24 (5) (*a*), is to be read in a wide sense, as one speaks of the cotton or woollen trade or industry, so that it is not enough to establish that a particular trader is unfairly prejudiced; it must be further proved that the trade or industry as a whole is thus affected.

(4) The "establishment of any new trade or industry" referred to in Patents & Designs Act, 1907 (c. 29), s. 24 (5) (*a*), is a different thing from the entry of a particular person into an existing trade or industry.

(5) The "demand" referred to in Patents & Designs Act, 1907 (c. 29), s. 24 (5) (*a*), is not the demand of a particular person, but that of the public at large.

(6) If the default towards the public is established, Patents & Designs Act, 1907 (c. 29), s. 24, confers two alternative rights; first, a right in the individual who presents the petition to have a licence granted to himself; &, secondly, a right in the public, in the circumstances mentioned in Patents & Designs Act, 1907 (c. 29), s. 24 (3), to be relieved from the effects of the patentee's monopoly by the revocation of the patent.

(7) An order under Patents & Designs Act, 1907 (c. 29), s. 24, should not take the form of a general direction to grant licences, but should

p. *Licence unreasonably withheld.*]—INTERNATIONAL CONE CO., LTD. *v.* CONSOLIDATED WAFER CO., [1926] 2 D. L. R. 915; [1926] Exch. C. R. 143.—CAN.

direct the grant of a licence to petitioner. Another person requiring a licence would have to present a petition of his own.

(8) A patentee may use the advantage given by his patent either by putting it in operation, himself supplying the public with the article or by licencing others to do so. If he himself maintains an adequate supply there is no necessity from the public point of view for a grant of licences & Patents & Designs Act, 1907 (c. 29), s. 24 (5), contemplates these alternatives as legitimate modes of working a patent. It is not enough, therefore, for a petitioner to prove that the patentee makes default in one of these alternative modes; he must prove that the patentee has made default in the other also.

Petitioners were the proprietors of a patent of 1911 for an improvement in incandescent electric lamps with two filaments & therefore alleged to have greater durability than the ordinary type of lamp with one filament only, & to make their invention a commercial success desired to use drawn tungsten wire. Two resps. were the respective owners of several patents relating to incandescent electric lamps with drawn tungsten wire filaments, the manufacture of such wire being covered by the patents, & had granted to each other & to other persons licences thereunder, & thus through themselves & their licences controlled the industry to a large extent. To prevent the cutting of prices resps. required from their licencees an undertaking not to sell their lamps below certain list prices, the result being that the price in this country was considerably higher than abroad, but not so high as in the opinion of the ct. to be unreasonable, while the supply of lamps was adequate to meet the demands of the public. Petitioners or their predecessors in title had requested one of resps. to quote a price for the making for petitioners of their double filament lamps, which resp. consented to do, stipulating, however, that the lamps should not be sold at a price less than 1*s.* in excess of resps.' price list. Petitioners declined this offer & applied to both resps. to supply them with the wire made under the patents relating thereto, which both resps. declined to do. Petitioners then inquired on what terms each of resps. would grant a licence to manufacture the wire. Neither of resps. complied with this request, though one of them offered to sell the wire at a price which petitioners regarded as excessive. This petition for the grant of a compulsory licence was then presented. There was no trade or industry with which the wire was connected except the making & selling of electric lamps & there was no demand for the wire except in that connection:—*Held:* petitioners had failed to establish a case for the grant of a compulsory licence under Patents & Designs Act, 1907 (c. 29), s. 24.—*Re* ROBIN ELECTRIC LAMP CO.'S PETITION, [1915] 1 Ch. 780; 84 L. J. Ch. 500; 113 L. T. 132; 31 T. L. R. 309.

1653. —— —— Alternative remedies.] —*Re* ROBIN ELECTRIC LAMP CO.'S PETITION, No. 1652, *ante*.

1654. —— —— Proof of default.]—*Re* ROBIN ELECTRIC LAMP CO.'S PETITION, No. 1652, *ante*.

1655. "Trade or industry"— Not particular trades.]—*Re* ROBIN ELECTRIC LAMP CO.'S PETITION, No. 1652, *ante*.

1656. "Establishment of new trade or industry —Not entry of person to one existing.]—*Re* ROBIN ELECTRIC LAMP CO.'S PETITION, No. 1652, *ante*.

1657. "Demand"—Of public at large.]—*Re* ELECTRIC LAMP CO.'S PETITION, No. 1652, *ante*.

1658. "Patentee"—Person entitled to benefit.] —The D. co. were the owners of B.'s patent relating to bicycle tyres or rims, subject to certain licences. An American co. were the owners of another patent relating to bicycle wheels, namely, for a combination consisting of a special form of wooden rim & special form of tyre to fit it, & they presented a petition to the Board of Trade for the grant to them of a compulsory licence under B.'s patent on the grounds that (*a*) the reasonable requirements of the public with respect to the invention could not be supplied, & (*b*) that petitioners were prevented from working or using to the best advantage their own invention. It appeared that B.'s patent had been owned, subject to a licence, by the N. B. co., who had assigned it to the D. co. in consideration of a sum of money & the grant of a licence to the N. B. co., & an agreement by the D. co. only to grant one further licence. Such licence had been granted to the C. co. The existence of such licences was one of the grounds of the refusal of the D. co., previously to the presentation of the petition, to grant a licence to petitioners. The N. B. co. & the C. co. applied to the Board of Trade for & obtained leave to appear & oppose the petition. The licensees, in their affidavits, expressed their willingness to supply petitioners with tyres of the special form covered by petitioners' patent. At the hearing the D. co. & the licensees objected to the petition being amended by making the licensees resps., but the petition was subsequently ordered to be amended by adding the N. B. co. & any other person interested in the patent. It was contended by resps. that the existence of an exclusive licence precluded any jurisdiction in the Board of Trade to order the grant of a compulsory licence; they also objected that petitioners did not carry on their manufacture in England. The N. B. co. in their declaration stated that they were prepared to supply petitioners, & in the course of the hearing they made an offer to petitioners to supply them with tyres of their special form on certain terms, & evidence was heard as to the reasonableness of such offer. Such offer was at first made "without prejudice," but the referee refusing to receive it in that form these words were withdrawn. It was contended, for petitioners, that it was sufficient for them to show a default in granting a licence before the presentation of the petition. During the hearing the referee intimated that he proposed to report to the Board of Trade on the following points:—(1) the "patentee," in Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 22, means the person or persons for the time being entitled to the benefit of the patent; if such person or persons were before the Board of Trade it had jurisdiction, but the respective rights of the persons entitled might affect the discretion of the Board of Trade; & it was not necessary that there should be default on the part of each of such persons; (2) the Board of Trade has jurisdiction to allow an amendment of a petition by adding the names of persons appearing, after the presentation of the petition, to be interested in the patent; (3) in a case in which petitioners' invention was an improved variety of a species covered by resps.' patent, the Board of Trade ought not to order the grant of a licence if resps. make a reasonable offer to manufacture such improved variety; (4) the offer by the N. B. co. was a reasonable one.

(5) The Board of Trade has no jurisdiction over the costs of a petition for a compulsory licence. —*Re* BARTLETT'S PATENT (1899), 16 R. P. C. 641.

Sect. 2.—*Compulsory licence: Sub-sect.* 2. *Sects.* 3 & 4. *Part XII. Sect.* 1.]

SUB-SECT. 2.—PROCEEDINGS.

See, now, Patents & Designs Act, 1919 (c. 80), ss. 1, 2; Patent Rules, 1920, rr. 69–75.

1659. Jurisdiction of Board of Trade—To allow amendment — After presentation of petition.]—*Re* BARTLETT'S PATENT, No. 1658, *ante*.

1660. —— To award costs.]—There is no jurisdiction [in the Board of Trade] where a compulsory licence is dismissed to award costs.—*Re* CONTINENTAL GAS GLUHLICHT ACT. METEOR PETITION (1898), 15 R. P. C. 727.

—*Re* BARTLETT'S PATENT, No. 1658, *ante*.

1662. Grant of licence—To whom granted—Petitioner only.]—*Re* ROBIN ELECTRIC LAMP CO.'S PETITION, No. 1652, *ante*.

1663. —— Patent manufactured abroad.]—*Re* LEVINSTEIN'S PETITION (1898), 15 R. P. C. 732.

1664. —— Reasonable offer to supply petitioners.]—*Re* BARTLETT'S PATENT, No. 1658, *ante*.

1665. —— Stay pending arrangements.]—*Re* INTERTYPE LTD.'S APPLICATION FOR THE GRANT OF A COMPULSORY LICENCE IN RESPECT OF LETTERS PATENT No. 2562 OF 1914 (KENNEDY) (1926), 43 R. P. C. 305.

1666. Particulars of opposition—Right of petitioner to inspect.]—When a petition for the grant of a compulsory license has been referred to the ct. by the Board of Trade pursuant to Patents & Designs Act, 1907 (c. 29), s. 24, petitioner is not entitled to particulars of the grounds of opposition stated in any notice of opposition given by the patentee pursuant to Patents Rules, 1908, r. 70, the grounds of opposition stated in such notice being matter for the consideration of the Board of Trade alone, & not a proceeding under the petition when it has been referred to the ct.—*Re* ROBIN ELECTRIC LAMP CO., LTD., [1914] 2 Ch. 461; 84 L. J. Ch. 49; 111 L. T. 1062.

SECT. 3.—LICENCE FOR PRODUCTION OF FOOD OR MEDICINE.

See Patents & Designs Act, 1919 (c. 80), s. 11 (1); Patent Rules, 1920, r. 85.

1667. To whom granted—Actual food manufacturers.]—A Comptroller's licence under Patents & Designs Act, 1907 (c. 29), s. 38A (2), "limited to the use of the invention for the purposes of the preparation or production of food . . . but not otherwise" can only be granted to actual food manufacturers. It cannot be granted to persons who merely import an infringing ingredient for sale to food manufacturers for the express purpose of their manufacture.—*Re* SCHOU'S PATENTS, [1924] 1 Ch. 574; 93 L. J. Ch. 305; 131 L. T. 464; 41 R. P. C. 298.

See, also, Nos. 427–435, *ante*.

SECT. 4.—RIGHTS OF CROWN.

See, now, Patents & Designs Acts, 1907 (c. 29), s. 29, & 1919 (c. 80), s. 8.

1668. Right to use invention.]—CLARE *v.* R. (1865), cited in 6 B. & S. at p. 290; 122 E. 1203.

Annotations:—**Reld.** Feather *v.* R. (1865), 6 B. & S. ...; **Mentd.** Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A. C. 531.

1669. —— Patentee's remedy—Petition of right.]—By letters patent, dated Nov. 26, 1862, the Crown granted to the suppliant special licence, power, sole privilege & authority to use, exercise & vend a certain invention for improvements in the construction of ships, & to "enjoy the whole profit, benefit, commodity & advantage from time to time coming, growing, accruing & arising by reason of the invention for & during the term of," etc. The letters purported to be granted upon the petition of the suppliant, & "of your especial grace, certain knowledge & mere motion"; & they contained a command "to all & every person & persons, bodies politic & corporate, & all other our subjects whatsoever," that they should not use the invention without the consent, licence & agreement of the suppliant, his exors., etc., on such pains & penalties as could be justly inflicted, & the liability to damages. There was also a clause that the letters should be void if the suppliant, his exors., etc., should "not supply or cause to be supplied for our service all such articles of the said invention, as he or they should be required to supply by the officers or Comrs. of the department of our service for the use of which the same shall be required," etc. It was further provided, that the letters were to be construed in the most favourable & beneficial sense for the best advantage of the suppliant, his exors., etc. The Crown having made use of the invention during the currency of the letters patent, a petition of right was preferred by the inventor:—*Held:* (1) the Crown was not excluded from the use of the invention; (2) if the effect of the letters was to exclude the Crown, yet a petition of right could not be maintained in respect of the infringement of the patent right.—FEATHER *v.* R. (1865), 6 B. & S. 257; 35 L. J. Q. B. 200; 12 L. T. 114; 29 J. P. 709; 122 E. R. 1191.

Annotations:—*As to* (1) **Apprvd.** Dixon *v.* London Small Arms Co. (1876), 1 App. Cas. 632. **Reld.** Roden *v.* London Small Arms Co. (1876), 46 L. J. Q. B. 213. *Generally*, **Mentd.** Thomas *v.* R. (1874), L. R. 10 Q. B. 31; Windsor & Annapolis Ry. *v.* R. & Western Counties Ry. (1886), 11 App. Cas. 607; Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A. C. 531; Goldsmiths' Co. *v.* Wyatt, [1907] 1 K. B. 95; Johnstone *v.* Pedlar, [1921] 2 A. C. 262; Rhondda's Claim, [1922] 2 A. C. 339.

1670. —— Position of government contractor.]—The Crown has the right to the use of a patented process or invention without compensation to the patentee. This right of the Crown is not because the Crown is impliedly excepted from the effect of the letters patent, but because the privilege thereby granted is granted against the subject only & not against the Crown. A patent in the usual terms was granted for an improvement in the manufacture of firearms. The Secretary at War issued a notice for a tender for the supply of 13,875 rifles of the description known as that patented. The price was settled, minus the cost of the steel barrels & the stocks, which the War Office was to supply. The rifles were to be delivered within a certain time, the manufacture of them might be inspected at any time, & they might be rejected by officers at the War Office if not made according to pattern, or not delivered in time. The persons who took the contract employed the patented process in the formation & insertion of the lock:—*Held:* they were liable to the patentee for an infringement of the patent, for that they were not servants or agents of the Crown doing the work of the Crown, but were private contractors with the Crown to supply a certain manufactured article, & were therefore not protected in what they did by any particular privilege attaching to the Crown.—DIXON *v.* LONDON SMALL ARMS CO. (1876), 1 App. Cas. 632; 46 L. J. Q. B. 617; 35 L. T. 559; 25 W. R. 142, H. L.

Annotations:—**Consd.** Roden *v.* London Small Arms Co.

(1876), 35 L. T. 505; Pyrene Co. *v.* Webb Lamp Co. (1920), 37 R. P. C. 57; Akt. Für Autogene Aluminium Schweissung *v.* London Aluminium Co. (No. 2) (1923), 40 R. P. C. 107. **Refd.** Howard & Bullough *v.* Tweedales & Smalley (1895), 12 T. L. R. 28.

granted by deed to defts. a license to use a patented invention for manufacture of rifles, on payment of a royalty, which defts. covenanted to pay, for every rifle manufactured or produced "under the powers hereby granted." At the time the deed was entered into, as well as previously, defts. had been manufacturing arms, under contracts, for the British Govt., in accordance with pltf.'s patent, & without paying royalties, under the belief that they were legally entitled to do so; & the deed itself, as pltf. knew, was intended by defts. to apply only to rifles exclusive of those manufactured for the Govt. Some years afterwards it was decided that the right of the Crown to the free use of a patent did not extend to manufacturers fulfilling Govt. contracts, & pltf. thereupon brought his action under the deed to recover royalties on all arms so manufactured from the time that the deed was entered into:—*Held:* he was not entitled to recover, for though the terms of the licence would, *primâ facie*, be taken to include every exercise of the patented invention, the words, "under the powers hereby granted," contained a latent ambiguity, which admitted of parol evidence to show that the deed was not intended to apply to rifles manufactured for the Govt.—RODEN *v.* LONDON SMALL ARMS CO., LTD. (1876), 46 L. J. Q. B. 213; 35 L. T. 505; 25 W. R. 269.

1672. Patent used by government department—Recovery of compensation.]—Where a Govt. department has used a patented invention before the coming into operation of Patents & Designs Act, 1919 (c. 80), s. 8 (Apr. 23, 1920), although the dispute between the patentee & the Treasury as to the amount of compensation to be paid to the patentee has not been settled, sect. 8 is not retrospective so as to entitle him to proceed under subsect. 2 thereof, but he must proceed under Patents & Designs Act, 1907 (c. 29), s. 29, for which sect. 8 of the Act of 1919 is now substituted as regards the user of inventions after Apr. 23, 1920.—*Re* HALE'S PATENT, [1920] 2 Ch. 377; 90 L. J. Ch. 35; 124 L. T. 261; 37 R. P. C. 171; 36 T. L. R. 832; 64 Sol. Jo. 714.

1673. —— —— Validity of patent disputed.] *Re* ROLLS-ROYCE, LTD. (1921), 38 R. P. C. 149.

Costs of proceedings.] Appcts. applied by originating summons under Patents & Designs Act, 1907 (c. 29), s. 29, as amended by Patents & Designs Act, 1919 (c. 80), s. 8, for an inquiry as to the remuneration proper to be paid to them for the user by a Govt. department of the patented invention of which they were the registered owners. In the course of the proceedings preliminary to hearing of the motion orders were made in which the litigation was treated, with the acquiescence of both litigants, as subject to the ordinary rule as to costs, & on two occasions orders were made requiring appcts. to give security for costs. After the hearing had proceeded for some time appcts. withdrew their claim in view of a prior trial of the invention found to have been made on behalf of the Govt., which, by virtue of the proviso to Patents & Designs Act, 1919 (c. 80), s. 8, entitled the Govt. to make use of it thereafter without payment:—*Held:* under that part of the Patents & Designs Act, 1919 (c. 80), which authorised proceedings against a Govt. department, there was no express mention of costs; the authority to deal with them was derived from the general jurisdiction of the ct.: & the ct. had therefore no authority to depart from the common law rule that the Crown neither paid nor received costs, unless the special circumstances of the particular case justified it in so doing; but having regard to the orders that had been made before the hearing of the motion, & particularly to the two orders for security for costs, the ct. would infer an agreement between the parties that each of them should be treated as ordinary litigants as regarded liability for costs.—*Re* CARBONIT AKT., [1924] 2 Ch. 53; 93 L. J. Ch. 309; 131 L. T. 89; 40 T. L. R. 421; 68 Sol. Jo. 476; 41 R. P. C. 203, C. A.

Annotation:—**Mentd.** Swift *v.* Board of Trade. [1926] 2 K. B. 131.

Part XII.—Term of Patent.

SECT. 1.—DURATION OF ORIGINAL GRANT.

See, now, Patents & Designs Act, 1919 (c. 80), s. 6.

1675. Day of expiry.]—(1) The specification having described the invention to consist in passing pipes through a fixed hole:—*Held:* the passing such pipes through grooved rollers in motion was an infringement of the patent.

(2) An improvement upon the precise mode described in the specification may be an infringement of the patent.

(3) The adoption of a material part of the process described is an infringement.

(4) Day of the date of letters patent is inclusive & not exclusive so that the term of fourteen years granted by letters patent dated Feb. 26, 1825, would expire at midnight Feb. 25, 1839; *aliter* as to the enrolment of specification.—RUSSELL *v.* LEDSAM (1845), 14 M. & W. 574; 14 L. J. Ex. 353; 5 L. T. O. S. 495; 9 Jur. 557; 153 E. R. 604; *on appeal, sub nom.* LEDSAM *v.* RUSSELL (1847), 16 M. & W. 633, Ex. Ch.; (1848), 1 H. L. Cas. 687, H. L.

Annotations:—*As to* (4) **Refd.** Crossley *v.* Potter (1853), Macr. 240; Williams *v.* Nash (1859), 28 Beav. 93; Brakspear *v.* Barton, [1924] 2 K. B. 88. *Generally*, **Refd.** *Re* Markwick's Patent (1860), 13 Moo. P. C. C. 310. **Mentd.** Sturm *v.* Jeffree (1847), 8 L. T. O. S. 415; R. *v.* Edwards (1853), 9 Exch. 32; Isaacs *v.* Royal Insce. (1870), 39 L. J. Ex. 189; Goldsmiths' Co. *v.* West Metropolitan Ry., [1904] 1 K. B. 1; English *v.* Cliff, [1914] 2 Ch. 376.

1676. Patent founded on foreign patent—Revocation of foreign patent.]—DAW *v.* ELEY, No. 2725, *post*.

PART XII. SECT. 1.

1675 i. *Day of expiry.*]—A patent of invention expires in two years from its date, or at the expiration of a lawful extension thereof, if the inventor has not commenced & continuously carried on its construction or manufacture so that any person desiring to use it could obtain it or cause it to be made.—POWER *v.* GRIFFIN (1902), 33 S. C. R. 39; 23 C. L. T. 79.—**CAN.**

q. *Expiration of foreign patent.*]—DRESCHEL *v.* AUER INCANDESCENT LIGHT MANUFACTURING CO. (1898), 28 S. C. R. 608.—**CAN.**

r. ——.]—Canadian patent expires as soon as any foreign patent for the same invention existing at any time during the continuance of the Canadian patent expires. A British patent is a foreign patent within Canadian Patent Act.—DOMINION COTTON MILLS CO., LTD. *v.* GENERAL ENGINEERING CO. OF ONTARIO, [1902] A. C. 570.—P. C.—**CAN.**

t. ——.]—BRISCOE & CO. *v.* WASHBURN & MOEN MANUFACTURING CO. (1891), 10 N. Z. L. R. 85.—**N.Z.**

SECT. 2.—EXTENSION OF TERM.

SUB-SECT. 1.—PARTIES.

A. To Petition.

See Patents & Designs Acts, 1907 (c. 29), s. 18 ; 1919 (c. 80), s. 7 ; R. S. C., Ord. 53A, rr. 3 & 4.

1677. Legal personal representative of patentee.]—*Re* DOWNTON'S PATENT (1839), 1 Web. Pat. Cas. 565, P. C.

1678. ——.]—(1) The circumstance of there being *lis pendens*, respecting the validity of the letters patent, is no objection to the grant of an extension of the original letters patent.

(2) No accounts were kept by the deceased patentee of the expenditure or receipts, on account of his patent. Upon its appearing that his estate was of little value, his effects being sworn for administration under £100, the petitioner, the administratrix of the patentee, on the allegation that there had been no profits, but considerable loss, to such estate, was examined to prove that fact.—*Re* HEATH'S PATENT (1853), 8 Moo. P. C. C. 217 ; 2 Web. Pat. Cas 247 ; 14 E. R. 83, P. C.

Annotation :—As to (1) **Refd.** *Re* Honiball's Patent (1855), 9 Moo. P. C. C. 378.

1679. ——.]—*Re* BAILEY'S PATENT, No. 1960, *post.*

1680. Bare trustee.]—B. was the grantee & registered legal owner of a patent, granted in respect of an invention of improvements for making cup wafers, sugar wafer biscuits & the like, which had expired in Nov. 1919. Shortly after the grant of the patent, B., requiring financial assistance to work the patent, had obtained the assistance of V., & in Dec. 1905, a limited co., in which V. was the only substantial shareholder was formed for the purpose of working the patent. In Jan. 1906, B. agreed, in consideration of certain payments, which consideration was satisfied, to assign the patent to the co. The patent was in fact never assigned to the co., but the co. worked the patent until 1911, when the co. was wound up. After that date the patent was worked by B. Owing to the outbreak of war, B. lost the services of his workmen & from 1915 to 1919 he was engaged on munition work, & owing to those causes & the fact that certain luxury trades were prohibited, he was unable to work his patent during the war. In Jan. 1921, B. applied by originating summons for an extension of the patent :—*Held :* B. was a bare trustee, the beneficial title having on the dissolution of the co. vested in the Crown [as *bona vacantia*], & an extension of the patent could not be granted to B. alone. The application was ordered to stand over generally, with liberty to restore, in order to enable B. to procure the beneficial title or to obtain the concurrence of the beneficial owner.

At the adjourned hearing, V. was joined in the application & the Treasury waived any claim on the part of the Crown to be considered the beneficial owner, on the ground that the co. was extinct.

An extension of four years was granted subject to the Board of Trade being satisfied that B. & V. were the only persons substantially interested in the co., & subject to the usual restrictions.—*Re* BATES' PATENT (1921), 38 R. P. C. 385.

1681. Limited company.] — *Re* HORSEY'S PATENT, No. 1697, *post.*

1682. —— **By trustee.**]—*Re* PETTIT SMITH'S PATENT (1850), 7 Moo. P. C. C. 133 ; 13 E. R. 830, P. C.

Annotations :—**Refd.** Feather *v.* R. (1865), 6 B. & S. 257. **Mentd.** Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A. C. 531.

1683. —— ——.]—*Re* CLARIDGE'S PATENT, No. 1743, *post.*

1684. Application on account of losses due to hostilities by British company—Foreign company on register during war—Patents & Designs Acts, 1907–1919, s. 18 (6).]—*Re* WINGQUIST'S PATENT, No. 2057, *post.*

1685. Joinder of legal personal representative—By reason of contract.]—A petition was presented for the prolongation of a patent by C., a son of the patentee, who had acquired an interest in the patent for the benefit of his mother & sisters from L., to whom it had been assigned by the trustee in liquidation of the patentee. The patentee had, up to his death, worked the patent under a verbal agreement with L., that when L. had been paid £500 out of profits, L. would settle the patent on a member of the patentee's family. The patentee had paid £300 at the date of his death, & C. paid £200 subsequently. The patent was handed over to C., but no assignment was executed by L. The Judicial Committee intimated that the legal personal representative of the patentee ought to be a party to the petition, which was amended, & the legal personal representative & L. were made parties :—*Held :* the utility of the invention as a whole was not apparent.—*Re* WILLACY'S PATENT (1888), 5 R. P. C. 690.

1686. Joinder of mortgagee—& others claiming lien.]—The patentee's invention consisted of improvements upon a former patent, taken out by him in consequence of a communication by a foreigner :—*Held :* as the improvements were novel & of public utility, the patentee was, in absence of adequate remuneration, entitled to an extension.

The patentee had been involved in debt arising from extensive litigation in defending his patent rights, & had, moreover, mortgaged his letters patent, & entered into a deed of arrangement or inspectorship under the Bkpcy. Act with his creditors. The petition was presented by the patentee, & certain mtgees. & others claiming liens on the letters patent. In the circumstances, their lordships granted the extension of the patent to the patentee alone.—*Re* BOVILL'S PATENT (1863), 1 Moo. P. C. C. N. S. 348 ; 15 E. R. 733, P. C.

1687. —— **Necessary party.**] — *Re* CHURCH'S PATENTS (1886), 3 R. P. C. 95 ; Griffin's Patent Cases (1884–1886), 256, P. C.

Assignee.]—*See* Sub-sect. 3, *post*

Importer of foreign invention.]—*See* Sub-sect. 4, *post.*

B. Other Parties.

See Patents & Designs Acts, 1907 (c. 29), s. 18 ; 1919 (c. 80), s. 7 ; R. S. C., Ord. 53A, rr. 3 & 4.

1688. Crown—Represented by Attorney-General.]—*Re* PETTIT SMITH'S PATENT, No. 1888, *post.*

1689. —— **Bona vacantia.**]—*Re* BATES' PATENT, No. 1680, *ante.*

1690. Lords of Admiralty—Refused representation otherwise than by Attorney-General.]—*Re* PETTIT SMITH'S PATENT, No. 1888, *post.*

1691. Owner of beneficial interest of patent.]—*Re* BATES' PATENT, No. 1680, *ante.*

SUB-SECT. 2.—CONTENTS OF PETITION.

See R. S. C., Ord. 53A, rr. 3 & 4.

1692. General rule.]—It is incumbent upon all persons who come here petitioning for a prolongation, that the whole history, everything bearing

on the matter, should be stated on the face of the petition (LORD HOBHOUSE).—*Re* STANDFIELD'S PATENT (1897), 15 R. P. C. 17, P. C.

1693. All material facts.]—(1) Rule III. of the Privy Council, made pursuant to 5 & 6 Will. 4, c. 83, relating to letters patent for inventions, provides that a petition under sects. 2 & 4, must be presented within one week from the insertion of the last of the advertisements required to be published in the *London Gazette*.

Petitioner inserted the last advertisement of his intention to petition for a prolongation on May 24, but did not present his petition until June 5 following. The registrar refused to receive the petition as being too late. Upon a special application for that purpose, it appearing that the delay arose from a mistake of petitioner's agent, an order was made admitting the petition. A caveat had been entered:—*Held:* as the party filing the caveat was interested in sustaining the objection to the reception of the petition, notice of the application must be served on him.

(2) Material facts, showing the title of petitioner, were disclosed in the evidence, which were omitted to be stated in the petition for prolongation. In such circumstances the hearing was postponed, & the petition directed to be amended by stating those facts.

(3) The books of petitioner with respect to the profits having been lost during his bkpcy., the account of profit & loss was taken upon his own evidence.—*Re* HUTCHISON'S PATENT (1861), 14 Moo. P. C. C. 364; 15 E. R. 343, P. C.

1694. ——.]—*Re* CLARK'S PATENT, No. 1937, *post*.

1695. ——.]—*Re* JOHNSON'S PATENT (No. 2), No. 1765, *post*.

1696. Candid statement of facts.] — As the recommendation to the Crown for the prolongation of the term of letters patent is a matter of discretion in the Judicial Committee, it is imperatively necessary that the petition for such prolongation should state fairly & fully everything relating to the patent: an omission to do so is fatal to the application.—*Re* PITMAN'S PATENT (1871), L. R. 4 P. C. 84; 8 Moo. P. C. C. N. S. 293; 17 E. R. 322, P. C.

1697. —— **Non-disclosure—Sham company as assignees.**]—A limited co. who were the registered assignees of Horsey's patent (No. 3145 of 1870), presented a petition for the prolongation of the terms of such patent. The co. consisted mainly of seven persons, to whom a share each was given to enable the requirements of the Joint Stock Cos. Act to be literally complied with; but the only persons really interested were the patentee & a creditor of his for money borrowed. These facts were not stated in the petition:—*Held:* the requisite good faith had not been observed by petitioners, & the prayer of the petition must therefore be refused.

. . . This co. being non-existent, or, to use popular language, a mere sham & pretence. Under these circumstances it appears to their lordships that it has not been candid on the part of the petitioners to withhold this state of facts from their Lordships, & to give them to understand on the face of the petition that a *bonâ fide* co.—a real co. I must call it—was formed, whereas no real co. was ever formed at all. Under these circumstances it appears to their lordships that the requisite good faith not having been observed on the part of the petitioners . . . it is their duty to advise her Majesty not to prolong this patent (SIR ROBERT P. COLLIER).—*Re* HORSEY'S PATENT (1884), 1 R. P. C. 225; Griffin's Patent Cases (1884–1886), 261, P. C.

1698. —— —— **Assignment.**]—A petition for the prolongation of a patent stated that the patent had been during the whole of the term & still was the property of petitioner, who was also the inventor. It appeared at the hearing that subsequent to the date of the patent petitioner assigned all his present & future patent rights to a co., receiving no consideration in money or shares, but reserving certain rights. Counsel for the Crown asked for the dismissal of the petition on the ground of the non-disclosure of material facts. Their lordships advised that the petition be dismissed with one set of costs between three opponents.—*Re* FERRANTI'S PATENT (1901), 18 R. P. C. 518, P. C.

1699. Acquisition of foreign patents.]—(1) Where a patentee, whether English or foreign, has obtained foreign patents they should be stated to their lordships & the fullest information afforded as to the profits thereof.

(2) An English patent may be renewed though a foreign one has been taken out & allowed to expire.

(3) A patentee should preserve the clearest evidence of everything which has been paid & received on account of the patent.

(4) Whether or not his remuneration has been adequate, his furnishing a satisfactory account is a condition precedent to his obtaining an extension of his term.—*Re* ADAIR'S PATENT (1881), 6 App. Cas. 176; 50 L. J. P. C. 68; 29 W. R. 746; Goodeve's Patent Cases, 580, P. C.

Annotation:—As to (4) **Refd.** *Re* Duncan & Wilson's Patent (1884), 1 R. P. C. 257.

1700. Prior patents relating to same subject-matter.]—Petitioner for prolongation ought to call attention to prior patents relating to the same subject-matter within his knowledge, & cannot complain of the Crown introducing such prior patents in evidence without giving him notice of them.

The patentee of an invention relating to steam boilers presented a petition for prolongation. The invention consisted in having expanding flues for the purpose of making combustion more perfect, & in his specification the patentee made success dependent on expanding the flues in certain scientific proportions, as to which he gave no details. During the life of the patent, the patentee had given up his whole time to the invention, & his remuneration had amounted to something over £6,000. On the hearing one of his witnesses gave evidence that he understood the exact proportions were known to the patentee alone, & that he could not attain the exact proportions himself. All furnaces constructed under the patent were constructed under the superintendence of the patentee. Petitioner, who was a foreigner, but who had lived in England for twenty-five years, had taken out foreign patents subsequently to his English patents, & had allowed them to lapse. On the hearing, a prior patent claiming the principle of expanding flues, though by a different process, for perfecting combustion was put in evidence by the Crown. This patent was known to the patentee but had not been disclosed in his evidence:—*Held:* (1) the petitioner could not complain of the introduction of the prior patent by the Crown, & it would have been better if he had himself brought it forward; (2) if the

PART XII. SECT. 2, SUB-SECT. 2.

1693 i. *All material facts.*]—*Re* ROBINSON'S PATENT (1918), 25 C. L. R. 116.—**AUS.**

Sect. 2.—*Extension of term: Sub-sects.* 2 & 3, *A., B.*

merit of the patent had been sufficient, the remuneration would probably not have been too great, but the main merit of the patent lay not in the disclosure of a principle but in the details of construction, & as to these petitioner had not given sufficient disclosure in his specification, & the patent ought not to be prolonged.

(3) The Committee considered that the question of the lapse of the foreign patents was rightly brought forward as a preliminary objection, but left the question whether the old rule of practice on that point was still applicable for future consideration.—*Re* FOUNTAIN LIVET'S PATENT (1892), 9 R. P. C. 327, P. C.

See, also, No. 2000, *post*.

Accounts & profits.]—*See* Sub-sect. 7, *post*.

SUB-SECT. 3.—ASSIGNEES.

A. Right to be Petitioner.

1701. Legal assignees.]—The interest of the inventor is immediately consulted through the assignee.—*Re* MORGAN'S PATENT (1843), 1 Web. Pat. Cas. 737, P. C.

Annotations:—**Refd.** *Re* Honiball's Patent (1855), 9 Moo. P. C. C. 378; *Re* Norton's Patent (1863), 1 Moo. P. C. C. N. S. 339; *Re* Pitman's Patent (1871), L. R. 4 P. C. 84; *Re* Hopkinson's Patent, [1897] A C. 249.

1702. ——.]—LEDSAM *v.* RUSSELL, No. 2566, *post*.

1703. ——.]—*Re* HARDY'S PATENT, No. 1909, *post*

1704. ——.]—*Re* NAPIER'S PATENT, No. 1892, *post*.

1705. ——.]—*Re* CARMONT'S PATENT, No. 1840, *post*.

1706. ——.]—*Re* HOPKINSON'S PATENT, No. 1711, *post*.

1707. Equitable assignee—Name must appear in advertisements.]—To entitle an equitable assignee, to appear with the legal assignees of a patent, on a petition for a prolongation of the letters patent, the name of such equitable assignee must appear with the other petitioners, in the advertisements, required by 5 & 6 Will. 4, c. 83, s. 4, & rule 2, made in pursuance thereof.—*Re* NOBLE'S PATENT (1850), 7 Moo. P. C. C. 191; 15 L. T. O. S. 1; 13 E. R. 853, P. C.

1708. Executor of surviving assignee.]—Where the exor. of the surviving assignee of a patentee, petitioned for an extension of the term of the letters patent, & it was established, that a valuable consideration had been given for the assignment & that the assignee had sustained considerable loss, the Judicial Committee, in granting an extension of the term, refused to impose terms upon the petitioners, in favour of the patentee.—*Re* BODMER'S PATENT (1849), 6 Moo. P. C. C. 467; 13 E. R. 764, P. C.

Annotation:—**Refd.** *Re* Claridge's Patent (1851), 7 Moo. P. C. C. 394.

Losses due to hostilities.]—*See* Sub-sect. 3, D., *post*.

B. Principles on which Extension Granted.

1709. Assignee's title must be strictly proved.]—(1) In an application by an assignee, his title must be strictly proved.

(2) The new letters patent are subject to the objections to the old, & the questions of novelty & utility will not be minutely entered on.

(3) The fact of great improvements having been made on the original invention, affords no objection to the extension of the term.

In calculating whether any profit has been obtained through or by means of a patent, it is correct to deduct in the first place, beyond the cost price, a fair manufacturer's profit on the articles sold; & the mere preference of the market obtained by the manufacturer is not to be deemed a profit derived from the patent.—*Re* GALLOWAY'S PATENT (1843), 1 Web. Pat. Cas. 724; 7 Jur. 453, P. C.

Annotation:—*As to* (4) **Refd.** Penn *v.* Jack (1867), L. R. 5 Eq. 81.

1710. Assignee not on so favourable a footing as patentee.]—The grounds on which extensions of patents are granted by the Judicial Committee have all reference to the inventor. They are: (*a*) to reward the inventor for the peculiar ability & industry he has exercised in making the discovery; (*b*) to reward him, because some great benefit of an unusual description has by him been conferred upon the public through the invention itself; or, (*c*) because the inventor has not been sufficiently remunerated by the profits derived from his strenuous exertions to make the invention profitable.

All these grounds proceed on the supposition that the invention is a new & useful invention. But where the inventor intentionally delays for a great length of time attempting to put the invention into practice, those reasons for a prolongation of the patent cannot be relied upon by him, unless he shows some reasonable ground, such as want of funds, for the delay.

Although by Judicial Committee Act, 1844 (c. 69), s. 4, the assignee of a patentee is entitled to apply for an extension of letters patent, yet he does not, unless under peculiar circumstances, stand on the same favourable footing as the original inventor, as the ground that the merits of the inventor ought to be properly rewarded, in dealing with an invention which has proved useful & beneficial to the public, does not exist in the case of an assignee, unless such assignee be a person who has assisted the patentee with funds to enable him to perfect & bring out his invention, & thus to bring it into use.—*Re* NORTON'S PATENT (1863), 1 Moo. P. C. C. N. S. 339; 1 New Rep. 557; 9 Jur. N. S. 419; 11 W. R. 720; 15 E. R. 729, P. C.

Annotations:—**Consd.** *Re* Bower-Barff Patent, [1895] A. C. 675. **Refd.** *Re* Hopkinson's Patent, [1897] A. C. 249.

1711. ——.]—This was a petition for prolongation of a patent by the patentee & a co. to whom he had sold the whole beneficial interest in the patent. It appeared that the patentee had received a total amount of £19,750 in shares & cash for this patent & a German patent of the same invention, but that the co.'s expenditure had exceeded their receipts. The petition was opposed by the Crown on the ground that the inventor had been adequately remunerated & had no further interest, & was also resisted by seven sets of opponents:—*Held*: though assignees may petition for prolongation, they were not to be placed on the same favourable footing as the patentee; in this case the assignees had not assisted the inventor to bring out his invention, but had merely bought it from a prior assignee from him, & as the inventor had been adequately remunerated the Board were unable to report under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 25.—*Re* HOPKINSON'S PATENT, [1897] A. C. 249; 66 L. J. P. C. 38; 75 L. T. 462; 13 T. L. R. 126; 14 R. P. C. 5, P. C.

Annotation:—**Consd.** *Re* Henderson's Patent, [1901] A. C. 616.

1712. Annuity secured to patentee.]—(1) To entitle a patentee, or his assignee, to an extension of the term of letters patent, the petitioner must establish three things: (*a*) the merit of the invention; (*b*) that the parties interested had done all in their power to bring the invention into public use & to turn it to advantage; & (*c*) that from circumstances beyond their control, they have been unable to obtain adequate remuneration.

(2) An extension granted to the assignee, upon condition of an annuity being secured to the patentee.

(3) The accounts produced at the hearing were unsatisfactory, owing to the non-production of the books. The Judicial Committee in recommending a prolongation of the term of the letters patent, directed a proper account of the profits & losses of the patent, to be verified by affidavit, with an explanation accounting for the non-production of the books, to be laid before the A.-G., subject to which they extended the term.—*Re* MARKWICK'S PATENT (1860), 13 Moo. P. C. C. 310; 8 W. R. 333; 15 E. R. 116, P. C.

1713. Extension no benefit to patentee.]—*Re* NAPIER'S PATENT, No. 1892, *post*.

1714. ——.]—*Re* NORTON'S PATENT, No. 1710, *ante*.

1715. ——.]—*Re* BOWER-BARFF PATENT, No. 1722, *post*.

1716. ——.]—A patent, granted in 1884, was in 1888 absolutely assigned, in consideration of a sum then paid, to F., who had in 1886 obtained a patent for a similar invention. F., in 1898, presented a petition for prolongation of the patent of 1884:—*Held:* as the patentee would not derive any benefit from a prolongation, the petition must be dismissed.—*Re* FINCH'S PATENT (1898), 15 R. P. C. 674, P. C.

1717. ——.]—*Re* CLARK'S PATENT (1899), 16 R. P. C. 431, P. C.

1718. ——.]—*Re* VAN GELDER'S PATENTS, *Ex p.* THOMPSON, No. 1868, *post*.

1719. Assignees benefiting themselves—Rather than inventor.]—*Re* ELECTRIC TELEGRAPH CO.'S PATENT (*circa* 1845), cited in 1 Moo. P. C. C. N. S. at p. 346; 15 E. R. 732, P. C.

Annotation:—**Apld.** *Re* Norton's Patent (1863), 1 Moo. P. C. C. N. S. 339.

1720. —— **Rather than the public.**] — *Re* SILLAR'S PATENT (1882), Goodeve's Patent Cases, 581.

1721. —— **Who had done nothing to develop patent.**]—*Re* POULSEN'S PATENT, No. 1863, *post*.

1722. Patentee must be entitled to extension.]—An extension of a patent will not be granted to the assignee of an inventor unless the inventor would himself have been entitled thereto, & will himself derive benefit directly or indirectly therefrom.

Where a co. are petitioners & have bought the patent for cash & shares, the petition should disclose what sales of shares, if any, have taken place in the market.—*Re* BOWER-BARFF PATENT, [1895] A. C. 675; 73 L. T. 36; 11 T. L. R. 516; 11 R. 579; *sub nom. Re* BARFF'S & BOWER'S PATENT, 12 R. P. C. 383, P. C.

Annotations:—**Apld.** *Re* Hopkinson's Patent, [1897] A. C. 249. **Folld.** *Re* Finch's Patent (1898), 15 R. P. C. 674. **Refd.** *Re* Henderson's Patent, [1901] A. C. 616.

1723. —— **Already sufficiently remunerated.**]—*Re* HOPKINSON'S PATENT, No. 1711, *ante*.

1724. —— ——.]—*Re* HENDERSON'S PATENT, o. 1944, *post*.

1725. Assignment within few months of expiry.]—A patentee, a foreigner, patented his invention first in England & afterwards in France, which latter patent, at the date of the application for a prolongation of the English patent, had a year to run:—*Held:* (1) they could not recommend the Crown to extend the term upon the chance of the French patent being extended; (2) if the French patent had expired there was no power in the committee to recommend an extension of the English patent; (3) an assignee of the patentee who had taken an assignment of four-fifths of the patent within a few months of the expiration of a patent, which had only just been brought into use, for a small consideration, was not entitled to any extension.—*Re* NORMAND'S PATENT (1870), L. R. 3 P. C. 193; 6 Moo. P. C. C. N. S. 477; 16 E. R. 805, P. C.

Annotation:—**Refd.** *Re* Winan's Patent (1872), L. R. 4 P. C. 93.

1726. New patents made to assignee.]—*Re* SOUTHWORTH'S PATENT, No. 1872, *post*.

1727. New patent made to patentee—Assignment by way of mortgage.]—*Re* BOVILL'S PATENT, No. 1686, *ante*.

Conditions attached to grant.]—*See* Sub-sect. 6, B. (*a*), *post*.

C. Accounts.

1728. Accounts of patentee & assignee—To be produced.]—A co. who were the assignees of a patent, & who not only manufactured the patented articles, but also carried on a jobbing business in their factory, presented a petition for prolongation of the term of the patent:—*Held:* the accounts did not sufficiently distinguish the expenditure in the patent business from the expenditure in the general business, & the accounts did not satisfy the Judicial Committee that the amount stated as profits was the total amount of the profits made, & therefore the application must be refused.

Their Lordships think that in this case to give one-third only to the patent, & to take two-thirds of the whole profit as manufacturing profits, was more than ought to be allowed.—*Re* DUNCAN & WILSON'S PATENT (1884), 1 R. P. C. 257; 1 T. L. R. 59; Griffin's Patent Cases (1884–1886), 258, P. C.

1729. —— ——.]—Two patents for improvements in apparatus for measuring the flow of water in pipes were assigned to a limited co., established for the purpose of working the invention in consideration mainly of fully paid up shares, the greater part of which were still retained by the patentee, & had proved a very profitable investment. The patentee & the co. petitioned for the prolongation of the patents on the ground of inadequate remuneration. No account of the profits made by the co. were filed. The patentee's accounts showed that he had made profits exceeding £6,000, but contained no estimate of his interest in the co. The invention was one of great merit & public utility:—*Held:* in a petition for prolongation of a patent where the patent rights have been transferred, either in whole or in part, to a co. it is essential that there should be deposited not only the patentee's account of his profits, but, in order to test them, the account also of the co.; in the present case, although the last-mentioned account was absent, & although the profits of the patentee, both as patentee & as a member of the co., were very considerable, & the case therefore came very near the line; yet, having regard to the great merit & usefulness, & the great advantage to the public of the patentee's discovery, prolongation for three years should be granted.—*Re* DEACON'S PATENTS (1887), 4 R. P. C. 119; 3 T. L. R. 349, P. C.

1730. —— ——.] — The patentees of two patents for improvements in a certain class of

Sect. 2.—*Extension of term: Sub-sect.* 3, *C. & D.; sub-sects.* 4 & 5, *A. & B.*]

engines started a business for manufacturing the engines & other purposes, & sold the business to a co. They received a considerable sum for the transfer of the business & the patents & as remuneration for their services. The co. made considerable profits from its business. The co. presented a petition for prolongation of one patent, & they presented general accounts of their business; but they were unable to show what the patentees had actually received, or what profit had actually arisen from the patent:—*Held:* the Judicial Committee could not under the circumstances of the case report that the patentees had been inadequately remunerated—*Re* WILLANS & ROBINSON'S PATENT (1896), 13 R. P. C. 550, P. C.

1731. —— ——.]—*Re* HENDERSON'S PATENT, No. 1944, *post.*

Assignee also manufacturer.]—*See* Sub-sect. 7, D., *post.*

D. Losses due to Hostilities.

1732. Right to apply.]—The assignee of two patents granted to B. applied by originating summons for an extension of the term of the patents. The whole remuneration received by the patentee had consisted of royalty payments under an exclusive licence. The patents were granted in respect of inventions for use in building operations. Owing to the effect of hostilities upon the building trade the royalty payments had been considerably reduced. An extension of two & a half years was granted.—*Re* TOWNSLEY'S APPLICATION (BROWN'S PATENT) (1922), 40 R. P. C. 73.

1733. —— Joinder of patentee.]—*Re* SUMMERS BROWN'S PATENT, No. 2124, *post.*

1734. —— —— Failure to trace.]—In 1909 a patent in respect of an invention relating to the valves of internal combustion engines was granted to M., & in the same year a patent in respect of a very similar invention was granted to P. B. & A., Ltd. The inventors combined their interest, & the engines in which the patented inventions were embodied were known as the B. M. engines. In 1909 & 1910 two further patents in respect of inventions relating to the B. M. engine were granted to M., & in 1915 a patent in respect of similar subject-matter was granted to P. B. The patents were successfully worked by A., Ltd., until July, 1914, when that co. went into liquidation, but owing to causes arising out of hostilities the patents were not worked during the war period. In 1916 M. assigned all his interest in the patents to G. & F. In 1917 the interests in the patents were combined by a trust agreement & in 1920 the patents were assigned to W., Ltd. In 1924 W., Ltd., & others applied by originating summons for an extension of the terms of the patents. Evidence was given that efforts had been made to ascertain the whereabouts of M., who was not a party to the application, but that such efforts had failed. At the hearing the patent of 1915 was withdrawn from the application:—*Held:* a case of loss or damage or loss of opportunity had been established; in view of the fact that the assignment by M. to G. & F. was in the widest possible terms & of the evidence that M. could not be traced, the absence of M. ought not to disentitle applts. to relief, & an extension of four years should be granted in respect of the 1909 & 1910 patents.—*Re* MCCOLLUM'S PATENTS (1925), 42 R. P. C. 526.

1735. —— —— ——.]—*Re* LARSSON'S PATENT (1925), 43 R. P. C. 179.

1736. —— —— Second assignment after war.]—*Re* MIKKLESEN'S PATENT, *Re* KNUDSEN'S PATENT (1926), 44 R. P. C. 12.

1737. Assignment during or since war—Consideration of loss due to war—By joinder of patentee.]—*Re* SUMMERS BROWN'S PATENT, No. 2124, *post.*

1738. —— —— Assignment in widest terms.]—*Re* MCCOLLUM'S PATENTS, No. 1734, *ante.*

1739. —— —— Exclusive licencee from before the war.]—*Re* LARSSON'S PATENT, No. 1735, *ante.*

1740. Patent assigned to company—Patentee's position merged in that of shareholder.]—*Re* POULSEN'S PATENT (No. 2), *Re* HAGE'S APPLICATION, No. 2059, *post.*

1741. Loss suffered by original patentee during war—Subsequent application by assignees.]—*Re* SUMMERS BROWN'S PATENT, No. 2124, *post.*

SUB-SECT. 4.—FOREIGN IMPORTER.

1742. Of less merit than original inventor.]—*Re* SOAMES'S PATENT, No. 1828, *post.*

1743. —— Merits jealously considered.]—The importer of an invention from abroad is an inventor within the meaning of 5 & 6 Will. 4, c. 83, & entitled to apply for an extension of the term. But the Judicial Committee will look with jealousy into the merits of the invention imported.

Application for an extension, by the trustees of a joint stock co., the assignees of the patentee, refused; the invention imported having been in common use in France, & no great risk or expenditure incurred by the patentee or his assignees in introducing it to the public.—*Re* CLARIDGE'S PATENT (1851), 7 Moo. P. C. C. 394; 13 E. R. 932.

Annotations:—**Apld.** *Re* Bower-Barff Patent, [1895] A. C. 675. **Consd.** *Re* Hopkinson's Patent, [1897] A. C. 249.

1744. —— ——.]—(1) Exposition of the principles which regulate the Judicial Committee in recommending the Crown to extend the term of letters patent of an invention, consisting of a communication from a foreigner residing abroad, who had, previously to the English patent, taken out a patent for the same invention in a foreign state.

(2) Where there were several opponents; on dismissing the petition a lump sum was awarded to the opponents to be divided *pro rata* for costs.—*Re* JOHNSON'S PATENT (WILLCOX & GIBBS) (1871), L. R. 4 P. C. 75; 8 Moo. P. C. C. N. S. 282; 17 E. R. 318, P. C.

Annotations:—*As to* (1) **Apld.** *Re* Pitman's Patent (1871), L. R. 4 P. C. 84. **Reid.** *Re* Winan's Patent (1872), L. R. 4 P. C. 93; *Re* Blake's Patent (1873), L. R. 4 P. C. 535. *As to* (2) **Follid.** *Re* Wield's Patent (1871), L. R. 4 P. C. 89.

1745. On same footing as original inventor—Where public benefited—At considerable expense to importer.]—An importer of a foreign invention, by which the public is benefited, is entitled to be put on the same footing as an original inventor, when applying for a prolongation for such foreign importation.

In a case, therefore, where the invention was of considerable commercial value, & the importers had embarked a large capital upon machinery in trying to introduce it to general use, & incurred considerable loss in so doing; the Judicial Committee recommended an extension of the letters patent, for six years.—*Re* BERRY'S PATENT (1850), 7 Moo. P. C. C. 187; 13 E. R. 851.

Annotation:—**Mentd.** Walter *v.* Lane, [1900] A. C. 539.

SUB-SECT. 5.—GROUNDS FOR GRANTING OR REFUSING.

A. In General.

See Patents & Designs Acts, 1907 (c. 29), s. 18; 1919 (c. 80), s. 7.

1746. General statement of grounds of decision.]—*Re* DOWNTON'S PATENT, No. 1677, *ante.*

1747. ——.]—*Re* DEROSNE'S PATENT, No. 1771, *post.*

1748.——.]—*Re* MARKWICK'S PATENT, No. 1712, *ante.*

1749. ——.]—*Re* NORTON'S PATENT, No. 1710, *ante.*

1750. ——.]—It is essential in order to obtain an extension of the term of letters patent, for the petitioner to establish (*a*) that the invention is of considerable merit; (*b*) public utility; & (*c*) inadequate remuneration. Although the Judicial Committee will not adjudicate upon the validity of letters patent, the term of which is sought to be prolonged, yet where it appears from the specification that the subject-matter is not sufficient to sustain such patent, they will not, in the exercise of their discretion, recommend the Crown to extend the term. Where, therefore, the specification of a patent described it as improvements in treating, deodorising & disinfecting sewage, & other offensive matter, & also for deodorising & disinfecting in general, & as being composed of two ordinary well-known chemical acids in combination, such acids being in common use for disinfecting purposes by the public before & after the letters patent:—*Held:* not to be an invention of such merit & utility as to justify an extension, to the detriment of the public in the use of known sanitary agents.—*Re* MCDOUGAL'S PATENT (1867), L. R. 2 P. C. 1; 5 Moo. P. C. C. N. S. 1; 37 L. J. P. C. 17; Goodeve's Patent Cases, 563; 16 E. R. 415, P. C.

Annotations:—**Refd.** *Re* Sillar's Patent (1882), Goodeve's Patent Cases, 581; *Re* McCulloch's Patent (1908), 25 R. P. C. 684.

1751. Very strong case necessary.]—Upon a consideration of all the circumstances, we think that a sufficiently strong case has been made out to justify us in recommending to his Majesty to extend the first of these patents for the period of seven years, but we think no case has been made out to justify us in so recommending to his Majesty with respect to the second patent granted in 1825. By the first patent we mean those of England, Ireland, & Scotland. In cases of this kind we expect a very strong case of hardship to be made out, as well as a strong case upon the utility of the invention (LORD LYNDHURST).—*Re* ERARD'S PATENT (1835), 1 Web. Pat. Cas. 557, P. C.

1752. ——.]—*Re* HONIBALL'S PATENT, No. 1776, *post.*

1753. Petitioner must show uberrima fides.]—*Re* POULSEN'S PATENT, No. 1863, *post.*

1754. Extension not interfering with any vested interest—Due to novelty of invention.]—*Re* MUIR'S PATENT (1919), 36 R. P. C. 327.

1755. Further improvement.]—*Re* GALLOWAY'S PATENT, No. 1709, *ante.*

1756. ——.]—*Re* SOAMES'S PATENT, No. 1828, *post.*

1757. —— **Second patent shutting out first.**]—Patentees of a patent, No. 242 of 1876, presented a petition for prolongation of their patent alleging that they had not obtained an adequate remuneration. The total net profit they had received amounted to about £4,000 including in this sum an allowance of £200 a year to one of the patentees. In 1886 the patentees obtained a patent for an improved machine & it appeared that their recent sales had been almost entirely of machines constructed under this later patent:—*Held:* although there was utility, yet considering the degree of merit of the invention & the fact that the patentee had obtained a subsequent patent which had almost shut out the use of the earlier patent the remuneration had been adequate.—*Re* NUSSEY & LEACHMAN'S PATENT (1889), 7 R. P. C. 22, P. C.

1758. Patentee entering into agreement contrary to public policy—Agreement to obtain extension.]—A patentee agreed, by deed, with a public co. to grant them exclusive licence to use his patented machine, & also covenanted with them to obtain, at the expiration of the term, a renewal of the patent for the same purpose Under this deed the co. alone used the patent. An application by the patentee for a prolongation refused, on the ground that the agreement was contrary to public policy, & repugnant to the provisions of 5 & 6 Will. 4, c. 83, relating to prolongation of letters patent.—*Re* CARDWELL'S PATENT (1856), 10 Moo. P. C. C. 488; 14 E. R. 576.

Annotation:—**Consd.** *Re* Norton's Patent (1863), 1 Moo. P. C. C. N. S. 339.

1759. Failure to bring action for infringement.]—*Re* SIMISTER'S PATENT, No. 1766, *post.*

1760. Insufficient disclosure in specification.]—*Re* FOUNTAIN LIVET'S PATENT, No. 1700, *ante.*

B. Discretion of Court.

1761. General rule.]—*Re* PITMAN'S PATENT, No. 1696, *ante.*

1762. Exercise of discretion—Only limited as to extent of prolongation.]—LEDSAM *v.* RUSSELL, No. 2566, *post.*

1763. —— **To be judicial.**]—*Re* HILLS' PATENT, No. 1769, *post.*

1764. —— **Adequate remuneration of patentee.**]—*Re* HILLS' PATENT, No. 1769, *post.*

1765. —— —— **Patents & Designs Act, 1907 (c. 29), s. 18.**]—The power given to the ct. by above sect. to extend the term of a patent is a discretionary power which can only be exercised when the ct. is satisfied that the patentee has been inadequately remunerated by his patent, & it is only where the value of the patentee's disclosure to the public largely exceeds the benefit derived by him from the patent that he can be said to have been inadequately remunerated.

For the purpose of considering whether a patentee has been adequately remunerated profits on his foreign as well as on his English patents must be taken into account, & some allowance ought to be made for future profits on either which will probably be received before their expiration.

The ct. will pay especial attention to the fact that, although the thing disclosed may be minute

PART XII. SECT. 2, SUB-SECT. 5.—A.

1746 i. *General statement of grounds of decision.*]—Petitioner must prove that the invention is meritorious, that everything in his power to bring out the invention & turn it to advantage has been done, & that, owing to circumstances beyond his control, he has been unable to obtain an adequate remuneration. — *Re* ANDREWS & BEAVEN'S PATENT (1898), 18 N. Z. L. R. 526.—**N.Z.**

1746 ii. ——.]—The extension of the term of a patent is an exceptional privilege to be recommended only in cases where the invention is of exceptional merit & proved utility, & it lies upon petitioners to show that it has such merit & utility. In the absence of exceptional merit & proved utility the fact that no harm will be done by an extension is no ground for recommending it. — *Re* PETRE & SCULLY'S PATENT (1909), 28 N. Z. L. R. 1069.—**N.Z.**

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as compared with the sum total of what was known previously, it may be the *sine qua non* of the successful application of existing knowledge & thus fall within the category of great inventions. When the Comptroller opposes the extension of a patent on the ground that the traders of this country will, if the patent is prolonged, be put at a disadvantage compared with the traders of some other country, proper statistics or other information ought to be expressed to the ct. as to the nature & extent of the competition which is feared.—*Re* JOHNSON'S PATENT (No. 2), [1909] 1 Ch. 114; 77 L. J. Ch. 737; 99 L. T. 697; 25 R. P. C. 709; 24 T. L. R. 889.

Annotations:—**Consd.** *Re* Poulsen's Patent (1913), 30 R. P. C. 597. **Refd.** *Re* Inglis's Patent (1917), 34 R. P. C. 157.

C. Public Benefit.

See Patents & Designs Act, 1907 (c. 29), s. 18 (4).

1766. General rule.]—The consideration for extending the term of the patent is, that the public will be benefited after the term has expired.

Extension of the term in letters patent refused, although the profit derived from the patent article was less by £1,278 than the expenditure upon the patent, together with interest, the utility of the invention not being proved to be great.

The circumstances of a patent article, when once well known, not becoming of extensive application, goes far to negative its general utility.—*Re* SIMISTER'S PATENT (1842), 4 Moo. P. C. C. 164; 1 Web. Pat. Cas. 721; 7 Jur. 451; 13 E. R. 264, P. C.

1767. ——.]—*Re* WRIGHT'S PATENT (1843), 1 Web. Pat. Cas. 736; 1 L. T. O. S. 407, P. C.

1768. ——.]—LEDSAM *v.* RUSSELL, No. 2566, *post.*

1769. ——.]—(1) In determining whether to recommend the prolongation of a patent, even when the claim to a first discovery & the beneficial nature of that discovery are both conceded, it is still proper to consider both the degree of merit in the inventor, & the amount of benefit to the public flowing directly from the invention.

(2) Whether the Judicial Committee will recommend the extension of the term of letters patent, will depend on the exercise of a discretion, judicial indeed, yet to be influenced by every such circumstance as would properly weigh on a sensible & considerate person in determining whether an extraordinary privilege not of right, but of equitable reward, should be conferred. They will consider principally whether the individual patentee had, under all the circumstances, received what in equity & good sense would be considered a sufficient remuneration; & in some cases it may be necessary to consider, not only the state of things at the time the original letters patent were granted, but the circumstances existing at the time of the application for a prolongation of the term of the original letters patent.

(3) In an application for prolongation of the term of letters patent, the Judicial Committee will not try the validity of the patent; & though in general they will not enter into questions of doubtful validity, yet they will not recommend an extension of a patent which is manifestly bad.

(4) The most unreserved & clear statement of the patentee's remuneration is an indispensable condition in an application for extension.

(5) The patentee was also manufacturer & sold the patented articles. In his accounts he deducted two-thirds as profits from the manufacture & sale, & only credited the patent with one-third:—*Held:* to be an unreasonable deduction.

(6) Although law expenses by the patentee in maintaining his patent rights are allowed in deduction of his profits, yet where the patentee compromised suits & gave up costs to which he had an apparent title, a deduction on that head will not be allowed.

(7) Upon the dismissal of a petition for prolongation, the Judicial Committee, to avoid the expense of a formal taxation, allowed petitioner the option of paying a gross sum of £1,000, to the opponents for the costs of their successful opposition; such sum to be apportioned by the Registrar of the Privy Council among the several opponents, or in the alternative, dismissed the petition with costs generally.—*Re* HILLS' PATENT (1863), 1 Moo. P. C. C. N. S. 258; 9 L. T. 101; 9 Jur. N. S. 1209; 12 W. R. 25; Goodeve's Patent Cases, 549; 15 E. R. 698, P. C.

Annotations:—*As to* (1) **Consd.** *Re* Johnson's Patent (Willcox & Gibbs) (1871), L. R. 4 P. C. 75. *As to* (2) **Consd.** *Re* Johnson's Patent (Willcox & Gibbs) (1871), L. R. 4 P. C. 75; *Re* Winan's Patent (1872), L. R. 4 P. C. 93; *Re* Blake's Patent (1873), L. R. 4 P. C. 535. *As to* (5) **Refd.** *Re* Duncan & Wilson's Patent (1884), 1 R. P. C. 257.

1770. ——.]—The subject-matter of an invention was the employment of a metallic soap, composed of well known chemical substances in common use, which the specification described as applicable for coating of iron & wood to prevent the fouling of ships' bottoms, & for other useful purposes. Prolongation of the term of such letters patent refused on the ground (1) that the recommendation of an extension being discretionary, it would be detrimental to the public interest to grant the exclusive benefit of a metallic soap made from substances in common use; & (2) that the patentee had, as it appeared from the accounts, been adequately remunerated for his invention.—*Re* MCINNES' PATENT (1868), L. R. 2 P. C. 54; 5 Moo. P. C. C. N. S. 72; 37 L. J. P. & M. 23; 16 E. R. 443, P. C.

Annotation:—*As to* (2) **Refd.** *Re* Saxby's Patent (1870), 7 Moo. P. C. C. N. S. 82.

1771. Comparison between public benefit & private profit of patentee.]—(1) When the patentee resides abroad, & the invention is carried on under licencees, the advertisements should be inserted in papers circulating in the places where the manufacture is actually carried on.

(2) Some invention, benefit to the public, & no adequate remuneration, are the grounds for an extension.

When a reasonable profit has been made, the benefit which has resulted to the patentee, as compared with that to the public, will be taken into consideration.—*Re* DEROSNE'S PATENT (1844), 4 Moo. P. C. C. 416; 2 Web. Pat. Cas. 1; 13 E. R. 363, P. C.

1772. Prolongation giving foreign traders unfair advantage—Necessity for proper particulars.]—*Re* JOHNSON'S PATENT (No. 2), No. 1765, *ante.*

Lapse of foreign patents.]—*See* Sub-sect. 5, E., *post.*

PART XII. SECT. 2, SUB-SECT. 5.—C.

1766 i. *General rule.*]—The granting of an extension is subject to the paramount consideration of the public interest.—*Re* ROBINSON'S PATENT (1918), 25 C. L. R. 116.—**AUS.**

1766 ii. ——.]—Where the ct. is not satisfied that the invention has conferred upon the public any special or peculiar advantage or is of that high degree of merit which, if everything else were satisfactory would entitle the patentee to an extension of the term of the patent, the ct. will not extend such term.—*Re* DUNLOP'S PATENT (1922), 31 C. L. R. 579.—**AUS.**

D. Validity of Patent.

1773. Court will not consider validity—Unless patent manifestly bad.]—(1) Letters patent being about to expire, the Privy Council will hear a petition for extension, notwithstanding any doubts as to the validity of the patent.

(2) Necessary expenses may be deducted from the profits.—*Re* KAY'S PATENT (1839), 3 Moo. P. C. C. 24; 1 Web. Pat. Cas. 568; 13 E. R. 10, P. C.

Annotation:—As to (1) **Reid.** *Re* Honiball's Patent (1855), 9 Moo. P. C. C. 378.

1774. —— ——.]—*Re* GALLOWAY'S PATENT, No. 1709, *ante*.

1775. —— ——.]—*Re* WOODCROFT'S PATENT, No. 1802, *post*.

1776. —— ——.]—The grant of an extended term in letters patent is a new grant, subject to the same conditions, open to the same objections, &, in ordinary cases entitled to the same advantages, as the original grant.

The Crown, on the report of the Judicial Committee, may, in its discretion, under 5 & 6 Will. 4, c. 83, s. 2, confirm the grant of an extended term in letters patent, even after such grant has been, by the effect of a trial at law, found to be actually void; but a person applying under the above section for a confirmation of the grant of an extended term in letters patent, must satisfy the Committee (*a*) that before the date of the original patent the invention was not publicly & generally used; & (*b*) that the grantee of the original patent believed himself to be the first or original inventor.

An application to confirm the grant of an extended term in letters patent which, by the effect of a trial at law, were found to be void, was, under the circumstances of the case, refused; but, in consequence of the unnecessary expenses occasioned by the opposing parties, & of the manner in which their opposition was conducted, without costs.

To obtain the grant of an extended term in letters patent a very special case must be made out.

The jurisdiction under 5 & 6 Will. 4, c. 83, s. 2, to confirm letters patent found by the effect of a trial at law to be void, is to be most cautiously & sparingly used.

Opposition to an application for extension or confirmation of letters patent is rather encouraged by this ct. than otherwise, & upon a successful opposition the opposers' costs will, in general, be allowed.—*Re* HONIBALL'S PATENT (1855), 9 Moo. P. C. C. 378; 3 Eq. Rep. 225; 25 L. T. O. S. 1; 2 Web. Pat. Cas. 201; 14 E. R. 340, P. C.

1777. —— ——.]—(1) In 1849, letters patent were granted in England to B., a British subject. In 1850, a patent was granted in France for the same invention, to the patentee for fifteen years, & another in Belgium to a party on his behalf, for ten years. The Belgian patent expired before the English patent, & before application was made for a prolongation of that patent:—*Held:* the proviso in Patent Law (Amendment) Act, 1852 (c. 83), s. 25, that no patent should be valid which shall have been granted after the expiration of any foreign patent for the same invention, did not apply, so as to deprive the Judicial Committee of the power to entertain an application for the prolongation of the English patent; such sect. applying only to cases where the original patent had been first granted in a foreign country, & not where a patent had been first granted in the United Kingdom.

(2) The prolongation of a patent is, by 5 & 6 Will. 4, c. 83, & 16 & 17 Vict. c. 115, the same as a new grant.

D. in 1804, had in his specification described a certain result, but without any statement of the means by which such result could be made practically attainable. B. in 1849, took out a patent for the same result, explaining the method of obtaining it. B.'s patent was prolonged.

(3) If it can be clearly shown that the patent sought to be extended is bad for want of originality, the Judicial Committee will not entertain the application. *Aliter*, if at most, a doubtful question as to the validity of the letters patent can be raised.

(4) The account of profit & loss of the patentee in working a patent, ought to be clear & precise; & it is the duty of a patentee, if engaged in any other business, or as a manufacturer of his own invention, to keep the accounts of the patent & the manufacture separately.

(5) If a patentee is also manufacturer of his patent article, in taking account of the profits of the patent, he is entitled to deduct his profits as a manufacturer.—*Re* BETT'S PATENT (1862), 1 Moo. P. C. C. N. S. 49; 1 New Rep. 137; 9 Jur. N. S. 137; 11 W. R. 221; 15 E. R. 621; *sub nom. Ex p.* BETTS, 7 L. T. 577, P. C.

Annotations:—As to (1) **Apld.** *Re* Poole's Patent (1867), L. R. 1 P. C. 514. **Consd.** *Re* Johnson's Patent (Willcox & Gibbs) (1871), L. R. 4 P. C. 75. **Apld.** *Re* Winan's Patent (1872), L. R. 4 P. C. 93. **Refd.** *Re* Blake's Patent (1873), L. R. 4 P. C. 535; *Re* Semet & Solway's Patent, [1895] A. C. 78. *As to* (4) **Consd.** *Re* Adair's Patent (1881), 6 App. Cas. 176; *Re* Lake's Patent, [1891] A. C. 240. **Apld.** *Re* Hughes' Patent (1898), 15 R. P. C. 370; *Re* Lawrence & Kennedy's Patent (1910), 27 R. P. C. 252. **Refd.** *Re* Wuterich's Patent, [1903] A. C. 206. *As to* (5) **Refd.** *Re* Saxby's Patent (1870), 7 Moo. P. C. C. N. S. 82.

1778. —— ——.]—*Re* HILLS' PATENT, No. 1769, *ante*.

1779. —— ——.]—*Re* MCDOUGAL'S PATENT, No. 1750, *ante*.

1780. —— ——.]—S., being the patentee of an invention of improvements in sugar cane mills petitioned for the prolongation of his patent on the ground of having sustained an actual loss in working it. M. & co. & others opposed. M. & co. by their particulars of objections, alleged that the patented invention was not new, & referred to a previous patent of & machines made by C. At the hearing of the petition they tendered evidence to show anticipation by machines made by W., & by the publication in England of the American specification of H.:—*Held:* the last mentioned evidence was admissible, & on the then evidence it appeared that the patented invention had been so far anticipated by previous patents, & actual user of machines in this country, as to deprive it of that degree of novelty which would justify a prolongation of the term, & therefore that the petition must be dismissed, but under the circumstances without costs.—*Re* STEWART'S PATENT (1885), 3 R. P. C. 7; Griffin's Patent Cases (1884–1886), 264, P. C.

Annotation:—**Refd.** *Re* Fountain Livet's Patent (1892), 9 R. P. C. 327.

1781. —— ——.]—*Re* COCKING'S PATENT, No. 1835, *post*.

1782. ——.]—(1) C., being the grantee of two patents, transferred them to a limited co., who mortgaged them to R. by assignment. The co. presented a petition for prolongation of the terms of the patents, & the mtgee. was not a party to the petition. The prolongation was opposed mainly on the ground of want of novelty, &, therefore, of merit:—*Held:* as the invention was useful there was not that absence of novelty as would be fatal to an application for prolongation; the whole of the first patent & a portion of the second ought be extended for five years upon the petitioners undertaking to give the mtgee. the same security

Sect. 2.—*Extension of term: Sub-sect.* 5, *D., E. F.* (*a*) *i. & ii.*]

over the new patents that he had over the old ; & no costs would be given to the petitioners as it was a difficult & doubtful case.

(2) The Crown may adduce evidence against a patent irrespective of the objections.—*Re* CHURCH'S PATENTS (1886), 3 R. P. C. 95 ; Griffin's Patent Cases (1884–1886), 256, P. C.

1783. —— Except as to exceptional merit.]—(1) In an application for the prolongation of a patent it is not the practice of the Judicial Committee to decide upon the novelty or utility of the patent, except so far as such utility may properly be described as merit of that high degree that, every other requisite being satisfactory, it would entitle the patentee to a prolongation.

(2) A patentee in seeking a prolongation of the term of the patent must satisfy the Judicial Committee by the accounts, in a manner which admits of no controversy, of what has been the amount of remuneration which, in every point of view, the invention has brought him, & it is the duty of appct. to frame his accounts in such a shape as to leave no doubt as to what the remuneration has been that he has received.

(3) Where a patentee is also the manufacturer, the profits which he makes as manufacturer, although not strictly profits of the patent, must yet be taken into consideration in estimating the amount of his remuneration. Therefore, where, on a petition for prolongation, it appeared that the patentee was at the same time the manufacturer of the patented article, & was himself necessarily engaged in fixing & putting up the patented apparatus ; & that the accounts for such services were so intermixed as to render it impossible on their face to separate the items of profit received from the patent, it appearing that, on the whole, the receipts had been very large, & that even on the balance alleged there had been considerable gain to the patentee, the Judicial Committee held that such accounts were unsatisfactory, & refused the application, but without costs.—*Re* SAXBY'S PATENT (1870), L. R. 3 P. C. 292 ; 7 Moo. P. C. C. N. S. 82 ; 19 W. R. 513 ; Goodeve's Patent Cases, 565 ; 17 E. R. 31, P. C.

Annotations :—As to (1) **Apld.** *Re* Cocking's Patent (1885), 2 R. P. C. 151. *As to* (2) **Folld.** *Re* Clark's Patent (1870), L. R. 3 P. C. 421. **Consd.** *Re* Lake's Patent, [1891] A. C. 240. **Apld.** *Re* Thomas' Patents & Thomas & Gilchrist's Patent (1892), 9 R. P. C. 367 ; *Re* Henderson's Patent, [1901] A. C. 616 ; *Re* Lawrence & Kennedy's Patent (1910), 27 R. P. C. 252. **Refd.** *Re* Houghton's Patent (1871), L. R. 3 P. C. 461 ; *Re* Wield's Patent (1871), L. R. 4 P. C. 89 ; *Re* Adair's Patent (1881), 6 App. Cas. 176 ; *Re* Duncan & Wilson's Patent (1884), Griffin's Patent Cases (1884–1886), 258 ; *Re* Wuterich's Patent, [1903] A. C. 206. *As to* (3) **Apld.** *Re* Johnson's Patent (Willcox & Gibbs) (1871), L. R. 4 P. C. 75.

See, further, Sub-sect. 5, G. (*b*) i.

1784. Lis pendens respecting validity—No bar to extension.]—*Re* HEATH'S PATENT, No. 1678, *ante*.

1785 —— ——.]—L. the owner of a patent brought an action for infringement in which his patent was declared invalid. He appealed, & while judgment was still undelivered he presented a petition for prolongation. It appeared that he had granted a licence to the B. co., & then sold the patent to the A. co., who paid £5,000 to the B. co. ; that subsequently the A. co., after granting licences re-assigned the patent to L. ; that L. then mortgaged the patent, & then agreed to sell the patent to the L. co., who were co-petitioners. L. brought in accounts showing no remuneration, but these accounts gave no particulars relating to the licence to the B. co. or the sum of £5,000 paid to them, or of the working of the patent in the hands of the A. co., or of the application of the moneys raised by mtge., or as to the share dealings of the A. co.

The Board decided to hear the petition but :—*Held :* the omissions in the accounts were quite fatal, & dismissed the petition.—*Re* LANE FOX'S PATENT (1892), 9 R. P. C. 411, P. C.

E. Lapse of Foreign Patent.

1786. Whether bar to extension.]—Application was made under 5 & 6 Will. 4, c. 83, & 2 & 3 Vict. c. 69, by the assignees of a patentee for extension of an English patent for a foreign importation patented in France. At the date of the application the French patent had expired :—*Held :* as the foreign patent had expired, no renewed grant would be valid by Patent Law (Amendment) Act, 1852 (c. 83), s. 25, as 16 & 17 Vict. c. 115, s. 7, made an extended patent a new patent, within 15 & 16 Vict. c. 83, s. 25.—*Re* AUBÉ'S PATENT (1854), 9 Moo. P. C. C. 43 ; 14 E. R. 214, P. C.

Annotations :—**Distd.** *Re* Bett's Patent (1862), 1 Moo. P. C. C. N. S. 49. **Refd.** *Re* Honiball's Patent (1855), 9 Moo. P. C. C. 378 ; *Re* Hutchison's Patent (1861), 14 Moo. P. C. C. 364.

1787. ——.]—Letters patent were granted in this country in Aug. 1848, for fourteen years, & in Sept. 1848, a patent was granted in the United States for the same period, in respect of the same invention. On an application for a prolongation of the English patent :—*Held :* though this application was not contrary to the letter of Patent Law (Amendment) Act, 1852 (c. 83), ss. 25, 40, & 16 & 17 Vict. c. 115, s. 7, yet it was so far inconsistent with their spirit, their Lordships would not, in the exercise of their discretion, advise her Majesty to grant the desired prolongation.—*Re* NEWTON'S PATENT (1862), 15 Moo. P. C. C. 176 ; 9 Jur. N. S. 109 ; 10 W. R. 731 ; 15 E. R. 460, P. C.

Annotations :—**Distd.** *Re* Bett's Patent (1862), 1 Moo. P. C. C. N. S. 49. **Folld.** *Re* Winan's Patent (1872), L. R. 4 P. C. 93. **Refd.** *Re* Blake's Patent (1873), L. R. 4 P. C. 535 ; *Re* Semet & Solvay's Patent, [1895] A. C. 78.

1788. ——.]—*Re* HILLS' PATENT, No. 1769, *ante*.

1789. ——.]—A patent by American subjects was taken out in this country & shortly afterwards in America & France for the same invention. After the expiration of the French patent, & within a few months of the expiration of the American patent, application was made for a prolongation of the English patent. Such application refused, as the Judicial Committee would not, on the ground of general policy, recommend a renewal of the English patent after the French patent had been allowed to expire.—*Re* WINAN'S PATENT (1872), L. R. 4 P. C. 93 ; 8 Moo. P. C. C. N. S. 306 ; 17 E. R. 327, P. C.

Annotation :—**Folld.** *Re* Blake's Patent (1873), L. R. 4 P. C. 535.

1790. ——.]—A patent was first taken out in America, afterwards in England, & two days after the date of the English patent the invention was patented in France. The French patent was allowed to drop. On an application for prolongation of the English patent :—*Held :* although the Judicial Committee might have jurisdiction under Patent Law Amendment Act, 1852 (c. 83), s. 25, to entertain the application, yet, on the ground of public policy, as the French patent had been allowed to expire, they would not in the exercise of the discretion vested in them recommend the extension of the term of the English patent.—*Re* BLAKE'S PATENT (1873), L. R. 4 P. C. 535 ; 9 Moo. P. C. C. N. S. 373 ; 17 E. R. 554, P. C.

1791. ——.]—*Re* ADAIR'S PATENT, No. 1699, *ante*.

1792. ——.]—By Patent Law Amendment Act, 1852 (c. 83), s. 25, an English patent ceases at the expiration of a prior foreign patent for the same invention.

Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 113 (1), saves to a patentee existing at the date of the Act his right to a confirmation under 5 & 6 Will. 4, c. 83, s. 2, subject, however, to above qualification. The provisions of rule 1 relating to confirmation relaxed under special circumstances.

Petition for prolongation refused as inadmissible under Patents, Designs, & Trade Marks Act, 1883 (c. 57), or the earlier law.—*Re* JABLOCHKOFF'S PATENT, [1891] A. C. 293; 60 L. J. P. C. 61; 65 L. T. 5; 8 R. P. C. 281, P. C.

Annotation:—**Distd.** *Re* Marshall's Patent, [1891] A. C. 430.

1793. ——.]—*Re* FOUNTAIN LIVET'S PATENT, No. 1700, *ante*.

1794. ——.]—Where a British patent granted before the passing of the Patents, Designs, & Trade Marks Act, 1883 (c. 57), was prior in date to payments for the same foreign invention obtained by the same patentee in seven foreign countries, five of which were still in force, but two of which had lapsed owing to non-performance of the condition of the grant:—*Held:* according to the rule laid down in Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 25 (4) (sect. 113 of which repealed Patent Law Amendment Act, 1852 (c. 83), s. 25), the committee had a discretion to extend the patent whether or not it had been first granted, with due regard to the circumstances connected with the foreign patents.

Extension granted, as the evidence did not suggest that the inhabitants of the United Kingdom would be prejudicially affected thereby in their foreign competition.—*Re* SEMET & SOLVAY'S PATENT, [1895] A. C. 78; 64 L. J. P. C. 41; 71 L. T. 674; 11 T. L. R. 105; 11 R. 362, P. C.

Annotation:—**Refd.** *Re* Henderson's Patent, [1901] A. C. 616.

1795. ——.]—In considering a petition for the prolongation of a patent in this country the fact that several foreign patents in respect of the same invention have already expired, & that the English patent is the only one surviving, though not an insuperable objection to a prolongation, is one which the Judicial Committee will consider as a serious obstacle to granting a prolongation, unless very strong grounds for doing so are shown.—*Re* PIEPER'S PATENT (1895), 72 L. T. 782; 11 R. 581; 12 R. P. C. 292, P. C.

Annotation:—**Refd.** *Re* Henderson's Patent, [1901] A. C. 616.

1796. ——.]—*Re* HENDERSON'S PATENT, No. 1944, *post*.

1797. —— Original patent first granted in England.]—*Re* BETT'S PATENT, No. 1777, *ante*.

1798. —— ——.]—Patent Law Amendment Act, 1852 (c. 83), s. 25, does not deprive the Judicial Committee of the Privy Council of the power to entertain an application for an extension of the term of letters patent taken out first in England, though a patent has been obtained for the same invention in a foreign state; & the foreign patent would expire before the expiration of the prolonged term. *Secus*, if the patent was first obtained abroad by a foreign subject, & afterwards taken out in England.

A patentee residing in America, for the purpose of getting the patented article into general use in England, arranged with an agent in England, & in consideration gave him a moiety of the royalties: *Held:* in estimating the profits of the patentee derived from the patent, such moiety was to be deducted.—*Re* POOLE'S PATENT (1867), L. R. 1 P. C. 514; 4 Moo. P. C. C. N. S. 452; 36 L. J. P. C. 76; 16 E. R. 388, P. C.

Annotations:—**Consd.** *Re* Johnson's Patent (Willcox & Gibbs) (1871), L. R. 4 P. C. 75; *Re* Adair's Patent (1881), 6 App. Cas. 176.

1799. Foreign patent lapsing before expiration of prolonged term.]—*Re* POOLE'S PATENT, No. 1798, *ante*.

F. Utility and Merit.

(a) Utility.

i. *In General.*

See Patents & Designs Act, 1907 (c. 29), s. 18 (4).

1800. Necessity to prove.] — *Re* BAILEY'S PATENT, No. 1960, *post*.

1801. ——.]—*Re* BEAULAND'S PATENT, No. 1812, *post*.

1802. Want of success due to inutility.]—No extension will be granted if want of success be owing to inutility, or unless it be really coming into use.

A strong case of merit & want of remuneration must be made out. If a clear case of invalidity appear the patent will not be extended, but otherwise if the case be doubtful.

The extension decides nothing as to the validity of the patent.—*Re* WOODCROFT'S PATENT (1846), 10 Jur. 363; 2 Web. Pat. Cas. 18, P. C.

ii. *Presumption of Inutility.*

1803. From want of user.]—*Re* SIMISTER'S PATENT, No. 1766, *ante*.

1804. ——.]—The non-reduction of the patent into practical public utility, is the strongest evidence against merit & utility.

Semble: the ct. may infer want of remuneration to the patentee, from the circumstance that there must have been some expense.—*Re* PINKUS' PATENT (1848), 12 Jur. 233, P. C.

1805. ——.]—A patent was granted to S. for a process of treating or ageing spirit, which was chiefly applicable to spirits distilled from grain. The patentee applied for a prolongation. He had failed to get the process taken up by the trade, but it was alleged that an incentive to its use would probably arise in the future:—*Held:* as the invention had not been taken up in the past, & as there was not likely to be any different experience in the future, prolongation should be refused.—*Re* SCOTT'S PATENT (1906), 23 R. P. C. 478, P. C.

1806. —— Rebuttal.]—*Re* HERBERT'S PATENT, No. 1911, *post*.

1807. —— —— Only by strongest evidence.] Where the utility of a patent has not been tested by actual employment, for a period of fourteen years, although efforts have been made by the patentee to bring it into use, it raises a very strong presumption against its practical utility, which presumption can only be rebutted by the strongest evidence. Application for a prolongation of the term, in the circumstances of non-user, refused by the Judicial Committee.—*Re* ALLAN'S PATENT (1867), L. R. 1 P. C. 507; 4 Moo. P. C. C. N. S. 443; 16 E. R. 385, P. C.

Annotations:—**Consd.** *Re* Hughes' Patent (1879), 4 App. Cas. 174. **Refd.** *Re* Bakewell's Patent (1862), 15 Moo. P. C. C. 385.

1808. —— —— ——.]—*Re* HUGHES' PATENT, No. 1914, *post*.

1809. —— —— Limited market.]—*Re* HERBERT'S PATENT, No. 1911, *post*.

See, also, Sub-sect. 5, G. (*b*) iii.

1810. —— —— Failure to form company.]—Non-user of a patent, during the term of the letters patent, is not a conclusive ground against

Sect. 2.—Extension of term: Sub-sect. 5, F. (a) ii., (b) i. & ii., & G. (a).]

extension of the term, but such fact amounts to a strong presumption that the invention is not useful. Such presumption, however, may be rebutted by evidence showing the utility of the patent.

A patent, well known, had never been brought into public use during the period of fourteen years. The patentee accounted for the non-user, on the ground that the invention was of such a nature that it could only be carried out by a co., which he had failed to form :—*Held :* not sufficient to rebut the presumption against the practical utility of the patent, & an extension of the term refused.—*Re* BAKEWELL'S PATENT (1862), 15 Moo. P. C. C. 385 ; 15 E. R. 540, P. C.

Annotations :—**Consd.** *Re* Allan's Patent (1867), L. R. 1 P. C. 507 ; *Re* Hughes' Patent (1879), 4 App. Cas. 174.

(*b*) *Merit.*

i. *In General.*

See Patents & Designs Act, 1907 (c. 29), s. 18 (4).

1811. Exceptional merit—Necessity to prove.]—*Re* FURNESS' PATENT (1885), Griffin's Patent Cases (1884–1886), 260, P. C.

1812. —— ——.]—A petition was presented by the patentee for the prolongation of a patent for improvements in quadrants for opening & adjusting windows on the ground that it was an invention of merit & great public utility, & that he had not been adequately remunerated. From the accounts it appeared that his profits amounted to £700, & those of his exclusive licencees to between £300 & £400 :—*Held :* prolongation ought to be granted only in cases of exceptional merit or great public utility ; in the present case, no exceptional merit or utility was proved, & under all the circumstances of the case the patentee had been adequately remunerated.—*Re* BEAULAND'S PATENT (1887), 4 T. L. R. 30 ; *sub nom. Re* BEANLAND'S PATENT, 4 R. P. C. 489, P. C.

1813. —— ——.]—(1) Where letters patent had been granted for improvements in steam generators, & it was shown that the invention consisted of the combination of various parts all or most of which were admittedly not new at the date of the letters patent ; an extension was refused in the absence of evidence that the invention was of unusual merit.

(2) Where patentees had incurred losses, these cannot be regarded as evidence of inadequate remuneration if attributable to unskilfulness in conducting their business.—*Re* THORNYCROFT'S PATENT, [1899] A. C. 415 ; 68 L. J. P. C. 68, P. C.

1814. —— ——.]—*Re* VAN GELDER'S PATENTS, *Ex p.* THOMPSON, No. 1868, *post.*

1815. —— ——.]—*Re* POULSEN'S PATENT, No. 1863, *post.*

1816. —— ——.]—In 1902 a patent was granted to B. & others for improvements in or connected with the production of lead oxide & the treatment of rough litharge & residues from the precipitation white lead processes. B. had obtained patents for similar purposes in 1898, & subsequently to 1902 he obtained further patents for improvements in the processes. He had presented a petition for the extension of the patents of 1898, but had withdrawn it. At the hearing of a petition presented by B. & the assignees of his patents for the extension of the patent of 1902, it was proved that the process had been worked by three cos. which had been commercially unsuccessful. A fourth co., petitioners with B. were the assignees of the patents, & were working the patents under the superintendence of B., & were paying him royalties on the working :—*Held :* the invention had merit, but not in an exceptional degree ; the want of commercial success was due to B.'s failure to appreciate the value of the invention, & that was not a ground for extension.—*Re* RUNCORN WHITE LEAD CO., LTD.'S PATENT (1916), 33 R. P. C. 201.

1817. —— ——.]—S. was the grantee of two patents granted in 1906 & 1907 for inventions of improvements in Fire & Temperature Alarms or Indicators. The object of the invention protected by the earlier patent was to render the mechanical multiple element type of fire alarm thoroughly practicable & reliable by providing one continuous tension member of high tensile material & forming loops therein, which loops are held in form by fusible metal wholly supported by the tension member. The subject-matter of the later patent was a special construction of fusible member for use in a device made in accordance with the earlier patent. The patentee presented a petition for an extension of the patents for ten years. Evidence was given that the petitioner's device was more simple in construction, less expensive to instal & maintain & was more reliable than any previous system. Petitioner had been unable to obtain the certificate of the Fire Offices Committee until 1914 & thereafter had been hindered in exploiting the patents by causes due to hostilities. The accounts showed a loss. The Crown did not oppose the grant of an extension of five years, but contended that the merit of the invention was not sufficiently great to bring the case within the words exceptional cases in Sect. 18, sub-sect. 5, of Patents & Designs Acts, 1907 (c. 29), & 1919 (c. 80), while for petitioner it was contended that the words exceptional cases did not necessarily import exceptional merit :—*Held :* the case fulfilled all the requirements necessary to enable a patentee to obtain an extension ; that the main element in determining whether a case was an exceptional case was the element of merit ; exceptional cases was a wide phrase, but absence of remuneration without exceptional merit was not sufficient to justify the grant of an extension of more than five years. Both patents were extended for a period of five years as from the date of expiry of the 1900 patent.—*Re* SMITH'S PATENTS (1922), 39 R. P. C. 313 ; *previous proceedings* (1920), 37 R. P. C. 32.

1818. Admission of merit by Crown.]—On a petition for prolongation of a patent the Crown admitted merit sufficient for moderate prolongation. The invention related to injectors for forcing feed water into steam boilers, & effected a great economy by utilising waste steam. The profits of the English patent were £2,365 ; of the foreign patents, £9,344. The patentee had devoted much time to the invention, & had expended £1,700, not brought into the accounts, in experiments. Prolongation was recommended for seven years.—*Re* DAVIES'S PATENT (1893), 11 R. P. C. 27, P. C.

1819. Failure to prove sufficient merit.]—Prolongation of patent refused on the ground of want of merits.—*Re* WOODCROFT'S PATENT (1841), 3 Moo. P. C. C. 171 ; 13 E. R. 72, P. C.

1820. ——.]—Their Lordships have not thought it necessary to consider what ought to be the consequence of the admission made by counsel for petitioner that one of the claims made by him in the patent which he seeks to extend is invalid. In their opinion, the nature & merits of the invention disclosed in the patent are not such as to justify them in making any report which would enable Her Majesty to extend the term of the patent (LORD WATSON).—*Re* BUR-

LINGHAM, INNES & LEE'S PATENT (1898), 15 R. P. C. 195, P. C.

1821. ——.]—A patent was granted in 1892 for improvements in mechanism for automatic guns. The specification originally contained ten claims, but, after having been twice amended, it contained only one claim, which was as follows:—The addition of a suitable projection at the lower part of the crankhandle or cam which serves to rotate the crank & open the breech mechanism. It is this projection, that in its rotary motion will cause all the recoil parts to be carried forward before the aforesaid breech mechanism begins to close. The patentee presented a petition for prolongation, alleging that, through want of means, he had not been able to obtain protection for his invention in any foreign country; that he believed the invention had been used with great practical success by certain others in infringement of his rights; that he had been unable to bring his invention into use owing to ill health & want of means, & to the fact that the invention was one capable of being utilised by only a limited class of manufacturers & in connection with inventions protected, for a large portion of the term of the grant to him, by patents belonging to others; & that he had received no appreciable remuneration:—*Held:* the invention was not of sufficient merit to justify an extension of the patent.—*Re* RICCI'S PATENT (1906), 23 R. P. C. 269, P. C.

1822. ——.]—*Re* HOOD & SALAMON'S PATENT, No. 1864, *post*.

1823. Proof of merit as to part—Extension granted as to that part.]—Where letters patent, for improvements in machinery, tools, or apparatus for cutting, planing, turning, drilling, & rolling metals, embraced several subjects, one only of which, namely, the rolling of metals, had been worked out, & that part of the patent was affected by subsequent patented improvements by the same patentee, & could not be effectually used without such subsequent improvements; the Judicial Committee, before recommending an extension of the term of the first patent, put the petitioner upon terms of disclaiming all the parts of the original patent not worked out, & restricted the prolongation to the unexpired term of the subsequent patents. — *Re* BODMER'S PATENT (1853), 8 Moo. P. C. C. 282; 14 E. R. 108, P. C.

Annotations:—**Folld.** *Re* Lee's Patent (1856), 10 Moo. P. C. C. 226. **Refd.** *Re* Aubé's Patent (1854), 9 Moo. P. C. C. 43.

1824. —— ——.]—Letters patent comprised three separate subjects. Upon an application for an extension of the term of the patent, one only of the three subjects, that relating to railway breaks, appeared to the Judicial Committee to be deserving of a renewed grant. Prolongation granted under 15 & 16 Vict. c. 83, s. 40, for such part only of the letters patent as related to railway breaks, & not to the other subject-matters of the patent.—*Re* LEE'S PATENT (1856), 10 Moo. P. C. C. 226; 14 E. R. 478, P. C.

1825. No evidence of merit.]—The patentee of an invention for a telescopic ladder applied for a prolongation. No evidence was offered as to merit. The accounts showed a profit of £3,105 16*s*. but petitioner stated that the accounts did not include expenses amounting to £3,650. Petition refused.—*Re* KELLY'S PATENT (1900), 17 R. P. C. 476, P. C.

1826. Evidence against merit—Want of user.]—A patent article was unprofitable for ten years after the date of the patent, in consequence of a defect which was not cured until then. Extension of the term refused.—*Re* BELL'S PATENT (1846), 2 Web. Pat. Cas. 159; 10 Jur. 363, P. C.

1827. —— ——.]—*Re* PINKUS' PATENT, No. 1804, *ante*.

See, also, Sub-sect. 5, G. (*b*) ii., *post*.

ii. *What amounts to Merit.*

1828. Smallness of step in improvement.]—(1) The fact of a further improvement having been made is an argument in favour of an extension.

(2) An inference against the merit of the invention from the smallness of the step, must be carefully guarded against.—*Re* SOAMES'S PATENT (1843), 1 Web. Pat. Cas. 729, P. C.

Annotations:—*As to* (1) **Refd.** *Re* Honiball's Patent (1855), 9 Moo. P. C. C. 378. *Generally,* **Refd.** *Re* Laménaude's Patent (1850), 2 Web. Pat. Cas. 164; Harris *v.* Rothwell (1887), 35 Ch. D. 416.

1829. —— **Sine qua non of successful application.**]—*Re* JOHNSON'S PATENT (No. 2), No. 1765, *ante*.

1830. Simplicity.]—(1) The simplicity of an invention an element of its value.

(2) Manufacturer's & patentee's profits. Distinction between the cases of patentee & manufacturer.—*Re* MUNTZ'S PATENT (1846), 2 Web. Pat. Cas. 113, P. C.

Annotation:—*As to* (2) **Refd.** *Re* Hill's Patent (1863), 1 Moo. P. C. C. N. S. 258.

1831. First to attain practical result.]—The patentee of an invention for improvements in steam engines presented a petition for prolongation. The accounts showed a total profit of £6,098 on the English patent, & £1,000 on the foreign patents, after allowing the patentee £400 a year for his time. The Crown admitted that though the idea had occurred in prior patents, the present patent was the first to attain a practical result, & that it was a case for moderate prolongation. The Judicial Committee required the patentee & one engineer to give evidence in support of the petition, & granted prolongation for seven years. —*Re* JOY'S PATENT (1893), 10 R. P. C. 89, P. C.

G. Adequacy and Inadequacy of Remuneration.

(*a*) *In General.*

See Patents & Designs Act, 1907 (c. 29), s. 18 (5); 1919 (c. 80), s. 7.

1832. Remuneration as a whole to be looked at.]—(1) The advertisements should be proved before the case is heard.

(2) The remuneration from the patent as a whole must be looked to.

(3) Accounts must be strictly proved. The amount of profits in different years material. The annual profits must be ascertained.—*Re* PERKINS' PATENT (1845), 2 Web. Pat. Cas. 6, P. C.

Annotation:—*Generally,* **Refd.** *Re* Carr's Patent (1873), L. R. 4 P. C. 539.

1833. Inadequate remuneration defined.]—*Re* JOHNSON'S PATENT (No. 2), No. 1765, *ante*.

1834. Inadequacy a ground for granting.]—*Re* BOVILL'S PATENT, No. 1686, *ante*.

1835. ——.]—A petition was presented for the prolongation of a patent on the ground that the patentee had been inadequately remunerated. The merit of the invention was proved & the inadequacy of the remuneration was not seriously

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1834 i. *Inadequacy a ground for granting.*]—On an application for an extension appet. must prove the inadequacy of his remuneration during the term of the patent, *i.e.* that his profits have been disproportionately small in comparison with the merits of his invention in relation to the public —*Re* ROBINSON'S PATENT (1918), 25 C. L. R. 116.—**AUS.**

Sect. 2.—Extension of term: Sub-sect. 5, G. (a) & (b) i.]

disputed, but objections were taken to the novelty of the invention & the sufficiency of the specification, & it was suggested that the patent, if prolonged, should be made subject to the compulsory licences clause of the new Act:—*Held:* unless a patent was manifestly bad, it was not the practice of the Judicial Committee to enter into questions as to the novelty of an invention, & as the specification described a new invention, & as although the invention was meritorious the patentee had not been sufficiently remunerated, the prayer of the petition ought to be acceded to & a new patent for five years granted on the usual terms, but not subject to any conditions.—*Re* COCKING'S PATENT (1885), 2 R. P. C. 151; Griffin's Patent Cases (1884–1886), 258.

1836. ——.]—In 1902 a patent was granted for "improvements in the treatment or complete purification of brine or other saline solutions." The improvements consisted in adding a chemically equivalent quantity of freshly precipitated barium carbonate to precipitate the calcium & magnesium sulphates, with or without the previous addition of lime to convert the magnesium sulphate into calcium sulphate, or if calcium chloride or magnesium chloride, or both were present, first adding a soluble sulphate, such as sodium sulphate, to convert the chlorides into sulphates, & then treating as before. A petition for the extension of the patent was presented by the patentee & a co. formed to work his process, & it was proved that by the patented process salt containing at least 99·98 per cent. of sodium chloride could be produced with great rapidity & economy, a result never before obtained on a commerical scale. It was contended for the Comptroller-General that the alleged invention was wanting in novelty, & that the production of salt of extreme purity was not useful, & that the inventor had been sufficiently remunerated; the inventor had received £4,000 or £5,000 including his salary & £1,000 of the co.'s shares on which a dividend of 5 per cent. had been paid for about one year. The co. had made a profit estimated at £12,000:—*Held:* petitioners had not been adequately remunerated; & a new patent for three years ought to be granted.—*Re* TRANTOM'S PATENT (1916), 34 R. P. C. 29.

1837. —— Except where utility not proved.]—*Re* SIMISTER'S PATENT, No. 1766, *ante*.

1838. —— Patent worked by company—Remuneration of managing director patentee.]—C. was the grantee & registered proprietor of a patent which had been worked exclusively by a co. in which C. & his family were large shareholders, & of which C. was managing director. No formal arrangement had been entered into between C. & the co., & C.'s remuneration in respect of the patent had been derived entirely from his position as a shareholder & director. C. applied by originating summons for an extension of the term of the patent:—*Held:* C. had suffered a loss *qua* patentee, & an extension of two years should be granted.—*Re* CHAMBERS' PATENT (1927), 44 R. P. C. 332.

1839. Adequacy a ground for refusing.]—*Re* MCINNES' PATENT, No. 1770, *ante*.

1840. ——.]—The application for a patent in this case is made, not by the original patentee, but by the co. who are now the assignees of the patent. The patent was sold in the first instance by the patentee to a co. called the Noiseless Tyre co., in consideration, under circumstances which happened, of £2,500, & 100 shares of £10 each in the co. That co. was unsuccessful, & its interest was sold to a new Noiseless Tyre co., which carried on the business for three years at a small profit, & then sold the business & the invention to the present appcts. They received on that sale £5,000 in cash, £10,000 in debentures, making £15,000 & 20,000 £1 shares. It is said that the 20,000 £1 shares are now worth only 3*s*. per share instead of £1 per share, the working of the co. in which those shares were held not having been so successful as was at one time anticipated. It is doubtful whether these shares ought to be regarded now at their presnt value of 3*s*. seeing that they had, at the time they were assigned & made over as part of the consideration, a possible value of £1 & might ultimately have had a value of more than £1; but taking them as shares of the value of 3*s*. that would be £3,000 which, added to the £15,000, makes £18,000 received by the co. who sold to the present appcts. Then present appcts. have made admittedly several thousand pounds in addition. Questions have been raised whether certain items which they have debited as against the receipts are properly debited on the ground that they are losses on the cab business, & whether interest on the purchase money of the cab business ought to be taken into account. It is unnecessary to say whether they ought to be taken into account or not, but, undoubtedly, £25,000 must be taken, at the least, as having been received in respect of this invention by the original inventor & his assignees, when the receipts are taken together, as it is suggested they should be. It is unnecessary to deal with the point raised as to the position of appcts. in view of the fact that the inventor, the original patentee, parted with his patent outright, & retained no interest in the patent except as regards shares in the co. which was to work it, which shares of course have no relation to the present co. It is unnecessary to consider the position of an appct. asking for a prolongation under those circumstances, inasmuch as their lordships are of opinion that, accepting the principle contended for by the counsel for the appcts., quite sufficient remuneration has been received for the invention now in queston (LORD HERSCHELL).—*Re* CARMONT'S PATENT (1897), 14 R. P. C. 239, P. C.

1841. ——.]—*Re* FLEMING'S PATENT, No. 2052, *post*.

1842. ——.]—A patent was granted in 1906 for "improvements in alternating current dynamo-electric machines." One of the claims was for "a dynamo electric machine equivalent in its working to two machines connected in cascade, characterised by the fact that upon either the rotor or stator or both is a compound winding which can be so interconnected as to carry currents which produce a plurality of magnetic fields of different numbers of poles." Another patent was granted in the same year to the same grantees for "improvements in windings for alternating current dynamo-electric machines." One of the claims was for "a method of winding parts of dynamo-electric machines requiring windings which can have induced in them currents which produce the equivalent of two magnetic fields of different numbers of poles, consisting in the elimination from the two basal component windings of pairs of bars which neutralise each other, & the suitable interconnection of the remaining bars, substantially as described." A petition for the extension of the patents was presented. At

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1839 i. *Adequacy a ground for refusing.*]—*Re* TRUFORD OF AUSTRALIA, LTD.'S, PATENT (1920), 28 C. L. R. 294.—**AUS.**

the hearing, the petition was not opposed, except by the Comptroller-General on the ground (*inter alia*) that petitioners' accounts required explanation, in that a sum had been charged for patent fees & renewals, the bulk of which had been incurred in respect of other patents, & that it was impossible to ascertain what had been paid in respect of the patents of which extension was sought. Petitioners were willing to have the said sum treated as if it had all been paid in respect of the other patents. If that had been done, & if the manufacturing profits & the royalties had been separated & treated as one-half each, the patentees' remuneration would have been £13,000 or £14,000. It was proved that there had been a great loss by petitioners owing to the war. The Comptroller-General did not oppose the petition being regarded as a proceeding under sect. 18 (6) of the Patents & Designs Acts, 1907 & 1919, with an extension of the terms of the patents for four years:—*Held:* although the £20,000 rule was no longer applicable, the remuneration had been considerable, & an extension for more than four years could not be granted; but that the petition might be regarded, not only as a petition under Patents & Designs Act, 1907 (c. 29), but also as a proceeding under Patents & Designs Act, 1919 (c. 80) in respect of war losses. An extension of the patents for four years from the termination of the earlier patent was granted.—*Re* HUNT'S PATENTS (1922), 39 R. P. C. 131.

·]—*See, also*, No. 1729, *ante*.

1843. Proof of inadequacy—Strong case necessary.]—*Re* ERARD'S PATENT, No. 1751, *ante*.

1844. —— Whether inferred from expense.]—*Re* PINKUS' PATENT, No. 1804, *ante*.

1845. —— Absence of profit for part of term.]—The absence of all profits during a part of the term a ground for extension.—*Re* DOWNTON'S PATENT (1839), 1 Web. Pat. Cas. 565, P. C.

1846. —— Actual loss.]—*Re* BATE'S PATENT (1836), 1 Web. Pat. Cas. 739, n.

1847. —— ——.]—The original Act of Parliament allows fourteen years, & it was considered that fourteen years would be the time during which the party would be remunerated; it turns out, however, that S. has received not only no remuneration, but that he has been an actual loser; we think, under these circumstances, it is not unreasonable that he should have the full addition of seven years, only half the length of term which the legislature at the time of James I. contemplated as the proper remuneration (LORD LYNDHURST).—*Re* STAFFORD'S PATENT (1838), 1 Web. Pat. Cas. 563, P. C.

1848. —— ——.]—*Re* PORTER'S PATENT, *Ex p.* HONIBALL (1852), 2 Web. Pat. Cas. 196, P. C.

Annotation:—**Refd.** *Re* Honiball's Patent (1855), 2 Web. Pat. Cas. 201.

Inclusion of foreign profits.]—*See* Sub-sect. 7, B., *post*.

(*b*) *Inadequacy.*

i. *Invention of Exceptional Merit.*

1849. Expenditure not properly reimbursed during term.]—Applications of this kind are of very considerable importance, & require to be investigated with a great deal of attention. We have bestowed that attention in this case, & we consider the invention as very meritorious, the result of a great deal of labour, care, & science, & that it is extremely useful in its effects. We are satisfied by reasonable evidence that the party has sustained very considerable loss, & under these circumstances we think that the period ought to be extended. The only point about which we entertain doubt is, as to the extent of time to which it should be extended. We think upon the whole, looking at the profit acquired the last year, & the preceding year, & the year before, that it ought to be extended for seven years, in order to give the patentee a fair opportunity of reimbursing himself, & making some profit upon this invention (LORD LYNDHURST).—*Re* SWAINE'S PATENT (1837), 1 Web. Pat. Cas. 559, P. C.

Annotation:—**Refd.** *Re* Honiball's Patent (1855), 9 Moo. P. C. C. 378.

1850. ——.]—As it appears that this patent has been taken out for a purpose, which, if successful, would be one of great & general use, & that the inventor has been in no way reimbursed, & cannot, probably, be reimbursed for a considerable time; & as it also appears, that the Admlty. has taken up the use of these engines, & that the Crown will have a right to their use, we think it a case in which we may recommend to her Majesty, that an extension of the patent should be granted for fourteen years (SHADWELL, V.-C.).—*Re* DUNDONALD'S (EARL) PATENT (1844), 8 Jur. 969, P. C.

1851. ——.]—*Re* LOWE'S PATENT (1846), 2 Web. Pat. Cas. 158; 10 Jur. 363, P. C.

1852. ——.]—*Re* PETTIT SMITH'S PATENT, No. 1888, *post*.

1853. ——.]—After an assignee of a patentee had incurred considerable loss in carrying out a patent for a smoke prevention apparatus, an Act of Parliament passed to compel the owners of furnaces in the Metropolis to construct them so as to consume their own smoke:—*Held:* on an application for a prolongation of the letters patent, though the Act of Parliament might, in effect, compel the use of the petitioner's patent, yet that such circumstance formed no objection to a renewal of the term of the letters patent, the merits of the invention, & loss incurred in carrying it out being established.—*Re* FOARDE'S PATENT (1855), 9 Moo. P. C. C. 376; 14 E. R. 339, P. C.

Annotation:—**Consd.** *Re* McCulloch's Patent (1908), 25 R. P. C. 684.

1854. ——.]—(1) Prolongation of term of letters patent for seven years, the invention being a meritorious one, & of great value as a raw material for the manufacture of paper; no profit having been made either by the inventor or his assignees.

(2) The statement of accounts furnished being *primâ facie* satisfactory, petitioners were allowed to prove the merits of the invention before going into the accounts.—*Re* HOUGHTON'S PATENT (1871), L. R. 3 P. C. 461; 7 Moo. P. C. C. N. S. 309; 17 E. R. 118, P. C.

1855. ——.]—A patent having been granted to B. in 1870, B. & the other persons then interested in such patent applied in due course in 1884 for a prolongation of the term of the patent:—*Held:* as the invention was a meritorious one, & the accounts, which were not objected to, showed that that petitioners had not made profits, but had sustained a loss, the patent ought to be extended, & the extension should in this case be for seven years.—*Re* BISCHOF'S PATENT (1884), 1 R. P. C. 162, P. C.

1856. ——.]—*Re* ROPER'S PATENT, No. 1894, *post*.

1857. ——.]—The owner of a patent for a broadside steam digger presented a petition for prolongation of his patent, & satisfied the Judicial Committee that his invention was of great merit, & that he had suffered great loss in endeavouring to introduce it. The patent had in the tenth

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year of his patent given S. the exclusive right to use it. S., however, made no claim to any right to the patent during any prolongation that might be granted. The patentee had also recently entered into an agreement with three persons who had agreed to assist him in presenting the petition & in continuing the patent if prolonged, the patentee to have one third of the profits. One only of such persons gave evidence on the hearing of the petition:—*Held:* it was not necessary, under the circumstances, to prove the losses with the strict accuracy usually required; there was no reason to suppose the public had suffered loss by the agreement with S., the evidence of the single part to the third agreement was sufficient, & the patent should be prolonged, &, as it was an exceptional case, for ten years.—*Re* DARBY'S PATENT (1891), 8 R. P. C. 380, P. C.

1858. ——.]—Where an invention was of conspicuous merit, & it appeared that as regards its application to one of its purposes the patentee had received for an exclusive licence to use it certain shares in cos. formed for that purpose, the value of which shares was largely dependent on the prolongation of the patent, & that with respect to its application to all other purposes the patentee, who had done his best to push his invention, had received nothing at all if the accounts were made up on the basis of a reasonable allowance to himself for his services in working his patents:—*Held:* the patentee, who had fairly kept & presented his accounts, should be allowed a five years' prolongation.—*Re* PARSONS' PATENT, [1898] A. C. 673; 67 L. J. P. C. 55; 15 R. P. C. 349, P. C.

1859. ——.]—*Re* RITCHIE'S PATENT, No. 1885, *post.*

1860. Remuneration nearly adequate—Exceptional merit ground for short extension.]—*Re* DEACON'S PATENTS, No. 1729, *ante.*

Necessity to prove.]—*See* Sub-sect. 5, F. (*b*) i., *ante.*

ii. *Fault of Patentee.*

1861. Delay in putting invention on market—Due to disputes.]—A patentee entered into an agreement with certain parties, to work the patent, but owing to disputes between them, the invention was not prosecuted until a short time before the expiration of the term of the letters patent; in such circumstances, an extension was refused.—*Re* PATTERSON'S PATENT (1849), 6 Moo. P. C. C. 469; 13 Jur. 593; 13 E. R. 765, P. C.

1862. —— **Intentional delay.**]—*Re* NORTON'S PATENT, No. 1710, *ante.*

1863. —— **Unexplained delay.**]—In 1899 a patent was granted for a method of & apparatus for effecting the storing up of speech or signals by magnetically influencing magnetisable bodies. One of the claims was for the herein described method of receiving, storing & reproducing messages, signals or the like, by subjecting a magnetisable body, such as a steel wire or strip, to the action of an electromagnet which moves along it, or along which it is moved, the coil of this magnet being first in connection with a transmitter, so that the wire or strip is influenced in a manner corresponding to the signals transmitted, & the coil being then in connection with a telephone receiver by which the signals which influenced the wire or strip are reproduced. A petition for the extension of the patent was presented by the assignees of the patent, an American co., which was not a manufacturing but only a promoting co. The bulk of that co.'s stock was held by a Danish co., which itself was not a manufacturing co., the manufacturing in Denmark being done by another Danish co. No attempt had been made to work the patent in the United Kingdom, beyond an endeavour to form a co. for the purpose. The invention was of great scientific merit, & apparatus made in accordance with it gave good results, but, although many attempts had been made to produce a commercially useful apparatus, no success had been achieved before the date of the presentation of the petition. The petition did not state the fact that the patentee, with an associate, had received £10,000 from the sale of shares in one of the foreign cos.; it stated that the great defect in the machines had been their difficulty of adjustment & their fragility, but the patentee in his evidence stated that a machine exhibited did not suffer from fragility:—*Held:* (1) the petitioners had not shown that the merits of the invention were such as, in the interests of the public, would justify the extension of the term of the patent, & they had not explained or attempted to explain or justify their not having attempted to put the invention into use in this country; (2) if an extension were granted the benefit of it would belong directly to the petitioners, who had not done anything to develop the invention, & indirectly to the Danish co., & still more indirectly to the patentee; & (3) the petitioners were wanting in the required *uberrima fides*, in that they had not stated in their petition the patentee's profit & had stated that the machines suffered from fragility.—*Re* POULSEN'S PATENT (1913), 30 R. P. C. 597.

1864. —— ——.]—*Re* HOOD & SALAMON'S PATENT (1924), 41 R. P. C. 592.

1865. Failure to push the invention commercially.]—On a petition for prolongation of a patent granted in 1882, it appeared from the evidence that, except for an attempt in 1882, no effort was made to work or push the patent commercially until Nov. 1894. No sufficient excuse was given for this delay, & prolongation was refused by the Judicial Committee on this ground.—*Re* DOLBEAR'S PATENT (1896), 13 R. P. C. 203, P. C.

1866. —— **Due to want of skill.**]—*Re* THORNYCROFT'S PATENT, No. 1813, *ante.*

1867. ——.]—*Re* HENDERSON'S PATENT, No. 1944, *post.*

1868. ——.]—Where it appeared that the patented invention had no exceptional merit & involved no new principle, that the assignee of the patents had neither by himself nor his agents displayed suitable energy & business capacity in pushing them & that the inventor was dead & could not possibly, if living, have derived advantage from their extension:—*Held:* their prolongation must be refused.—*Re* VAN GELDER'S PATENTS, *Ex p.* THOMPSON, [1907] A. C. 174; 76 L. J. P. C. 44; 96 L. T. 333, P. C.

1869. ——.]—*Re* POULSEN'S PATENT, No. 1863, *ante.*

1870. —— **Value of invention not appreciated.**]—*Re* RUNCORN WHITE LEAD CO., LTD.'S PATENT, No. 1816, *ante.*

1871. —— **In England.**]—A. S. S. Inc., an American co., were the owners of two patents, granted in 1910, in respect of inventions for testing the air pressure of pneumatic tyres. Prior to 1914 the patentees had manufactured the patented gauges in America only, & had devoted their efforts to bringing the gauges into common use

in that country. In Aug. 1914, the patentees purchased a factory in London & by the end of 1915 had put the same in a position to satisfy the anticipated English demand, & in the meantime had widely advertised the patented gauges. In Aug. 1916, the London factory was requisitioned by the War Office. Owing to the loss of the factory & to the almost total cessation of imports from America progress in the British business in the patented gauges ceased. As soon after the war as circumstances permitted manufacture was resumed & the sales of the patented gauges were continuous & increasing. A. S. S. Inc. applied by originating summons for an extension of the terms of the patents:—*Held:* having regard to the fact that manufacture in the United Kingdom had been commenced, discretion ought to be exercised in favour of appcts., notwithstanding the fact that there had been no manufacture here during the early years of the life of the patent; loss had been shown, & an extension of three years should be granted in the case of each patent.—*Re* FARIES' PATENT, *Re* SCHWEINERT & KRAFT'S PATENT (1926), 43 R. P. C. 349.

iii. *Patent having Limited Market.*

1872. Ground for prolongation.]—(1) The nature of an invention as affecting its introduction into use to be considered.

(2) The new patent must be to the assignee. *Re* SOUTHWORTH'S PATENT (1837), 1 Web. Pat. Cas. 486, P. C.

1873. ——.]—The insufficiency of the usual term to afford remuneration, regard being had to the nature of the invention, a ground for the extension of the term.—*Re* JONES'S PATENT (1840), 1 Web. Pat. Cas. 577, P. C.

Annotation:—**Refd.** *Re* Honiball's Patent (1855), 9 Moo. P. C. C. 378.

1874. ——.]—*Re* BERRINGTON'S PATENT (1852), cited in L. R. 1 P. C. at p. 510; 4 Moo. P. C. C. N. S. at p. 446; 16 E. R. 386.

Annotations:—**Consd.** *Re* Allan's Patent (1867), L. R. 1 P. C. 507; *Re* Hughes' Patent (1879), 4 App. Cas. 174.

1875. ——.]—(1) Letters patent for an invention communicated by a foreigner resident abroad, extended for five years. The invention, machinery for letter press printing, was of a meritorious & useful character, but of an expensive nature, & only at the latter end of the term of the letters patent brought into public use; & although the patent had been worked at a profit, it was not, in the opinion of the Judicial Committee, sufficiently remunerative, considering the value of the invention.

(2) In taking an account of the profits & loss of the working of a patent, the patentee is entitled to charge, as part of his expenses, for loss of time in endeavouring to bring the invention into general use.—*Re* NEWTON'S PATENT (1861), 14 Moo. P. C. C. 156; 15 E. R. 265, P. C.

Annotations:—*As to* (1) **Refd.** *Re* Newton's Patent (1862), 15 Moo. P. C. C. 176; *Re* Semet & Solvay's Patent, [1895] A. C. 78.

1876. ——.]—*Re* HERBERT'S PATENT, No. 1911, *post.*

1877. ——.]—RUTHVEN'S PATENT CASE (*circa* 1860), cited in 4 App. Cas. at p. 179; 48 L. J. P. C. at p. 23, P. C.

Annotation:—**Consd.** *Re* Hughes' Patent (1879), 4 App. Cas. 174.

1878. ——.]—A patentee presented a petition for prolongation of his patent for improvements in sluices & floodgates. He satisfied the Judicial Committee that his invention was meritorious, but was, from its nature, only capable of being employed to an occasional or limited extent, & that he had had little or no profit:—*Held:* the patent should be prolonged, &, as it was an exceptional case, for ten years.—*Re* STONEY'S PATENT (1888), 5 R. P. C. 518, P. C.

Annotation:—**Distd.** *Re* Smith's Patent (1922), 39 R. P. C. 313.

1879. ——.]—The patentee of an invention for an improved machine for planing wood presented a petition for prolongation. The accounts showed that after allowing the patentee £25 a year for out of pocket expenses, & £117 a year for personal services, he was largely out of pocket, & that he had been at great difficulties in pushing his invention. The evidence showed that the machine was very successful. Prolongation was granted for seven years.—*Re* HAZELAND'S PATENT (1894), 11 R. P. C. 467, P. C.

1880. ——.]—Where it appeared that an invention was of considerable merit, that there were great difficulties in introducing it, & that petitioner had incurred loss in his endeavours so to do, their lordships recommended a new patent for the term of ten years.—*Re* CURRIE & TIMMIS' PATENT, [1898] A. C. 347; 67 L. J. P. C. 66; 15 R. P. C. 63, P. C.

Annotation:—**Consd.** *Re* McCulloch's Patent (1908), 25 R. P. C. 684.

1881. ——.]—*Re* THOMPSON'S PATENT (1902), 19 R. P. C. 565, P. C.

1882. ——.]—In 1894 a patent was granted for new or approved appliances for use in glazing or otherwise covering roofs & sloping surfaces. The claim was for the construction of wire tension roofs for covering conservatories, greenhouses, sheds & other buildings & spaces, consisting of wires or rods strained to form a bearing for sheets of glass, metal or other material, the sheets being held in position by clips or similar appliances to secure them to the wires, substantially as & for the purposes herein set forth & described, & illustrated in the accompanying drawings. The patentee presented a petition for prolongation. The firm of which the patentee was a member worked under the patent & exhibited greenhouses constructed on the patented system at agricultural & other exhibitions. It was stated in evidence that in any district into which the greenhouses had been introduced their adoption had increased & that the patentee had made, or would make, an estimated profit of about £2,100, in addition to an annual remuneration of £250 for fourteen years:—*Held:* although the patentee had received considerable remuneration, yet having regard to the merits of the invention, & its utility, & the difficulty the patentee must have found in bringing the invention to the notice of the public, a prolongation of the patent for three years should be granted.—*Re* BOARD'S PATENT (1908), 25 R. P. C. 537, P. C.

1883. ——.]—In 1902 a patent was granted for improvements in or relating to means or apparatus for operating or controlling type-writing & type-setting mechanism by means of perforated tape. The object of the invention was to reproduce telegraphic messages in ordinary printed letters. One of the claims was as follows:—Apparatus for operating or controlling type-writing or type-setting mechanism by means of perforated tape, wherein the extent of movement of the tape-feeding mechanism is variable, & is controlled or determined by selecting mechanism, the action of which is also variable & is dependent upon the position in the successive portions of tape of the perforations & spaces representing the successive letters, the arrangement being such that when the

Sect. 2.—Extension of term: Sub-sect. 5, G. (b) iii. iv., (c), & H.; sub-sect. 6, A. & B. (a).]

apparatus is in operation the tape will be automatically fed forward in an intermittent manner to an extent dependent upon the length of each letter, whether the lengths of successive letters be variable or not, substantially as described. At the hearing of a petition for the extension of the patent there was no opposition by the public, & it was admitted on behalf of the Comptroller-General, that the invention was meritorious. The number of users was necessarily small, & the working of the invention had for about a year been impeded by the existing war, but petitioners including the inventor, had received considerable remuneration:—*Held:* the remuneration was inadequate. An extension was granted for seven years, not to exceed five years from the termination of the war.—*Re* CREED'S & COULSON'S PATENT (1916), 34 R. P. C. 11.

iv. *Other Cases.*

1884. Matters beyond patentee's control.]—*Re* KOLLMAN'S PATENT (1839), 1 Web. Pat. Cas. 564, P. C.

1885. ——.]—A patent, granted in 1899 to R. for improvements in telautograph apparatus, became vested in a co. who presented a petition for the extension of the same for fourteen years. It was established that no profits had been made at all from the patented invention up to Mar. 1908, when a certain licence was obtained from the Postmaster-General which enabled the invention to be used practically, & that since that time small & increasing profits had been made:—*Held:* the patent was for a meritorious invention; there had been no sufficient remuneration; this was not due to any matter under the control of those interested in the patent, & the patent should be extended for the further term of five years.—*Re* RITCHIE'S PATENT (1913), 31 R. P. C. 1.

1886. ——.]—The ct. granted an extension for five years of a patent for an improved method of absorbing gases & the application thereof to the production of high vacua & the separation of gases on the ground that during the greater part of the life of the patent there had been no adequate opportunity of making its utility available.—*Re* DEWAR'S PATENT (1918), 34 T. L. R. 512.

1887. Law costs.]—*Re* RUSSELL'S PATENT, No. 1907, *post.*

1888. ——.]—(1) In cases for extension of the term of letters patent, the A.-G. represents the Govt. & the public generally.

An application by the Lords of the Admlty. to enter a caveat & be heard against a petition for an extension, such caveat not having been filed within the time required by the rules of the Privy Council Office, refused, as the A.-G. was present to watch the interests of the Govt.

(2) Extension of letters patent granted for five years; the invention being of great merit & public utility, but the patentee & his grantees had received no remuneration, in consequence of the originality of the patent being disputed at law.

In granting such prolongation, the Judicial Committee imposed a condition, that the Comrs. for executing the office of High Admiral should have the right of manufacturing such invention, for the service of Her Majesty, without any licence from the patentee.—*Re* PETTIT SMITH'S PATENT (1850), 7 Moo. P. C. C. 133; 13 E. R. 830, P. C.

Annotations:—Generally, **Mentd.** Feather *v.* R. (1865), 6 B. & S. 257; Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A. C. 531.

1889. Peculiar character of opposition.]—*Re* ROBERTS' PATENT (1839), 1 Web. Pat. Cas. 573, P. C.

1890. Lack of influence.]—*Re* PAYNE'S PATENT (1854), cited in Coryton's Laws of Letters Patent, p. 220,

1891. Public prejudice.]—*Re* PAYNE'S PATENT, No. 1890, *ante.*

1892. Discovery of gold fields.]—The ct. has authority to grant the prolongation of the term of a patent to an assignee, even after the original patentee has ceased to have any connection with the working of it.

Where the assignees of a patent, with the working of which the original patentee had ceased to have any connection, were prevented from working it at a profit, on account of the discovery of the gold fields in Australia, the ct. granted a prolongation of the term for five years.—*Re* NAPIER'S PATENT (1861), 13 Moo. P. C. C. 543; 9 W. R. 390; 15 E. R. 204, P. C.

1893. Difficulty of bringing patent into use.]—*Re* ROPER'S PATENT, No. 1894, *post.*

1894. Illness.]—The patentee of a captain's bridge constructed as a self-launching life raft petitioned for prolongation on the ground that owing to illness & other circumstances beyond his control, he had not been adequately remunerated. It was proved that for nearly eight years he had been practically incapacitated for business in consequence of a railway accident. The invention had been awarded prizes at exhibitions, but had never been brought into actual use:—*Held:* having regard to the meritorious nature of the invention, the difficulty of bringing it into actual use, the patentee's illness, & the fact that no opposition was offered on behalf of the Crown, the case was an exceptional one, & extension for seven years should be granted.—*Re* ROPER'S PATENT (1887), 4 R. P. C. 201.

1895. Success dependent on prolongation.]—*Re* PARSONS' PATENT, No. 1858, *ante.*

1896. Time & cost of development.]—*Re* STILL'S PATENT (1927), 44 R. P. C. 248.

1897. Limitation of output by licencees.]—*Re* NOURSE & NEWMAN'S PATENT (1927), 44 R. P. C. 252.

(c) *Accounts Showing Remuneration.*

See Sub-sect. 7, *post.*

H. Non-Disclosure of Material Facts in Petition.

Ground for refusal.]—*See* Sub-sect. 2, *ante.*

SUB-SECT. 6.—THE ORDER.

A. In General.

See Patents & Designs Acts, 1907 (c. 29), s. 18; 1919 (c. 80), s. 7; R. S. C., Ord. 53A, rr. 3 & 4.

1898. In form of new grant.]—*Re* HONIBALL'S PATENT, No. 1776, *ante.*

1899. ——.]—*Re* BETT'S PATENT, No. 1777, *ante.*

1900. ——.]—*Re* COCKING'S PATENT, No. 1835, *ante.*

PART XII. SECT. 2, SUB-SECT. 5.—G. (b) iv.

1884 i. *Matters beyond patentee's control.*]—Petitioner must prove that the invention is meritorious, that everything in his power to bring out the invention & turn it to advantage has been done, & that, owing to circumstances beyond his control, he has been unable to obtain an adequate remuneration.—*Re* ANDREWS & BEAVEN'S PATENT (1898), 18 N. Z. L. R. 526.—N.Z.

1901. ——.]—S., to whom a patent was granted in 1871, petitioned for a prolongation thereof. On the hearing of the petition witnesses were called to prove that the invention was meritorious, but no witnesses were called for the Crown, & it was admitted that the accounts were satisfactory:—*Held:* a new patent ought to be granted for seven years, such patent not to contain any restrictions, conditions, or provisions, & no new specification need be filed.—*Re* SMITH'S PATENT (1885), 2 R. P. C. 14; Griffin's Patent Cases (1884–1886), 263, P. C.

1902. ——.]—I think in all the circumstances of this case I shall be exercising my discretion properly if I extend these patents coterminously with the expiration of the American patents, & that is, in effect, one year in regard to each of the patents. That will be, in regard to one of them, in the form of a re-grant, & in the other in the form of an extension, & the order will take that particular form. As regards the re-grant, there will be the usual restrictive provisions (TOMLIN, J.).—*Re* KETTERING & CHRYST'S PATENTS (1924), 42 R. P. C. 507.

1903. ——.]—I will grant an extension of three years, & it must take the form of a re-grant in the usual way (TOMLIN, J.).—*Re* WESTMORELAND'S PATENT (1925), 42 R. P. C. 513.

1904. Extension as to some claiming clauses only.]—The ct. has power, under Patents & Designs Act, 1907 (c. 29), s. 18, to extend the term of a patent as to one or more of its claiming clauses without extending it as to all those clauses.—*Re* LODGE'S PATENT, [1911] 2 Ch. 46; 80 L. J. Ch. 517; 104 L. T. 716; 27 T. L. R. 419; 28 R. P. C. 365.

Annotation:—**Refd.** *Re* Trantom's Patent (1916), 34 R. P. C. 29.

——.]—*See, also*, Nos. 1823, 1824, *ante*.

1905. Power to impose conditions—Limit to authority.]—LEDSAM *v.* RUSSELL, No. 2566, *post*.

1906. —— Transfer to beneficial owner.]—*Re* YOUNGS' PATENT, No. 2120, *post*.

——.]—*See* Sub-sect. 6, B., *post*.

B. Conditions.

(a) In favour of Patentee or His Estate.

1907. Application by assignee—Benefit of patentee.]—Term of letters patent for improvement in manufacturing gas tubes, extended by the Judicial Committee, under the 5 & 6 Will. 4, c. 83, for six years; on the ground of the great merit & utility of the invention, & the inadequate remuneration occasioned in a great measure by the expense incurred by litigation, which the assignee of the patent had been involved in for the protection of his patent rights.

Where the inventor, a mechanic, had assigned his interest to the patentee, his master, the Judicial Committee, under the circumstances, made it a condition to their recommendation to the Crown to prolong the term of the patent, that the assignee of the patent should secure the inventor an annuity during the period of the extension.—*Re* RUSSELL'S PATENT (1838), 2 Moo. P. C. C. 496; 12 E. R. 1095, P. C.

Annotations:—**Distd.** *Re* Bodmer's Patent (1849), 6 Moo. P. C. C. 468. **Consd.** *Re* Markwick's Patent (1860), 13 Moo. P. C. C. 310. **Distd.** *Re* Pitman's Patent (1871), L. R. 4 P. C. 84. **Refd.** *Re* Claridge's Patent (1851), 7 Moo. P. C. C. 394.

1908. —— ——.]—*Re* WHITEHOUSE'S PATENT (1838), 1 Web. Pat. Cas. 473, P. C.

Annotations:—**Consd.** *Re* Markwick's Patent (1860), 8 W. R. 333. **Refd.** Allen *v.* Rawson (1845), 1 C. B. 551.

1909. —— ——.]—Extension of term of letters patent granted to assignees of patentee.

The inventor & patentee had lost largely by the patent, but his assignees had lately made very considerable profits, & from their position in the trade, were likely to command a very large sale of the patent article. The patent was of high merit, & of great service to the public safety. In such circumstances, a prolongation of the term was granted to the assignees for four years, upon conditions, first, that the assignees secured to the patentee half the profits derived from the sale; &, secondly, that the patented article should be sold by the assignees to the public, at a certain fixed price.

In estimating the profits made under a patent, the profits arising from the sale of the patented article for exportation must be included.—*Re* HARDY'S PATENT (1849), 6 Moo. P. C. C. 441; 13 Jur. 177; 13 E. R. 754, P. C.

Annotations:—**Distd.** *Re* Bodmer's Patent (1849), 6 Moo. P. C. C. 468. **Refd.** *Re* Claridge's Patent (1851), 7 Moo. P. C. C. 394.

1910. —— —— Effect of expenditure by assignee.]—*Re* BODMER'S PATENT, No. 1823, *ante*.

1911. —— Benefit of widow.]—Petition for prolongation of term of letters patent by patentee, together with the assignees of a moiety of the patent. After the presentation of the petition, & before the hearing, the patentee died, having by his will appointed his widow extrix. & residuary legatee. Extension granted to the assignees on condition that they held the moiety of the patent in trust for the widow of the patentee. If an invention had not been brought into practical use during the term of the letters patent, it raises a strong, though not conclusive, presumption against its utility; & unless there are circumstances to rebut such presumption, an extension of the term of letters patent will not be granted. The fact of a patent of a valuable nature, but having a limited market, not having been so generally used as to remunerate the inventor, is sufficient to remove the presumption against the utility of the invention.—*Re* HERBERT'S PATENT (1867), L. R. 1 P. C. 399; 4 Moo. P. C. C. N. S. 300; 16 E. R. 330, P. C.

1912. —— ——.]—A patent was granted for improvements relating to the treatment of "sewage." The invention consisted in the addition of yeast to sewage in order to separate the sludge & obtain a substance containing much less water than the original sludge, & so more capable of being economically dried & utilised as a fertiliser. Various assignments of the patent rights had been made, & a certain amount of sewage had been dealt with by a co., but, owing to the war & internal troubles in Ireland, only in a discontinuous manner, & for a short time. A petition for the extension of the patent having been presented, it was stated by petitioner that it was proposed that plant for dealing with sewage should be erected for local authorities at the expense of the owners of the patent rights, by whom the treated sludge would be sold as fertiliser & the plant would eventually become the property of the local authorities, & that a contract upon those terms had been made. The accounts showed a loss of a large sum of money upon, or in connection with, the development of the invention. The petition was supported by the Comptroller on the ground that, as the utilisation of the process might be a great public utility, the case was an exceptional one, in which an extension for seven or eight years might be granted.

a. *Application by assignee—Benefit of executors.*]—*Re* MCCULLOCH'S PATENT (1908), 25 R. P. C. 684.—SCOT.

Sect. 2.—*Extension of term: Sub-sect.* 6, *B.* (*a*), (*c*), (*d*) & (*e*); *sub-sect.* 7, *A.*]

A petitioning co., the registered owners of the patent, offered to secure to the grantee's widow, his administratrix, a holding equal to 5 per cent. of the issued capital of the co. for the time being :—*Held:* the case came within the exceptional cases in which some extension beyond five years was permissible, & the proper term of extension was eight years, subject to the condition to which the owners of the patent had offered to submit.—*Re* DICKSON'S PATENT (1925), 42 R. P. C. 463.

(*b*) *In favour of Crown.*

1913. Rights of user without licence.] — *Re* PETTIT SMITH'S PATENT, No. 1888, *ante.*

1914. ——.]—In all cases where the utility of a patent has not been tested by actual employment the question to be considered is, whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility. Application for a prolongation of the term granted after strong & unanswered evidence of utility, though the patent had not been used in England during the whole term. On grounds of public policy the condition was annexed that the govt. & all contractors employed by the govt. should be at liberty to use the invention.

The question to be considered in all these cases is whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility (SIR MONTAGUE SMITH).—*Re* HUGHES' PATENT (1879), 4 App. Cas. 174 ; 48 L. J. P. C. 20 ; 27 W. R. 493, P. C.

Annotation :—**Refd.** *Re* Soc. Chimique des Usines du Rhône's Patent, [1922] 1 Ch. 258.

1915. ——.]—The new letters patent must . . . be subject to the condition, which has become now a usual one in cases of inventions which are likely to be required for use by the govt., that the govt. & its contractors be entitled to use the invention (SIR MONTAGUE SMITH).—*Re* NAPIER'S PATENT (1881), 6 App. Cas. 174 ; 50 L. J. P. C. 40 ; 29 W. R. 745, P. C.

1916. —— **Refusal of court to insert condition.**]—Patent for improvements in the manufacture of fire-arms. The patentee had received large sums of money from govt., for the expenses of experiments, & by way of bounty & reward, but from the nature of the patent had not, in the opinion of the Judicial Committee, received sufficient remuneration for his invention, & in granting an extension, their lordships refused to impose a condition in the new grant, that the Crown should be at liberty to use the invention for the public service without licence from the patentee.—*Re* LANCASTER'S PATENT (1864), 2 Moo. P. C. C. N. S. 189 ; 15 E. R. 872.

Annotations :—**Refd.** Feather *v.* R. (1865), 6 B. & S. 257. **Mentd.** Income Tax Comrs. *v.* Pemsel (1891), 65 L. T. 491.

1917. —— ——.]—*Re* CARPENTER'S PATENT (1854), 2 Moo. P. C. C. N. S. 191, n. ; 15 E. R. 873.

Annotations :—**Refd.** Feather *v.* R. (1865), 6 B. & S. 257. **Mentd.** Income Tax Special Purposes Comrs. *v.* Pemsel, A. C. 531.

1918. Right of user on certain terms.] — *Re* TAYLOR'S PATENT (1918), 35 R. P. C. 247.

(*c*) *Licences.*

1919. No new licences—Though old licences not renewed.]—Patentee, formerly in partnership with J. & W., by a deed of dissolution stipulated that J. & W. should have the exclusive right of granting, in certain cases there provided, licences for manufacturing the patent art. In recommending an extension of the term of the letters patent, the Judicial Committee imposed a condition upon the patentee to secure to J., in whom the interest under the deed of dissolution then vested, the same interest in the new letters patent as related to the granting of licences as was provided by the deed of dissolution, but refused to allow J. to substitute new licences for those granted under the original letters patent, in the event of the original licencees declining to renew their licences from him under the new grant.—*Re* NORMANDY'S PATENT (1855), 9 Moo. P. C. C. 452 ; 14 E. R. 370.

1920. Licences to public on terms similar to one already granted.]—A patentee, who was not a manufacturer, granted a licence to a manufacturing firm to manufacture the patented article, which by agreement between them was of an almost exclusive character. In granting a prolongation of the term of the letters patent, the new letters patent were directed to be made upon condition that licences should be granted by the patentee to the public upon terms similar to the one already granted.—*Re* MALLET'S PATENT (1866), L. R. 1 P. C. 308 ; 4 Moo. P. C. C. N. S. 175 ; 16 E. R. 282, P. C.

1921. Licences to all persons on same terms.]—L. presented a petition for prolongation of a patent granted to him in 1880 for improvements in the construction & arrangement of apparatus for purifying, disinfecting, & drying. The validity of the patent had been upheld by the House of Lords in an action. The petition was opposed by W., one of defts. in the action, & also by the corpns. of N. & W. & the H. local Board, who did not dispute the validity of the patent or question the accounts or assert the insufficiency of the remuneration, but contended that it should be a term of prolongation that petitioner should grant a licence to anyone desiring it upon the same terms as to royalty as those granted to his exclusive licencees, which petitioner undertook to do before the hearing of this petition. W. contended that the invention was not one of such exceptional merit under the circumstances as to justify prolongation. The Crown consented to a prolongation for a short period. The Judicial Committee decided to recommend the grant of a new patent for five years upon the condition that petitioner should grant licences on the same terms to all persons, the royalties to be limited to 10 per cent. upon the selling price of each machine ; but that the case was not one for costs.—*Re* LYON'S PATENT (1894), 11 R. P. C. 537.

1922. Existing licences to be continued—New licences to reserve twice the royalty.]—A patent was granted for "improvements in thrust & like bearings." The object of the invention was the construction of a thrust bearing in which the lubricating oil should be automatically carried in between the bearing surfaces in sufficient quantity to form a continuous film capable of supporting the load on the bearing. Only one of the bearing parts, either the fixed or the moving part, had the form of a continuous collar, ring, or disc ; the other bearing part, instead of being also a continuous ring or disc, consisted of two or more separate plates or blocks, each forming substantially a sector of such a ring or disc ; & each block was pivoted at a point somewhat behind its centre of figure, the total bearing pressure that the block carried being transmitted to it by the pivot. A petition for an extension of the patent was presented by the patentee. The petition was unopposed, & the merits of the invention were

admitted by the Comptroller-General. It was proved that the invention caused a very great reduction of friction, &, consequently, increased the power transmissible by a shaft, & that the adoption of the invention in ships of war had led to a great saving in coal & oil, in the cost of construction, & in the space occupied by the bearings. The remuneration of the inventor had been about £15,000 :—*Held :* the invention was very meritorious ; the inventor had not been wanting in diligence in attempting to bring the invention into practical use ; the remuneration of the inventor had been inadequate. An extension of the term of the patent for seven years was granted, on condition that the patentee should continue the licences to existing licencees on the same terms as in those licences, & should, in the case of future licencees, not claim a royalty greater than twice that charged to certain existing licencees.—*Re* MICHELL'S PATENT (1919), 36 R. P. C. 223.

1923. ——.]—*Re* FLEMING & GALE'S PATENT (1919), 36 R. P. C. 266.

1924. Terms of licences subject to direction of Board of Trade.]—In 1904 a patent was granted for "improvements in apparatus for ventilating, & for humidifying & warming & cooling air." The invention was more particularly applicable to cotton spinning & weaving factories. The patentee presented a petition for prolongation. By the Factory & Workshop Act, 1901 (c. 22), & earlier statutes, obligations as to ventilation were imposed on manufacturers, but the provisions of the Acts were not enforced, the manufacturers having objected that the legal standard could not be attained. In 1904 an expert appointed by the Home Office reported that the standard could be attained by means of petitioner's apparatus. Petitioner had made a profit by the sale of his apparatus, but at the hearing of the petition it was admitted on behalf of the Crown that if the statutory provisions had been enforced he would have made a larger profit. Petitioner stated that, in the event of prolongation being granted, he was willing to grant licences on terms fixed by the Board of Trade & to accept the decision of the Board as to whether or not he was charging excessive prices :—*Held :* an extension for six years should be granted, the patentee undertaking to abide by any direction the Board of Trade might give as to the prices of the machines or the terms on which licences were to be granted.—*Re* HART'S PATENT (1908), 25 R. P. C. 299.

Annotation :—**Mentd.** McCullock's Patent (1908), 25 R. P. C. 684.

1925. Exclusive licence to be renounced.]—A patentee had granted an exclusive licence for the last nine years of the term of the patent, as he was unable in any other way to get funds to work the patent. The licencees were made co-petitioners in a petition for prolongation. Prolongation was granted for a term of seven years, but the exclusive licencee was required to renounce all right & benefit under the exclusive licence.—*Re* SHONE'S PATENT (1892), 9 R. P. C. 438.

(*d*) *Registration of Licences.*

1926. Undertaking to procure.]—I will grant an extension of three years. There must be an undertaking to procure the registration of the licences. The order must be in the re-grant form, & with the usual proviso (TOMLIN, J.).—*Re* MORISON'S PATENTS (1924), 42 R. P. C. 511.

1927. ——*Re* SCHOOP'S & MORF'S PATENTS (1925), 43 R. P. C. 74.

1928. ——*Re* ARGYLLS, LTD., PERROT & RUBURY'S PATENT (1925), 43 R. P. C. 161.

(*e*) *Extension of Expired Patent.*

1929. No action to be brought against innocent infringers.]—*Re* FLEMING & GALE'S PATENT, No. 1923, *ante.*

1930. Patent expired shortly before making of Order—Usual provisions inserted.]—*Re* COSSAR'S PATENT (1926), 44 R. P. C. 201.

1931. —— ——.]—The A. co. applied by originating summons for the extension of the terms of three patents all granted in respect of "Improvements in or relating to Telephone Systems." The patents were three of a group of seventeen, the terms of six of which had already been extended. One of the patents expired ten days before the hearing of the summons. The application was opposed by C. co., on whose behalf it was contended that the war had in fact benefited the A. co. inasmuch as the development of automatic telephony in this country having been delayed by the war, the A. co. had been able to develop their system so as to enable them, after the war, to compete with a rival system which might, but for the war, have been adopted, & that, in any case the period of extension asked for was too long :—*Held :* the opponents' contention had not been made out & each patent should be extended so as to expire on Jan. 18, 1931, the date fixed for the expiry of the six earlier patents ; the provisions usual in the case of expired patents must be inserted, although it was not due to any default of appcts. that one patent had expired at the date of the hearing of the summons, the ct. having received a measure of assistance as the result of the opposition, there would be no order as to costs.—*Re* DICKER'S PATENT (No. 2), *Re* DERRIMAN'S PATENT, *Re* MARTIN'S PATENT (1927), 44 R. P. C. 263.

SUB-SECT. 7.—ACCOUNTS.

A. Proper and Sufficient Account.

1932. Condition precedent to prolongation.]—*Re* MARKWICK'S PATENT, No. 1712, *ante.*

1933. ——.]—*Re* BETT'S PATENT, No. 1777, *ante.*

1934. ——.]—*Re* HILLS' PATENT, No. 1769, *ante.*

1935. ——.]—(1) To entitle a patentee to a prolongation of the term of letters patent, he must satisfactorily establish the amount of his profits.

A patentee did not manufacture or sell the patented article (ship anchors), but granted licences to I. to manufacture, from whom he received royalties. On an application by him for an extension of the term of the letters patent on the ground of inadequate remuneration, the accounts produced of his own expenditure in carrying on the patent being unsatisfactory, & no accounts given of the profits derived by the licencees, a prolongation of the letters patent was refused, first, as the patentee's accounts were unsatisfactory, & secondly, from the patentee having so dealt with his patent rights as to deprive

PART XII. SECT. 2, SUB-SECT. 7.—A.

1932 i. *Condition precedent to prolongation.*]—On an application for an extension appct. must exhibit in the affidavit in support of his application a balance sheet showing what he presents as being the receipts & expenditure year by year in respect of the patent.—*Re* ROBINSON'S PATENT (1918), 25 C. L. R. 116.—**AUS.**

1932 ii. ——.]—*Re* LAWRENCE & KENNEDY'S PATENT (1910), 27 R. P. C. 252.—**SCOT.**

Sect. 2.—Extension of term: Sub-sect. 7, A. & B.]

him of the power of showing the amount of profit derived from the working of the patent.

(2) Licencees stand, with respect to the profits, in the same position as an assignee of the patentee.—*Re* TROTMAN'S PATENT (1866), L. R. 1 P. C. 118; 3 Moo. P. C. C. N. S. 488; 16 E. R. 185, P. C.

1936. ——.]—*Re* SAXBY'S PATENT, No. 1783, *ante*.

1937. ——.]—Petitioner, seeking the grace & favour of the Crown, in applying for an extension of the term of letters patent, is bound to bring his accounts before the committee in such a shape as to leave no doubt what the remuneration has been that he has received from the patent.

The petition for extension, & the accounts furnished by petitioner, the patentee, not containing sufficiently full & accurate information in respect to the patent, or the remuneration received by him, the Judicial Committee declined to recommend a prolongation of the term.

The principle, where the statement of the remuneration received by the patentee, is on the face of the petition & accounts filed unsatisfactory, of adjudicating without reference to the merits of the invention, as acted on in *Saxby's Patent*, No. 1783, *ante*, recognised.—*Re* CLARK'S PATENT (1870), L. R. 3 P. C. 421; 7 Moo. P. C. C. N. S. 255; 17 E. R. 97, P. C.

Annotations:—**Distd.** *Re* Houghton's Patent (1871), L. R. 3 P. C. 461. **Refd.** *Re* Pitman's Patent (1871), L. R. 4 P. C. 84.

1938. ——.]—(1) Accounts of profits & loss filed by a patentee on his application for a prolongation of the term of letters patent being *primâ facie* unsatisfactory, the Judicial Committee directed the question of accounts to be taken before considering the merits of the invention. As the accounts were not satisfactorily explained, the application for a prolongation was refused.

(2) It is certainly not desirable to refuse the costs of a fair opposition, since it is rather in the interest of this tribunal to encourage *bonâ fide* oppositions (*per* CUR.).—*Re* WIELD'S PATENT (1871), L. R. 4 P. C. 89; 8 Moo P. C. C. N. S. 300; 17 E. R. 325, P. C.

1939. ——.]—*Re* ADAIR'S PATENT, No. 1699, *ante*.

1940. ——.]—(1) On petition for extension of the term of letters patent the accounts of the patentee, who was also the manufacturer of the patented article, did not distinguish between receipts in respect of the patented article & receipts in respect of other articles manufactured by the patentee, or between the profits of the earlier or later years of the term:—*Held:* the accounts were not satisfactory, & further time to amend the accounts was refused.—*Re* YATES & KELLETT'S PATENT (1887), 12 App. Cas. 147; 57 L. J. P. C. 1; 3 T. L. R. 353; 4 R. P. C. 150, P. C.

1941. ——.]—Where the accounts filed by a patentee showed not the result of the books, but the accountant's correction of them, & where it also appeared that the books themselves had been kept in such a way that without a very long, minute, & laborious investigation it was impossible to say whether he had been adequately remunerated or not:—*Held:* a petition for prolongation must be dismissed.—*Re* LAKE'S PATENT, [1891] A. C. 240; 60 L. J. P. C. 57; 8 R. P. C. 227, P. C.

1942. ——.]—*Re* LANE FOX'S PATENT, No. 1785, *ante*.

1943. ——.]—*Re* CLARK'S PATENT, No. 1717, *ante*.

1944. ——.]—Where petitioners were assignees & purchasers of a British patent as a commercial speculation, & their accounts did not disclose with any clearness the extent of the profits made either by the inventor or petitioners:—*Held:* prolongation must be refused, although the invention was one of great merit & worthy of exceptional consideration; the expiration of the foreign patents for the same invention & the failure of the British patentee to push the invention in this country for the first seven years of the life of the patent were serious, though not in themselves objections to a prolongation.

Prolongation of a patent refused, appct. being the assignee by purchase of the patent as a commercial speculation, & there being no satisfactory evidence that the inventor had not been adequately remunerated.—*Re* HENDERSON'S PATENT, [1901] A. C. 616; 70 L. J. P. C. 119; 85 L. T. 358; 17 T. L. R. 676; 18 R. P. C. 449, P. C.

Annotation:—**Refd.** *Re* Wuterich's Patent, [1903] A. C. 206.

1945. ——.]—Petition by assignees of a patent for its extension dismissed, no means of judging whether the inventor had been remunerated having been given. An application for adjournment was refused as unprecedented.—*Re* PEACH'S PATENT, *Ex p.* PEACH & BOSWELL, HATFIELD & CO., [1902] A. C. 414; 71 L. J. P. C. 98; 87 L. T. 153; 19 R. P. C. 65, P. C.

1946. ——.]—The accounts presented to the Committee on an application for extension of a patent must be intelligible & complete, showing what remuneration the patentee has actually received. He cannot be allowed, except perhaps in very special circumstances, to supplement them by oral evidence.—*Re* WUTERICH'S PATENT, [1903] A. C. 206; 72 L. J. P. C. 60; 88 L. T. 306, P. C.

1947. —— **Absence of books unfavourable to petitioner.**]—A petition was presented for prolongation of a patent for refrigerators by a co., the assignees of the patent. The assignees admitted a profit by the patentees previous to the assignment of £7,000 odd, & by the co. of £2,000, & one of the patentees had received £2,750, as manager of the co. The accounts of the patentees' working were missing. In the prospectus issued on the formation of the co., it was stated a profit had been made which would pay 7 per cent., which, if true, would have made the profit considerably larger than was admitted by the patentees. The sale of the refrigerators was not increasing:—*Held:* doubting whether the patent had sufficient merit to justify prolongation, the remuneration was adequate, & the patentees must be taken to have received more than they had admitted, as in the absence of the books, & of a reasonable explanation of such absence, everything must be taken most strongly against petitioners, & if the statement in the prospectus was untrue, that would bring an amount of discredit into the case which would prevent prolongation being granted.—*Re* LAWRENCE'S PATENT (1890), 9 R. P. C. 85, P. C.

1948. What are sufficient accounts—Annual profits must be shown.]—*Re* PERKINS' PATENT, No. 1832, *ante*.

1949. —— **Made up from insufficient material by accountant.**]—*Re* LAKE'S PATENT, No. 1941, *ante*.

1950. —— ——.]—H. applied for prolongation of a patent granted to him, alleging utility of the invention & that he had received no remuneration

at all. He had kept no books, but shortly before the presentation of the petition he had marked upon certain cheques drawn upon his private account approximately the amounts expended by him at different times in working the patent. Upon these materials the accounts accompanying the petition were made up by the accountant. There were no vouchers or other corroboration :—*Held :* prolongation ought to be refused.—*Re* HUGHES' PATENT (1898), 15 R. P. C. 370, P. C.

1951. —— Utility as to part only—Profits as to that part to be shown.]—*Re* WILLACY'S PATENT, No. 1685, *ante*.

1952. —— Where remuneration very large—Must be of fullest nature.]—It may not be always necessary to show licencees' profits, but the profits of a person who is assignee of one-third of the patent with a free licence must be shown.

The owners of patents for improvements in the manufacture of steel presented a petition for prolongation. It was admitted that a profit of over £250,000 had been made. It appeared that the original patentees had, in order to get their invention taken up, given to B. one-third share in the patents & a free licence, that a large number of licences were granted to manufacturers, & that for the convenience of dividing profits a limited co. had been formed of the persons interested in the patents, including B. It was alleged by petitioners that the invention was of national importance, & of such exceptional merit that the remuneration was not adequate. By their accounts petitioners showed the moneys received for royalties, & the proportion received by B. in respect of his third share, but did not show the profits made by any of the licencees, nor any profits made by B. before the formation of the co., nor B.'s manufacturing profits since. Some of the items of expenditure were grouped together under one head, such as an item of £15,000 for salaries, office rent, travelling & general expenses, experiments & drawings. A preliminary objection was taken by the Crown that the accounts were insufficient, if not on the ground that they did not show the licencees' profits, at any rate because they did not show B.'s profits, & also because no sufficient details were given of the items :—*Held :* doubting whether, if the case had been gone into, any evidence could have induced the Committee to report inadequate remuneration, in such a case the accounts ought to be of the fullest nature ; without going into the questions whether the licencees' profits should be shown, which might not be necessary, or whether a considerable number of items might be lumped together, which might be justifiable, the case of B., an assignee of a share of the patents & a free licencee, was entirely different ; the profits made by B., so far as his manufacturing profits were assignable to the patents, & all the profits made by him by the use of a free licence, compared with the profits made by other licencees paying royalties, ought to have been shown, & the petition was dismissed. —*Re* THOMAS' PATENTS & THOMAS & GILCHRIST'S PATENT (1892), 9 R. P. C. 367, P. C.

What profits must be shown.]—*See* Sub-sect. 7, , *post*.

Manufacturers' profits.]—*See* Sub-sect. 7, *post*.

Profits to be Shown.

See Patents & Designs Act, 1907 (c. 29), s. 18 (4).

1953. Foreign profits.]—*Re* HARDY'S PATENT, No. 1909, *ante*.

1954. —— From foreign patent.]—*Re* ADAIR'S PATENT, No. 1699, *ante*.

1955. —— ——.]—(1) Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 25, clause 4, does not alter the rules adopted by the Judicial Committee.

(2) It is the duty of a patentee applying for a prolongation to produce accounts of all the profits received under foreign patents in respect of his invention.—*Re* NEWTON'S PATENTS (1884), 9 App. Cas. 592 ; 52 L. T. 329 ; Griffin's Patent Cases (1884–86), 262 ; 1 R. P. C. 177, P. C.

1956. —— ——.]—*Re* JOHNSON'S PATENT (No. 2), No. 1765, *ante*.

1957. Sale of patent for cash & shares—Subsequent sales of shares to be shown.]—*Re* BOWER-BARFF PATENT, No. 1722, *ante*.

1958. Assignment for lump sum & annual payment—Annual payments to be shown.]—In 1884, a patent was granted to L. for "improvements in moulds for moulding decorative or other slabs & blocks." He assigned this patent with others to the P. A. co., & £6,000 was the consideration for the assignment, besides which L. had received £250 from another co. The P. A. co. went into liquidation & a new co., the A. S. co., acquired the patent. L. & the A. S. co. presented a petition for prolongation. It transpired that L. had for some eight years received £300 *per annum* as managing director of the A. co. L. claimed to deduct from the £6,250 the costs incurred by him in certain legal proceedings in relation to the patent, & that the balance was an insufficient remuneration. The accounts showed that the patent had been worked at a loss :—*Held :* the £300 a year ought to have been brought into account by the patentee ; he was not entitled to made the deductions claimed.—*Re* MCLEAN'S PATENT (1898), 15 R. P. C. 418, P. C.

1959. Profits from subsidiary patents—To be clearly distinguished.]—A petition was presented for prolongation of letters patent for "Improvements in dissolving cellulose & allied compounds." The invention consisted of a new reaction producing a new material, & for petitioners it was alleged that the uses to which the new material could be put had to be ascertained & the trades in them created, & that therefore, although the merits of the invention were very great & the patentees had shown great industry in endeavouring to get the invention taken up, they had not received adequate remuneration. The accounts included matters relating to subsequent patents taken out by the patentees & included accounts relating to the sale of foreign patents & the accounts of certain licenced companies in which the patentees held a considerable interest. The patentees alleged that there had been a loss on English business taken alone. For the Crown, it was objected that the accounts were not sufficiently clear & in particular did not distinguish between expenditure in respect of the patent, & that in respect of subsidiary patents subsequently taken out by the patentees ; & that it was not shown that there was a loss on the English business taken alone, & that the patentees had not fulfilled their duty to present clear accounts :—*Held :* though the accounts were at first sight rather confusing, the Board were satisfied after explanations & after consideration, that the accounts were sufficient, &, the invention being of great merit, the patent was prolonged for five years.—*Re* CROSS, BEVAN & BEADLE'S PATENT (1906), 23 R. P. C. 485, P. C.

Profits as manufacturer.]—*See* Sub-sect. 7, C., *post*.

Sect. 2.—*Extension of term: Sub-sect.* 7, *C., D., F. & G.; sub-sect.* 8, *A. &*

C. Deductions from Profits.

1960. Deductions not mentioned in petition.]—The administrator of a patentee petitioned for prolongation of the patent on the ground of inability to obtain due remuneration for perfecting the invention. The accounts presented showed a nett remuneration of £8,038 16*s.* 4*d.* The patentee at the bar claimed that some further deductions not mentioned in the petition or the accounts ought to be made from this sum:—*Held:* no such deductions could be made, & evidence on the point was under the circumstances inadmissible; &, on the evidence which was admitted, the patentee had not been inadequately remunerated, & the petition should be dismissed.

What the statute says is, that the Judicial Committee shall, in considering their decision, have regard to the nature & merits of the invention in relation to the public. Upon that, evidence has been called, which shows what can hardly be disputed, viz., that the invention which is the subject of the patent is a beneficial invention; but as to the petitioner showing there was any special or peculiar advantage in the invention in relation to the public to entitle the patentee to the large reward of an extension of his patent, their lordships are of opinion that he has totally failed so to do. No such proof has been given (LORD BLACKBURN).—*Re* BAILEY'S PATENT (1884), Griffin's Patent Cases (1884–86), 253; 1 R. P. C. 1, P. C.

1961. Necessary expenses.]—*Re* KAY'S PATENT, No. 1773, *ante.*

1962. Whether cost of litigation may be deducted.]—*Re* HEATH'S PATENT (1853), 8 Moo. P. C. C. 217; 2 Web. Pat. Cas. 247; 14 E. R. 83, P. C.

Annotation:—**Refd.** *Re* Honiball's Patent (1855), 9 Moo. P. C. C. 378.

1963. ——.]—*Re* BOVILL'S PATENT, No. 1686, *ante.*

1964. ——.]—*Re* MCLEAN'S PATENT, No. 1958, *ante.*

1965. —— **Suits compromised & costs given up.**]—*Re* HILLS' PATENT, No. 1769, *ante.*

1966. Loss of time in bringing patent before public.]—*Re* NEWTON'S PATENT, No. 1875, *ante.*

1967. ——.]—In circumstances showing a want of adequate remuneration, an extension of the term of letters patent granted for six years. In estimating the profits derived from the patent, the Judicial Committee will take into consideration a deduction from the profits of the patent for the personal expenses of the patentee, for the exclusive devotion of his time in bringing the patent into practical operation & public notice.—*Re* CARR'S PATENT (1873), L. R. 4 P. C. 539; 9 Moo. P. C. C. N. S. 379; 17 E. R. 556, P. C.

1968. Division of royalty with agent.]—*Re* POOLE'S PATENT, No. 1798, *ante.*

Patentee also manufacturer.]—*See* Sub-sect. 7, D., *post.*

D. Patentee also Manufacturer.

1969. Accounts must show profits of patent—& of manufacture.]—*Re* MUNTZ'S PATENT, No. 1830, *ante.*

1970. ——.]—*Re* BETT'S PATENT, No. 1777, *ante.*

1971. —— ——.]—*Re* SAXBY'S PATENT, No. 1783, *ante.*

1972. —— ——.]—*Re* DUNCAN & WILSON'S PATENT, No. 1728, *ante.*

1973. —— —— **Sufficiency.**]—*Re* YATES & KELLETT'S PATENT, No. 1940, *ante.*

1974. General increase in business due to patent.]—*Re* SAXBY'S PATENT, No. 1783, *ante.*

1975. Deduction of profits as manufacturer.]—*Re* GALLOWAY'S PATENT, No. 1709, *ante.*

1976. ——.]—*Re* BETT'S PATENT, No. 1777, *ante.*

1977. —— **Amount.**]—*Re* HILLS' PATENT, No. 1769, *ante.*

1978. —— ——.]—*Re* DUNCAN & WILSON'S PATENT, No. 1728, *ante.*

1979. —— **Mere preference of market.**]—*Re* GALLOWAY'S PATENT, No. 1709, *ante.*

1980. Invention cheapening manufacture.]—In 1920 the assignees of a patent granted in 1905 applied by originating summons under Patents & Designs Act, 1907 (c. 29), s. 18, as amended by Patents & Designs Act, 1919 (c. 80), s. 7 (3), for an extension of the term of the patent. The evidence in support of the application was to the effect that the invention consisted in a machine for cutting the pile of cotton velvets; that appcts. had acquired the patent in 1911, & prior to the war had expended a large sum of money on new buildings & machines; that owing to the war appcts. had not been able to use the said buildings & machines to their full capacity; & that in addition they had been unable to sell machines to customers abroad:—*Held:* where the effect of a patent is to reduce the cost of production, the profits of a manufacturer who is a monopolist in the use of the patent can be divided into (*a*) ordinary manufacturing profits & (*b*) profits arising from reduced cost of production, & it would be wrong to say that, because those profits are not segregated from each other, a loss was a loss solely as a manufacturer & not as a patentee; & such loss & also loss with reference to the manufacture of machines for sale abroad came within Patents & Designs Act, 1907 (c. 29), s. 18 (6). An extension of three & a half years was granted.—*Re* UNITED VELVET CUTTERS ASSOCN., LTD.'S APPLICATION (1920), 37 R. P. C. 261.

E. Assignees.

See Sub-sect. 3, C., *ante.*

F. Licencees.

1981. Exclusive licencees.]—*Re* SHONE'S PATENT, No. 1925, *ante.*

1982. Whether licencees' accounts essential.]—*Re* TROTMAN'S PATENT, No. 1935, *ante.*

1983. —— **Assignee of one-third part.**]—*Re* THOMAS' PATENTS & THOMAS & GILCHRIST'S PATENT (1892), 9 R. P. C. 367, P. C.

G. Practice.

See R. S. C., Ord. 53, r. 3 (*i*).

1984. Accounts unsatisfactory—Merits not considered.]—*Re* SAXBY'S PATENT, No. 1783, *ante.*

1985. —— ——.]—*Re* CLARK'S PATENT, No. 1937, *ante.*

—— ——.]—*See, generally,* Sub-sect. 7, A., *ante.*

1986. Accounts primâ facie satisfactory—Proof of merits before considering accounts.]—*Re* HOUGHTON'S PATENT, No. 1854, *ante.*

1987. Time for production.]—*Re* YATES & KELLETT'S PATENT, No. 1940, *ante.*

1988. Admission of oral evidence to supplement accounts — Deceased patentee having kept no accounts—Only small estate left.]—*Re* HEATH'S PATENT, No. 1678, *ante.*

1989. —— **Books lost during bankruptcy.**]—*Re* HUTCHISON'S PATENT, No. 1693, *ante.*

1990. ——.]—*Re* WUTERICH'S PATENT, No. 1946, *ante*.

1991. Adjournment for amendment of accounts.]—*Re* YATES & KELLETT'S PATENT, No. 1940, *ante*.

1992. ——.]—*Re* PEACH'S PATENT, *Ex p.* PEACH & BOSWELL, HATFIELD & CO., No. 1945, *ante*.

1993. Production & inspection before hearing.]—*Re* BRIDSON'S PATENT, No. 2039, *post*.

1994. Whether strict proof required.] — *Re* THOMPSON'S PATENT, No. 1881, *ante*.

SUB-SECT. 8.—PRACTICE.

A. In General.

See Patents & Designs Acts, 1907 (c. 29), s. 18 & 1919 (c. 80), s. 7 ; R. S. C., Ord. 53A, r. 3.

1995. Application for extension—Governed by R. S. C., Ord. 53A, r. 3.]—R. S. C., 1908, Ord. 53A, r. 3, forms in itself, taken in connection with the Rules of the Supreme Court which are made applicable, a code by which all questions of practice relating to petitions for the extension of patents are to be governed, & the subsequent rules of the order as to particulars in cases of petitions for revocation & actions for infringement are governed by different considerations.

R. S. C., 1908, Ord. 53A, r. 3 (*l*), gives the ct. considerable latitude as to what particulars of objections to a prolongation should be given, & the considerations which apply are those which apply to pleadings generally. But the objector should at the earliest stage possible give the petitioner particulars of what he relies on as preventing the patent from being novel or from having subject-matter, including a concise statement of what he knows as to any literature, specifications, & the like documents relied on.—*Re* JOHNSON'S PATENT, [1908] 2 Ch. 487 ; 77 L. J. Ch. 732 ; 99 L. T. 442.

1996. Whether failure to observe rules may be remedied—Necessity to observe statutory provisions.]—*Re* ADAM'S PATENT (1898), 16 R. P. C. 1, P. C.

1997. ——.]—*Re* PEACH'S PATENT, *Ex p.* PEACH & BOSWELL, HATFIELD & CO., No. 1945, *ante*.

1998. Petition prosecuted with effect—Brought to hearing before expiry of patent.]—(1) By 5 & 6 Will. 4, c. 83, s. 4, it is provided, "that no extension shall be granted if the application shall not be made & prosecuted with effect, before the expiration of the term originally granted in such letters patent" :—*Held :* the petition for such prolongation must be brought to a hearing before the expiration of the letters patent, & the pendency thereof is not sufficient to bring it within the proviso.

Where, therefore, petitioner had been prevented prosecuting his petition before the expiration of the letters patent, by the conduct of parties objecting, & from the circumstance of the Judicial Committee not being sitting, & the period for which such letters patent had been originally granted, had, in the mean time, expired, the Judicial Committee, feeling themselves bound by the terms of the Act of Parliament, dismissed the petition, though no laches, or neglect, could be imputed to petitioner.

(2) The rules enacted for practice, in patent cases, under 5 & 6 Will. 4, c. 83, must be observed in an application for a prolongation under Patents Act, 1839 (c. 67).—*Re* BODMER'S PATENT (1840), 2 Moo. P. C. C. 471 ; 12 E. R. 1085, P. C.

Annotation :—**Refd.** *Re* Kay's Patent (1839), 3 Moo. P. C. C. 24.

1999. —— ——.]—LEDSAM *v.* RUSSELL, No. 2566, *post*.

2000. Amendment—Of petition.]—*Re* REECE'S PATENT (1881), cited in Halsbury's Laws of England, Vol. XXII., p. 200.

2001. Application to enter caveat by Crown—Out of time.]—*Re* PETTIT SMITH'S PATENT, No. 1888, *ante*.

2002. Particulars of objections—Whether essential in case of Crown.]—*Re* CHURCH'S PATENTS, No. 1782, *ante*.

2003. —— **Sufficiency of.**]—It is sufficient, prior to tendering evidence of instances of anticipation, to state the grounds of objection to the extension of letters patent without stating all the particulars of those objections.—*Re* BALL'S PATENT (1879), 4 App. Cas. 171 ; 48 L. J. P. C. 24 ; 27 W. R. 477, P. C.

Annotation :—**Refd.** *Re* Livet's Patent (1892), 9 R. P. C. 327.

2004. —— **To be given at earliest moment.**]—*Re* JOHNSON'S PATENT, No. 1995, *ante*.

2005. Evidence — Admissibility of American specification.]—*Re* STEWART'S PATENT, No. 1780, *ante*.

Adjournment for amendment of accounts.]—*See* Sub-sect. 7, G., *ante*.

B. Advertisements.

See Patents & Designs Act, 1907 (c. 29), s. 18 (1) ; R. S. C., Ord. 53A, rr. 3 (*a*), (*b*), (*c*).

2006. Proved before case heard.]—*Re* PERKINS' PATENT, No. 1832, *ante*.

2007. Advertisements after petition — Whether allowed.]—*Re* LINDON'S PATENT (1897), 14 R. P. C. 643, P. C.

Annotation :—**Distd.** *Re* Frieze-Green's Patent, [1907] A. C. 460.

2008. —— ——.]—*Re* POYSER'S PATENT (1907), 24 R. P. C. 157, P. C.

2009. —— —— **No power to waive provisions of statute.**]—Under the Patents Act, 1883 (c. 57) the Board has no power to entertain a petition for extension where there has not been any advertisement as prescribed by sect. 25 (1). It has no power to dispense with the express provisions of a statute.—*Re* FRIEZE-GREEN'S PATENT, [1907] A. C. 460 ; 76 L. J. P. C. 105 ; 97 L. T. 223, P. C.

2010. In what journal advertised — Patentee resident abroad.]—*Re* DEROSNE'S PATENT, No. 1771, *ante*.

2011. What advertisements necessary—Amendment of summons.]—A. & G. applied by originating summons for an extension of the term of a patent granted to them in respect of an invention of "Shelf-supporting brackets." In the title of the summons the patent was stated to be "for an invention of self-supporting brackets." An extension was granted, & subsequently the error in the title of the summons was discovered. Appcts. then applied to the ct. for leave to put the matter in order by amending the summons. The application was refused, & it was intimated

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b. *Adjournment.*]—Where the term of a patent has been extended by an Act of Parliament passed subsequent to the presentation by the patentee of a petition under Patents & Designs Act, 1907 (c. 29), s. 18, the petition must be adjourned generally.—*Re* ALLIBON'S PATENT, [1920] 1 I. R. 83.—IR.

c. *Notice of hearing.*]—In case of extension the ct. will require notice of the hearing to be given to the A.-G.—*Re* ANDREWS & BEAVEN'S PATENT (1898), 18 N. Z. L. R. 526.—N.Z.

d. *Right of Registrar of Patents to appear.*]—*Re* MARCONI'S WIRELESS TELEGRAPH CO., LTD., [1920] N. Z. L. R. 188.—N.Z.

Sect. 2.—*Extension of term: Sub-sect.* 8, *B. & C.* (*a*)

that a fresh summons should be issued & advertised. On the second summons coming before the ct. on the application to fix a day, the order for an extension that had been made previously was repeated.—*Re* HOUGHTON'S (A. B. & G. G.) PATENT (1926), 43 R. P. C. 343.

2012. —— Not order granting extension.]—Where a petition is presented under Patents & Designs Act, 1907 (c. 29), s. 18, asking for an extension, the order granting the extension is not advertised as in the case of an amendment of a specification under Patents & Designs Act, 1907 (c. 29), s. 22, & R. S. C., Ord. 53A, r. 23 (*f*).—*Re* FERRANTI'S PATENT (1918), 88 L. J. Ch. 123; 119 L. T. 306; 34 T. L. R. 390; 62 Sol. Jo. 535.

C. Time for Proceedings.

(*a*) *In General.*

See Patents & Designs Act, 1907 (c. 27), s. 18 (1); & Patents & Designs Act, 1919 (c. 80), s. 7.

2013 Application for extension—General rule—Short time before six months prior to expiry—Not altered by Patents & Designs Act, 1919 (c. 80), s. 7.]—(1) The procedure by originating summons introduced by Patents & Designs Act, 1919 (c. 80), s. 7 (3), was merely substituted for or alternative to the former procedure by petition, & by reason of Patents & Designs Act, 1907 (c. 29), s. 92, as amended by Patents & Designs Act, 1919 (c. 80), s. 20, sched., the decision of the judge selected by the Lord Chancellor was final in every case with the exception mentioned in the schedule, namely, an order revoking or confirming the revocation of a patent.

D., who claimed to have suffered loss or damage by reason of hostilities, applied by originating summons under Patents & Designs Act, 1907 (c. 29), s. 18, as amended by Patents & Designs Act, 1919 (c. 80), s. 7, for the extension of the terms of eight several patents granted in the years 1911 to 1915 inclusive. The G. L. B. syndicate, Ltd., made a similar application in respect of three patents granted in the years 1912, 1915 & 1916 respectively:—*Held:* (2) the well settled practice as to applications for the extension of the terms of letters patent existing prior to Patents & Designs Act, 1919 (c. 80), namely, that the application had to be made very shortly before the six months prior to the expiration of the patent, had not been materially altered by Patents & Designs Act, 1919 (c. 80), s. 7; & accordingly, an application for prolongation under Patents & Designs Act, 1919 (c. 80), s. 7, must be made as a general rule quite a short time before the expiration of the patent; (3) the "loss or damage" through hostilities, mentioned in Patents & Designs Act, 1919 (c. 80), s. 7 (3), referred to loss or damage suffered during the whole term of the patent, & not merely to that which was suffered during a portion of that term; (4) in neither of the cases was there any special circumstance to justify a departure from the general rule.—*Re* DAVIDSON'S PATENTS, *Re* GASKIN'S PATENTS, [1921] 1 Ch. 69; 90 L. J. Ch. 214; 124 L. T. 300; 37 T. L. R. 57; 65 Sol. Jo. 74; 37 R. P. C. 252, C. A.

Annotations:—*As to* (2) **Distd.** *Re* Metropolitan Amalgamated Ry. Carriage & Wagon Co. & Greg's Patent (1920), 37 R. P. C. 266. **Consd.** *Re* Pugh's Patents (1921), 38 R. P. C. 150.

2014. —— Whether early application entertained—Difficulty of assessing profits made.]—*Re* MACINTOSH'S PATENT (1837), 1 Web. Pat. Cas. 739, n.

Annotation:—**Folld.** *Re* Allibon's Patent (1920), 37 R. P. C. 30.

2015. —— —— Necessity for special circumstances—Two years before expiry.]—In Oct. letters patent were granted for "improvements in railway coaches, tramcars, & the like, & in the manufacture of the same." On Mar. 23, 1920, the patentees applied by originating summons under Patents & Designs Act, 1907 (c. 29), s. 18, as amended by Patents & Designs Act, 1919 (c. 80), s. 7 (3), for an extension of the term of the patent. The evidence in support of the application was to the effect that the invention was a pioneer invention, that until Aug. 1914, appcts. had endeavoured to procure the introduction of the use of the invention, but that the outbreak of war had prevented them from carrying the matter further, & that, owing to the heavy expenditure necessary for the development of the invention, it would not be of advantage to appcts. to proceed with such development unless the term of the patent should be extended:—*Held:* the case was within Patents & Designs Act, 1907 (c. 29), s. 18 (6), the circumstances of the case were sufficiently special to justify the application being made two years before the expiration of the term of the patent, owing to the exceptional expenditure necessary to enable the advantages of the patent to be reaped, it was probable that such expenditure would have to be deferred until the extension of the patent or abandoned, & five years extension should be granted.—*Re* METROPOLITAN AMALGAMATED RAILWAY CARRIAGE & WAGON CO., LTD. & GREG'S PATENT (1920), 37 R. P. C 266.

2016. —— —— ——.]—*Re* DAVIDSON'S PATENTS, *Re* GASKIN'S PATENTS, No. 2013, *ante*.

2017. —— —— Effect of statute extending duration.]—Where after an application for prolongation of a patent had been launched & the advertisements required before the petition had been issued, but a new Act for extending the duration of patents for two years was passed a few days before the petition was filed, thereby rendering the petition premature in the ordinary course:—*Held:* even though the expenses of advertising would be thrown away, the petition must stand over generally with liberty to apply to restore later on.—*Re* SMITH'S PATENTS (1920), 90 L. J. Ch. 110; 123 L. T. 568; 37 R. P. C. 32; 36 T. L. R. 321.

2018. ——— Extension of time by Comptroller—Patents, Designs & Trade Marks (Temporary) Rules, 1914, r. 3.]—By virtue of Patents, Designs & Trade Marks (Temporary) Rules, 1914, r. 3, the Comptroller has power to extend the time which is limited by Patents & Designs Act, 1907 (c. 29), s. 18 (1), for presenting a petition for the prolongation of a patent.—*Re* WOODALL & DUCKHAM'S PATENTS (1917), 87 L. J. Ch. 67; 117 L. T. 216; 61 Sol. Jo. 479; 34 R. P. C. 228.

2019. —— Petition presented more than one week after last advertisement—Service of notice of motion to admit on person filing caveat.]—*Re* HUTCHISON'S PATENT, No. 1693, *ante*.

2020. Notice of opposition.]—*Re* ARGYLLS, LTD., PERROT & RUBURY'S PATENT, No. 1928, *ante*.

(*b*) *Application for Extension after Expiry.*

See Patents & Designs Act, 1919 (c. 80), s. 7 (1).

2021. Discretion of court.]—On Dec. 29, 1902,

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2021 i. *Discretion of court.*]—The time within which an application for an extension may be made, may, before the expiration of the patent, be extended to a time subsequent to such expiration.—*Re* ROBINSON'S PATENT (1918), 25 C. L. R. 116.—**AUS.**

a patent was granted for " improvements in hopper barges & dredgers " ; & on Feb. 24, 1920, the patentee applied by originating summons under Patents & Designs Act, 1907 (c. 29), s. 18, as amended by Patents & Designs Act, 1919 (c. 80), s. 7 (3), asking that, if necessary, the period within which application might be made for the extension of the term of the patent, or for the grant of a new patent in respect thereof, might be extended, & that the term of the patent might be extended, or that an order might be made granting to the patentee a new patent for such a term as might be specified therein. The patentee stated in an affidavit that he, with his family, owned about 80 per cent. of the capital in a co. which the patentee had never licenced under the patent, but which he had permitted to manufacture under the patent. Up to the outbreak of the war the co. had built, on an average, about one vessel a year embodying the patent, & in the ordinary course of business had completed one such vessel in 1914, & another, by special permission of the Ministry, in 1915, the co. having become a controlled establishment. At the hearing of the summons, the Comptroller contended that an application at so long a time as three years after the expiration of the patent could not be allowed, & that it had not been shown that the co. could have built a vessel a year, or that there had been any loss to the patentee as such :—*Held :* the patentee was claiming in respect of a loss sustained by him, not as patentee, but as one of the shareholders in the co., & a loss sustained because the co., in common with other ship building cos., had been precluded from building a ship, not because the co. had been precluded from building a ship with certain patent rights attaching to it ; without deciding that it was impossible to grant an extension of a patent under the legislation in question when the patent had expired three years before the application, it would have to be a very special case for such an extension to be made ; the case before the ct. was not a special case of that kind, & it would not be right to extend the patent for one year, or possibly eighteen months, which would be the utmost to which the patentee could be entitled.—*Re* BROWN'S PATENT (1920), 37 R. P. C. 142.

Annotations :—**Refd.** *Re* Pierpont & Duncan's Patent & Boult's Patent (1921), 38 R. P. C. 355 ; *Re* Poulsen's Patent (No. 2) (1921), 38 R. P. C. 105.

2022. Exercise of discretion—Petition presented before expiry of patent.]—LEDSAM *v.* RUSSELL, No. 2566, *post.*

2023. —— Two years after expiry—Application impossible before.]—In 1904, letters patent for " improvements in & connected with electric capstans " were granted to D. & letters patent for " improvements in & connected with capstans " were granted to B. D. & B. had pooled their interests in the patents. The patents expired in 1918. In 1920 D. & B. made a joint application by originating summons under Patents & Designs Act, 1907 (c. 29), s. 18 (6), amended by Patents & Designs Act, 1919 (c. 80), for extension of the terms of the patents & adduced evidence that prior to the war there had been a growing demand for capstans manufactured under the patents ; that from 1905 till Mar. 1915, one hundred & eighty-three capstans had been manufactured ; that from Mar. 1915, till Mar. 1917, eight capstans had been manufactured ; that from Mar. 1917, till Mar. 1918, no capstans had been manufactured ; & that capstans were again in course of manufacture :—*Held :* an extension of four years should be granted. [illegible] & BAXTER'S PATENT (1920), 38 R. P. C. 23.

2024. —— Special case must be made out.]—*Re* BROWN'S PATENT, No. 2021, *ante.*

2025. —— ——.]—*Re* POULSEN'S PATENT (No. 2), *Re* HAGE'S APPLICATION, No. 2059, *post.*

2026. —— ——.]—The M. L. corpn. was the registered proprietor of two patents which had expired respectively in Oct. 1917, & Dec. 1917. In 1920 it applied by originating summons for an extension of the patents. The application was opposed by S. on the ground (*inter alia*) that he had used the patented inventions, & incurred expense in connection therewith, on the footing that the patents were dead. Owing to the M. L. corpn. having been engaged on the manufacture of munitions throughout the war, & having been controlled from 1915 onwards, manufacture of the patented article had been practically suspended, & the corpn. had been largely unable to meet the demand for the patented article. The reasons advanced for delay in making the application were that, when the patents expired in 1917, there seemed little prospect of a speedy cessation of hostilities ; that, apart from the fact that appcts.' establishment was controlled, it was impossible to obtain materials for work other than such as was authorised by Govt. ; that owing to the pressure of Govt. work it was impossible to devote the time necessary to preparing a case by petition ; but that as soon as the provisions of the Patents & Designs Act, 1919 (c. 80), had come into force appcts. had considered their position with the result that this application had been instituted :—*Held :* in a case where a patent had expired for over two years a special case was necessary to the grant of an extension ; in view of that, & that appcts. had, since the patents had expired, been able to sell the patented article very much as if the patents had been still in existence, & also that an extension might prejudice the opponents, an extension ought not to be granted.—*Re* PIERPONT & DUNCAN'S PATENT & BOULT'S PATENT (1921), 38 R. P. C. 355.

2027. —— Decision not to apply at right time.]—In Jan. 1905, letters patent were granted to P. for an invention relating to " improvements in navigable vessels." In 1906 the patent was assigned to M. S. C., Ltd., P. receiving three thousand shares in the co. In Jan. 1919, the patent expired. The invention, in substance, consisted in constructing vessels situated on or below the water line. In a petition for extension of the patent, presented in 1920 by the patentee & his assignees, petitioners claimed that the use of this principle imparted to the vessel greater strength, less dead weight, reduced vibration, steadier sea going qualities, increased cargo capacity, & resulted in a considerable saving of cost in construction & working ; & alleged that the invention had not been extensively used owing to the principle of the invention being contrary to accepted scientific thought, & the consequent disinclination on the part of shipbuilders to adopt it, & also owing to Govt. restrictions as to shipbuilding during the war. That nine ships had been built up to 1914, & one in 1917, one in 1918, & one in 1921, & that two ships were being built. Patents had been taken out in a number of foreign countries, but with the exception of the United States patent, they had all lapsed or expired. The M. S. C., Ltd., had, prior to the expiration of the patent, been advised that, in order to obtain an extension, it would be necessary to give the inventor an increased interest in the invention, & in consequence of that & of conflicting advice as to whether the merit of the invention was sufficient to support a successful

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petition, no application had been made at that time. P. had since acquired an increased interest in the patent. In 1920 leave was given to present the petition without prejudice to the objection that it was out of time, the motion for leave being ordered to be dealt with at the hearing of the petition:—*Held:* petitioners having decided not to apply for an extension at the right time, the jurisdiction to extend the period under the proviso to Sub-sect. 1, of Sect. 18 of Patents & Designs Acts, 1907–1919, ought not to be exercised so far as the application was made under the old jurisdiction; so far as the application was based on sub-sect. 6, the result of the war had been to cause loss to the patentee; & substantially four & a half years of the useful life of the patent had been lost, & an extension of four & a half years from the expiration of the patent should be granted on terms as to infringement proceedings & licences.—*Re* PETERSEN'S PATENT (1921), 38 R. P. C. 267.

Annotation:—**Reid.** *Re* Hunt's Patents (1922), 39 R. P. C. 131.

D. Accounts.

See Sub-sect. 7, G., *ante*.

E. Appeal.

2028. No appeal from originating summons.]—*Re* DAVIDSON'S PATENTS, *Re* GASKIN'S PATENTS, No. 2013, *ante*.

F. Loss due to Hostilities.

Form of application—Originating summons.]—*See* Patents & Designs Acts, 1907 (c. 29), s. 18, & 1919 (c. 80), s. 7 (3); R. S. C., Ord. 53A, r. 4.

2029. —— —— Petition in involved case.]—*Re* POULSEN'S PATENT (No. 2), *Re* HAGE'S APPLICATION, No. 2059, *post*.

2030. Particulars—By Comptroller—Objection intended to be insisted on.]—*Re* HADDAN'S PATENTS (1923), 41 R. P. C. 166.

2031. Onus of proof.]—D. & B., who were the registered proprietors of a patent granted in 1906 to R. in respect of an invention of "Improvement in means for conveying cotton from a bale breaker or the like to the mixing rooms of a mill" applied by originating summons for an extension of the patent. It appeared from the evidence that the nature of the patented apparatus was such as to necessitate it being sold, in the first instance, at approximately cost price in order to secure its introduction into general use, & that up to 1914 no real profits were made; that in Aug. 1914, appcts. had commenced manufacturing munitions of war & that in Sept. 1915 they had become a controlled establishment; that owing to their being controlled & the high cost of labour & materials & the disturbed state of the trade it had not been possible to develop the patented invention; that in Nov. 1919 appcts. had become decontrolled, & that in 1919, 1920, & 1921 they had sold a large number of the patented apparatus at a very large profit:—*Held:* it lay upon appcts. to show affirmatively that they had suffered loss or damage; the abnormal profits made since the end of the war, which to a very large extent were the result of the war, had more than counterbalanced the loss sustained as the result of the war, & an extension of the patent should not be granted.—*Re* RUSHTON'S PATENT (1922), 40 R. P. C. 30.

Application after extension.]—*See* No. 2

G. Costs.

(a) Petitioner Successful.

See R. S. C., Ord. 53A, r. 3 (*u*).

2032. No ground for opposition.]—*Re* DOWNTON'S PATENT (1839), 1 Web. Pat. Cas. 565, P. C.

2033. Difficult & doubtful case.]—*Re* CHURCH'S PATENTS, No. 1782, *ante*.

2034. Opposition withdrawn.]—M. co. & H. co. applied by originating summons for an extension of the term of a patent granted to M. in 1909. Evidence of loss due to hostilities was given. Notice of opposition had been given but was subsequently withdrawn. Owing to delays arising out of the opposition the summons was not heard until the patent had expired for over a year. In view of that circumstance an extension of four years from the date of the expiration of the patent was granted. The opponents were ordered to pay the costs of the application so far as they had been increased by the opposition.—*Re* MARTINEAU'S PATENT 1926), 44 R. P. C. 205.

2035. ——.]—*Re* DRESSLER'S PATENT (1926), 44 R. P. C. 203.

2036. Measure of assistance from opposition.]—*Re* DICKER'S PATENT (NO. 2), *Re* DERRIMAN'S PATENT, *Re* MARTIN'S PATENT, No. 1931, *ante*.

2037. Petitioner partially successful—Period of extension reduced.]—J. applied by originating summons for an extension of the terms of two patents, the second being a patent of addition for a period of five years. The application was opposed by L. co. The patents related to improvements in the manufacture of axles, & had been worked only by L. co., who had installed apparatus for that purpose at their works at C. Prior to the war the major part of the manufacture of axles carried out by L. co. had taken place at their works at P. During the war the P. works had been enlarged to meet the govt.'s demand for steel, & in consequence thereof the manufacture of axles had been wholly transferred to C. It was contended by L. co. that the decrease in royalties during the war had been due to lack of orders, & that such decrease had been balanced by a corresponding increase after the war; that the transfer of the manufacture of axles to C. had resulted in a benefit, due to the war, to J., since apparatus for working the patents had not been installed at P.; & that in any case the period of extension asked for was too long:—*Held:* (1) appct. had suffered a loss which would be fairly compensated by the grant of an extension of two years; & (2) the result of the opposition having been to substantially reduce the period of extension asked for, appct. should not be awarded costs.—*Re* JOHNSTON'S PATENTS (1927), 44 R. P. C. 254.

(b) Petition Abandoned.

2038. Discretion of court.]—(1) The Judicial Committee will exercise a discretion as to the allowance of an opposer's costs upon an abandoned petition for extension of letters patent.

(2) A gross sum allowed for costs of opposers, instead of referring their costs to taxation.

(3) An affidavit of merits by petitioner upon the question of costs, rejected, as no copy had been served upon the opposers.—*Re* MILNER'S PATENT (1854), 9 Moo. P. C. C. 39; 14 E. R. 212, P. C.

2039. Costs given to all opposers.]—(1) Application, under Evidence Act, 1851 (c. 99), s. 6, by parties who opposed an extension of letters patent, for production & inspection of petitioners' accounts

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e. *No appeal from Lord Ordinary.*] —There is no appeal from the decision of the Lord Ordinary on a petition brought in Scotland for an extension of the term of a patent.—*Re* LAWRENCE & KENNEDY'S PATENT (1910), 27 R. P. C. 252.—**SCOT.**

previous to the hearing of the petition refused, with costs.

(2) Costs given to all the opposers upon petitioners abandoning petition before hearing.

(3) Where the petition is abandoned, it is not necessary that the opposers should serve petitioners with notice of their intended application to the ct. for costs of opposition.—*Re* BRIDSON'S PATENT (1852), 7 Moo. P. C. C. 499; 13 E. R. 973, P. C.

2040. ——.]—On a petition for prolongation of letters patent, a day was fixed for hearing. Objections were lodged against an extension. Before the hearing petitioners abandoned the prosecution of the petition. In such circumstances, costs of opposition allowed to opposer.—*Re* HORNBY'S PATENT (1853), 7 Moo. P. C. C. 503; 13 E. R. 974; *sub nom. Re* HORNBY'S PATENT, *Ex p.* ASHTON, 1 C. L. R. 519, P. C.

2041. ——.]—*Re* BROWN'S PATENTS (1886), 3 R. P. C. 212, P. C.

2042. —— Gross sum allowed.]—*Re* MILNER'S PATENT, No. 2038, *ante*.

2043. —— One set of costs between opponents.]—*Re* IMRAY'S PATENT (1908), 26 R. P. C. 11.

2044. —— —— Leave to withdraw.]—*Re* STEARN'S PATENTS (1911), 28 R. P. C. 696.

2045. —— Leave to withdraw refused.]—*Re* LILLIEHÖÖK'S PATENT (1920), 37 R. P. C. 36.

2046. Service on opposers of notice of application for costs.]—*Re* BRIDSON'S PATENT, No. 2039, *ante*.

(*c*) *Successful Opposition.*

See R. S. C., Ord. 53A, rr. 3 (*u*), (*v*), (*w*).

2047. Successful opposer usually given costs—To encourage opposition.] — *Re* HONIBALL'S PATENT, No. 1776, *ante*.

2048. —— ——.]—*Re* WIELD'S PATENT, No. 1938, *ante*.

2049. Gross sum for costs of all opposers.]—Where there were two opponents to an application for a prolongation of a patent upon substantially the same grounds of objection, the Judicial Committee, upon a successful opposition, allowed a gross sum for the costs of both parties.—*Re* JONES' PATENT (1854), 9 Moo. P. C. C. 41; 14 E. R. 213, P. C.

2050. —— To avoid expense of taxation.]—*Re* HILLS' PATENT, No. 1769, *ante*.

2051. —— To be divided pro rata.]—*Re* JOHNSON'S PATENT, No. 1995, *ante*.

2052. —— Others than Comptroller.]—In 1904, a patent was granted for "Improvements in instruments for detecting & measuring alternating electric currents." One of the claims was for "A vacuous vessel having in it two conductors adjacent to but not touching each other, one of them being heated, these conductors being connected by a circuit outside the vessel, such circuit being exposed to some influence tending to produce an alternating current in it & which contains a galvanometer or other instrument for detecting a continuous current substantially as described." A petition for the extension of the term of the patent was presented by the patentee & the owners of the patent. Petitioners alleged that the invention, the subject of the patent, & commonly known as the "F. valve" enabled the signals of wireless telegraphy to be received with certainty at distances much greater than had been possible with any previously known detector & that it was, & had been for some years, used all over the world for long distance signalling. They also alleged that the detectors previously in use were satisfactory for short distance work, & were cheaper & less fragile than the patentee's invention, & that, accordingly, until long distance stations had come into use, there had not been any market for the invention. The customers of the owners of the patent had been practically confined by legislation to a co. working under licences from the owners, & to various Govt. departments, which, until the outbreak of war, had made little use of high power wireless stations. It was alleged by some of the opponents of the petition that (*inter alia*) the alleged invention was wanting in subject-matter & utility, & by them & other opponents that petitioners had been adequately remunerated. At the hearing it was admitted by petitioners that they had made a profit of about £8,500, on the sale of the valves, & it was proved that petitioners had received a sum of over £13,000 on the shares received on the sale of foreign patent rights to subsidiary cos., that they had a large share of pending claims against British Govt. departments, & that they had been monopolist users of the invention, with one exception, & had had, during the whole term of the patent, opportunity for fully exploiting the invention:—*Held:* without deciding as to subject-matter, the invention was of unusual utility, but the remuneration of petitioners had not been inadequate. Petition was dismissed, with one set of costs among the opponents, other than the Comptroller.—*Re* FLEMING'S PATENT (1919), 36 R. P. C. 55; 35 T. L. R. 179.

2053. Discretion to give no costs.] — *Re* STEWART'S PATENT, No. 1780, *ante*.

2054. ——.]—*Re* LYON'S PATENT, No. 1921, *ante*.

(*d*) *On Originating Summons.*

See R. S. C., Ord. 53A, r. 4 (*j*), (*k*), (*l*).

2055. Comptroller's costs—Same practice as on petition.]—*Re* WINGQUIST'S PATENT, No. 2057, *post*.

SUB-SECT. 9.—LOSS DUE TO HOSTILITIES.

A. In General.

See Patents & Designs Acts, 1907 (c. 29), s. 18; 1919 (c. 80), s. 7 (3).

2056. Extension in nature of substitution for part of original term—Effect of failure to manufacture.]—By Patents & Designs Act, 1919 (c. 80), s. 7 (3), it was provided that at the end of sect. 18 of Patents & Designs Act, 1907 (c. 29), the following sub-sect. should be added: "(6) Where by reason of hostilities between His Majesty & any foreign state, the patentee as such has suffered loss or damage . . . an application under this sect. may be made by originating summons . . . & the ct. in considering its decision may have regard solely to the loss or damage so suffered by the patentee. . . ."

On an application for an extension of a patent under this provision, in which it was shown that loss or damage had been suffered by the patentee by reason of hostilities, it appeared that the patented article had never been manufactured in the United Kingdom, but that as a matter of ordinary business success any attempt to manufacture in the United Kingdom would have been foredoomed to failure:—*Held:* although on an application for an extension under Patents & Designs Act, 1907 (c. 29), s. 18, as unamended the failure to manufacture would have been a grave objection to granting an extension, it was far less material in an application seeking an extension under the new sub-sect. when the extension was in the nature of a substitution for part of the original term of the patent which had been rendered valueless by reason of hostilities; &

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accordingly, for this reason & having regard to the satisfactory explanation given by appcts. of their failure to manufacture in the United Kingdom, an extension ought to be granted.—*Re* SOCIÉTÉ CHIMIQUE DES USINES DU RHÔNE'S PATENT, [1922] 1 Ch. 258; 91 L. J. Ch. 348; 126 L. T. 657; 66 Sol. Jo. 217; 39 R. P. C. 27.

Annotation:—**Refd.** *Re* Faries' Patent, *Re* Schweinert & Kraft's Patent (1926), 43 R. P. C. 349.

As to default of patentee.]—*See* Sub-sect. 5, G. (*b*) ii., *ante*.

2057. Abnormal profits since war—May counterbalance loss due to war.]—In 1907 letters patent were granted to W., & in 1911 were assigned to a foreign co., subject to a sole & exclusive licence granted in 1910 to a British co. In 1922 the patent was assigned by the foreign co. to the British co. subject to & with the benefit of the sole & exclusive licence. The foreign co. held practically all the share capital of the British co. The invention, the subject of the patent, was specially applicable to a particular purpose, but was also applicable to general purposes. The British co. alleged that, by reason of the war & govt. control, the special application of the invention could not properly be developed & that they had suffered loss. During the war there was a greatly increased demand for the article to which the patent related for general purposes. This demand was partly met by the British co. by obtaining supplies from the foreign co., but owing to the rate of exchange the British co. suffered heavy loss. During the war the foreign co. made large profits. The British & foreign cos. joined in an application by originating summons for an extension of the patent on the ground of loss due to hostilities. The application was opposed. At the hearing appcts. were unable to prove definitely the date at which the British co. became a controlled establishment:—*Held:* (1) the foreign co. being on the register as the patentees during the period of the war, the position of the British co. as sole & exclusive licencee did not constitute them the patentees within Patents & Designs Acts, 1907–1919, s. 18 (6); (2) a slight retardation had taken place in the percentage of sales by the British co. of the patented article for its special purpose as compared with total sales, but that was outweighed by the increase in the total sales & in the sales for the particular purpose resulting from the war; (3) if the British co. alone were to be considered, very large losses exceeding the profits had been incurred by the co., & the foreign co. as patentee had made a large extra profit in consequence of the hostilities; (4) in the circumstances, the date from which govt. control was exercised was inmaterial, but it was for appcts. to establish such date if necessary for their case.

(5) In the absence of special circumstances the same practice as regards the costs of the Comptroller-General should be followed as is provided for under R. S. C., Ord. 53A, r. 3 (*w*), in the case of petitions.—*Re* WINGQUIST'S PATENT (1923), 40 R. P. C. 261.

Reason for shortening period of extension.]—*See* Sub-sect. 9, E., *post*.

No jurisdiction to entertain application after patent once extended.]—*See* Sub-sect. 11, *post*.

2058. Petition on insufficient grounds under Patents & Designs Act, 1907 (c. 29)—Regarded as proceeding under Patents & Designs Act, 1919 (c. 80), in respect of war losses.]—*Re* HUNT'S PATENTS, No. 1842, *ante*.

2059. Position of firm coming into existence during period of hostilities.]—In July, 1920, an application was made by originating summons for the extension of a patent which had expired in July, 1917. Appcts. were H., the registered legal owner at the date of the expiration of the patent, a syndicate entitled to the beneficial interest in the patent at the date of the application, & a co. which had succeeded the said syndicate in the beneficial interest. The application was opposed by the Crown upon the grounds (*inter alia*) that the patent had expired nearly three years previously to the application; that since the patent had expired the invention had been used & developed by govt. departments & others on the footing that the patent had expired; & that the facts of the case were not such as to bring it within sub-sect. 6, added to Patents & Designs Act, 1907, c. 29, s. 18, by Patents & Designs Act, 1919 (c. 80). The application was also opposed by C. F. Elwell & The Radio Communication Co., Ltd. Evidence was given in support of the application to show that, owing to Treasury restrictions, appcts. had not been able to obtain the capital necessary to exploit the patent, & that user of the invention was restricted owing to the war:—*Held:* (1) especially in view of the exceptional case that an appct. must make out to obtain the extension of the term of a patent that has expired for three years, the evidence did not establish a *primâ facie* case for an extension. (2) *Semble:* sub-sect. 6 is primarily aimed at compensating persons whose existing business or position has been interfered with by reason of the outbreak of hostilities, & a co. that had come into existence during hostilities would only with difficulty bring itself within the sub-sect.; (3) appct. H. having sold the patent to appct. co., his former position was merged in that of a shareholder, & he could only be compensated in that capacity by reason of an extension being granted to the co. The application was dismissed & appcts. were ordered to pay the costs of the opponents E. & the R. C. Co. (4) Applications under sub-sect. 6 could be made by petition instead of by originating summons, & in an elaborate & involved case it was desirable that the application should be made by petition.—*Re* POULSEN'S PATENT (No. 2), *Re* HAGE'S APPLICATION (1921), 38 R. P. C. 105.

Annotation:—*As to* (4) **Refd.** *Re* Hunt's Patents (1922), 39 R. P. C. 131.

2060. Failure to bring patent into general use.]—J. & T. were the grantees of two patents in 1906. The patentees agreed to assign the patents to a co., which co. subsequently assigned its interest in the patents to the P. co., which became the beneficial owner of the patents. No assignment was ever executed. In 1909 J. died. In 1922 T. & the P. co. applied by originating summons for an extension of the patents. The first patent had never come into general use, but with regard to the second patent there had been a considerable loss due to conditions caused by hostilities:—*Held:* there not having been any business in the material covered by the first patent to be interfered with, an extension should not be granted, but an extension of four years & three months was granted with regard to the second patent.—*Re* JOHNSON & TITLEY'S PATENTS (1922), 39 R. P. C. 419.

2061. Loss or damage—Loss during whole term of patent—Patents & Designs Act, 1919 (c. 80), s. 7 (3).]—*Re* DAVIDSON'S PATENTS, *Re* GASKIN'S PATENTS, No. 2013, *ante*.

2062. —— Loss of opportunity.]—*Re* COSSAR'S PATENT, No. 1930, *ante*.

2063. ——.]—*Re* DRESSLER'S PATENT, No. 2035, *ante*.

2064. —— **Development delayed.**] — *Re* DICKER'S PATENT (No. 2), *Re* DERRIMAN'S PATENT, *Re* MARTIN'S PATENT, No. 1931, *ante*.

2065. Loss of foreign profits.]—*Re* UNITED VELVET CUTTERS ASSOCN. LTD.'S APPLICATION, No. 1980, *ante*.

B. Personal Services.

2066. Military service—Of patentee.]—B. & T. were the grantees of a patent granted in respect of an invention of "Improvements in cinematograph pictures" in which the basic purpose was the embodiment in a portable form of a cinematograph machine that could be used in the home free from technical difficulties of operation & in which pictures were taken by the ordinary strip film & reproduced through a microscope in a spiral series on a flat disc. At the time of the grant of the patent both patentees were without capital & T. was bkpt. In order to exploit the patented invention the patentees entered into an agreement with U. whereby U. was to buy the patent, & also to pay a royalty & to employ T. in connection with developing the patented invention. B. & T. remained the registered legal owners of the patent. A considerable amount of experimental work was found to be necessary to make the patented invention capable of commercial exploitation, & experiments with that object were carried on until Aug. 1914.

It was impossible to carry on the experiments during the period of the war owing to the fact that U. & his staff were engaged either with His Majesty's Forces or on work of national importance. The experiments were resumed in 1919, & in 1922 the patentees were in a position to exploit the patented invention commercially. In Oct. 1921, T. obtained his discharge from bkpcy. & by an agreement made in July, 1922, the grantees regained the beneficial interest in the patent, U. being given an interest in the patent in return for financial assistance. On an application by originating summons for an extension of the term of the patent:—*Held:* B. & T. had suffered loss *quâ* patentees, including loss of opportunity of developing the patented invention & an extension of five years should be granted.—*Re* BROWN & BROWN'S PATENT (1923), 40 R. P. C. 95.

2067. ——.]—*Re* CLAUDE'S PATENTS (1926), 44 R. P. C. 17.

2068. —— **Of applicant.**]—*Re* AYRE & BALLARD'S PATENT (1924), 42 R. P. C. 178.

2069. —— **Of applicant's son.**]—B. was the grantee of a patent granted in 1906 in respect of an invention of "Improvements relating to calendars." The profits made with respect to the patent showed a consistent increase until 1914. During hostilities the profits decreased, & owing to the control of paper during 1917 & 1918 the business was almost at a standstill. Thereafter the profits again increased. The patentee was also hampered by the absence of his son on military service. After the termination of hostilities the patentee formed a private liability co., in which he held nearly all the shares, to organise & carry on his business, including the patent. Subsequently the patent was assigned to the co. B. & the co. applied by originating summons for an extension of the patent. Extension of three years was granted.—*Re* BENNET'S PATENT (1922), 39 R. P. C. 447.

2070. —— **Of directors & staff of licencees.**]—F. was the grantee of three patents, granted in respect of inventions of improvements in internal combustion engines. Two of the patents were granted in 1909, & the third in 1913. The inventions related to a new type of opposed piston engines suitable for operation in either gas or liquid fuel & for land, marine or aeronautical purposes. The invention the subject of the 1913 patent was of an improvement on the inventions the subject of the 1909 patents. F. granted an exclusive licence, including the power of granting sub-licences, for the whole of the unexpired term of the patents and any extension thereof for all land & aeronautical purposes to E., Ltd., & subsequently assigned the patents, subject to the said licence to S., Ltd. S., Ltd., who were the registered owners of the patents, applied by originating summons for an extension of the patents. The exor. of F., who was deceased, was a consenting party to the application. S., Ltd. & E., Ltd., who had the same chairman, directors & staff, had jointly endeavoured to develop the inventions, their policy being to do so by the grant of licences. Under the licences some engines had been completed for experimental purposes, & others were still under construction, the completion having been very greatly delayed owing to war conditions. Detailed evidence was given as to the difficulties encountered. One engine built for commercial purposes completed its trials in 1920, & was actually in commercial use. The engines were very costly to construct. S., Ltd., & E., Ltd., had together expended £33,432 in developing the patented inventions & had received £25,894; C., Ltd., licencees, had expended £149,000 & had received £13,833; E. E., Ltd., licencees, had expended £23,994, & had had no receipts. The operations of S., Ltd., & E., Ltd., had been further hampered by the absence of directors & staff, either with the Army or on work of national importance:—*Held:* appcts. had suffered loss by reason of hostilities, & having regard to the very great cost of developing the patents & constructing the engines, & to the fact that there could not be any real profit to the patentees before the normal expiry of the 1909 patents, an extension of five years should be granted with regard to these patents; but no order should be made at present with regard to the 1913 patent.—*Re* FULLAGAR'S PATENTS (1922), 39 R. P. C. 421.

2071. Applicant made prisoner of war.]—W. was the grantee of two patents, the second being a patent of addition, the main use of the patented inventions being to render possible the construction of electrolytic cells for the manufacture of caustic soda. W. was also the grantee of an earlier patent granted in 1902 relating to the manufacture of caustic soda by electrolytic methods, & he had granted an exclusive licence under that patent to M. M. continued the manufacture by chemical methods & declined to work W.'s 1902 patent. W. feeling himself to be under personal obligations to M., decided to postpone the exploitation of the patents until the expiration of the 1902 patent in 1916, & in the meantime proceeded to work the patented inventions in Germany. On the outbreak of hostilities the German authorities, believing W. to be a Russian subject, made him a prisoner of war, & he was unable to return to England until 1919. W. applied by originating summons for an extension of the terms of the patents. Both patents were extended for three years.—*Re* WILDERMAN'S PATENT (1924), 42 R. P. C. 42.

2072. Employment on munitions.]—A patent in respect of an invention of "Apparatus for crushing, dividing or disintegrating ores & other substances" was granted in 1907 to H., who was

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domiciled in America. H. formed the H. co. incorporated in America for the purpose of exploiting the invention, & in 1913 decided that the business of supplying the British & European markets should be conducted from England, & with that object appointed F. to be London manager. The patented articles were manufactured by authorised agents, the co. obtaining orders from customers. In Aug. 1914, F. joined the Army, he was made a prisoner of war & was released in Dec. 1919. B., who was left in charge of the London office, joined the Army on attaining military age in 1916, when F.'s mother took charge of the London office. On the outbreak of war between the United States & Germany, H.'s son, who had been responsible for the European business through F., joined the American Army & was on service from 1917 to 1919, & H. was engaged almost entirely on munition work until the end of the war. The English manufacturers were engaged in the manufacture of munitions, & very few of the patented articles were made during the war, nor could any be supplied from America. H. applied by originating summons for an extension of the term of the patent. An extension of four & a quarter years was granted.—*Re* HARDINGE'S PATENT (1922), 40 R. P. C. 92.

2073. ——.]—The grantee of a patent granted in 1906 in respect of improvements in tyres, having been unable to interest British firms in the patent, assigned it, in 1913, to M. in consideration of a royalty payment. In 1915, in consequence of disputes between the patentee & M., the patent was reassigned. The patentee was engaged on munition work, & in consequence thereof was unable to interest himself in the patent until 1917, when he endeavoured to interest various firms in it; he was unsuccessful in that until 1921, when he assigned a share of the patent to C. in consideration of C. affording financial support to the exploitation of the patent in the event of an extension being granted. In 1922 the patentee applied by originating summons for an extension of the patent:—*Held:* the period of loss to the patentee due to hostilities was not equivalent to the whole period of the war, & an extension of three & a half years was granted.—*Re* COLEMAN'S PATENT (1922), 39 R. P. C. 389.

2074. ——.]—*Re* HADWIN'S PATENT (1923), 40 R. P. C. 457.

2075. ——.]—*Re* MOYES & STEVENSON'S PATENTS (1925), 43 R. P. C. 183.

2076. Absence of directors & staff—On work of national importance.]—*Re* FULLAGAR'S PATENTS, No. 2070, *ante*.

2077. —— ——.] — *Re* BROWN & BROWN'S PATENT, No. 2066, *ante*.

C. Works becoming Controlled Establishment.

See Patents & Designs Acts, 1907 (c. 29), s. 18; 1919 (c. 80), s. 7 (3).

2078. Ground for extension.] — On Oct. 1905, letters patent were granted to H. who held the patent in trust for H. H., Ltd. In 1908 H. died, having bequeathed his estate to A. In Oct. 1919, the patent expired. In 1920 H. assigned to H. H., Ltd., the sale & exclusive right to, & benefit of, all extensions of the patent. In Jan. 1921, H. H., Ltd. & A. applied by originating summons for an extension of the patent. From Nov. 1914 until the Armistice H. H., Ltd., had been engaged on work of national importance & had been controlled by the Ministry of Munitions, & in consequence had been unable to work the patent fully during the war, & in the year 1918–19 the sales of the patented article had been almost negligible.

An extension of three years was granted on terms in the form substantially of those prescribed in Patent Rules, 1920, r. 62 (1) in the case of restoration of lapsed patent of the Comptroller-General.—*Re* HOPE'S PATENT (1920), 38 R. P. C. 152.

Annotation:—**Refd.** *Re* Petersen's Patent (1921), 38 R. P. C. 267.

2079. ——.]—In 1920 the grantees of letters patent granted in 1907 for improvements in connection with the spindles of spinning machinery applied by originating summons under Patents & Designs Act, 1907 (c. 29), s. 18, as amended by Patents & Designs Act, 1919 (c. 80), s. 7 (3), for extension of the term of the patent, & applied by a similar summons for the extension of the terms of two patents granted to them in 1911 & 1912 respectively for improvements in carburetters for internal combustion engines. Appcts. alleged that they had manufactured, & had established a substantial trade, under the patents, but that on the outbreak of war their factory had become much occupied in the manufacture of munitions of war, & later their firm had become a controlled firm, & the sales of the articles made under the patents had become very small:—*Held:* the patent of 1907 was a proved patent; its term was extended for four years; but the application as to the patents of 1911 & 1912 was ordered to stand over, with liberty to restore.—*Re* PUGH'S PATENTS (1921), 38 R. P. C. 150.

2080. ——.]—The L. M. corpn. was the registered proprietor of three patents dated respectively 1901, 1905, & 1910, & which related to machinery for the manufacture of matrices. In 1920, the L. M. corpn. applied by originating summons for an extension of the patents. At the hearing the application, so far as it concerned the 1901 patent, was abandoned. Owing to the L. M. corpn. having been engaged on the manufacture of munitions throughout the war, & having been controlled from Sept. 1915, onwards, manufacture of the patented article had been practically suspended & the L. M. corpn. had been largely unable to meet the demand for the patented article. An extension of three years & nine months was granted as to the 1905 patent, & the application was adjourned as to the 1910 patent.—*Re* PIERPONT & LANSTON MONOTYPE CORPORATION'S PATENTS & DUNCAN & PIERPONT'S PATENT (1921), 38 R. P. C. 353.

2081. ——.]—*Re* AUSTIN MOTOR CO., LTD. & AUSTIN'S PATENT (1922), 39 R. P. C. 294.

2082. ——.]—The N. Co. Ltd., who were the assignees & registered proprietors of a patent granted in 1907 in respect of an invention of "improvements in or relating to primers for explosives," applied by originating summons for an extension of the term of the patent. In support of the application evidence was given that the patented invention related to the use of lead azide as a primer in detonators in substitution for fulminate of mercury & that it aimed at producing a less expensive means of ignition; that in Aug. 1914, experiments were in their initial stage only & that during the period of hostilities the N. Co., Ltd., had been unable to continue the experiments owing to the demands made upon them in other directions, but that in Germany, by reason of a shortage of fulminate of mercury, the invention had been developed to the detriment of the N. Co., Ltd. The summons was adjourned to enable further evidence to be

At the further hearing evidence was given to the effect (*inter alia*) that the N. Co.'s plant had not been suitable for the manufacture of lead azide & that in 1911, the date of the assignment of the patent to the N. Co., Ltd., experimental plant had been obtained from Germany, but that the experiments had been hindered by the necessity of suspending experimental work due to explosions necessitating further research as to lead azide; that in 1912 & 1913 improved plant had been obtained from Germany & that on receipt of the plant in 1913 the N. Co., Ltd., had immediately proceeded to erect a special building for the housing of it & for carrying out the experimental work; that such building had been nearing completion at the outbreak of war, when the N. Co., Ltd., had been obliged to discontinue the experiments; that early in 1919 experiments had been resumed & that the N. Co., Ltd., were satisfied that they could now produce a satisfactory merchantable detonator primed with lead azide; that upwards of £9,000 had been expended in experimental work; that from the outbreak of war the N. Co., Ltd., had been fully occupied in making explosives for war purposes, that in 1916 they had become a controlled establishment & had been decontrolled in 1919:—*Held:* the further evidence sufficiently explained the position, & an extension of four years was granted.—*Re* WÖHLER'S PATENT (1922), 40 R. P. C. 49.

2083. ——.]—The B. U. S. M. co. was the registered proprietor of two patents granted respectively to J. & the co. & to J., B., G. & the co. The patented inventions were in respect of machinery for use in the manufacture of boots & shoes, & the co. both sold & leased the machines to manufacturers. During the war the co.'s business in boot & shoe machinery had been directed to the supply of manufacturers of military boots & the demands of manufacturers of civilian boots & shoes had been necessarily neglected. The co. had also been extensively engaged in the manufacture of munitions of war, & from Aug. 1915 until after the Armistice in 1918 had been a controlled establishment, & owing to the depletion of the stock of parts & to the necessary reorganisation of the co.'s works, regular manufacture of the patented machines had not been possible till Apr. 1919. In Dec. 1922, the co. applied by originating summons for an extension of the terms of the patents. An extension of two years was granted in the case of both patents.—*Re* JERRAM & BRITISH UNITED SHOE MACHINERY CO., LTD. & JERRAM, BATES, GOULDBOURN & BRITISH UNITED SHOE MACHINERY CO., LTD.'S PATENTS (1923), 40 R. P. C. 74.

2084. ——.]—R. was the registered legal owner of letters patent which expired on Dec. 23, 1922. On Dec. 22, 1922, he applied by originating summons for an extension of the patent on the ground of loss due to hostilities. The application was not opposed. A considerable number of the patented article were sold during the period of hostilities, but the patentees' works became a controlled establishment in Dec. 1915, & the patented apparatus could only be sold to brewers supplying the troops. The patentee alleged that this fact, being known in the trade, operated to prevent or to curtail orders for the apparatus, & stated that up to 1917 the orders did not exceed his capacity to supply them. An extension of two years from the date of the expiration of the patent was granted.—*Re* ROBINSON'S PATENT (1923), 40 R. P. C. 217.

2085. ——.]—*Re* EWART & SON., LTD. & EWART'S PATENTS (1923), 40 R. P. C. 155.

2086. ——.]—*Re* GARRATT'S PATENT (1923), 40 R. P. C. 396.

2087. ——.]—*Re* EWART'S PATENT (1925), 43 R. P. C. 164.

2088. ——.] — *Re* SHEFFIELD & TWINDERBARROW'S PATENT (1925), 43 R. P. C. 165.

2089. ——.]—*Re* WALKER & BURRELL'S PATENT (1925), 43 R. P. C. 181.

2090. ——.] — *Re* FARIES' PATENT, *Re* SCHWEINERT & KRAFT'S PATENT, No. 1871, *ante*.

D. General Interference with Development of Patent.

2091. Inability to push patent.]—R. was the registered proprietor of a patent, the patented invention being a waste collector for use in connection with cotton combing machines. R. granted an exclusive licence to work the patent to D. & B., Ltd. D. & B., Ltd., worked the patent themselves & also granted two sub-licences. The trade of D. & B., Ltd., in the patented invention was mainly in connection with the "H" type of combing machine, while that of the sub-licence was mainly in connection with the "N" type of machine. Owing to hostilities D. & B., Ltd., were unable to push the patent & sustained a loss which they claimed was equal to four and a quarter years, while there was no loss in connection with the "N" type of machine. In 1922 R. assigned the patent to D. & B., Ltd. On Mar. 1, 1923, the patent expired. D. & B., Ltd., & resp. applied by originating summons for an extension of the term of the patent. An extension of the term ending one year from Apr. 17, 1923, was granted, subject to the terms usual in the case of an expired patent.—*Re* BOULT'S PATENT (1923), 40 R. P. C. 375.

2092. Decrease in sales.]—H. was the grantee of a patent in respect of an invention of "Improvements in or relating to mineral washing & separating apparatus." At the time of the grant of the patent H. was an engineer in the C. co.'s employ, & he had applied for the patent with the co.'s consent. By a verbal agreement it was agreed between H. & the co. that the co. should have the exclusive right to the use of the patent, & that H. should be paid, in addition to his salary, a commission on the profits of the co.'s coal department, such commission to include remuneration for the use by the co. of the invention. The apparatus for washing & separating coal made by the co. practically invariably included appct.'s invention. Owing to hostilities there was a large decrease in the plant sold by the co., & a consequent decrease in the commission paid to appct. The patentee applied by originating summons for an extension of the patent on the ground of loss during the war. An extension of four years was granted, subject to an undertaking, which was given by appct., that the said verbal agreement should be embodied in a deed & registered.—*Re* HOWARTH'S PATENT (1922), 39 R. P. C. 140.

2093. ——.]—*Re* SPENCER'S PATENT (1923), 40 R. P. C. 458.

2094. ——.]—M. was the grantee of a patent in respect of an invention of "A liquid brake for ships' rudders," & by 1914 he had built up a connection amongst shipbuilders for the sale of the patented invention. In 1915 M. formed a limited co. for the purpose of manufacturing the

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patented invention. M. received shares in the co. in lieu of royalties. Owing to hostilities the sales of the patented invention decreased & the connection that had been built up was lost:—*Held:* M. had suffered loss *quâ* patentee. An extension of three years was granted.—*Re* MACGREGOR'S PATENT (1923), 40 R. P. C. 157.

2095. Ordinary manufacture relinquished—In favour of munitions.]—In 1905 two patents were granted to H. & R. In 1908 H. assigned all his interest in the patents to R. In 1919 the patents expired. On Apr. 10, 1920, R. applied by originating summons under Patents & Designs Act, 1907 (c. 29), s. 18, as amended by Patents & Designs Act, 1919 (c. 80), s. 7 (3), for an extension of the patents. Appcts. alleged that they had made profits on the patents during 1913 & again during 1919, but that during the war they had suffered a loss of approximately £3,800 by reason of the fact that owing to the war the demand for the patented articles had fallen off, that they had been unable to obtain necessary material, & that their plant & personnel had been diverted to the manufacture of war supplies:—*Held:* the case was within sub-sect. 6. Four years' extension of both patents in the form of fresh grants was granted, subject to the filing of an affidavit by H. verifying an arrangement made with him & his consent to the application.—*Re* HATFIELD & REASON MANUFACTURING CO., LTD.'S PATENTS (1920), 37 R. P. C. 273.

2096. —— ——.]—G. was the grantee of a patent in respect of an invention of "Improvements in or relating to railway & tramway vehicles." The grantee was an engineer in the G. N. Ry. co.'s employment, & it was a term of his employment that the co should have the use of any inventions made by him free of charge. Owing to the novel character of the patented invention the co. had not adopted it to any extent until after exhaustive trials had been carried out. Owing to the cessation of coach building & the manufacture of munitions by railway cos. during the war & to the fact that G.'s time was fully occupied in his duties with the co., G. had been unable to bring the invention to the notive of other cos. In Oct. 1920, G. assigned the patent to the L. F. co. G. & this co. applied for an extension of the term of the patent. An extension of four years & three months granted.—*Re* GRESLEY'S PATENT (1922), 39 R. P. C. 444.

2097. —— ——.]—In 1906 a patent in respect of an invention relating to steam generators was granted to C., who in 1913 assigned the patent to H. & S., Ltd., in which co. C. held a number of shares. From 1912 onwards H. & S., Ltd., had been the sole manufacturers of the patented article. C. & H. & S., Ltd., applied by originating summons for an extension of the term of the patent. Evidence was given of loss due to H. & S., Ltd., having been engaged in the production of munitions & to Govt. restriction on the manufacture of steam generators not required for war purposes, & also to the effect that the development of the invention had been hindered before the war, by lack of capital &, after the war, by the coal strike. The patent had expired:—*Held:* loss not due to hostilities could not be considered. An extension of four years, subject to the usual terms in the case of expired patents, was granted.—*Re* CASMEY'S PATENT (1923), 40 R. P. C. 99.

2098. —— ——.]—*Re* SHEFFIELD & TWINDERBARROW'S PATENT, No. 2088, *ante*.

2099. —— ——.]—*Re* TAYLOR'S PATENT (1923), 41 R. P. C. 64.

2100. —— ——.]—*Re* CLAUDE'S PATENTS, No. 2067, *ante*.

2101. —— **For Government contract.**]—*Re* EVANS' PATENT (1926), 43 R. P. C. 345.

2102. Inability of obtaining material—Due to control.]—*Re* HATFIELD & REASON MANUFACTURING CO., LTD.'S PATENTS, No. 2095, *ante*.

2103. ——.]—*Re* BENNET'S PATENT, No. 2069, *ante*.

2104. ——.]—*Re* LARSSON'S PATENT (1925), 43 R. P. C. 179.

2105. —— **& labour.**]—*Re* BROCK'S PATENT (1923), 40 R. P. C. 397.

2106. Inability to work plant economically.]—*Re* INSHAW'S (J. G. & G. R.) PATENT (1925), 43 R. P. C. 178.

2107. Manufacture controlled by government—Under priority contracts.]—*Re* LE BAS & GARRATT'S PATENT (1923), 40 R. P. C. 101.

2108. Manufacture stopped during war.]—*Re* MUIR'S PATENT, No. 1754, *ante*.

2109. —— **Previous work dismantled by Admiralty order.**]—*Re* MOYES & STEVENSON'S PATENTS, No. 2075, *ante*.

2110. ——.]—The M. Co., Ltd., applied by originating summons for the extension of the terms of six patents all granted in respect of "Improvements in or relating to telephone systems." Two of the patents had not been worked in the United Kingdom. Evidence was given (*inter alia*) that the patents related to important inventions which had enabled the "two wire" system of automatic telephony to become a practical success; that one of the patents had not been used in this country owing to practical difficulties in no way connected with the patented invention itself, but that these difficulties had been recently overcome, & that, but for the war these difficulties would probably have been overcome earlier; that another of the patents related to an invention for use in connection with satellite exchanges, & had not so far been used in this country largely because the earlier exchanges had all been single line exchanges & because the war had retarded the development of automatic telephony; that prior to the war appcts. had spent large sums in exploiting the patents, but that the war had practically put a stop to telephone manufacturing activities; that by reason of matters arising out of the war, appcts. had experienced considerable delay in restoring themselves to their pre-war position. At the hearing of the summons appcts. asked for an extension of six years in respect of each patent. Each patent was ordered to be extended for a period of five years.—*Re* DICKER'S PATENT, *Re* MELLINGER'S PATENT, *Re* KEITH'S PATENT, *Re* FALES' PATENTS (1925), 43 R. P. C. 167.

2111. Applicant cut off from customers by war conditions.]—*Re* SHEFFIELD & TWINDERBARROW'S PATENT, No. 2088, *ante*.

E. Length of Extension.

See Patents & Designs Acts, 1907 (c. 29), s. 18; 1919 (c. 80), s. 7 (3).

2112. Period of useful life blotted out by war.]—In 1905 a patent for an invention relating to "improvements in, & relating to, furnaces for burning pulverulent fuel & for treating pulverulent ores" was granted to R. & C. B. In 1906, 1908 & 1909 patents relating to the same invention were granted to C. B. The development of the invention was carried out by C. B., A. V. B., Al. B.

& E. B. In 1912 C. B. died & his interest in the patents became vested in A. V. B. In 1913 a co., B. B., was formed to carry out the development of the invention. The bulk of the shares in B. B. were held by A. V. B. & E. B., both A. V. B. & E. B. devoting their time to the interests of the co. R.'s interest in the invention was satisfied by the issue to him of shares in B. B. In 1913 B. B. granted an exclusive licence to F. & C., Ltd., & undertook to assist in the development of the invention. On the outbreak of war A. V. B., E. B. & Al. B. joined His Majesty's Forces. Al. B. was killed on service & A. V. B. & E. B. served throughout the war. During the whole period of the war F. & C., Ltd., were engaged on special war work & were unable to attend to the invention. In 1919 the patent of 1905 expired. A. V. B. was the registered owner of the unexpired patents. On an application by originating summons for extension of the patents:—*Held:* A. V. B. had suffered loss as patentee; as the result of the war, four & a half years had been blotted out of the useful life of the original patent & of the patents of 1906 & 1908, & the terms of those three patents ought to be extended by four & a half years.—*Re* BETTINGTON BOILERS, LTD.'S APPLICATION (1921), 38 R. P. C. 349.

2113. ——.]—Appcts. had a case for the period of the war, that is four years & a quarter. They took some time after the war to get the machines manufactured here, but the discovery made then, that they could manufacture them better in England than in Canada, was practically made before the war, so that I do not see how they can get an additional time for that. So, if they got the period of the war, four years & a quarter, I think that would be sufficient (SARGANT, J.).—*Re* JOHNSON'S PATENTS (1923), 40 R. P. C. 394.

2114. Period giving fair compensation.]—*Re* JOHNSTON'S PATENTS, No. 2037, *ante*.

2115. ——.]—*Re* HAYDOCK & PARKES' PATENT (1927), 44 R. P. C. 250.

2116. Matters to be taken into account—Failure to regain position after war—Fault of patentee.]—*Re* JOHNSON'S PATENTS, No. 2113, *ante*.

2117. —— —— **Competition by sale of government surplus stock.**]—*Re* EVANS' PATENT, No. 2101, *ante*.

2118. —— **Manufacture continued to some extent during hostilities.**]—*Re* TAYLOR'S PATENT, No. 2099, *ante*.

2119. —— **Increased sales after war.**]—J. C. & W. F. C. applied by originating summons for an extension for a period of four years of a patent granted in 1906, of which they were the grantees & registered legal owners. It appeared from the evidence that from 1911 until the outbreak of hostilities in 1914, there had been an increasing demand for the patented article; that the sales had fallen off considerably during the period of hostilities; but had revived in 1919, & in 1920 were considerably larger than any previous year. On behalf of appcts., an extension of four years was not pressed for in view of the 1920 sales, but it was contended that the 1920 sales were not due to a postponed demand & that loss within sect. 18, sub-sect. 6, of Patents & Designs Acts, 1907 & 1919, had been suffered. An extension of three years was granted.—*Re* CRIGHTON'S PATENT (1922), 39 R. P. C. 259.

2120. —— ——.]—The Y. B. P. co. were, & at all material times had been, the beneficial owners of a patent granted to Y. in 1906. In 1918 Y. died. The exors. of Y. & the Y. B. P. co. applied by originating summons for an extension of the patent the ground of loss due to hostilities. The patent had been worked by the Y. B. P. co., & owing to their employees having joined His Majesty's Forces the sales of the patented article had been very considerably reduced, & the Y. B. P. co.'s premises had been devoted to the manufacture of munitions. After the war there had been a very substantial increase in the sales of the patented article:—*Held:* an extension should be granted, & that, in view of the increase in sales after the war, the extension should be for three years. Appcts. were required to undertake that the patent should be transferred to the beneficial owners.—*Re* YOUNGS' PATENT (1922), 39 R. P. C. 364.

2121. —— ——.]—*Re* RUSHTON'S PATENT, No. 2031, *ante*.

2122. —— **To bar extension.**]—*Re* WINGQUIST'S PATENT, No. 2057, *ante*.

2123. —— **Expiry of patent—Delay arising from opposition.**]—*Re* MARTINEAU'S PATENT, No. 2034, *ante*.

2124. Application by assignee—Loss as sole licencee during war.]—Patents & Designs Act, 1919 (c. 80), s. 7 (3), provides that at the end of Patents & Designs Act, 1907 (c. 29), s. 18, which enables petitions for the extension of patents to be made, the following sub-sect. shall be added: Where by reason of hostilities between His Majesty & any foreign state, the patentee as such has suffered loss or damage . . . an application under this section may be made by originating summons instead of by petition, & the ct. on considering its decision may have regard solely to the loss or damage so suffered by the patentee . . .: —*Held:* (1) where a patentee has assigned his patent since the war he & his assignee are entitled to apply together for an extension under the sub-sect.; (2) the ct. will in determining the extension to be granted take into account loss or damage suffered by the then patentee as such only & not losses suffered by the assignee in the character of sole licencee during the war.—*Re* SUMMERS BROWN'S PATENT, [1922] 2 Ch. 759; 92 L. J. Ch. 126; 128 L. T. 249; 38 T. L. R. 818; 66 Sol. Jo. 710; 39 R. P. C. 367.

Annotation:—**Distd.** *Re* McCollum's Patents (1925), 42 R. P. C. 526.

——.]—*See, generally*, Sub-sect. 3, *ante*.

2125. Foreign profits—Excluded unless result of hostilities.]—F., who was the registered owner of a patent, applied by originating summons for an extension of the term of the patent on the ground of loss owing to restrictions placed on the working of the patent by reason of hostilities. At the hearing of the summons it was objected on behalf of the Comptroller-General that F. had made profits during hostilities on a corresponding foreign patent. The summons was adjourned & appct. was directed to file a further affidavit dealing with the foreign profits. It appeared from the further evidence that the foreign profits were not the result of hostilities:—*Held:* profits on a corresponding foreign patent were not material, unless it could be shown that there was some interconnection between such profits & hostilities, & an extension of two years should be granted subject to the terms usual in the case of expired patents.—*Re* KAY & FOXWELL'S PATENT (1924), 42 R. P. C. 222.

F. Assignees.

See Sub-sect. 3, D., *ante*.

G. Practice.

See Sub-sect. 8, F., *ante*.

Sect. 2.—*Extension of term: Sub-sects.* 10 & 11.
Sect. 3. *Part XIII. Sect.* 1: *Sub-sect.* 1, *A.*

SUB-SECT. 10.—APPLICATIONS RESPECTING TWO OR MORE PATENTS.

2126. Patents granted in same year.]—*Re* HATFIELD & REASON MANUFACTURING CO., LTD.'S PATENTS, No. 2095, *ante.*

2127. ——.]—*Re* JERRAM & BRITISH UNITED SHOE MACHINERY CO., LTD. & JERRAM, BATES, GOULDBOURN & BRITISH UNITED SHOE MACHINERY CO., LTD.'S PATENTS, No. 2083, *ante.*

2128. Two years' difference in grant—Extension granted — Both to expire on same day.] — *Re* STIFF'S PATENTS (1923), 40 R. P. C. 459.

2129. Four years' difference in grant—Adjournment.]—*Re* PUGH'S PATENTS, No. 2079, *ante.*

2130. Two years' difference in grant—Adjournment.]—*Re* PIERPONT & LANSTON MONOTYPE CORPORATION'S PATENTS & DUNCAN & PIERPONT'S PATENT, No. 2080, *ante.*

2131. Effect of grant of extension—Where one patent invalid.]—Separate patents were granted for an invention in England, Scotland, & Ireland, previous to the passing of the Patent Law (Amendment) Act, 1852 (c. 83), for terms expiring at the same date. By that Act, & its amending Act, Patent Law (Amendment) Act, 1853 (c. 115), it was provided that the letters patent granted for the prolongation of a patent should for the future be sealed with the Great Seal of the United Kingdom, & should be of force in the whole of the United Kingdom.

Letters patent were subsequently granted, sealed with the Great Seal of the United Kingdom, prolonging for a term of five years from their expiration the privileges granted by the three patents above-mentioned :—*Held :* the effect was the same as if the three patents had been separately prolonged, & the fact of one of the original patents being void for want of novelty would not prevent the letters patent being valid as a prolongation of the other patents.—BOVILL *v.* FINCH (1870), L. R. 5 C. P. 523 ; 39 L. J. C. P. 277 ; 23 L. T. 151 ; 18 W. R. 1071.

SUB-SECT. 11.—FURTHER EXTENSIONS.

See Patents & Designs Acts, 1907 (c. 29), s. 18 (5) ; 1919 (c. 80), s. 7 (2).

2132. General rule.]—The power given to the Judicial Committee by Judicial Committee Act, 1844 (c. 67), s. 2, enlarging 5 & 6 Will. 4, c. 83, s. 4, to recommend an extension of the term of letters patent for an invention, is exhausted, when an extension has been once recommended & new letters patent granted ; & the Judicial Committee have no jurisdiction to entertain a petition for a further prolongation of the new letters patent.—*Re* GOUCHER'S PATENT (1865), 2 Moo. P. C. C. N. S. 532 ; 15 E. R. 1001, P. C.

Annotations :—**Folld.** *Re* Thompson's Patent, [1909] 2 Ch. 447 ; *Re* Muir's Patent (No. 2) (1926), 43 R. P. C. 352.

2133. ——.]—When a patent has once been extended for a further term the power given by Patents & Designs Act, 1907 (c. 29), s. 18, is exhausted, & the ct. has no jurisdiction to grant a second extension.—*Re* THOMPSON'S PATENT, [1909] 2 Ch. 447 ; 78 L. J. Ch. 690 ; 101 L. T. 527 ; 25 T. L. R. 786 ; 26 R. P. C. 673.

Annotation :—**Folld.** *Re* Muir's Patent (No. 2) (1926), 43 R. P. C. 352.

2134. —— **Not modified by Patents & Designs Act, 1907 (c. 29), s. 18 (6).**]—A patentee having been granted in 1919, prior to the coming into force of Patents & Designs Act, 1919 (c. 80), an extension of his patent for seven years under Patents & Designs Act, 1907 (c. 29), s. 18, on the ground of inadequate remuneration, applied on the expiration of such extension by originating summons under Patents & Designs Act, 1919 (c. 80), s. 7 (3) (being an additional sub-sect. to Patents & Designs Act, 1907 (c. 29), s. 18), for a further extension of ten years on the ground of heavy unforeseen losses or damage therewith suffered by reason of hostilities :—*Held :* the patentee having been granted an extension under the original sect. 18 of the Patents & Designs Act, 1907 (c. 29), there was no jurisdiction under the amended sub-sect. 6, sect. 7, sub-sect. 3, Patents & Designs Act, 1919 (c. 80), by which the ct. could entertain a second application, even where the ground alleged for the application is loss by reason of hostilities. The ct. had no separate independent jurisdiction under the new sub-sect., which was merely a modification of an existing jurisdiction & only in the nature of an instruction in relation to procedure. Such an application therefore could not be granted.—*Re* MUIR'S PATENT, [1927] 1 Ch. 188 ; 96 L. J. Ch. 100 ; 136 L. T. 631 ; 43 R. P. C. 352.

SECT. 3.—**PATENTS OF ADDITION.**

See Patents & Designs Acts, 1907 (c. 29), s. 19 ; 1919 (c. 80), sched.

2135. Second patent of addition—Possibility of combination with original patent—Or first patent of addition.]—Application for a patent of addition on a patent of addition under Patents & Designs Act, 1907 (c. 29), s. 19 :—*Held :* when a patent of addition which was applied for could have been combined with the original patent & an earlier patent of addition in one application, it could be granted as a patent of addition.—*Re* MCFEELY'S APPLICATION (1911), 29 R. P. C. 386.

2136. Addition to series of patents.]—On an application under Patents & Designs Act, 1907 (c. 29), s. 19, for a patent of addition to a patent of 1911, a complete specification was filed in which a claim was made to an improvement in the process not only of the patent of 1911, but also of two earlier patents. The Chief Examiner refused to accept the application.—*Re* H. S. J.'s APPLICATION (1913), 31 R. P. C. 47.

PART XII. SECT. 2, SUB-SECT. 11.

2132 i. *General rule.*]—The power of extension beyond the two years given to the Comr. of Patents, or his deputy can only be exercised once.—POWER *v.* GRIFFIN (1902), 33 S. C. R. 39 ; 23 C. L. T. 79.—**CAN.**

PART XII. SECT. 3.

i. *Grant of patent of addition—Whether conclusive evidence of validity of patent.*]—ROCHFORD *v.* DUBLIN THEATRE CO., LTD. (1911), 29 R. P. C. 185.—**IR.**

Part XIII.—Revocation.

SECT. 1.—**BY THE COURT.**

SUB-SECT. 1.—THE PETITIONER.

A. Private Person.

See Patents & Designs Act, 1907 (c. 29), s. 25 (3) (*b*); R. S. C., Ord. 53A, r. 9.

2137. Persons having qualification by statute—Additional grounds of objection.]—A petition was presented under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26 (4) (*e*), for the revocation of a patent for an invention of improvements in carriages. Petitioner alleged that he had many years prior to the date of the patent, publicly made & sold carriages made according to the alleged invention; & that, by reason of the matters set forth in the petition, & of the other matters appearing in the particulars of objections delivered therewith, the letters patent were invalid. The preliminary objection was taken that the petitioner, by referring to "other matters appearing in the particulars of objections," which related to alleged acts of prior user by other persons than himself, had failed to bring himself within the strict definition of the persons authorised by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26 (4), to present a petition for revocation, & that therefore the authority of the Attorney-General was required before the petition could be presented:—*Held:* Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26 (4), merely contained a description of the various classes of persons who might apply to the ct. for revocation; any person having any of the qualifications therein mentioned might apply; & the fact that petitioner had further objections to the validity of this patent was no ground for regarding him as having failed to bring himself within the strict definition of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26.—*Re* MORGAN'S PATENT (1888), 58 L. T. 713; 5 R. P. C. 186.

Annotation:—**Apld.** *Re* Stewart's Applu. (1896), 13 R. P. C. 627.

2138. Purchaser pendente lite.]—An application to revoke letters patent on the ground that the patented process had been carried on wholly outside the United Kingdom was granted by the Comptroller, the patentees not having filed evidence, & not appearing in opposition to the application. The patent had been owned by a French co., which at the date of the application was in liquidation. The Judicial Liquidator on the day before the decision of the Comptroller was given sold the assets which included the patent. The purchaser appealed by petition of appeal, & asked for leave to file evidence; & he adduced evidence in support of his application to show that the Liquidator had had no means at his disposal with which to contest the application to revoke, & that there had, in fact, been no working of the patented process abroad after the expiration of four years from the date of the patent. Resp. to the appeal contended that petitioner had no *locus standi*, & that the application ought not to be allowed. The appeal was set down to be heard on these preliminary points:—*Held:* although petitioner could be in no better position than the Liquidator, yet the ct. would have power to give the Liquidator leave to file further evidence, &, under all the circumstances of the case, such leave should be given on terms to petitioner.—*Re* GREEN'S APPLICATION (1910), 28 R. P. C. 28; *subsequent proceedings*, [1911] 1 Ch. 754.

2139. Agent.]—(1) In order to obtain revocation of a patent under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26, on the ground that it was obtained in fraud of the rights of petitioner, it is necessary to prove dishonesty or grave moral culpability on the part of the person obtaining the patent.

(2) The honest mistake of an agent, causing a loss to his principal, is not an act done in fraud of the rights of the principal.

(3) To be in fraud of his rights it must be either done with the intention of depriving the principal of his rights, or must be insisted upon so as to deprive the principal of his rights (COTTON, L.J.).—*Re* AVERY'S PATENT (1887), 36 Ch. D. 307; 56 L. J. Ch. 1007; 57 L. T. 506; 36 W. R. 249; 3 T. L. R. 775; 4 R. P. C. 322, C. A.

Annotations:—*As to* (3) **Folld.** *Re* Norwood's Patents (1895), 12 R. P. C. 214; *Re* Ralston's Patent, *Re* Preston & Ralston's Patent (1909), 100 L. T. 386.

B. Attorney-General.

See Patents & Designs Act, 1907 (c. 29), s. 25 (3) (*a*).

2140. Adjournment to obtain fiat.]—This was a petition for revocation of a patent for "Improvements in knickerbocker & riding breeches" on the ground that patentee was not the true & first inventor; that the alleged invention was not novel or good subject-matter; that the specification was insufficient; & that the alleged invention was anticipated. The petition was originally presented under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26 (4) (*e*), without the fiat of the A.-G., but, on coming on for hearing, was stood over to obtain the fiat.—*Re* DEGE'S PATENT (1895), 12 R. P. C. 448.

2141. ——.]—A patent having in 1894 been granted to J. on a communication from abroad for "Improvements in atmospheric or power hammers" Y., who had unsuccessfully defended an action brought by J. for infringement, presented a petition for revocation of the patent, alleging that he was the first & true inventor of the patented invention & that the invention had been patented by J. in fraud of him. On the first hearing of the petition it was adjourned pending the hearing of the appeal in another action, with liberty to amend by alleging the A.-G.'s fiat. Application was made to the Ct. of Appeal to advance the

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PART XIII. SECT. 1, SUB-SECT. 1.—A.

g. *Interest must be proved.*]—Where it is sought to impeach or revoke a patent of invention by statement of claim pltf. must establish a personal interest in the action as distinguished from that of the public interest against a monopoly. Failing to do so, he has no *locus standi* before the ct., & his action should be dismissed.—BERGERON v. KERMOR ELECTRIC HEATING CO., LTD., [1925] Exch. C. R. 160.—**CAN.**

h. *Action brought by member of firm affected—In his own name.*]—Pursuer averred that he was a civil engineer, & a member of a firm doing a large business in reinforced concrete, & that his business was in danger of being affected by the enforcement of defender's patent. The action was brought in the name of pursuer as an individual & not of his firm:—*Held* pursuer had a title & interest to sue in his own name.—MELVILLE *v.* CUMMINGS, [1912] S. C. 1185.—**SCOT.**

PART XIII. SECT. 1, SUB-SECT. 1.—B.

k. *Power of High Court to cancel patent—Where Attorney-General not a party.*]—The High Court has power to cancel a patent in an action to which the A.-G. is not a party.—AFRICAN GOLD RECOVERY CO., LTD. *v.* HAY, [1904] A. C. 438, P. C.—**S. AF.**

Sect. 1.—*By the court: Sub-sect.* 1, *B.; sub-sect.* 2, *A.*

hearing of the appeal, but this was refused, & the ct. directed the petition to be restored to the list. The A.-G.'s fiat having been obtained the petition was restored, & came on for further hearing:—*Held:* J. was the first & true inventor; & no fraud had been proved.

A man who alleges fraud is bound to prove it (FARWELL, J.).—*Re* JAMESON'S PATENT (1902), 19 R. P. C. 246.

2142. ——.]—A patent having been granted to M. for an "Improved process for the manufacture of lustrous threads, bands, strips, & the like of viscose," C. & co. presented a petition for the revocation of the patent, alleging that they were largely interested in the manufacture of artificial silk from viscose; that they were the registered legal owners of letters patent No. 2529 of 1902 granted to S. & W., & that they were entitled to present the petition as assignees of that patent. The particulars of objections alleged that the invention was not useful; that the specification disclosed no proper subject-matter for a valid patent; that the invention was not new; & that resp. was not the first & true inventor. A doubt being expressed as to whether petitioners had any *locus standi* to present the petition, the judge, without deciding the point, gave leave to apply for the fiat of the A.-G., which if granted was to be treated as if granted *nunc pro tunc*, & the hearing of the petition was continued. The fiat of the A.-G. was obtained. The question of terms as to costs upon which leave was given to apply for the fiat was deferred until after the hearing of the petition:—*Held:* S. & W. were not the first & true inventors of the invention for which M.'s patent was granted; the patent was useful; there had been no anticipation; & there was proper subject-matter for a valid patent. The petition was dismissed with costs on the higher scale, & consequently there was no necessity on that occasion to go into the question of terms as to costs upon which leave was given to apply for the fiat.—*Re* MAX MÜLLER'S PATENT (1907), 24 R. P. C. 465.

Documents to obtain fiat—Privileged from production.]—*See* DISCOVERY, Supp. II., No. 805*a*.

SUB-SECT. 2.—GROUNDS FOR REVOCATION.

A. Fraud.

See Patents & Designs Act, 1907 (c. 29), s. 25 (1) (b).

2143. What amounts to fraud—Grave moral culpability.]—*Re* AVERY'S PATENT, No. 2139, *ante*.

2144. —— ——.]—(1) If in proceedings for revocation of a patent it appears that the patentee is not the inventor of a material part of the invention for which the patent is granted, it is the duty of the ct. to revoke the patent, & it has no power to exclude from the patent that part of which the patentee was not the inventor.

(2) If the patentee has obtained the patent in fraud of the rights of petitioner in such proceedings as regards the material part of which the patentee was not the inventor, the ct. will make an absolute order for revocation, & will not limit it to take effect only in case the patentee does not within a reasonable time obtain leave to amend the specification by disclaiming the parts of which he is not the inventor.

(3) The expression in Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26, & in Patents & Designs Act, 1907 (c. 29), s. 25, "in fraud of the rights of the true & first inventor" involves the idea of moral turpitude on the part of the patentee, & the existence of this element may be inferred not merely from his conduct prior to & at the time of the application or grant, but also from the use which he makes of the grant when obtained, as, for example, by insisting as against the true inventor on treating the invention as his own.

A material part of the patented invention being taken in fraud of the rights of the petitioner a declaration that petitioner was the true & first inventor of that part was made in addition to the order for revocation.—*Re* RALSTON'S PATENT, *Re* PRESTON & RALSTON'S PATENT (1909), 100 L. T. 386.

2145. —— Patent taken out & insisted on with fraud.]—*Re* AVERY'S PATENT, No. 2139, *ante*.

2146. —— ——.]—(1) In 1891, two patents were granted to N. for the manufacture of improved compounds for coating walls & other surfaces. In Apr. 1894, C. & H. presented a petition for revocation of these patents, alleging that the inventions were the result of experiments made by C. & H. & communicated by them to N., & that the patents were taken out by N. in fraud of their rights. At the hearing, C. appeared in person, & H. separately by counsel:—*Held:* the experiments finally resulting in the discovery of the invention were made by C. with the assistance of H., & not by H. under the directions of N.; N. was not the true & first inventor; C. was the true & first inventor of the principle of the invention, & the best method of carrying it out; the patents were obtained in fraud of C.'s rights, as they were taken out, & had been insisted upon so as to deprive C. of his rights & gain an advantage for N.; but only one patent should be revoked, as C. had, during the greater part of the trial, abandoned his case as to the other patent.

(2) N. was ordered to pay the costs of C., but not the costs of shorthand notes. No order was made as to the costs of H. It was intimated by the judge that the separate appearance of petitioners was allowed by consent, & was not to be taken as a precedent.—*Re* NORWOOD'S PATENTS (1895), 12 R. P. C. 214.

2147. —— ——.]—In 1891, two patents were granted to N., one on Dec. 4 for "the manufacture of an improved compound for coating walls & other surfaces, & for the production of casts or mouldings, & for analogous purposes"; & the other on Dec. 7 for "the manufacture of an improved compound for coating walls & other surfaces, & for analogous purposes." In 1894, C. & H. presented a petition for revocation of these patents, & it was held, as to the earlier patent, that C. was the first & true inventor, & that the patent had been obtained by N. in fraud of C.'s rights, & it was accordingly revoked; but no order was made as to the later patent, C. having abandoned the case as to that patent. A patent for the invention to which the revoked patent related was subsequently granted to C., who in 1895 presented another petition for revocation of the later patent, alleging the same grounds as before. The earlier patent related to a compound formed from glue & an active base, whilst the later patent related to a compound formed from glue & an inert base, & the processes were admitted to be identical:—*Held:* the process being C.'s invention, he might have taken out a patent to cover the combination of glue with an inert base, & the later patent was also obtained by N. in fraud of C.'s rights. The later patent was accordingly revoked, but no order was made as to

costs.—*Re* NORWOOD'S PATENTS (No. 2) (1898), 15 R. P. C. 98.

2148. —— Honest mistake of agent.]—*Re* AVERY'S PATENT, No. 2139, *ante*.

2149. —— Separate application for patent—Joint application having lapsed.]—(1) In May, 1888, K. & G. jointly applied for a patent, accompanying their application with a provisional specification. This application lapsed. In Feb. 1889, G. applied for a patent alone for the same invention, which he obtained. K. then presented a petition for revocation, alleging that he was the first & true inventor, & that G.'s application was made fraudulently. G. alleged that he was the first & true inventor:—*Held:* petitioner had made out his case, & the patent must be revoked.

(2) If a party cross-examines his opponent's witnesses, he ought to bring that evidence before the ct. The party who has the right to begin should file his evidence in chief first.—*Re* GALES' PATENT (1891), 8 R. P. C. 438.

2150. —— Patent after private demonstration.]—In 1906 letters patent were granted to M. on a communication from abroad for "improvements in & relating to sound records for sound reproducing machines." Petitioner alleged that, having by an agreement made in 1905, sold in consideration of a money payment & of certain royalties, to a co. in America an invention together with all improvements therein, & all rights to apply for patents in countries foreign to America in respect of the invention & improvements, he had, in pursuance of the agreement made a confidential communication & demonstration in England to D., as agent of the American co., of the invention covered by the agreement; that D. communicated the invention to the co. in America; & that M., as agent of the American co., applied for & obtained the letters patent, the subject of the petition. Petitioner alleged that the invention covered by the patent had been made by him, & that the American co. had deprived him of all benefits in the patent, & that it was invalid on the ground that it was obtained in fraud of his rights, & that he was entitled to the grant thereof. He asked that the Comptroller might be directed upon the application of petitioner to grant him letters patent for the invention in accordance with the Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26. Para. 3 of the particulars of objections alleged that the inventions claimed in the patent had been used in the United Kingdom prior to the date thereof by petitioner, public user, or user by way of trade, not being specifically alleged. It was contended on behalf of petitioner that resp. M. was not the first & true inventor by reason of the confidential communication & demonstration to D.; further, in the event of his not succeeding on the issue of fraud, that under para. 3 of the particulars of objections the patent was wholly invalid by reason of prior user within Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 26 (4) (*a*):—*Held:* fraud had not been established; M. was the first & true inventor; & the plea of prior user in para. 3 particulars of objections did not include public user, or user by way of trade; & the user which was alleged was experimental.—*Re* MARKS' PATENT (1908), 25 R. P. C. 553, 558.

2151. Fraud must be strictly proved.] — *Re* JAMESON'S PATENT, No. 2141, *ante*.

2152. ——.]—*Re* MARKS' PATENT, No. 2150, *ante*.

B. Want of Novelty.

See Patents & Designs Act, 1907 (c. 29), s. 25 (3)

2153. Grounds for revocation.]—(1) This was a petition for revocation of a patent granted to a foreigner for an invention of "Improved incandescent mediums for purposes of illumination." Notice of the petition & of the hearing was sent to the patentee by registered letter. The patentee did not appear at the hearing.

(2) Evidence was given by two experts that the invention was unworkable, or so far as it was workable, had been anticipated. The patent was revoked.—*Re* HIRSCHFELD'S PATENT (1894), 11 R. P. C. 514.

2154. ——.]—This was a petition represented by the Pharmaceutical Society for revocation of a patent for "A new medicine for the cure of influenza & other complaints" on various grounds, including want of novelty & subject-matter. On the hearing of the petition, the patentee appeared & did not oppose revocation, but he asked that no costs might be given, as from the first he had not opposed the petitioners:—*Held:* the patent must be revoked, as the patentee could not or would not support it, & with costs, as there was no other method of obtaining revocation.—*Re* WALLACE'S PATENT (1895), 12 R. P. C. 444.

2155. ——.]—A petition was presented to obtain the revocation of a patent for improvements in machines for lasting the uppers of boots & shoes, the validity of which had been upheld in an action for infringement against petitioner, on the grounds that the patent was anticipated by a prior specification, & an abridgment of another specification, not brought forward in the previous action, & that the claim of the patent in the previous action had been given so wide a construction that it covered parts of those specifications:—*Held:* the claim attacked was for the general construction, combination, & arrangement of certain parts of a machine; there was no estoppel by the former decision to prevent the patentee contending that his arrangement was not identical with the prior patents, & the patent was not anticipated by either of the alleged anticipations.—*Re* LEWIS & STIRCKLER'S PATENT (1896), 14 R. P. C. 24.

2156. ——.]—In 1900 letters patent were granted to K. for "Improvements in & connected with stencil sheets." A petition was presented for revocation of this patent, & petitioners alleged in their petition that they had publicly manufactured, used, & sold within the realm before the date of the patent stencil sheets made according to the alleged invention. In their particulars of objections they stated that the invention was not new, & alleged want of subject-matter. Prior to the trial leave had been granted by the Comptroller to amend the specification by the omission of claims 1 & 2. Owing to delay the order had not been drawn up. To avoid postponement of the hearing of the petition it was arranged by consent that the hearing should take place upon the footing of the specification having been amended:—*Held:* petitioners were entitled to succeed, there being no real invention in that which was described in the specification.—*Re* KLABER'S PATENT (1902), 19 R. P. C. 174.

PART XIII. SECT. 1, SUB-SECT. 2.—B.

2153 i. *Grounds for revocation.*]—An invention entitled "Improvements in shaking table ore concentrators" for which letters patent were granted by the Commonwealth:—*Held:* not novel, & to have been anticipated, & letters patent ordered to be revoked.—BROKEN HILL SILVER MINING CO. *v.* GUTHRIDGE, LTD. (1908), 8 C. L. R. 187.—**AUS.**

Sect. 1.—*By the court: Sub-sect.* 2, *B., C., D., E. F.; sub-sect.* 3, *A.*]

2157. ——.]—A petition was presented for revocation of letters patent granted for "Improvements in or connected with petticoats & like garments." The petition came on for hearing on a petition day, when resp. did not appear. The petition was ordered to stand over until the next petition day, unless resp. desired that it should go into the witness list. He did not so desire, & stated his intention not to contest the matter. The petition was heard on affidavit evidence, & the patent was revoked on the grounds of want of novelty by reason of prior user, want of subject-matter, & that the patentee was not the first & true inventor.—*Re* LEE'S PATENT (1906), 23 R. P. C. 233.

2158. Want of novelty as to part.]—In 1895 a patent was granted to J. for "Improvements in cyclometers, revolution counters, or indicators." The first claim was as follows:—"In a cyclometer, revolution counter, or indicator the combination, with a chambered support & an actuating shaft, of index rings mounted to revolve on said support & adapted to transmit movement from each of said index rings to the next in order, the hubs of said gear being flattened, spring arms supported within the chamber & bearing upon the opposite flattened faces of said gear hubs, & means for actuating the first of said rings from said actuating shafts." There were four other claims for similar combinations, expressed in more detail & with additional modifications. In 1900, A. W. G., Ltd., presented a petition for revocation of the patent on the grounds of want of novelty & subject-matter:—*Held:* in the first claim the novelty depended on the squaring of the hub & the use of the spring arms in the minor combination which was the subject of the claim, & such combination was not new, useful, & good subject-matter for a patent; the petition failed as to the other four claims. Revocation of the patent was ordered unless within three months the patentee should obtain leave to amend his specification by disclaiming the first claim.—*Re* JUSTICE'S PATENT (1901), 18 R. P. C. 241.

See, also, Nos. 2206, 2208, *post.*

C. First and True Invention.

See Patents & Designs Act, 1907 (c. 29), s. 25 (3) (*b*).

2159. Petitioner first & true inventor.]—*Re* GALES' PATENT, No. 2149, *ante.*

2160. ——.]—A patent having in 1903 been granted to J. for "Improvements in sacks or material for wrapping or packing purposes, applicable also for other purposes," B. presented a petition for revocation of the patent, alleging that he was the first & true inventor of the patented invention, that he had communicated said invention to J. in confidence, & that the invention had been patented by J. in fraud of him:—*Held:* J. was the first & true inventor, & further, no fraud had been proved.—*Re* JACKSON'S PATENT (1905), 22 R. P. C. 384.

2161. ——.]—*Re* MARKS' PATENT, No. 2150, *ante.*

2162. Patentee not first & true inventor.]—*Re* LEE'S PATENT, No. 2157, *ante.*

2163. —— As to material part.]—*Re* RALSTON'S PATENT, *Re* PRESTON & RALSTON'S PATENT, 2144, *ante.*

D. Want of Subject-Matter.

2164. Ground for revocation—System of distributing electricity.]—*Re* GAULARD & PATENT (1890), 7 R. P. C. 367, H. L.

Annotations:—**Refd.** Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424; Fenner *v.* Wilson, [1893] 2 Ch. 656; *Re* Owen's Patent, [1899] 1 Ch. 157; *Re* Bridge's Appln. (1901), 18 R. P. C. 257; Donnersmarckhütte Oberschlesische Eisen Kohlenwerke Act. *v.* Electric Construction Co. (1910), 27 R. P. C. 774; Holmes *v.* Associated Newspapers (1910), 27 R. P. C. 136.

2165. —— ——.]—A patent was granted in 1903 for "Improvements in metallic conduits for electric light cables & the like." The alleged improvements consisted in means for connecting the parts of the conduits, in which the electric cables were laid, & the fittings so that there should be a complete electric metallic circuit throughout without necessarily using screwed conduits. This was effected by using a differential split bushing which was so constructed as to have an overhung grip on the conduit. At the hearing of a petition for revocation it appeared that a bushing described in the prior specification of L. gave both an overhung & a direct grip, & that the device described in the specification of B. effected the patentees' object, though in none of the alleged anticipations was there an overhung grip alone. It was alleged that alternative forms of bushing shown & claimed were of no utility. It also appeared that resps., the patentees, had not sold any of their patented bushings, but had sold bushings of another form:—*Held:* there was no such invention as could form good subject-matter for the patent; & to uphold the patent would be to take away from the public the full use, to which they were entitled, of the then public knowledge, & in particular of that given by L.'s specification.—*Re* WATERHOUSE'S PATENT (1906), 23 R. P. C. 470.

2166. —— Patent medicine.]—*Re* WALLACE'S PATENT, No. 2154, *ante.*

2167. —— ——.]—This was a petition presented by the Pharmaceutical Society for revocation of a patent for "An improved medicinal preparation, applicable as an embrocation or liniment" on various grounds, including want of subject-matter. On the hearing of the petition, the patentee did not appear, & the patent was revoked.—*Re* SIMMONS'S PATENT (1895), 12 R. P. C. 446.

2168. —— Preparation of saccharine.]—In 1896, letters patent were granted to C. for "preparation of ortho-sulphamine benzoic acid," being a method of preparing saccharine. In 1897, The Saccharine Corpn., Ltd., presented a petition for revocation of this patent on the ground of want of utility, want of subject-matter, & that the specification did not describe a process by which saccharine could be produced. On the hearing of the petition it was unopposed, & the patent was revoked.—*Re* CERCKEL'S PATENT (1898), 15 R. P. C. 500.

2169. —— Cyclometer.]—*Re* JUSTICE'S PATENT, No. 2158, *ante.*

2170. —— Improvement of stencil plates.]—*Re* KLABER'S PATENT, No. 2156, *ante.*

2171. —— Improvement of garments.]—*Re* LEE'S PATENT, No. 2157, *ante.*

PART XIII. SECT. 1, SUB-SECT. 2.—C.

2162 i. *Patentee not first & true inventor.*]—Persons claiming rights prior to those of a patentee may petition for their own protection for revocation of the patent, without the A.-G.'s fiat & before proceedings for infringement are taken by the patentee.—*Re* SCOTT'S PATENT (1898), 19 N. S. W. L. R. (Eq.) 114; 15 N. S. W. W. N. 69.—**AUS.**

E. Prior User.

See Patents & Designs Act, 1907 (c. 29), s. 25 (3) (*b*).

2172. By petitioner.]—In 1888, a patent was granted to S. for "a disconnecting, folding, or fixed arm anchor." In 1898, N. presented a petition for revocation of the patent on the ground (*inter alia*) of prior user of the invention, alleging that he had himself prior to the date of the patent altered an anchor so that it possessed the features of the patented anchor:—*Held:* the alleged prior user of the invention had been established, & the patent was revoked.—*Re* SINNETTE'S PATENT (1898), 15 R. P. C. 761.

2173. User must be public.]—*Re* MARKS' PATENT, No. 2150, *ante*.

F. Other Grounds.

2174. Patent taken out to obtain exemption under Pharmacy Act, 1868 (c. 117).]—The Pharmaceutical Society of Great Britain presented a petition for the revocation of a patent for an alleged invention of an improved medicinal preparation for the cure of indigestion & like complaints. The compound included diluted prussic acid. Revocation was asked for on various grounds, including insufficiency in not stating the strength of the diluted acid & it was alleged the patent was taken out to evade the provisions of above Act, relating to the sale of poisons. The petition now came on for directions, resp. did not appear & petitioners asked that revocation might be granted. The judge made an order for revocation on production of an affidavit verifying the petition, but stated incidentally that he was of opinion that the fact that the patent was taken out to evade the provisions of above Act, was not a ground for revocation.—*Re* VAISEY'S PATENT (1894), 11 R. P. C. 591.

Ground which would have been available under scire facias.]—*See* Patents & Designs Acts, 1907 (c. 29), s. 25, 2 (*a*); 1919 (c. 80), sched.

2175. ——.]—A writ of *sci. fa.* to repeal letters patent lies in three cases: (1) When the King does grant by several letters patent one & the self-same thing to several persons, the first patentee shall have a *sci. fa.* to repeal the second; (2) when the King doth grant a thing upon a false suggestion, he *prærogativa regis* may by *sci. fa.* repeal his own grant; (3) when the King does grant any thing which by law he cannot grant.—R. *v.* MUSSARY (1738), 1 Web. Pat. Cas. 41.

SUB-SECT. 3.—PRACTICE.

A. In General.

See R. S. C., Ord. 53A, rr. 9, 10, 13.

2176. Right to begin.]—*Re* TIERMANN'S PATENT (1899), 43 Sol. Jo. 706; *sub nom. Re* TIEMANN'S PATENT, 16 R. P. C. 561.

2177. Right of patentee to amend specification—Patentee alien enemy.]—In proceedings for the revocation of a patent the ct. has power to allow the patentees to amend their specification by way of disclaimer, notwithstanding the patentees are alien enemies, such amendment being in the nature of a defence to the proceedings for revocation; & the ct. will, when necessary, guard against the danger of the patentee thereby improving his position, by putting him on terms.—*Re* STAHLWERK BECKER ART.'S PATENT, [1917] 2 Ch. 272; 86 L. J. Ch. 670; 117 L. T. 216; 33 T. L. R. 339; 61 Sol. Jo. 479.

2178. Putting petition into witness list.]—*Re* BORROWMAN'S PATENT (1902), 19 R. P. C. 159.

2179. ——.]—A petition for revocation ought not to be put into the witness list until it is effective for hearing. Inspection or discovery should be applied for when the petition comes into the petition list.—*Re* SCOTT'S PATENT (1902), 19 R. P. C. 273.

2180. Inspection or discovery—Time of application.]—*Re* SCOTT'S PATENT, No. 2179, *ante*.

2181. Particulars.]—In a petition for revocation of a patent relating to improvements in telegraphic apparatus, petitioners alleged prior user by the manufacture & sale or use by their predecessors in business & others of certain electrical shunts, coils & recorders. On a summons by resps. for further particulars as to these alleged prior users the judge ordered particulars to be given which included particulars of the weight, size, resistance & induction of the articles. Petitioners appealed, but offered to give particulars not covering these matters:—*Held:* petitioners ought not to be ordered to give the particulars objected to, as they were matters of description & not merely of identification, & the order was discharged with costs. Petitioners undertook to give the particulars they had offered.—*Re* BROWN'S PATENT (1906), 23 R. P. C. 790, C. A.

2182. —— **Amendment.**]—On a petition for the revocation of a patent:—*Held:* petitioners ought not to be allowed to amend their particulars of objection, in the Ct. of Appeal.—ALSOP FLOUR

PART XIII. SECT. 1, SUB-SECT. 2.—E.

2172 i. *By petitioner.*]—MURCHLAND *v.* NICHOLSON (1893), 10 R. P. C. 417.—**SCOT.**

PART XIII. SECT. 1, SUB-SECT. 2.—F.

l. *Refusal to licence.*]—Refusal to sell the right to use unconditionally an invention or to licence avoids the patent.—TORONTO TELEPHONE MANUFACTURING CO. *v.* BELL TELEPHONE CO. OF CANADA (1885), 8 L. N. 34.—**CAN.**

m. *Illegal importation.*]—TORONTO TELEPHONE MANUFACTURING CO. *v.* BELL TELEPHONE CO. OF CANADA (1886), 18 R. L. O. S. 463; 9 L. N. 27.—**CAN.**

n. ——.]—BROOK *v.* BROADHEAD (1889), 2 Exch. C. R. 562.—**CAN.**

o. ——.]—BERLINER GRAMOPHONE CO., LTD. *v.* POLLOCK (1915), 35 O. L. R. 137; 9 O. W. N. 263.—**CAN.**

p. —— *By others—With consent of patentee.*]—If, after the time has expired wherein the patentee may have imported the invention without prejudice to his rights, he consents to its importation by others, such consent brings him within the prohibition of 38 Vict. c. 26, & avoids his patent.—BARTER *v.* SMITH (1877), 2 Exch. C. R. 455.—**CAN.**

q. —— *Parts.*]—ANDERSON TIRE CO. OF TORONTO *v.* AMERICAN DUNLOP TIRE CO., AMERICAN DUNLOP TIRE CO. *v.* ANDERSON TIRE CO. OF TORONTO (1896), 5 Exch. C. R. 82.—**CAN.**

r. —— ——.]—DOMINION CHAIN CO. *v.* MCKINNON CHAIN CO. (Ont.) (1919), 58 S. C. R. 121; 45 D. L. R. 367.—**CAN.**

t. —— *Machinery to carry out process.*]—ALSOP PROCESS CO. OF CANADA *v.* FRIESEN & SON (Ont.), [1919] 1 W. W. R. 544; 57 S. C. R. 606.—**CAN.**

a. *Expiry of foreign patent.*]—R. *v.* GENERAL ENGINEERING CO. OF ONTARIO, LTD. (1900), 6 Exch. C. R. 328; 20 C. L. T. 53.—**CAN.**

b. *Failure to manufacture & sell.*]—HAMBLY *v.* ALBRIGHT & WILSON, LTD. (1902), 7 Exch. C. R. 363; 22 C. L. T. 201.—**CAN.**

c. ——.]—HILDRETH *v.* MCCORMICK MANUFACTURING CO., LTD. (1906), 10 Exch. C. R. 378; 26 C. L. T. 782.—**CAN.**

d. ——.]—BERLINER GRAMOPHONE CO., LTD. *v.* POLLOCK (1915), 9 O. W. N. 263; 35 O. L. R. 137.—**CAN.**

PART XIII. SECT. 1, SUB-SECT. 3.—A.

2176 i. *Right to begin.*]—R. *v.* LA FORCE (1894), 4 Exch. C. R. 14.—**CAN.**

e. *Particulars of breaches—Declaration—Trial.*]—R. *v.* HALL (1867), 27 U. C. R. 146.—**CAN.**

f. *Revocation on ground of error—Onus of proof.*]—Where a bill is filed by a private individual to repeal letters patent on the ground of error, the *onus* of proof is on pltf., though it may to some extent involve proof of a negative.—MCINTYRE *v.* A.-G. (1867), 14 Gr. 86.—**CAN.**

g. *Fiat—Necessity for.*]—A *sci. fa.* to set aside a patent was issued at the instance of a private relator, without the *fiat* of either the A.-G. for the Dominion or for Ontario having been first obtained:—*Held:* a *fiat* was

Sect. 1.—*By the court: Sub-sect.* 3, *A., B., C.* (*a*) (*b*), *D. & E.; sub-sect.* 4.]

PROCESS, LTD. *v.* FLOUR OXIDIZING CO., LTD., *Re* ANDREWS' PATENT (1908), 25 R. P. C. 477, H. L.

Annotation:—**Consd.** Watson, Laidlaw *v.* Pott, Cassels & Williamson (1909), 26 R. P. C. 349.

2183. —— Extension of time.]—*Re* BARTON'S PATENTS (1912), 29 R. P. C. 207.

2184. Stay pending appeal in action for infringement.]—*Re* HITCHCOCK'S PATENT (1903), 20 R. P. C. 767.

See, also, No. 2202, *post.*

2185. Place of trial—At assizes with jury.]—*Re* EDMOND'S PATENT (1888), 5 T. L. R. 109.

2186. —— In King's Bench Division.]—The ct. will order a transfer of a petition for revocation of a patent to the Q. B. Div., subject to the consent of the President of that division, to be heard by the judge at the same time as an action for damages before a judge & jury in respect of the same subject-matter.—*Re* EDGE'S PATENT (1890), 63 L. T. 370; 38 W. R. 698.

2187. Evidence—Whether vivâ voce.]—A petition for the revocation of a patent having been presented under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 26:—*Held:* resps. were entitled, as they desired it, to have the petition tried with *vivâ voce* evidence.—*Re* GAULARD & GIBBS' PATENT (1887), 34 Ch. D. 396; 56 L. J. Ch. 606; 56 L. T. 284; 35 W. R. 301.

2188. —— Matter for cross-examination—Duty to bring before court.]—*Re* GALES' PATENT, No. 2149, *ante.*

2189. —— Admissibility—To discredit witnesses—As to prior user.]—An action for infringement of the patent the subject of this petition, brought by resp. to the present petition, having failed, the ct. being satisfied that the invention had been used prior to the date of the patent at one place out of several referred to, this petition was brought to have the patent declared void, petitioner relying solely on the instance which had satisfied the ct. in the prior action.

A witness on the part of petitioner stated that he had seen the invention used at the particular place relied on, & in cross-examination he stated that he had seen it used also at other places referred to prior to the date of the patent.

Resp. asked to be allowed to adduce evidence as to the prior user at such other places:—*Held:* the evidence was inadmissible, on the ground that if admitted it would be allowing resp. to go into matters not relevant to the question at issue for the sole purpose of discrediting the witness & disproving the answers to questions put to him on cross-examination.—*Re* HAGGENMACHER'S PATENTS, [1898] 2 Ch. 280; 67 L. J. Ch. 675; 15 R. P. C. 431.

2190. —— Negative evidence adduced by applicant.]—*Re* MAX MÜLLER'S PATENT, No. 2142, *ante.*

2191. Estoppel—Patent attacked on similar grounds in action for infringement.]—*Re* LEWIS & STIRCKLER'S PATENT, No. 2155, *ante.*

Committal for contempt.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 27, No. 250.

B. Service out of Jurisdiction.

See R. S. C., Ord. 11, r. 8A.

2192. Necessity for.]—A petition for revocation of a patent was served on two of three patentees, the third being abroad. The petition was ordered to be put into the witness list, but not to come on for hearing without leave, unless the absent patentee appeared by counsel on notice to him of the presentation of the petition.—*Re* KAY'S PATENT (1894), 70 L. T. 756; 11 R. P. C. 279; 8 R. 263.

2193. Sufficiency of—Notice by registered letter.]—*Re* HIRSCHFELD'S PATENT, No. 2153, *ante.*

2194. —— Personal delivery of copy of petition & particulars.]—The sole resp. to a petition for the revocation of a patent was a domiciled Scotsman, who was resident in Scotland. A copy of the petition & of petitioners' particulars of objection had been delivered to him personally in Scotland, & he had written to petitioners' solrs. saying that he did not intend to appear on the hearing of the petition, because he was not under the jurisdiction of the English cts. Upon an application by petitioners for directions as to the mode of trial:—*Held:* though there had not been, & could not under the R. S. C. be, any service of the petition out of the jurisdiction, yet, as ample notice had been given to resp., the ct. could make an order *nisi*, that, unless resp. should, on or before a specified day, appear & show cause to the contrary, in which case it would be open to him to dispute the jurisdiction, the petition should be tried with *vivâ voce* evidence, & be set down for trial in the list of witness actions.—*Re* DRUMMOND'S PATENT (1889), 43 Ch. D. 80; 59 L. J. Ch. 102; 6 R. P. C. 576.

Annotations:—**Folld.** *Re* Görz & Högh's Patent (1895), 11 T. L. R. 463. **Refd.** *Re* Cliff, Edwards *v.* Brown, [1895] 1.

—— —— Letter from petitioner's solicitors.]—*Re* GÖRZ & HÖGH'S PATENT (1895), 11 T. L. R. 463.

C. The Order.

(*a*) *In General.*

2196. Revocation as to part—Whether leave to amend by disclaimer granted.]—Where on a petition for revocation of a patent the judge holds that all the claims are bad & orders the patent to be revoked & this order is entered on the Register of Patents, the Ct. of Appeal, if it is of opinion that one claim is valid, may reverse the order below & order that the patent be revoked, unless within three months, or such further time as the ct. may allow, the patentee obtain leave to amend his specification by disclaiming all the claims except the valid one.—DEELEY *v.* PERKES, [1896] A. C. 496; 65 L. J. Ch. 912; 75 L T. 233; 12 T. L. R. 547; 13 R. P. C.

Annotations:—**Consd.** *Re* Dellwick's Patent, [1896] 2 Ch. 705. **Expld.** *Re* Pitt's Patent, Ludington Cigarette Machine Co. *v.* Baron Cigarette Machine Co., [1900] 1 Ch. 508. **Apld.** *Re* Justice's Patent (1901), 18 R. P. C. 241. **Consd.** *Re* Geipel's Patent, [1903] 2 Ch. 715. **Distd.** *Re* Ralston's Patent, *Re* Preston & Ralston's Patent (1909), 100 L. T. 386. **Refd.** *Re* Lewis & Stirckler's Patent (1896), 14 R. P. C. 24; Shoe Machinery Co. *v.* Cutlan, [1896] 1 Ch. 108; *Re* Woolfe's Patent, Woolfe *v.* Automatic Picture Gallery (1902), 87 L. T. 95; *Re* Klaber &

necessary, & the A.-G. for Ontario was the proper authority to grant it.—R. *v.* PATTEE (1871), 5 P. R. 292.—**CAN.**

h. —— *By whom granted.*]—R. *v.* PATTEE (1871), 5 P. R. 292.—**CAN.**

k. *Jurisdiction—Minister of Agriculture—Exclusive jurisdiction.*]—The jurisdiction in respect to the avoidance of patents conferred upon the Minister of Agriculture by Patent Act, 1872, s. 28, is exclusive of that possessed by any other tribunal in the Dominion.—TORONTO TELEPHONE MANUFACTURING CO. *v.* BELL TELEPHONE CO. OF CANADA (1885), 2 Exch. C. R. 524.—**CAN.**

PART XIII. SECT. 1, SUB-SECT. 3.—C. (a).

l. *Action to avoid patents—What procedure necessary.*]—Upon a motion for judgment for default of pleading in an action to avoid certain patents of invention, the ct. granted the motion, but directed that a copy of the judgment should be served upon defts., & that the registrar should not issue a certificate of the judgment for the purpose of entering the purport thereof on the margins of the enrolment of the several patents in the Patent Office until the expiry of thirty days after such service.—PETERSON *v.* CROWN CORK & SEAL CO. (1897), 5 Exch. C. R. 400.—**CAN.**

Steinberg's Patent (1908), 77 L. J. Ch. 569; Poulton *v.* Adjustable Cover & Boiler Block Co. (1908), 99 L. T. 647; Porter *v.* Freudenberg, Kreglinger *v.* Samuel & Rosenfeld, *Re* Merten's Patent, [1915] 1 K. B. 857.

2197. —— —— Patent in fraud of petitioner's rights.]—*Re* RALSTON'S PATENT, *Re* PRESTON & RALSTON'S PATENT, No. 2144, *ante*.

(b) Consent Order.

2198. Jurisdiction to make order by consent.]—*Re* DAWSON'S PATENT (1907), 24 R. P. C. 140.

2199. Whether order made in chambers.]—*Re* SCOTT'S PATENT (1903), 20 R. P. C. 604.

Annotation :—**Expld.** *Re* Clifton's Patent, [1904] 2 Ch. 357.

2200. ——.]—A petition for revocation of a patent should be heard in open ct., & not, even by consent, in chambers.—*Re* CLIFTON'S PATENT, [1904] 2 Ch. 357; 73 L. J. Ch. 597; 91 L. T. 284; 52 W. R. 629; 48 Sol. Jo. 573; 21 R. P. C. 515.

2201. Order made when petition brought on for directions.]—A petition for revocation of a patent having been brought on for the purpose of obtaining directions as to the hearing, resp. appeared in person & consented to an immediate order for revocation, which was accordingly made.—*Re* SLEIGHT'S PATENT (1893), 10 R. P. C. 447.

2202. Stay of order—Pending appeal in action for infringement.]—*Re* SCOTT'S PATENT (1907), 24 R. P. C. 100.

2203. Certificate of particulars.]—*Re* AYLOTT'S PATENT (1911), 28 R. P. C. 227.

2204. ——.] — *Re* MERRYWEATHER'S PATENT (1911), 29 R. P. C. 64.

2205. Not "going to trial."] — *Re* AYLOTT'S PATENT, No. 2203, *ante*.

2206. Costs.]—On a petition by the Pharmaceutical Society, with the leave of the A.-G., for revocation, of a patent for a medicinal compound on certain grounds including absence of novelty, resp. consented to an order of revocation, but solely for want of novelty. The judge made an order for revocation with costs of the petition.—*Re* RENDELL'S PATENT (1894), 70 L. T. 756.

2207. —— Only method of obtaining revocation.]—*Re* WALLACE'S PATENT, No. 2154, *ante*.

2208. —— Petitioner aware of defect when patent granted.]—The patent was applied for, though both parties to this petition were well aware at the time that no patent could be validly granted, because the thing was actually on sale, had been sold in this country. Then petitioners suddenly commenced proceedings to revoke the patent. Resp. says, & he is justified in saying, that under these circumstances he should not be ordered to pay the costs. Accordingly I revoke the patent & I make no order as to the costs (PARKER, J.).—*Re* SLINGSBY'S PATENT (1910), 27 R. P. C. 524.

2209. —— Whether respondent bound to surrender patent.]—*Re* AYLOTT'S PATENT, No. 2203, *ante*.

2210. —— No notice of petition.]—*Re* MERRYWEATHER'S PATENT, No. 2204, *ante*.

D. Expiry of Patent.

2211. Not sufficient to refuse fiat.] — (1) An action claiming merely a declaration of invalidity of letters patent already expired, where no legal right of pltf. has been infringed, is not maintainable.

(2) The proper mode of procedure in a case of is kind is by petition for revocation under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26.

(3) The mere fact that a patent has expired is not of itself a sufficient reason for refusing a fiat for a petition for revocation.—NORTH EASTERN MARINE ENGINEERING CO. *v.* LEEDS FORGE CO., [1906] 2 Ch. 498; 75 L. J. Ch. 720; 95 L. T. 178; 22 T. L. R. 724; 50 Sol. Jo. 650, C. A.

Annotation :—As to (1) **Refd.** Guaranty Trust Co. of New York *v.* Hannay, [1915] 2 K. B. 536.

2212. Petition not proceeded with.]—*Re* LUDLOW'S PATENT (1912), 29 R. P. C. 616.

E. Costs.

See R. S. C., Ord. 53A, r. 7.

2213. Costs on higher scale.]—*Re* TIERMANN'S PATENT, No. 2176, *ante*.

2214. Costs subsequent to disclaimer.]—R. *v.* MILL (1851), 14 Beav. 312; 51 E. R. 306.

2215. Costs of shorthand note.]—*Re* NORWOOD'S PATENTS, No. 2146, *ante*.

2216. ——.]—*Re* TIERMANN'S PATENT, No. 2176, *ante*.

2217. Cost of obtaining fiat of Attorney-General.]—The costs of obtaining the authority of the A.-G. ought to be allowed on taxation to petitioner for revocation who has been given the costs of the petition. A petition for revocation of a patent having been presented with the authority of the A.-G., the patent was revoked, resp. being ordered to pay the costs of petitioner. On the taxation resp. objected that petitioner was not entitled to the costs of obtaining the authority of the A.-G. The taxing master allowed such costs. Resp. applied to review the taxation :—*Held :* the costs of obtaining the authority of the A.-G. were properly allowed. The summons was dismissed with costs.—*Re* POULTON'S PATENT (1906), 23 R. P. C. 571.

2218. Security for costs of appeal—Position of nominal respondent.]—*Re* OWEN'S PATENT (1900), 17 R. P. C. 637.

2219. No order as to costs.]—*Re* NORWOOD'S PATENT (NO. 2), No. 2147, *ante*.

Of consent order.]—*See* Sub-sect. 3, C. (*b*), *ante*.

SUB-SECT. 4.—REVOCATION OF EXTENDED PATENT.

2220. Jurisdiction.] — (1) The Judicial Committee have, under Judicial Committee Act, 1833 (c. 41), s. 4, jurisdiction to entertain a petition, referred to them by the Crown, seeking to revoke an Order in Council, made upon their recommendation, upon an application by patentees for a prolongation of letters patent under 5 & 6 Will. 4, c. 83, & to recall the warrant for sealing such letters patent.

(2) An alien resident abroad, who was interested in an English patent by a foreign inventor, & who had also considerable dealings in this country in respect of sales of the patented machine & in granting licences for the use of such patent, held, in the circumstances, to have a *locus standi* as to entitle him to petition the Crown to revoke an Order in Council for granting an extended term of an English patent, & to recall the warrant for sealing such patent.

(3) *Qu. :* whether an alien living abroad, without such interest, could inform the Crown by petition as to any matters touching letters patent. —*Re* SCHLUMBERGER (1853), 9 Moo. P. C. C. 1; 14 E. R. 197; *sub nom. Re* SHLUMBERGER'S PATENT, 2 Eq. Rep. 36, P. C.

2221. Application by alien—Interested in dealing with patented article in England.]—*Re* SCHLUMBERGER, No. 2220, *ante*.

SECT. 2.—BY THE COMPTROLLER.

SUB-SECT. 1.—IN GENERAL.

See Patents & Designs Acts, 1907 (c. 29), s. 26, & 1919 (c. 80), sched.; Patents Rules, 1920, rr. 76, 78.

2222. Interests of public to be considered—Not those of individual.]—(1) While the motive of appct. for the revocation of a patent under Patents & Designs Act, 1907 (c. 29), s. 27, is immaterial, his position & conduct, so far as they may have influenced the action of the owner of the patent, are material; & in considering whether a case for revocation has been made out the Comptroller-General or the ct. must look primarily not to the interests of the individual, but to those of the public.

(2) Appcts. for the revocation of a patent under the Patents & Designs Act, 1907 (c. 29), s. 27, on the ground that it had been worked exclusively or mainly outside the United Kingdom, were themselves the owners of a prior patent which would have been infringed by any working of the patent sought to be revoked. They had refused an offer of a licence under that patent, & its owners had not applied for a voluntary or compulsory licence under the prior patent. The prior patent would shortly expire, but the other patent had some years to run:—*Held:* notwithstanding the non-application for a licence by the owners of the patent sought to be revoked, the fact that it could not have been worked without the risk of infringement proceedings by the owners of the prior patent was a satisfactory reason for the patent not being worked in this country, & ought not therefore to be revoked.—*Re* TAYLOR'S PATENT, [1912] 1 Ch. 635; 81 L. J. Ch. 438; 106 L. T. 600; 28 T. L. R. 293; 56 Sol. Jo. 415.

SUB-SECT. 2.—PATENT WORKED MAINLY ABROAD.

A. In General.

See, generally, Patents & Designs Acts, 1907 (c. 29), s. 27; & 1919 (c. 80), s. 1; Patents Rules, 1920, rr. 79–83.

2223. Application to patents existing before Act.]—(1) Patents & Designs Act, 1907 (c. 29), s. 24, deals primarily with cases where the trade of this country has been injured by an abuse of the monopoly conferred by the patent, irrespective of anything which is being done abroad, while Patents & Designs Act, 1907 (c. 29), s. 27, deals primarily with cases where the object or effect of the use of such rights in the way they have been used has been to favour the development of industries abroad at the expense of industries in the United Kingdom.

(2) The keynote of Patents & Designs Act, 1907 (c. 29), s. 27, is forfeiture of the patent for the abuse of the monopoly at the instance of a common informer, & any one, whether a foreign or a British subject, & whatever his motive, can, by satisfying the Comptroller of the existence of the circumstances contemplated in Patents & Designs Act, 1907 (c. 29), s. 27 (1), throw on the patentee the *onus* of proving, to prevent revocation, that the patented process or article is carried on or manufactured to an adequate extent within the United Kingdom, or of giving a satisfactory reason why it is not so carried on or manufactured. Sect. 27 does not mean that in every case where more than 50 per cent. of the patented articles manufactured anywhere are made abroad the patentee can be called upon to defend his patent rights; if the article is manufactured in the United Kingdom to as great an extent as can reasonably be expected, having regard to the industrial development of other countries, no presumption against the patentee arises.

(3) Patents & Designs Act, 1907 (c. 29), s. 27 (1), institutes a comparison between the extent to which the article or process is manufactured or carried on in this country & the extent to which it is manufactured or carried on abroad, whether the articles are or are not imported into this country, & Patents & Designs Act, 1907 (c. 29), s. 27, is meant to hit every abuse of the patentee's monopoly the object or result of which is to benefit foreigners at the expense of traders within the United Kingdom.

(4) In determining whether there has been "adequate" manufacturing in the United Kingdom, or whether "satisfactory reasons" for the inadequacy are given by the patentee, it is left to the Comptroller, subject to appeal to the ct., to determine in each case, & having regard to all the circumstances, whether the home manufacture is adequate, or, if not, whether the reasons are satisfactory, he bearing in mind (*a*) that that manufacture is not adequate if it is lessened by the patentee exercising his patent rights to the hurt of British industry—*e.g.* by giving foreign traders a preference as to licences or otherwise over British traders—& (*b*) that reasons are not satisfactory which do not account for the inadequacy of the home manufacture by causes operating irrespective of any abuse of the monopoly.

On the other hand, a patentee who has allowed part of the demand in this country to be supplied by the importation of goods from abroad has not necessarily precluded himself from proving that there is adequate home manufacture or giving satisfactory reasons for the inadequacy of that manufacture, the policy of Patents & Designs Act, 1907 (c. 29), s. 27, being to secure fair play between foreign & British industries.

(5) Patents & Designs Act, 1907 (c. 29), s. 27, applies both to patents in existence before Patents & Designs Act, 1907 (c. 29), & patents subsequently granted, although reasons might be accepted as satisfactory in the case of the former which would not be so accepted in the latter; but the fact that a patentee has before Patents & Designs Act, 1907 (c. 29), precluded himself by licence or contract from working his patent in this country is not a satisfactory reason.

In 1900 two patents were granted to H. for inventions relating to a process of manufacturing imitation stone slabs. The invention was in commercial operation in Germany, France, & Belgium, but was never worked in the United Kingdom. The patentee devoted himself to the establishment abroad of industries in which the patented process was carried on, & used his monopoly to secure to a Belgian co., to whom in 1905 he granted an exclusive licence for the United Kingdom, the monopoly of selling in the United Kingdom articles manufactured by the co. in Belgium:—*Held:* the patent ought to be revoked forthwith, although in July, 1908, the patentee & the Belgian co. had issued newspaper advertisements in the United Kingdom expressing their willingness to sell or enter into working arrangements for the manufacture of goods in the United Kingdom under the patented process.

(6) The word "mainly" is used in Patents & Designs Act, 1907 (c. 29), s. 27 (1), in close connection with & as an alternative to "exclusively," & having regard to this fact, I do not think that a process or article can be said to be mainly carried on or manufactured abroad merely because it is

carried on or manufactured abroad to a somewhat greater extent than within the United Kingdom (PARKER, J.).—*Re* HATSCHEK'S PATENTS, *Ex p.* ZERENNER, [1909] 2 Ch. 68; 78 L. J. Ch. 402; 100 L. T. 809; 25 T. L. R. 457; 26 R. P. C. 228.

Annotations:—*As to* (1) **Apld.** *Re* Robin Electric Lamp Co.'s Petn., [1915] 1 Ch. 780. *As to* (2) **Apld.** *Re* Lake's Patent (1909), 26 R. P. C. 443; *Re* Fiat Motors' Appln., [1911] 1 Ch. 66. *As to* (4) **Consd.** *Re* Boult's Patent (1909), 26 R. P. C. 383. *As to* (5) **Consd.** *Re* Taylor's Patent (1912), 106 L. T. 600. *Generally*, **Reld.** Thermos *v.* Isola (1910), 27 R. P. C. 195; Saccharin Corpn. *v.* National Saccharin Corpn. (1911), 28 R. P. C. 287; British Thomson-Houston Co. *v.* Duram, [1915] 1 Ch. 823.

2224. Primary object—Prevention of development of foreign industries at expense of British.]—*Re* HATSCHEK'S PATENTS, *Ex p.* ZERENNER, No. 2223, *ante*.

2225. What is the "Patented Article"—Construction of specification.]—(1) An application was made by R., under Patents & Designs Act, 1907 (c. 29), s. 27, for the revocation of a patent No. 8401 of 1903 granted to L. for "Improvements in sound magnifying horns for phonographs & the like" on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. The application was opposed by G. & L., Ltd., who were assignees of the patent. The evidence for appct. was directed to showing that the "sound boxes," which he alleged to be part of the patented article, were in all cases made in the United States of America; & that large numbers of talking machines coming within the claims were imported & sold by other parties. The assignees filed declarations to the effect that there was a substantial manufacture of "the improved sound magnifying horn" in this country, & that this improved horn was the only "patented article" which it was necessary for them to manufacture here to escape the penalties of the Act. At the hearing they contended that a *primâ facie* case had not been raised by appct., & that the *onus* was upon him to prove the allegations upon which the application was founded, & that, until he did so, he had no *locus standi*:—*Held:* on a proper construction of the specification the real invention of the patentee was the improved sound magnifying horn, & although a sound box was claimed in combination, there was no claim for any special form of sound box; it was not necessary therefore for the sound box to be manufactured in this country to escape the provisions of Patents & Designs Act, 1907 (c. 29). s. 27; & the evidence adduced by appct. was irrelevant & insufficient to discharge the *onus* cast upon him under Patents & Designs Act, 1907 (c. 29), s. 27 (1). (2) Until a *primâ facie* case is made out by appct. under Patents & Designs Act, 1907 (c. 29), s. 27 (1), the patentee cannot be called upon to produce his witnesses for cross-examination, or for examination by the Comptroller-General.—*Re* LAKE'S PATENT (1909), 26 R. P. C. 443.

2226. Manufacture in England by licencees since application to revoke.]—An application was made under Patents & Designs Act, 1907 (c. 29), s. 27, to revoke a patent (No. 25,382 of 1901) for "Improvements in typewriting machines" on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. Before the end of Aug. 1908, a few advertisements were inserted in various journals & some correspondence was entered into by the patentees with a view to the grant of licences. An agreement to manufacture certain parts of the machines was relied upon by the patentees, but this was only entered into six months after the year of grace given by Patents & Designs Act, 1907 (c. 29), s. 27, & three months after the date of the application to revoke. The evidence showed that between one thousand & one thousand five hundred machines protected by the patent were annually imported, while only an order for one hundred sets of certain parts of the machines had been given up to the date of the hearing & this order, although being executed, had not then been actually completed:—*Held:* there was no adequate manufacture in this country at the date of the hearing, & no sufficient reasons had been given for the earlier inaction of the patentees & the lateness of the present attempt. He therefore revoked the patent & gave appct. costs.—*Re* FEIL'S PATENT (1909), 27 R. P. C. 25.

2227. Higher price charged for article manufactured in United Kingdom—Case of suspicion.]—(1) An application was made under Patents & Designs Act, 1907 (c. 29), s. 27, to revoke a patent for "Mills for pulverising or granulating" on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. The patentee did not contend that the machine was not manufactured exclusively or mainly abroad, but urged that there was adequate manufacture, or that there were satisfactory reasons for deficiency in this respect. At the date of the application one machine had already been made in the United Kingdom; & a second machine had been commenced, which was completed shortly before the hearing, although parts of these machines had been imported; & a third had been taken in hand. The present demand in the United Kingdom did not exceed two machines *per annum*, & the manufacturers here were prepared to turn out ten or twelve machines *per annum* if required:—*Held:* there was a manufacture in this country sufficient to meet the demand, & sufficient reasons were given for the absence of a more extensive manufacture. He, therefore, dismissed the application, & gave the patentees costs.

(2) In revocation cases under Patents & Designs Act, 1907 (c. 29), s. 27, the only question as to price is whether the price charged by the patentee is a *bonâ fide* one & not adopted for the purpose of checking & diminishing the demand for the article made in the United Kingdom. If the price charged by a patentee for a machine made in the United Kingdom were higher than that charged for a machine supplied from abroad a *primâ facie* case for suspicion would arise.—*Re* KENT'S PATENT (1909), 26 R. P. C. 666.

B. Who may Apply.

2228. Foreigner.]—*Re* HATSCHEK'S PATENTS, *Ex p.* ZERENNER, No. 2223, *ante*.

C. Manufacture Abroad.

See Patents & Designs Acts, 1907 (c. 29), s. 27; 1919 (c. 80), s. 1.

2229. No manufacture anywhere.]—An application was made, under Patents & Designs Act, 1907 (c. 29), s. 27, by K. for the revocation of a patent for a process & for an implement for carrying it out granted in 1901 to B. & assigned in 1905 to C. M., a German co. by whom the invention was communicated to the patentee, on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. The application was opposed by the assignees, who proved that the patented article was not manufactured at all, either in this country or abroad, but that the patented process was carried on in this country to a substantial extent for

Sect. 2.—By the comptroller: Sub-sect. 2, C., D., E. & F. (a).]

certain purposes, & that they were prepared to grant licences for its use for all purposes :—*Held :* (1) appct. had not discharged the *onus* of proof falling upon him under Patents & Designs Act, 1907 (c. 29), s. 27 (1), & the application should be dismissed ; (2) even if the application were amended so as to cover the patented process, it would be difficult for appct. to prove that the process was carried on "mainly" abroad as the process was in substantial use here for the primary purposes of the invention.—*Re* BOULT'S PATENT (1909), 26 R. P. C. 424.

2230. Foreign manufacture stopped—Time of stopping.]—In considering whether a patent ought to be revoked under Patents & Designs Act, 1907 (c. 29), s. 27 (1), on the ground that the "patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom," the ct. is not bound to determine that at the precise moment when the petition was lodged there was a manufacture of the patented article or a carrying on of the patented process ; a temporary cessation of manufacture & a sale of stock in the meantime will not prevent the operation of Patents & Designs Act, 1907 (c. 29), s. 27 (1) ; but where the manufacture & business are entirely & permanently stopped Patents & Designs Act, 1907 (c. 29), s. 27 will not apply merely because the remaining stock is sold after the business has come to an end.—*Re* GREEN'S APPLICATION, [1911] 1 Ch. 754 ; 80 L. J. Ch. 484 ; 104 L. T. 629.

D. Adequate Manufacture in England.

2231. Adequate—Meaning of.]—*Re* HATSCHEK'S PATENTS, *Ex p.* ZERENNER, No. 2223, *ante.*

2232. Not to be construed only with reference to demand in this country—To be construed with exclusively.]—*Re* HATSCHEK'S PATENTS, *Ex p.* ZERENNER, No. 2223, *ante.*

2233. Manufacture in England by infringers.]—On an application for revocation of a patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom, the Comptroller of Patents, in computing the extent to which the article or process for which the patent has been obtained is, within Patents & Designs Act, 1907 (c. 29), s. 27 (1), manufactured or carried on within the United Kingdom, ought not to inquire whether what has been done in the United Kingdom is or is not in derogation of the patentee's rights under his patent, or to exclude from the computation what has been done by infringers of the patent in derogation of those rights.—*Re* FIAT MOTORS, LTD.'S APPLICATION, [1911] 1 Ch. 66 ; 80 L. J. Ch. 48 ; 103 L. T. 453 ; 27 T. L. R. 74 ; 55 Sol. Jo. 64.

2234. No adequate manufacture at date of application—Manufacture adequate at date of hearing—Discretion of Comptroller.]—An application was made under Patents & Designs Act, 1907 (c. 29), s. 27, to revoke a patent granted to W. for "improvements in or relating to winding machines for yarn & other materials," on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. It was admitted that prior to 1914 no manufacture of the patented article took place in the United Kingdom, but it was proved that early in 1914 negotiations were commenced with a firm in the United Kingdom for the manufacture. These negotiations did not result in any manufacture until after the date of the application :—*Held :* (1) while there was no adequate manufacture of the patented article at the date of the application, there was adequate manufacture at the date of the hearing as the result of *bonâ fide* arrangements made by the patentee prior to the date of the application ; (2) the discretion of the Comptroller under Patents & Designs Act, 1907 (c. 29), s. 27 (2), might therefore properly be invoked.—*Re* WARDWELL'S PATENT (1914), 32 R. P. C. 88.

E. Satisfactory Reasons.

2235. Inadequacy of home manufacture—Explained by reasons irrespective of abuse of monopoly.]—*Re* HATSCHEK'S PATENTS, *Ex p.* ZERENNER, No. 2223, *ante.*

2236. Standard to be adopted—Standard of intelligent business man.]—(1) It is not enough for the efforts made by a patentee to carry out the obligations imposed on him by Patents & Designs Act, 1907 (c. 29), to be sufficient in his own estimation ; they must conform to the standard which an intelligent business man in this country would place before himself & adopt.

(2) If a patentee manufactures abroad & there is a demand abroad, the absence of a demand here is not necessarily a valid excuse for absence of manufacture. The patentee must in any case make an effort to create a demand for the patented article in this country, & the establishment of a manufacture may help to create the demand.—*Re* BOULT'S PATENT (1909), 26 R. P. C. 383.

Annotations :—As to (2) **Apld.** *Re* Kent's Patent (1909), 26 R. P. C. 666 ; *Re* Taylor's Patent (1911), 29 R. P. C. 29.

2237. Absence of demand in England—Effort to create demand.]—*Re* BOULT'S PATENT, No. 2236, *ante.*

2238. Manufacture in England sufficient to meet demand.]—*Re* KENT'S PATENT, No. 2227, *ante.*

2239. Patentee using best endeavours—Failure due to matters outside patentee's control.]—(1) If a patentee proves that he has done his best to fulfil the obligations arising under Patents & Designs Act, 1907 (c. 29), by establishing in this country an industry in the patented article, & that his want of success has been due to circumstances beyond his control & not to the manner in which he has exercised the rights conferred upon him by his patent, the patent ought not to be revoked.

(2) In the case of a patented article manufactured mainly outside the United Kingdom, the owner of such patent must in revocation proceedings prove that the patented article is manufactured, to an adequate extent, within the United Kingdom, or give satisfactory reasons why it is not so manufactured. In order to discharge this *onus*, he must at least show with regard to his letters patent that he has not by any exercise of his patent rights given any preference to foreign over British industry, or otherwise done anything inconsistent with the obligations of Patents & Designs Act, 1907 (c. 29).—*Re* BREMER'S PATENT, *Ex p.* BRAULIK, *Re* HÖGNER'S PATENT, *Ex p.* BRAULIK, [1909] 2 Ch. 217 ; 78 L. J. Ch. 550 ; 101 L. T. 21 ; 25 T. L. R. 610 ; 26 R. P. C. 449.

*Annotation :—***Refd.** *Re* Hatschek's Patents, *Ex p.* Zerenner, [1909] 2 Ch. 68.

2240. No practical utility.]—An application was made under Patents & Designs Act, 1907 (c. 29), s. 27, by J. & co. & J., carrying on business in London, to revoke a patent for "improvements in or relating to valve operating mechanism," No. 22762 of 1900, granted to O. & a co. & assigned to D. D. B., Ltd., on the ground of non-working &

abuse of monopoly. The application was opposed by the assignees, who admitted non-working, & pleaded absence of demand as a sufficient reason: —*Held:* absence of demand for the patented article by itself, & the admission of both parties that at present there was no practical utility in the invention constituted a satisfactory reason for non-working.—*Re* OSBORN'S PATENT (1909), 26 R. P. C. 819.

2241. Misunderstanding as to requirements of Act.]—An application was made under Patents & Designs Act, 1907 (c. 29), s. 27, by W. B. & G., a limited co. carrying on business in Birmingham, to revoke a patent, No. 25583 of 1897, for "an umbrella opening automatically," granted to Worring & Kortenbach of Weyer, in Germany, on the ground of non-working in the United Kingdom. The patentees alleged that they were under a misapprehension as to the requirements of Patents & Designs Act, 1907 (c. 29), s. 27, & asked for an extension of time in which to manufacture the patented article in the United Kingdom:—*Held:* the patent should be revoked forthwith. — *Re* WORRING & KORTENBACH'S PATENT (1909), 26 R. P. C. 163.

2242. Arrangements made for manufacture in future.]—Application was made under Patents & Designs Act, 1907 (c. 29), s. 27, to revoke a patent (No. 28807 of 1904) for "A new or improved method of & apparatus for cutting pipes, plates, & other metal articles" on the ground that the patented article & process was manufactured & carried on exclusively or mainly outside the United Kingdom. It was admitted that the manufacture had been carried on mainly abroad, but it was contended that there were satisfactory reasons for this, & that at the date of the hearing there was a substantial manufacture in this country. Negotiations for the sale of the patent had been commenced within four years from the date of the patent, & had resulted in the assignment of the patent to a British co. A few of the patented articles were manufactured in this country in 1908, & the present owners of the patent were, at the date of the hearing, in a position to manufacture to a full & adequate extent in this country:—*Held:* satisfactory reasons had been given for the failure to manufacture to an adequate extent in this country, before the expiration of four years from the date of the patent, & there was sufficient evidence of adequate manufacture at the present time. He therefore dismissed the application & gave the patentees thirty guineas costs. In considering the amount of costs to be awarded, the fact that appct. had justifiable grounds for making the application was taken into account.—*Re* JOTTRAND'S PATENT (1909), 26 R. P. C. 830.

2243. Temporary cessation of manufacture—Liquidation of company.]—*Re* GREEN'S APPLICATION, No. 2230, *ante*.

2244. Threat of action for infringement.]—*Re* TAYLOR'S PATENT, No. 2222, *ante*.

F. Practice.

(*a*) *In General.*

See Patents & Designs Acts, 1907 (c. 29), s. 27; 1919 (c. 80), s. 1; Patents Rules, 1920, rr. 79–83.

2245. Right to begin.] — The patentee held entitled to begin in revocation cases under Patents & Designs Act, 1907 (c. 29), s. 26, except in cases where revocation is sought on the ground of the invention having been obtained under Patents & Designs Act, 1907 (c. 29), s. 11 (1) (*a*).—NOTES OF RULINGS BY THE COMPTROLLER-GENERAL [illegible] (F) (1910), 27 R. P. C. App. VII.

2246. Primâ facie case by applicant—No necessity to leave sworn declaration.]—Application were made for the revocation of two patents by filing the ordinary form 24 under Patents Rules, 1908, r. 78, on the ground that the patented articles were manufactured exclusively or mainly outside the United Kingdom. The patentees objected to leave a declaration in answer under r. 79 until appct. had made out a *primâ facie* case or given evidence in support of his allegations. They contended that there was a conflict between Patents & Designs Act, 1907 (c. 29), s. 27, & the above-mentioned rules, & that under Patents & Designs Act, 1907 (c. 29), s. 27, the *onus* was thrown on appct. to make out a *primâ facie* case before the patentee was called upon to leave evidence; that, even if this was not so, an appct. ought to be called upon to make a declaration stating the facts on which he relied in all cases, & certainly in exceptional cases, & that the present case was exceptional because an action for infringement had been commenced by the patentees against appct. in which the pleadings were closed before the applications were made, & appct. had not pleaded that the patent was worked mainly or exclusively abroad as a defence, or counterclaimed for revocation:—*Held:* there was no conflict as alleged between Patents & Designs Act, 1907 (c. 29), & Patents Rules, 1908; on the proper construction of Patents & Designs Act, 1907 (c. 29), s. 27, appct. is not compelled to make out a *primâ facie* case before the patentee is called upon to leave evidence; the *onus* of proving, without help from the patentee, that the patented article is manufactured exclusively or mainly outside the United Kingdom is not thrown on appct., but that at the "consideration" & "inquiry" provided for by Patents & Designs Act, 1907 (c. 79), s. 27 (2), both appct. & patentee must do their best to assist the Comptroller with evidence upon which he may come to a proper conclusion; the Comptroller ought not to call on appct. in every case to leave a sworn declaration giving the particulars on which he relies, but the Comptroller has power under the general practice of the office & under Patents Rules 80 & 81 to call appct. before him & examine him, or to call for a sworn declaration if necessary, or to appoint a hearing at which both parties may be heard & the proceedings stayed where necessary.—*Re* ILGNER'S PATENTS (1909), 26 R. P. C. 198.

2247. —— Onus of proof on patentee.]—*Re* BREMER'S PATENT, *Ex p.* BRAULIK, *Re* HÖGNER'S PATENT, *Ex p.* BRAULIK, No. 2239, *ante*.

2248. —— ——.]—*Re* HATSCHEK'S PATENTS, *Ex p.* ZERENNER, No. 2223, *ante*.

2249. —— Before patentee can be called on to produce witnesses.]—*Re* LAKE'S PATENT, No. 2225, *ante*.

2250. Suspension of order—To give opportunity for manufacture here.]—An application was made under Patents & Designs Act, 1907 (c. 29), s. 27, by W. H., Ltd., Macclesfield, to revoke a patent, No. 4391 of 1904, granted to W. for "improvements in the preparation of clay for the casting of clay-ware," on the ground that the patented process had been carried on exclusively or mainly outside the United Kingdom. The application was opposed by W. It was admitted that the process had been carried on exclusively abroad, but it was contended that satisfactory reasons had been given for non-working in the United Kingdom. The principal reasons alleged were that: (*a*) W. had made repeated & *bonâ fide* efforts to sell or licence the patented process in this country. (*b*) W. had treated this country fairly, & had not given any preference to foreign countries. (*c*) The

Sect. 2.—*By the comptroller: Sub-sect.* 2, *F.* (*a*) & (*b*); *sub-sects.* 3 & 4. *Part XIV. Sect.* 1: *Sub-sect.* 1.]

failure to work had been due to the conservatism of English manufacturers; & (*d*) W. had now entered into a *bonâ fide* contract giving an option to purchase the patent rights for this country:—*Held:* the conduct of the patentee entitled him to consideration & to the benefit or indulgence of further time to comply with the provisions of Patents & Designs Act, 1907 (c. 27), & the patent would be revoked, not forthwith, but on Dec. 31, 1909, unless in the meantime it was shown to the Comptroller's satisfaction that the patented process was carried on to an adequate extent in the United Kingdom.—*Re* WEBER'S PATENT (1909), 26 R. P. C. 300.

2251. —— To amend specification.] — An application was made under Patents & Designs Act, 1907 (c. 29), s. 27, to revoke a patent granted to W., No. 25158 of 1901, for "improvements in or relating to winding machines for yarn threads, tapes & the like" on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. It was contended on behalf of the patentee that there was no manufacture of the patented article either in the United Kingdom or elsewhere, inasmuch as the machine which was admittedly manufactured outside the United Kingdom did not come within all the claims of the specification, & consequently Patents & Designs Act, 1907 (c. 29), s. 27, did not apply. Alternatively it was contended that the machine comprised many castings which could only be obtained satisfactorily in the United States:—*Held:* the machine manufactured in the United States embodied the patentee's invention, or at any rate an important part of it; it was covered by many of the more important claims & must therefore be considered as the patented article." Further, the reasons given for non-maufacture in the United Kingdom were not satisfactory. The Comptroller, therefore, decided to revoke the patent, but suspended the making of the order for one month to allow the patentee an opportunity of applying to amend his specification by striking out such parts as admittedly embodied the patented article which was manufactured in the United States & not in this country.—*Re* WARDWELL'S PATENT (1913), 30 R. P. C. 408.

(*b*) *Costs.*

2252. Revocation not contested—Prompt notification by patentee.]—An application was made, on Feb. 23, 1909, under Patents & Designs Act, 1907 (c. 29), s. 27, to revoke a patent for "Rim locks" granted in 1896 to W., on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. The patentee, who was resident in the United States, filed no evidence, & a letter was received on Apr. 27 from his agents by the Comptroller-General stating that he would take no steps to protect his patent:—*Held:* the patent should be revoked forthwith; but no costs were awarded on the ground that the patentee had acted promptly in notifying his intention not to contest the application.—*Re* TAYLOR'S PATENT (1909), 26 R. P. C. 381.

2253. ——.]—Appct. is entitled to some costs in respect of an application to revoke which is not contested.

An application was made on Feb. 5, 1909, under Patents & Designs Act, 1907 (c. 29), s. 27, by the S. Syndicate, Ltd., carrying on business in London, to revoke a patent for "improvements in or relating to steam generators" granted to B. as a communication from abroad, on the ground that the patented article was manufactured exclusively or mainly outside the United Kingdom. On Feb. 20 a letter was received by the Comptroller from B. stating that he did not propose to contest the application. The patent was revoked forthwith. B. submitted that no costs should be awarded, as he voluntarily relinquished his patent as soon as he had knowledge of the application to revoke:—*Held:* the patent should be revoked forthwith. Four guineas costs were awarded to appct.—*Re* BOULT'S PATENT (1909), 26 R. P. C. 219.

2254. Justifiable grounds for making application.]—*Re* JOTTRAND'S PATENT, No. 2242, *ante*.

SUB-SECT. 3.—GROUND ON WHICH GRANT MIGHT HAVE BEEN OPPOSED.

See Patents & Designs Acts, 1907 (c. 29), ss. 11 (1), 26, & 1919 (c. 80), s. 4, sched.

2255. Who may apply—"Successor in interest"—Assignee of invention subject of application.]—An application was made under Patents & Designs Act, 1907 (c. 29), s. 26, by B. & W. to revoke a patent for "Means for suspending curtains" (No. 22,479 of 1907) granted to G. on the ground (*a*) of Patents & Designs Act, 1907 (c. 29), s. 11 (1). Appcts. B. & W. claimed to be the "successors in interest" of A., the person from whom it was alleged that the invention had been obtained:—*Held:* the words "successor in interest" in Patents & Designs Act, 1907 (c. 29), s. 26, do not include an assignee under an assignment which purports to convey the invention which is the subject of an application under Patents & Designs Act, 1907 (c. 29), s. 26, & appcts. had no *locus standi*.—*Re* GASCOINE'S PATENT (1909), 27 R. P. C. 78.

2256. Amendment of specification—By insertion of specific references.]—In 1916 a patent was granted for "Improvements in impregnating compositions for proofing fabrics & other flexible materials." In 1917 an application for revocation of that patent by the Comptroller, under Patents & Designs Act, 1907 (c. 29), s. 26, was made by the owners of a patent granted in 1915 for "An improved fabric for balloon envelopes & the like & the method of manufacturing & aftertreating the same," on the ground that the invention claimed by the patent of 1916 had been claimed in the complete specification of the patent of 1915:—*Held:* (1) the invention of the patentees was not the same as that of the opponents; (2) even if a fabric made in accordance with the claims to which objection was taken would be an infringement of the opponents' patent, that would not, in itself, be a sufficient reason for striking out those claims; (3) the object of the insertion of a specific reference was not to preserve or assist the opponents' rights, but to protect the public in cases in which, but for the insertion, they would be likely to be misled; (4) there was not sufficient reason for giving any special warning.—*Re* WOOLLDRIDGE & FOX'S PATENT (1920), 37 R. P. C. 114.

2257. Published in prior specifications—Specifications published before 1919.]—(1) On an application under Patents & Designs Act, 1907 (c. 29), s. 26, for revocation of a patent granted before the passing of Patents & Designs Act, 1919 (c. 80), it is not a ground for revocation that the patented invention is published in an earlier British specification, because under Patents & Designs Act, 1907 (c. 29), s. 26, the application can only be made on

a ground " on which the grant of the patent might have been opposed," & prior publication was only made a ground of opposition by Patents & Designs Act, 1919 (c. 80), s. 4.

An invention was patented in the United States on Feb. 19, 1914, & under International Convention only a year was available for obtaining a patent of the invention in the United Kingdom. By virtue of art. 307 of the Treaty of Peace with Germany the time for patenting in the United Kingdom in such a case was extended to Jan. 10, 1921, & the invention was in fact patented in this country in 1920. It was alleged that it contained a claim of an invention that had been patented in the United Kingdom in 1916 on an application made on Feb. 15, 1915 :—*Held :* it could not be relied on as a ground for revocation of this latter patent, as it was not in existence at the time of the grant of that patent, & the insertion of a specific reference to it in the specification of the patent of 1916 could not be directed.

(2) There is not the same reason for directing the insertion in the specification of a patent of a specific reference to an earlier specification containing a description of the patented invention as there is when the earlier specification contains an actual claim of some part of the patented invention ; & in the former case the insertion of a specific reference ought not to be so frequently directed.—*Re* UCAR'S PATENT, [1922] 2 Ch. 220 ; 91 L. J. Ch. 735 ; 127 L. T. 779 ; 66 Sol. Jo. 488 ; 39 R. P. C. 269.

2258. Claimed on specification—Must be specification prior to grant.]—*Re* UCAR'S PATENT, No. 2257, *ante*.

2259. Earlier American patent subsequently patented in England.]—*Re* UCAR'S PATENT, No. 2257, *ante*.

2260. Patent granted under International Convention—Patent different from that patented abroad.]—An application was made under Patents & Designs Act, 1907 (c. 29), s. 26, by A. to revoke a patent for " Improvements relating to valves for internal combustion engines " (No. 27295 of 1910) granted to S. on an application made in the United Kingdom on Nov. 23, 1910, & dated Nov. 24, 1909, under Patents & Designs Act, 1907 (c. 29), s. 91. The grounds upon which the application to revoke was based were :—(*a*) that the nature of the invention or the manner in which it was to be performed was not sufficiently & fairly described & ascertained in the complete specification ; & (*b*) that the invention claimed was in the complete specification of patent No. 1674 of 1910, which would be of an earlier date to the patent No. 27295 of 1910 if the latter had not been antedated as a Convention application. The question was raised as to whether the specification, as finally accepted, did not contain an invention substantially different from the invention for which protection had been applied for abroad, & it was contended on behalf of appct. for revocation that, under Patents & Designs Act, 1907 (c. 29), s. 11 (1) (*c*), he was entitled to raise the point that the invention as accepted did not sufficiently or fairly describe the invention originally applied for in this country :—*Held :* sect. 11 (1) (*c*) applies only to the " sufficient or fair " description of the invention claimed in the complete specification, & does not admit of any person raising questions as to the propriety of amendments which had been allowed in the specification, prior to acceptance, during its progress through the Patent Office, or as to what might be called disconformity between the invention as originally put forward & the invention as finally claimed. The application for revocation was dismissed, & costs were allowed to the patentee.—*Re* SEREX'S PATENT (1912), 29 R. P. C. 284.

Grounds for opposition to grant.]—*See* Part VII., Sect. 2, sub-sect. 2, *ante*.

SUB-SECT. 4.—APPEALS.

See Patents & Designs Acts, 1907 (c. 29), ss. 26 (4), 92 (2), & 1919 (c. 80), Sched. ; R. S. C., Ord. 53A, r. 5.

2261. Whether time runs in Long Vacation—" Dilatoriness."]—On Aug. 4, 1910, the Comptroller refused an application for revocation of a patent. Appct. thereupon instructed his solrs. to take the necessary steps to appeal, but their clerk who was in charge of the matter had gone away for his holidays, & nothing was done till the end of Aug., when instructions were sent to counsel to prepare a petition for appeal. He was away from London & wrote that he had no facilities for drawing it & could not do so. This letter reached the solrs. on Sept. 2, too late to make an application in chambers or instruct other counsel. The time limited by R. S. C., 1883, Ord. 53A, r. 4, for presenting a petition for appeal expired on Sept. 4 :—*Held :* time included in the Long Vacation must be counted in ascertaining the month allowed for appealing, & therefore the appeal was out of time ; & further, dilatoriness was not a " special circumstance " within R. S. C., 1883, Ord. 53A, r. 4, so as to enable appct. to obtain an enlargement of the time.—*Re* BELDAM'S PATENT, [1911] 1 Ch. 60 ; 80 L. J. Ch. 133 ; 27 R. P. C. 758 ; *sub nom. Re* BELDAM'S PATENT, TURNER *v.* BELDAM, 103 L. T. 454 ; 55 Sol. Jo. 46.

Part XIV.—Infringement.

SECT. 1.—**WHAT CONSTITUTES INFRINGEMENT.**

SUB-SECT. 1.—IN GENERAL.

2262. Distinguished from infringement of design.]—There is little or no analogy between a patent & a design.—HARRISON *v.* TAYLOR (1859), 4 H. & N. 815 ; 29 L. J. Ex. 3 ; 5 Jur. N. S. 1219 ; 157 E. R. 1064, Ex. Ch.

Annotations :—**Consd.** Lazarus *v.* Charles (1873), L. R. 16 Eq. 117. **Refd.** Mulloney *v.* Stevens (1864), 10 L. T. 190; Dover *v.* Nürnberger Celluloidwaren Fabrik Gebrüder Wolff, [1910] 2 Ch. 25. **Mentd.** Hothersall *v.* Moore (1891), 9 R. P. C. 27.

2263. Whether manufacture by patentee necessary.]—ECCLES & BRIERLY *v.* MCGREGOR, No. 200, *ante*.

2264. Protection co-extensive with invention at time of patent.]—CROSSLEY *v.* POTTER (1853), Macr. 240.

2265. Infringement by mode not known at date of patent.]—UNWIN *v.* HEATH, No. 2505, *post*.

2266. Adaptation of apparatus or process existing before patent.]—To support a patent the invention must be that from which some novelty, either in process or product, results. It is not sufficient that the novelty consists merely in the application of an old apparatus to a new purpose.—

Sect. 1.—*What constitutes infringement: Sub-sects.* 2.]

BUSH *v.* FOX (1852), Macr. 152, N. P.; *subsequent proceedings* (1854), 9 Exch. 651, Ex. Ch.; (1856), 5 H. L. Cas. 707, H. L.

2267. ——.]—Pltfs. in an action for infringement were owners of a patent for "Improvements relating to the extraction of dust from carpets & other materials." The specification stated that it was essential for practical success to drive by power the pump employed for producing a vacuum, & to maintain a vacuum of at least 5 lbs. per square inch in the filter on the side of the filtering medium where the air & dust entered when the apparatus was at work, & that it was only to extractors working with a considerable vacuum that the claims related. The first claim was for the combination of an extracting implement connected with a power-driven suction pump & dust-collecting means interposed between the implement & pump, substantially as & for the purpose specified. The patent had been held by the House of Lords in a previous action to have subject-matter & to be valid. Pltfs. complained of threats to infringe & of actual infringement. The machine alleged to infringe had suction bellows instead of a cylinder pump. Defts. alleged that the patent was invalid on the ground of publication of two specifications of H. & the prior user of machines made under H.'s patent, & they denied infringement on the ground that the patent sued on did not cover suction bellows although worked by motor, & on the ground that the machine complained of did not work at substantially 5 lbs. vacuum:—*Held:* notwithstanding the prior use of the machine of H. the patent was, on the construction placed on the specification by the House of Lords, valid; but defts. had not infringed. — BRITISH VACUUM CLEANER CO. *v.* ROBERTSHAW (J.) & SONS, LTD. (1913), 31 R. P. C. 29.

2268. Alleged infringement substantially different.]—G. was the registered owner of a patent for "Improvements in falsegrates & coalsavers for domestic stoves & fireplaces," & the object of the improvements was to bring about more perfect combustion, reduce the consumption of fuel, & render the fuel basket, which was supported by feet across each end & centre of the base, adjustable in size to the required fire capacity. In 1906, by an agreement in writing between pltfs. & G., the latter agreed to sell & assign the patent to the co. but neglected to do so. In 1908 pltfs. commenced an action for infringement against C. & joined W. G. as a deft. & claimed specific performance against him. Deft. C. stated that the articles complained of were made in accordance with R.'s patent & denied infringement:—*Held:* there was a substantial difference between the grates of pltfs. & those of deft. C.; & there had been no infringement.—SPENNYMOOR FOUNDRY, LTD. *v.* CATHERALL & GELDARD (1909), 26 R. P. C. 822.

2269. Infringement of part of patent.] — The title of the patent & every part of the specification in which directions were given for putting the apparatus in use, mentioned "metallic circuits" as the means by which the electric current was to be conveyed, but no claim was made in respect of such circuits. At the time of the patent it was not known, but it was subsequently discovered, that the earth might be used to complete the circuit to an extent of almost one-half of the circuit, & that metal might be dispensed with to that extent, & defts. had always used this new discovery:—*Held:* nevertheless, defts., having been found by the jury to have adopted a part of pltf.'s invention, the patent had been infringed.—ELECTRIC TELEGRAPH CO. *v.* BRETT (1851), 10 C. B. 838; 20 L. J. C. P. 123; 17 L. T. O. S. 107; 15 Jur. 579; 138 E. R. 331.

Refd. Unwin *v.* Heath (1855), 16 C. B. 713.

2270. ——.]—The infringement of any part of a patent process is actionable, if that part is of itself new & useful, so as that it might be the subject-matter of a patent & is used by the infringer to effect the object proposed by the patentee.—PATENT BOTTLE ENVELOPE CO. *v.* SEYMER (1858), 5 C. B. N. S. 164; 28 L. J. C. P. 22; 141 E. R. 65; *sub nom.* BOTTLE ENVELOPE CO. *v.* SEYMOUR, 5 Jur. N. S. 174.

Annotations:—**Mentd.** Brook *v.* Aston (1859), 28 L. J. Q. B. 175; Horton *v.* Mabon (1862), 12 C. B. N. S. 437.

2271. Validity of patent—Must be assumed when considering infringement.] — MUNTZ *v.* FOSTER, No. 2324, *post.*

2272. —— ——.]—UNWIN *v.* HEATH, No. 2505, *post.*

2273. —— **May be questioned.**]—C., a patentee, brought an action under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, against R., a prior patentee of a similar invention, to restrain R. from issuing threats of legal proceedings against persons selling C.'s patent articles. Shortly after C. had sued out his writ, but before it had been served, R. had commenced an action for infringement against the P. co., who were selling C.'s articles:—*Held:* (1) the action mentioned in the proviso to sect. 32 as taking a case out of the sect. need not be an action against the person who is suing to restrain the threats, but an action for infringement honestly brought with reasonable diligence against any of the persons who have been threatened would, if duly prosecuted, satisfy the proviso; (2) in considering whether such an action is brought with due diligence, the time of issuing the threats, & not the time when the party bringing the action first knew of the acts which he alleges to be infringements, was the period to be looked to.

(3) In order to obtain an interlocutory injunction pltf. must make out a *primâ facie*, *i.e.*, a case such that if the evidence remains the same at the hearing it is probable that he will obtain a decree, & unless he makes out such a case an injunction will not be granted on the mere consideration of the balance of convenience & inconvenience.

(4) *Semble*, in an action under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, to restrain

PART XIV. SECT. 1, SUB-SECT. 1.

2269 i. *Infringement of part of patent.*]—Defts. had manufactured a form of metallic weather strip in Canada very much nearer to that shown & described in an American patent to a date prior to the Canadian patent owned by pltfs. than it was to any of the forms shown & described in pltfs.' patent:—*Held:* if pltfs.' patent was good, it was good only for the particular forms of weather strips shown & described therein; & upon the facts proved defts. had not infringed.—CHAMBERLIN METAL WEATHER STRIP CO. OF DETROIT *v.* PEACE & PEACE METAL WEATHER STRIP CO. (1905), 9 Exch. C. R. 399; 25 C. L. T. 144.—**CAN.**

m. *Validity of patent — New discovery not claimed.*]—An action in damages for the violation of a patent which does not claim a new discovery subject to a patent, will be dismissed.—BELLEMARE *v.* DANSEREAU (1886), 18 R. L. O. S. 250.—**CAN.**

n. —— *Inventive faculty not required.*]—A fair test of whether a machine is an infringement of a patent is whether a skilled mechanic, without inventive faculty, could have worked out the former, from a knowledge of the patent in question.—HOSIERS, LTD. *v.* PENMANS, LTD., [1925] Exch. C. R. 93.—**CAN.**

o. *Colourable imitation.*]— —— —— may be an infringement of a patent,

a patentee from issuing threats, the validity of deft.'s patent may be called in question.

In order that the ct. may be satisfied whether there is or is not an infringement of any legal right, one of the questions must be, if pltf. chooses to raise it, whether deft.'s patent is or is not valid (COTTON, L. J.).—CHALLENDER *v.* ROYLE (1887), 36 Ch. D. 425 ; 56 L. J. Ch. 995 ; 57 L. T. 734 ; 36 W. R. 357 ; 3 T. L. R. 790 ; 4 R. P. C. 363, C. A.

Annotations :—*As to* (1) **Consd.** Combined Weighing & Advertising Co. *v.* Automatic Weighing Machine Co. (1889), 42 Ch. D. 665 ; Johnson *v.* Edge, [1892] 2 Ch. 1. **Apld.** Z. Electric Lamp Manufacturing Co. *v.* Osram Lamp Works (1911), 28 R. P. C. 479. **Refd.** Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435. *As to* (2) **Folld.** Haskell Golf Ball Co. *v.* Hutchison & Main (1904), 21 R. P. C. 497. **Refd.** Colley *v.* Hart (1890), 44 Ch. D. 179. *As to* (3) **Apld.** Willoughby *v.* Taylor (1893), 11 R. P. C. 45. *As to* (4) **Apld.** Kurtz *v.* Spence (1887), 36 Ch. D. 770. **Refd.** Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435. **Mentd.** Dowson, Taylor *v.* Drosophore Co., (1894), 11 R. P. C. 653.

2274. —— Invalidity established—Infringement impossible.]—GAWTHORPE *v.* MASON, No. 3164, *post.*

2275. Distinction applicable to novelty—Also applicable to infringement.] — A distinction applicable to the question of novelty is applicable to the question of infringement—GITTINS *v.* SYMES (1854), Macr. 300.

2276. Fraudulent inducement by agent of patentee—To manufacture infringing article.]—K., a patentee, brought an action for infringement against B. & moved for an injunction. It was proved that deft. had, at the instance of pltf.'s agent, made an article, which, for the purposes of the motion, was admitted to be an infringement :—*Held :* deft. was not liable as an infringer. —KELLY *v.* BATCHELAR (1893), 10 R. P. C. 289.

Annotation :—**Distd.** Dunlop Pneumatic Tyre Co. *v.* Neal, [1899] 1 Ch. 807.

Where master entitled to use of invention by servant.]—*See* Part III., Sect. 2, sub-sect. 1, *ante.*

SUB-SECT. 2.—INTENTION OR KNOWLEDGE OF INFRINGER.

See, now, Patents & Designs Act, 1907 (c. 29), s. 33.

2277. Whether intention immaterial.]—In determining whether deft. has infringed a patent, no question arises as to his intention, but only as to his acts.—STEAD *v.* ANDERSON (1847), 4 C. B. 806 ; 2 Web. Pat. Cas. 151 ; 16 L. J. C. P. 250 ; 9 L. T. O. S. 434 ; 11 Jur. 877 ; 136 E. R. 724.

Annotations :—**Mentd.** Embrey *v.* Owen (1851), 6 Exch. 353 ; Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531 ; Plimpton *v.* Spiller (1877), 6 Ch. D. 412.

2278. ——.]—ECCLES & BRIERLY *v.* MCGREGOR, No. 200, *ante.*

2279. -UNWIN *v.* HEATH, No. 2505, *post.*

2280. -WHITEHEAD & POOLE, LTD. *v.* FARMER (SIR JAMES) & SONS, LTD., No. 2627, *post.*

2281. Motive for using infringement.]—It seems to me to follow that a person who makes use of the combinations within the limits of that purpose [of inventor] cannot escape from the charge of infringement merely because his motives for using the ingredients are different from those of the inventor (WRIGHT, J.).—MAXIM-NORDENFELT GUNS & AMMUNITION CO. & MAXIM *v.* ANDERSON (1897), 14 R. P. C. 371 ; 13 T. L. R. 262 ; *on appeal,* 13 T. L. R. 510, C. A. ; 14 R. P. C. 671, H. L.

2282. Whether knowledge immaterial.]—UNWIN *v.* HEATH, No. 2505, *post.*

2283. ——.]—WALTON *v.* LAVATER, No. 1536, *ante.*

2284. ——.]—Defts. bought & sold, in the way of trade, articles manufactured by O.'s process under the description of "O.'s patent machine-made plaiting," but they were not aware that O.'s process was an infringement, nor of the existence of W.'s patent :—*Held :* they were guilty of an infringement of W.'s patent.—WRIGHT *v.* HITCHCOCK (1870), L. R. 5 Exch. 37 ; *sub nom.* WIGHT *v.* HITCHOCK, 39 L. J. Ex. 97.

Annotations :—**Apprvd.** Von Heydon *v.* Neustadt (1880), 14 Ch. D. 230. **Mentd.** Badische Anilin und Soda Fabrik *v.* Johnson & Basle Chemical Works Bindschedler (1897), 76 L. T. 434 ; Badische Anilin Und Soda Fabrik *v.* Hickson, [1906] A. C. 419.

See Patents & Designs Acts, 1907 (c. 29), ss. 23, 32A, 33, 34 ; 1919 (c. 80), ss. 9, 10, Sched. ; &, *generally,* DAMAGES, Vol. XVII., pp. 78 *et seq.*

2285. Patent infringed in good faith—Without reasonable grounds for knowledge—Patents & Designs Act, 1907 (c. 29), s. 33.]—(1) The question whether the importation of an article made with an apparatus of which a patented invention forms part is an infringement of the patent must be determined by reference to the nature of the invention & the extent to which its employment played a part in the production of the imported article.

Pltf. was the patentee in this country of what, on the face of the specification, appeared to be a small mechanical detail in electrolytic cells. The patent for the cells themselves had expired, & the process was well known by which the cells were used in an apparatus to manufacture caustic potash. Defts. imported caustic potash manufactured by a German co. with an apparatus in which the cells used embodied the patented invention. No evidence was put in by pltf. as to the nature or effect of the invention, or to show that the use of it was necessary to render the working of the process practicable or profitable :—*Held :* the importation of the caustic potash was not an infringement of pltf.'s patent.

(2) When a patent has been infringed by a person acting in good faith & without having any reasonable ground for suspecting the existence of the patent, or any information that of itself offered him the means of making himself aware of the existence of the patent, he is entitled to the protection afforded by above sect., in respect of any claim for damages for infringement.—WILDERMAN *v.* BERK (F. W.) & CO., [1925] Ch. 116 ; 94 L. J. Ch. 136 ; 132 L. T. 534 ; 42 R. P. C. 79 ; 41 T. L. R. 50.

Sale with knowledge of user by public in particular way.]—*See* Sub-sect. 6, A., *post.*

although it does not come precisely within the description in the specification.—STOKES *v.* DUTHIE & CO. (1895), 14 N. Z. L. R. 404.—**N.Z.**

p. *Mere external resemblance in mechanism—Insufficient.*] — A fundamental point in patent law is that mere external resemblance in mechanism does not of itself constitute infringement, because all machines are made for the most part of mechanical elements which are well known, & it is the construction of these elements into a machine or part of a machine directed to a definite use that constitute the invention.—PRESTON DAVIES *v.* BLACK (1894), 11 R. P. C. 299, 574.—**SCOT.**

PART XIV. SECT. 1, SUB-SECT. 2.

2282 i. *Whether knowledge immaterial.*]—Where a patent was taken out in V. for an American Windmill, with improvements, & K. purchased in N. S. W. & used in V. an American Windmill with those improvements—*Held :* K.'s user was an infringement of the patentee's rights, although there was no evidence that he knew of the patent or of the improvements.—M'LEAN *v.* KETTLE (1883), 9 V. L. R. 145.—**AUS.**

2282 ii. ——.]—If a patent consists in a "combination," a person who, in bad faith, knowing it is an infringement to a patent, makes a part of such "combination," is liable in damages, & becomes joint infringer with the other for whom this work has been executed. —LAROCHELLE *v.* GAUTHIER (1898), Q. R. 14 S. C. 87.—**CAN.**

Sect. 1.—*What constitutes infringement: Sub-sect.* 3, *A. & B.; sub-sect.* 4.]

SUB-SECT. 3.—MANUFACTURE.

A. In General.

2286. Supply of component part—To agent completing patented article.]—(1) A patent consisted of the application of cards or strips of leather covered with wire to rollers at "wide distances." A person who contracted to clothe rollers & supplied to a "nailer" cards of such width that when applied to the rollers they must of necessity leave wide spaces, & who himself paid the nailer, was held to have infringed the patent, though he alleged that his business was that of a cardmaker only, & did not include the nailer's work. *Semble:* the conclusion would have been the other way if he had merely supplied the cards without making the nailer his agent.

Particulars of breach of a patent alleged divers sales between certain dates & particularly to two persons. An answer of deft. admitted a sale to H., a third person. Evidence of the transactions with H. was admitted.—SYKES *v.* HOWARTH (1879), 12 Ch. D. 826; 48 L. J. Ch. 769; 41 L. T. 79; 28 W. R. 215.

Annotations:—As to (1) **Distd.** Innes *v.* Short & Beal (1898), 14 T. L. R. 492; Akt. Für Autogene Aluminium Schweissung *v.* London Aluminium Co., [1919] 2 Ch. 67. **Refd.** Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 612.

2287. —— To person other than agent for completion.]—SYKES *v.* HOWARTH, No. 2286, *ante.*

2288. —— To licencee of patentee.] — The owners of a patent for "Improvements in rubber tyres & metal rims or felloes of wheels for cycles & other light vehicles," which had been construed by the House of Lords as being for the application to a wheel of a saddle shape tyre held in position by two inextensible wires, granted a licence to the G. co. to manufacture tyres under the licence in accordance with a deposited tyre. By agreement C. sold to the G. co. canvas strips to which the G. co. affixed the wires, which were in accordance with those in the deposited tyre, & resold the strips & wires to C., who then added the outer rubber & sold the tyre:—*Held:* C. had not infringed.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* CRESSWELL, CHESHIRE RUBBER CO., NORTH CHESHIRE RUBBER CO., LTD. & DONALD (1901), 18 R. P. C. 473.

Manufacture for sale.]—*See* Nos. 2324, 2325, *post.*

B. Repair.

2289. Amounting to reconstruction.]—DUNLOP PNEUMATIC TYRE CO. *v.* NEAL, No. 2626, *post.*

2290. Renewing essential part.]—UNITED TELEPHONE CO. *v.* NELSON, [1887] W. N. 193.

2291. ——.]—In 1891 a patent was granted to W. for "Improvements in rubber tyres & metal rims or felloes of wheels for cycles & other light vehicles." This patent became vested in pltfs., who brought an action for infringement against defts. The infringement complained of consisted in the repair of four old Dunlop tyres; in one case the old wires only were retained; in the others the old canvas & the old wires were kept, but the tyres were provided with new canvas linings, which completely covered the inside of the tyres, surrounded the wire, & were sewn all round the rim: —*Held:* what defts. had done was an infringement of pltfs.' patent.—DUNLOP PNEUMATIC TYRE CO., LTD., & PNEUMATIC TYRE CO., LTD. *v.* EXCELSIOR TYRE, CEMENT & RUBBER CO. & BARKER (1901), 18 R. P. C. 209.

2292. ——.]—The owners of the W. patent, having brought an action for infringement, defts.' case as to part of the alleged infringements was that the tyres complained of had been in substance made for a licencee, & further, that there had been such waiver or delay on pltfs.' part as to disentitle them to relief, & also that, owing to the circumstances, there was no possibility of further infringement, & therefore that an injunction should not be granted; &, as to the other alleged infringements, that what had been done were legitimate repairs:—*Held:* on the first part of the case, defts. failed on the facts; &, on the second part of the case, substantially new articles were made by defts., & whether an injunction would have been granted or not on the first part of the case alone, pltfs. were entitled to an injunction restraining infringement of the patent.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* HOLBORN TYRE CO., LTD. (1901), 18 R. P. C. 222.

SUB-SECT. 4.—USER.

2293. What amounts to user—Experimental user—Bona fides.]—(1) A patentee can sustain an action for an injunction to restrain a threatened infringement of his patent, even if no actual infringement has taken place.

(2) When articles which are the subject of a patent are made without a licence from the patentee simply for the purpose of *bonâ fide* experiments, those who so make them are not necessarily liable to an action, but when they are made & used for profit, or with the object of obtaining profit even to a limited extent, such making & using constitute an infringement of the patentee's rights, & will be restrained by injunction.—FREARSON *v.* LOE (1878), 9 Ch. D. 48; 27 W. R. 183.

Annotation:—**Refd.** British United Shoe Machinery Co. *v.* Simon Collier (1909), 26 R. P. C. 534.

2294. —— —— For instruction of pupils.]—User of a pirated article for the purpose of experiment & instruction is user for advantage, & an infringement of the patent.

Deft., an English electrician, purchased & imported from foreign manufacturers apparatus which if made here would have infringed pltfs.' patent. Deft. maintained that he had only purchased the apparatus for examination & experiment by himself & his pupils, as certain royalty-paid instruments in his possession were too expensive to be taken to pieces; & he insisted that he had never sold, & had never otherwise used the apparatus:—*Held:* such user of the pirated apparatus by deft. was a user for advantage & an infringement of the patent.—UNITED TELEPHONE CO. *v.* SHARPLES (1885), 29 Ch. D. 164; 54 L. J. Ch. 633; 52 L. T. 384; 33 W. R. 444; 1 T. L. R. 259; Griffin's Patent Cases (1884–86), 232; 2 R. P. C. 28.

Annotation:—**Dbtd.** British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122.

PART XIV. SECT. 1, SUB-SECT. 3.—A.

q. *Manufacture with alleged improvement.*]—GRIP PRINTING & PUB-) (1885),

r. *Giving licence to manufacture infringing article.*] — A person who gives another a licence to make an article which is an infringement of a patent is not himself an infringer.—MONTGOMERIE *v.* PATTERSON (1894), 11 R. P. C. 221, 633.—**SCOT.**

PART XIV. SECT. 1, SUB-SECT. 4.

t. *General rule.*]—An action will lie against any person purchasing & using articles made in derogation of the patent, no matter where they came from.—TORONTO AUER LIGHT CO. *v.* COLLING (1898), 31 O. R. 18.—**CAN.**

a. *User in breach of condition in licence.*]—HATTON *v.* COPELAND-CHAT-

2295. —— —— Abandoned with no intention to resume.]—In Aug. 1882, A. set up in B.'s factory four machines of his own make to be taken & paid for if they worked to B.'s satisfaction. They were used till Apr. 1883, when B., being dissatisfied with them, took them down, laid them in his yard, called on A. to take them away, & never used them again. A. did not take them away till Jan. 1885. In Mar. 1887, P., who had obtained a judgment against A. that A.'s machines were an infringement of a patent belonging to him, claimed royalties from B. B. replied that P. could satisfy himself by calling at B.'s mill that B. was using neither P.'s nor A.'s machines, & had no intention of so doing. Further correspondence took place, & B. denied all liability, alleging that he had not bought the machines from A., who had set them up on trial, & as they did not work well had to take them down, & that B. had not used & was not using any machine which infringed P.'s patent :—*Held :* though B. had infringed the patent, it was not to be inferred from the circumstances that he had any intention to infringe it again, & P. if he had made such inquiry as he ought would have discovered this ; there was, therefore, no case for an injunction.—PROCTOR *v.* BAYLEY (1889), 42 Ch. D. 390 ; 59 L. J. Ch. 12 ; 61 L. T. 752 ; 38 W. R. 100 ; 6 R. P. C. 538. C. A.

Annotations :—**Distd.** Werner Motors *v.* Gamage, [1904] 1 Ch. 264. **Refd.** Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435 ; Burberrys *v.* Watkinson (1906), 23 R. P. C. 141.

2296. —— User for profit.]—FREARSON *v.* LOE, No. 2293, *ante*.

2297. —— Exhibition of articles—No intention of sale.]—Pltfs. were the registered owners of letters patent No. 16783 of 1890, granted to B. for "Improvements in tyres or rims for cycles or other vehicles." The validity of these letters patent had been established in a previous action, & was not in dispute in either of these actions, in both of which the facts & matters in issue were identical. Defts. were manufacturers of motor cars, & at the Stanley Cycle Show exhibited a number of motor cars. These motor cars had fitted to & fully inflated, upon their wheels, tyres manufactured abroad in accordance with the specification of the letters patent sued upon & imported by defts. into this country. The motor cars themselves were on exhibition for sale, but defts. contended, & it appeared upon the evidence to be the fact that there was no intention of selling the tyres or offering them for sale together with the cars, but that if a car was sold the imported tyres would have been taken off & other tyres manufactured by licencees of pltfs. under the letters patent sued upon placed upon the car wheels prior to delivery to a purchaser. On this ground defts. contended that there was no infringement, there being no sale or offer for sale or user within the meaning of the words of the grant of the letters patent :—*Held :* even although defts. had not any intention of selling the tyres complained of, there had been such a user of the invention as to amount to an infringement, & pltfs. were entitled to an injunction.—DUNLOP PNEUMATIC TYRE CO., LTD. & PNEUMATIC TYRE CO., [illegible] *v.* BRITISH & COLONIAL MOTOR CAR CO., [illegible], SAME *v.* DE BREYNE (1901), 18 R. P. C. 313.

2298. —— Intention of user—Action against master of ship.]—An action was brought against the master of a ship to restrain him from using pumps which were an infringement of pltf.'s letters patent. He denied having used any pumps which were an infringement of the patent, & did not suggest that the owners ought to be parties. It was shown that the ship was fitted up exclusively with pumps which were an infringement of the letters patent, but had been so fitted up before deft., who was not a part owner, had taken command of her ; he had nothing to do with putting them on board, & they had never been worked in British waters. The Vice-Chancellor granted an injunction to restrain the master from using the patented invention :—*Held :* the injunction was rightly granted, on the ground that deft., being in command of a ship exclusively fitted up with pumps which were an infringement of the letters patent, was intending to use the patented invention.—ADAIR *v.* YOUNG (1879), 12 Ch. D. 13 ; 41 L. T. 361 ; 28 W. R. 85, C. A.

Annotations :—**Apld.** Upmann *v.* Forester (1883), 24 Ch. D. 231. **Refd.** Procter *v.* Bayley (1889), 42 Ch. D. 390 ; Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487.

2299. —— Transhipment & re-exportation.]—Where the subject of patent in England is made in a foreign country & applied to the purpose for which it was made & under these circumstances is sent to this country for transmission to another foreign country :—*Held :* this was sufficient user of the patent in England to constitute an infringement.—BETTS *v.* NEILSON, BETTS *v.* DE VITRE (1868), 3 Ch. App. 429 ; 37 L. J. Ch. 321, 325 ; 18 L. T. 159, 165 ; 32 J. P. 547 ; 16 W. R. 524, 529, L. C. ; *affd. sub nom.* NEILSON *v.* BETTS (1871), L. R. 5 H. L. 1, H. L.

Annotations :—**Consd.** Elmslie *v.* Boursier (1869), L. R. 9 Eq. 217 ; Nobel's Explosives Co. *v.* Jones (1882), 8 App. Cas. 5 ; British Thomson-Houston Co. *v.* Sterling Accessories, Same *v.* Crowther & Osborn, [1924] 2 Ch. 33. **Refd.** Plimpton *v.* Malcolmson (1876), 3 Ch. D. 531 ; Plimpton *v.* Spiller (1877), 6 Ch. D. 412 ; Von Heyden *v.* Neustadt (1880), 50 L. J. Ch. 126 ; Watson *v.* Holliday (1882), 20 Ch. D. 780 ; United Telephone Co. *v.* London & Globe Telephone & Maintenance Co. (1884), 51 L. T. 187 ; United Horseshoe & Nail Co. *v.* Stewart (1888), 13 App. Cas. 401 ; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569 ; Badische Anilin und Soda Fabrik *v.* Johnson & Basle Chemical Works, Bindschedler, [1897] 2 Ch. 322 ; Saccharin Corpn. *v.* Chemicals & Drugs Co., [1900] 2 Ch. 556 ; British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122 ; Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487. **Mentd.** Newman *v.* Pinto (1887), 57 L. T. 31.

2300. —— —— By custom house agents.]—Applts. were the assignees of a patent in the United Kingdom for making certain explosives less dangerous to handle & transport. Resps. acted as custom-house agents for a foreign firm who manufactured the patented article abroad & sent it to England for transshipment & re-exportation :—*Held :* the conduct of resps. was not an exercise or user of the invention for which an action would lie against them for an infringement of the patent.—NOBEL'S EXPLOSIVES CO., LTD. *v.* JONES, SCOTT & CO. (1882), 8 App. Cas. 5 ; 52 L. J. Ch. 339 ; 48 L. T. 490 ; 31 W. R. 388, H. L.

Annotations :—**Consd.** United Telephone Co. *v.* London & Globe Telephone & Maintenance Co. (1884), 26 Ch. D. 766. **Refd.** Badische Anilin und Soda Fabrik *v.* Basle Chemical Works Bindschedler, [1898] A. C. 200.

TERSON Co. (1906), 37 S. C. R. 651.—CAN.

b. *User by builder on foreign ship—Reversion of apparent title to ship to foreign power on completion.*]—Machines were purchased by the French Republic in New York, & shipped to itself at Fort William, & the installation was directed & supervised by the Republic's naval officers. The co. only furnished the labour & the material to install it, practically the same as would be required under pltf.'s first expired patent, & were never the owners of the apparatus, which at all time remained the property of the Republic of France :—*Semble :* in such a case, the act of the builder in so installing the machine was not an infringement of the patent within Patent Act.—MARCONI WIRELESS TELEGRAPH TELEGRAPH CO. OF CANADA, LTD. *v.* CANADIAN CAR & FOUNDRY CO., LTD. (1919), 19 Exch. C. R. 311 ; 50 D. L. R. 702.—CAN.

c. *Use contrary to condition of sale—Sale subject to rights of patentee.*]—

Sect. 1.—*What constitutes infringement: Sub-sects.*

2301. —— Transport in England—For sale in France.]—BRITISH MOTOR SYNDICATE, LTD. *v.* TAYLOR & SON, LTD., No. 3054, *post.*

2302. —— User outside United Kingdom.]—Pltf. obtained a patent for "improvements in apparatus employed in laying down submarine electric telegraph wires" & by his specification & drawing annexed, gave a full description of the manner in which it was to be performed. It was a combination of a wire or cable round a cone of supports placed cylindrically outside the coil, & then the use of rings, in combination with these, completed that for which he obtained the letters patent:—*Held:* what was done at Malta by defts. in respect of it was no infringement, &, as what they did in England was nothing more than coiling the rope round the cylinder & preventing it from slipping by means of a cylinder placed outside, there was no evidence of any infringement by defts. of pltf.'s patent; they did not make, vend, exercise or use the invention.—NEWALL *v.* ELLIOTT & GLASS (1864), 4 New Rep. 429; 10 L. T. 792; 10 Jur. N. S. 954; 13 W. R. 11.

Annotation:—**Consd.** Siddell *v.* Vickers (1888), 39 Ch. D. 92.

2303. —— User for non-commercial purpose.]—If another person uses the same process, & obtains a product, not for the purposes of commercial profit, but for the purpose solely of deodorising & purifying the sewage water, he is not guilty of an infringement of the patent.—HIGGS *v.* GOODWIN (1858), E. B. & E. 529; 27 L. J. Q. B. 421; 31 L. T. O. S. 196; 5 Jur. N. S. 97; 120 E. R. 606.

Annotation:—**Refd.** Harwood *v.* G. N. Ry. (1862), 2 B. & S. 222.

2304. —— Articles capable of misuser amounting to infringement.]—The owner of a patent for a "support & adjuster for soft collars," having brought an action for infringement, deft. denied infringement, & alleged that the patent was invalid (*inter alia*) for want of subject-matter & by reason of prior user. The patentee in his specification & claims stated that his support comprised a wire of substantially U-shape. Deft.'s support was of a W or M shape, & was intended to be affixed to the stud of the shirt. It was contended for pltf. that both pltf.'s & defts.' supports had two spring arms connected by a stretcher, & that deft.'s support had the resiliency which was a feature of pltf.'s support:—*Held:* without deciding whether there was subject-matter in the patented invention deft.'s article would be taken to be intended to be used on the stud, &, if so used, it failed to fulfil the function on which pltf. mainly relied in his specification; the fact that it might be mis-used by some people ought not to be taken into account in determining the question of infringement.—NOAKES *v.* MEHAREY (1915), 32 R. P. C. 307.

2305. —— Mere possession—Reserve for emergency.]—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* CLIFTON RUBBER CO., LTD. (1903), 20 R. P. C. 393.

2306. —— —— Essential part detached.]—Pltfs. sued defts. in respect of an alleged infringement of their patent granted for certain mechanism for "improvements in machines for trimming & channelling the soles of boots & shoes." The mechanism was adapted for use in connection with, & as part of, a complex machine, but was only designed to be brought into operation for a particular purpose, & need not be brought into operation at all unless wanted, & various essential parts of the mechanism could be detached without impairing the efficiency of the machine for purposes other than that for which it was designed. Defts. purchased two machines containing the alleged infringing mechanism, but they never used the particular mechanism, the essential parts of which had been actually detached from the rest of the machines while in the defts.' possession:—*Held:* in the circumstances there had been no infringement by defts. of pltfs.' patent.—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* SIMON COLLIER, LTD. (1910), 26 T. L. R. 587; 27 R. P. C. 567, H. L.

2307. —— —— Machines stored in warehouse.]—Defts., a telephone co., contracted with an American agent for the purchase of a number of telephones. These machines, known as Blake's transmitters, having been accordingly made in America, were sent to this country, & came into the possession of defts., who kept them unused in a warehouse. The Blake transmitters were protected by English & American patents. Pltfs., another telephone co., having in the meantime obtained an assignment of Blake's English patent, brought an action for infringement, claiming an injunction & delivery up of the machines. Defts. dismantled the machines by taking out the Blake elements, & kept the separate parts stored in a warehouse:—*Held:* (1) the possession of the machines by defts. was an infringement of pltfs.' patent rights; injunction granted.

(2) The ct. refused to order the destruction or the delivery up of the infringing machines.—UNITED TELEPHONE CO. *v.* LONDON & GLOBE TELEPHONE & MAINTENANCE CO. (1884), 26 Ch. D. 766; 53 L. J. Ch. 1158; 51 L. T. 187; 32 W. R. 870; Griffin's Patent Cases (1884–86), 229; 1 R. P. C. 117.

Annotations:—*As to* (1) **Refd.** British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122; Pessers, Moody, Wraith & Gurr *v.* Newell (1914), 31 R. P. C. 511.

2308. —— —— No intention to use before expiry of patent.]—In 1900 a patent was granted for "An improved game of skill & apparatus for playing the same." In an action for infringement of the patent it was proved that defts. were in possession of the patented apparatus, but they stated that they had bought it with the intention of keeping it, unused, until after the expiration of the patent, & that they had not used it beyond merely trying it:—*Held:* the defts. had not used the patented article during the term of the patent, & there was no infringement.—PESSERS, MOODY, WRAITH & GURR, LTD. *v.* NEWELL & CO. (1914), 31 R. P. C. 511.

2309. —— User for different purpose.]—The patent being for improvements in the making of felt applicable for the purpose of shipping or roofing:—*Held:* defts. should be restrained from making & selling the article in such a state that it might be applied by others to those purposes though they ought not to be restrained from applying it themselves to a different purpose.—ABBOTT *v.* WILLIAMS (1837), 2 Carp. Pat. Cas. 381, 383.

SUB-SECT. 5.—IMPORTATION.

2310. Importation.]—UNITED TELEPHONE CO. *v.* SHARPLES, No. 2294, *ante.*

). L. T. 846; 37

d. *Use for different purpose.*]—FLETCHER *v.* GLASGOW GAS COMRS. (1887), 4 R. P. C. 386.—SCOT.

e. ——.]—E. S. & A. ROBINSON, LTD. *v.* SMITH & RITCHIE (1913), 30 R. P. C. 63.—SCOT.

PART XIV. SECT. 1, SUB-SECT. 5.

2310 i. *Importation.*]—SACCHARIN CORPN. *v.* ROSS BROTHERS (1905), 22 R. P. C. 247.—SCOT.

2311. —— & sale.]—The importation & sale in England of articles manufactured abroad according to the specification of an English patent is an infringement.—ELMSLIE *v.* BOURSIER (1869), L. R. 9 Eq. 217; 39 L. J. Ch. 328; 18 W. R. 665.

Annotations:—**Apprvd.** Von Heyden *v.* Neustadt (1880), 14 Ch. D. 230. **Apld.** Saccharin Corpn. *v.* Anglo-Continental Chemical Works, [1901] 1 Ch. 414. **Refd.** Wright *v.* Hitchcock (1870), L. R. 5 Exch. 37; Nobel's Explosives Co. *v.* Jones, Scott (1881), 17 Ch. D. 721; Badische Anilin und Soda Fabrik *v.* Johnson & Basle Chemical Works, Bindschedler, [1897] 2 Ch. 322; Saccharin Corpn. *v.* Reitmeyer, [1900] 2 Ch. 659; Badische Anilin und Soda Fabrik *v.* Hickson, [1906] A. C. 419.

2312. —— ——.]—Where a patent has been granted in England for a new process for producing more cheaply a chemical product which was previously known, the importation & sale in England of this substance made abroad according to the patented process is an infringement of the patent.—VON HEYDEN *v.* NEUSTADT (1880), 14 Ch. D. 230; 50 L. J. Ch. 126; 42 L. T. 300; 28 W. R. 496, C. A.

Annotations:—**Apld.** Saccharin Corpn. *v.* Anglo-Continental Chemical Works, [1901] 1 Ch. 414. **Refd.** Badische Anilin und Soda Fabrik *v.* Johnson & Basle Chemical Works, Bindschedler, [1897] 2 Ch. 322; British Motor Syndicate *v.* Taylor, [1900] 1 Ch. 577; Saccharin Corpn. *v.* Reitmeyer, [1900] 2 Ch. 659; Badische Anilin und Soda Fabrik *v.* Hickson, [1906] A. C. 419. **Mentd.** Moseley *v.* Victoria Rubber Co. (1887), 57 L. T. 142; British United Shoe Machinery Co. *v.* Johnson (1925), 42 R. P. C. 243; Mergenthaler Linotype Co. *v.* Intertype Co. (1926), 42 T. L. R. 682.

2313. —— ——.]—SACCHARIN CORPN., LTD. *v.* HOPKINSON (1904), 21 R. P. C. 272.

2314. —— ——.]—SACCHARIN CORPN., LTD. *v.* LOCKWOOD (1906), 23 R. P. C. 274.

2315. —— —— Substance manufactured by patented process—Chemically changed by subsequent operations.]—(1) Deft. imported into & sold in this country an article made abroad. A material made by a process similar to that protected by pltf.'s patent was used in the manufacture. The nature of this material was chemically changed by subsequent operations in the course of the manufacture, & the imported article was the material after such chemical change:—*Held:* defts. were indirectly depriving the patentees of the benefit of their invention, they had infringed the patent, & they must be restrained from so doing.

(2) In Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 31, the words "any subsequent action" mean an action commenced after the certificate was granted.—SACCHARIN CORPN., LTD. *v.* ANGLO-CONTINENTAL CHEMICAL WORKS, [1901] 1 Ch. 414; 70 L. J. Ch. 194; 48 W. R. 444; 44 Sol. Jo. 392.

to (1) **Refd.** Saccharin Corpn. *v.* Reitmeyer, 2 Ch. 659.

—— No knowledge that article subject of patent.]—*See* No. 1536, *ante.*

2316. —— Article patented in England & America by same patentee—Importation of article manufactured under American patent.]—In 1892 a patent was granted to B., an American, for improvements in "rubber stamps" & a patent for a similar invention was granted to him in America. L. sold certain rubber stamps which he imported from America, where he obtained them from H. These stamps bore, by arrangement with B. & H. the following: "Licensed Buck's Patent," "Made in America," "Patented in U.S.," & "Patented in England." The owners of B.'s English patent brought an action against L. to restrain him from infringing their patents & from selling stamps inscribed "Buck's Patent," or with any other words leading to the belief that the stamps were made under their patent, & they claimed an account of profits:—*Held:* deft.'s stamps were not infringements, & on deft. undertaking in future to use words showing that the American patent was alone referred to, no injunction would be awarded, no case of passing-off had been made out by pltfs., but pltfs. were entitled to damages for the use by deft. in the past of the words complained of, which damages were assessed by the judge at 40*s.*—PNEUMATIC RUBBER STAMP CO., LTD. *v.* LINDNER (1898), 15 R. P. C. 525.

2317. What amounts to importation—Sale & delivery abroad—Goods posted by direction of customer—Post office agent of buyer.]—(1) A foreign manufacturer, who manufactures abroad, & sends by post at their request to a firm in England articles which infringe an English patent, does not himself infringe the patent, & is not liable to an injunction restraining infringement in an action by the owner of the English Patent.

(2) The ct. has no jurisdiction to restrain a foreigner abroad as regards transactions carried on by him in his own country.—BADISCHE ANILIN UND SODA FABRIK *v.* BASLE CHEMICAL WORKS, BINDSCHEDLER, [1898] A. C. 200; 67 L. J. Ch. 141; 77 L. T. 573; 46 W. R. 255; 14 T. L. R. 82, H. L.

Annotations:—*As to* (1) **Folld.** Badische Anilin und Soda Fabrik *v.* Hickson, [1906] A. C. 419. **Refd.** Saccharin Corpn. *v.* Reitmeyer, [1900] 2 Ch. 659; British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122; Badische Anilin und Soda Fabrik *v.* Chemische Fabrik Vormals Sandoz (1903), 88 L. T. 490. *Generally,* **Mentd.** Wimble *v.* Rosenberg, [1913] 3 K. B. 743; Underwood *v.* Burgh Castle Brick & Cement Syndicate, [1922] 1 K. B. 343.

2318. —— —— Contract made in England—Delivery at foreign port.]—The principle laid down in *Elmslie* v. *Boursier*, No. 2311, *ante*, & *Von Heyden* v. *Neustadt*, No. 2312, *ante*, that the importation into and sale in England of an article manufactured abroad according to a process protected by an English patent is an infringement of the patent, does not apply to a case where deft. in an action for infringement has as commission agent entered into an agreement for delivery of the article at a foreign port, but has not himself either imported into or sold in England the infringing article. Such deft. will not be deemed to have "exercised" the invention.—SACCHARIN CORPN. *v.* REITMEYER & CO., [1900] 2 Ch. 659; 69 L. J. Ch. 761; 83 L. T. 397; 49 W. R. 199; 16 T. L. R. 494.

Annotation:—**Folld.** Badische Anilin und Soda Fabrik *v.* Hickson, [1905] 2 Ch. 495.

2319. —— —— —— Delivery to purchaser's order in Switzerland.] — Resp. contracted in England to sell to a purchaser in England goods manufactured abroad according to an invention protected by applts.' English patent, & pursuant to the contract completed the sale by delivery of the goods to the purchaser's order in Switzerland. The purchaser afterwards imported the goods into England:—*Held:* there had been no infringement of applt.'s patent by resp.—BADISCHE ANILIN UND SODA FABRIK *v.* HICKSON, [1906] A. C. 419; 75 L. J. Ch. 621; 95 L. T. 68; 22 T. L. R. 641; 23 R. P. C. 149, H. L.

2320. —— Article ordered & received in England.]—GIBSON *v.* BRAND, No. 2330, *post.*

2321. —— Agent passing article through custom house.]—NOBEL'S EXPLOSIVES CO., LTD. *v.* JONES, SCOTT & CO., No. 2300, *ante.*

2322. Importation of article made by apparatus including patent—Nature of invention—Extent of employment in production.] — WILDERMAN *v.* BERK (F. W.) & CO., No. 2285, *ante.*

Sect. 1.—*What constitutes infringement: Sub-sect.* 6, *A. & B.; sub-sect.* 7, *A.*]

SUB-SECT. 6.—SALE.

A. In General.

2323. Exposure for sale.]—In a declaration for infringing a patent which granted that pltf., & no others, should "make, use, exercise, & vend" his invention, & forbade all persons to "make, use, or put in practice" the same, or to counterfeit or imitate it, without pltf.'s license, pltf. alleged that deft. without his license exposed to sale articles intended to imitate, & which did imitate, his invention:—*Held:* the count was bad, as not stating anything which was necessarily an infringement of the patent.—MINTER *v.* WILLIAMS (1835), 4 Ad. & El. 251; 1 Web. Pat. Cas. 135; 1 Har. & W. 585; 5 Nev. & M. K. B. 647; 5 L. J. K. B. 60; 111 E. R. 781.

Annotations:—**Consd.** Walton *v.* Lavator (1860), 8 C. B. N. S. 162. **Expld.** British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122. **Refd.** Caldwell *v.* Vanvlissengen, Caldwell *v.* Verbeck, Caldwell *v.* Rolfe (1851), 9 Hare, 415; Adair *v.* Young (1879), 12 Ch. D. 13; United Telephone Co. *v.* London & Globe Telephone & Maintenance Co. (1884), 26 Ch. D. 766.

2324. Manufacture for sale.]—MUNTZ *v.* FOSTER (1844), 2 Web. Pat. Cas. 96.

Annotation:—**Refd.** Hills *v.* Evans (1862), 4 De G. F. & J. 288.

2325. —— No actual sale.]—The manufacture of a patent article for sale & offering it for sale, although no sale is actually effected, is a user of the invention.—OXLEY *v.* HOLDEN (1860), 8 C. B. N. S. 666; 30 L. J. C. P. 68; 2 L. T. 464; 8 W. R. 626; Goodeve's Patent Cases, 350; 141 E. R. 1327.

Annotations:—**Consd.** British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122. **Refd.** Lister *v.* Norton (1884), Griffin's Patent Cases (1884–1886), 148; Harris *v.* Rothwell (1887), 35 Ch. D. 416.

2326. Sale of article manufactured by patented process.]—WRIGHT *v.* HITCHCOCK, No. 2284, *ante.*

2327. SACCHARIN CORPN., LTD. *v.* JONES (1906), 23 R. P. C. 275.

2328. SACCHARIN CORPN., LTD. *v.* SCOTT (1906), 23 R. P. C. 276.

2329. ——.]—The owners of letters patent for "improvements in self-supporting electrical coils" commenced an action for infringement by manufacture & sale by deft. of self-supporting electrical coils & for damages & delivery up. The validity of the patent was not in issue. Deft. denied infringement:—*Held:* deft. had manufactured & sold coils which were infringements of the patent.—WESTERN ELECTRIC CO., LTD. *v.* FOOT (1926), 43 R. P. C. 106.

2330. —— Manufactured by third party.]—In case, for infringing a patent for a new & improved process or manufacture of silk, the infringement alleged in the declaration was that deft. had, directly & indirectly, made, used, & put in practice the said invention, & counterfeited the same:—*Held:* this allegation was supported by proof that deft. had ordered silk to be manufactured by certain parties by pltfs.' process, & had afterwards received & sold the same.—GIBSON *v.* BRAND (1842), 4 Man. & G. 179; 4 Scott, N. R. 844; 11 L. J. C. P. 177; 134 E. R. 74.

2331. —— Manufacture abroad.]—WALTON *v.* LAVATER, No. 1536, *ante.*

2332. Sale with knowledge of user by public in particular way—Sale of single article.]—Selling zinc powder to the public & inviting them to use it in such a way as to infringe pltfs.' patent for using zinc powder in boilers so as to prevent corrosion & incrustation, is an infringement of pltfs.' patent.—INNES *v.* SHORT & BEAL (1898), 15 R. P. C. 449; 14 T. L. R. 492.

Annotations:—**Distd.** Apollinaris Co. *v.* Duckworth (1906), 22 T. L. R. 638. **Refd.** Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 164; Adhesive Dry Mounting Co. *v.* Trapp (1910), 27 R. P. C. 341.

2333. —— Sale of combination of articles.]—The subject-matter of a patent was the combination of well-known articles of commerce to preserve textile materials. A bill by the patentee charged A. with selling to B. the requisite articles for the purpose of infringing the patent under a contract by which A. guaranteed B. against litigation in respect of the patent:—*Held:* the facts alleged did not amount to infringement by A.—TOWNSEND *v.* HAWORTH (1875), 12 Ch. D. 831, n.; 48 L. J. Ch. 770, n., C. A.

Annotations:—**Distd.** Innes *v.* Short & Beal (1898), 14 T. L. R. 492. **Apld.** Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 612. **Refd.** Sykes *v.* Howarth (1879), 12 Ch. D. 826; Adhesive Dry Mounting Co. *v.* Trapp (1910), 27 R. P. C. 341.

2334. —— ——.]—SYKES *v.* HOWARTH, No. 2286, *ante.*

2335. —— ——.]—The sale of a component part of a combination, the subject of a patent, the vendor knowing that the purchaser intends to use the article for the purpose of infringing the patent, is not an infringement by the vendor.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* MOSELEY (DAVID) & SONS, LTD., [1904] 1 Ch. 612; 73 L. J. Ch. 417; 91 L. T. 40; 52 W. R. 454; 20 T. L. R. 314; 48 Sol. Jo. 311, C. A.

Annotations:—**Refd.** Badische Anilin und Soda Fabrik *v.* Hickson, [1905] 2 Ch. 495; Sirdar Rubber Co. *v.* Wallington, Weston, [1905] 1 Ch. 451.

2336. Sale in breach of limited licence—Purchaser aware of terms of licence.]—Pltfs. sold their goods under a limited licence as to the sale & use of them. The terms of this licence were known to deft., who disregarded it. Deft. contended that he was not bound by the limited licence on the ground that such conditions were only binding on persons who bought from pltfs. direct. He had bought from dealers, & there was no privity between himself & pltfs. Breach of the condition was not, he contended, an infringement of any patent right but was purely contractual in its nature, & that an injunction was not the proper remedy:—*Held:* where a patented article was sold under a limited licence, if the terms of the licence were known to the person purchasing, whether the purchaser bought direct from the patentee or from a third party, the breach of the conditions imposed by the limited licence constituted an infringement of the patent rights in the article, & such a case was one where an injunction might be granted.—INCANDESCENT GAS LIGHT CO., LTD. *v.* BROGDEN (1899), 16 R. P. C. 179.

Annotations:—**Refd.** British Mutoscope & Biograph Co. *v.* Homer, [1901] 1 Ch. 671; Badische Anilin und Soda Fabrik *v.* Isler, [1906] 1 Ch. 605; National Phonograph Co. of Australia *v.* Menck, [1911] A. C. 336.

PART XIV. SECT. 1, SUB-SECT. 6.—A.

f. *Manufacture before patent — At request of patentee—Sale after patent issued—Sale without authority.*]—It is no defence to an action for infringement of a patent granted to pltf., that before the patent was obtained pltf. had employed deft. to manufacture a certain number of the articles, if deft., after he had notice of the patent, sold the articles without the authority of pltf.—CLARK *v.* GRIFFITHS (1885), 24 N. B. R. 567.—**CAN.**

g. —— *Actual sale — Continuation after patent issued.*]—Patent Act, s. 46, does not authorise one who has, with the full consent of the patentee, manufactured & sold a patented article for less than a year before the issue of the patent, to continue the manufacture after the issue thereof, but merely permits him to use & sell the articles manufactured by him prior thereto.—FOWELL *v.* CHOWN (1 25 O. R. 71.—**CAN.**

h. —— —— ——.]—VICTOR SPORTING GOODS CO. *v.* HAROLD A. WILSON CO. (1904), 24 C. L. T. 211;

2337. —— Necessity for knowledge of limitation.]—If a patentee sells the patented article & the purchaser uses it he does not infringe, because the law implies a licence by the patentee to the purchaser to sell or deal with the article as he pleases, unless at the time of the purchase the patentee imposed a condition. If a purchaser buys from a licencee to whose licence the patentee has attached conditions, nothing turns, so far as licence as distinguished from estoppel is concerned, on the question whether the purchaser knew of the conditions or not. It a person innocently uses a patented invention, not knowing that there is a patent, he is none the less an infringer; & if he buys from a licencee, not knowing that there are limits to the licence, he is equally an infringer. In this case, however, the patentee may be estopped from suing in certain circumstances, as, for instance, if he has acted in such a way as to lead the purchaser to suppose that the licence is not limited.—BADISCHE ANILIN UND SODA FABRIK *v.* ISLER, [1906] 1 Ch. 605; 75 L. J. Ch. 411; 94 L. T. 367; 22 T. L. R. 326; *affd.*, [1906] 2 Ch. 443, C. A.

—— Sale below minimum price.]—*See* Sub-sect. 6, B., *post.*

2338. Patent for application of article to particular purpose—Sale for such user.]—ABBOTT *v.* WILLIAMS, No. 2309, *ante.*

2339. Sale of similar articles as made under patent.]—CHUB *v.* PRIEST (1843), 1 L. T. O. S. 142.

2340. Loan distinguished from sale.]—UNITED TELEPHONE CO. *v.* HENRY (1884), Griffin's Patent Cases (1884–1886), 228.

Importation & sale.]—*See* Sub-sect. 5, *ante.*

User without intention of sale.]—*See* No. 2297, *ante.*

B. Sale Below Minimum Price.

2341. Licence limited by minimum price—Goods damaged by fire—Compensation recovered from insurance.]—The owners of a patent relating to improvements in the manufacture of sound records brought an action for infringement of the patent, complaining of sales of records below minimum prices which were fixed under licence. At the trial such sales were admitted as well as the fact that deft. knew of the restrictions, but deft. raised two defences, first that there had been a custom of selling the goods in the north of England below the minimum prices, & that pltfs. had in several cases not interfered; & secondly, that the sales complained of were of goods damaged in a fire at deft.'s premises, & that there was a custom to sell damaged goods at any price, & further that, deft. had recovered a sum from an insurance co. in respect of these goods, & with such sum & the purchase price, had received at least the same amount as if the goods had been sold at the minimum prices:—*Held:* neither of the alleged customs had been proved, & the last-mentioned defence had not on the facts been proved, &, if it had been, it would not have been a good defence. [illegible]MBIA GRAPHOPHONE CO. *v.* VANNER (1916), [illegible]. P. C. 104.

2342. —— Goods sold second-hand.]—The owners of letters patent relating to gramophone records brought an action for infringement against a person who held a pedlar's licence, & they applied for an interlocutory injunction restraining him from infringing by selling "Regal" records below authorised prices. Each of such records bears a notice that it must not be sold below the price fixed by the patentee, but the fixed price did not appear on the record. Deft., who was a hawker but also had a small shop, deposed that he bought records from private houses, usually at 2*d.* each, & resold the second-hand records so purchased to shop-keepers & others, but also to some extent in his shop. The prices at which he resold were below the fixed price, but he alleged that he was unaware that he was infringing the patents:—*Held:* deft. being fixed with notice of the restriction, an interlocutory injunction must be granted, & by consent of the parties the motion was treated as the trial of the action & the order was treated as a final order.—COLUMBIA GRAPHOPHONE CO., LTD. *v.* MURRAY (1922), 39 R. P. C. 239.

Annotation:—**Folld.** Columbia Graphophone Co. *v.* Thoms (1924), 41 R. P. C. 294.

2343. —— Notice of limitation—Stamped upon article.]—COLUMBIA GRAPHOPHONE CO., LTD. *v.* MURRAY, No. 2342, *ante.*

2344. —— —— — —.]—The owner of letters patent relating to gramophone records brought an action for infringement, asking for an injunction to restrain deft. from infringing, by selling "Regal" & "Columbia" records below authorised prices. Each of such records bears a notice that it must not be sold below the price fixed by the patentee, but the fixed price did not appear on the record, & deft. alleged that she had no notice of the respective prices fixed, & denied that she had sold under the fixed prices:—*Held:* deft. had notice of the conditions & in fact knew what the fixed prices were, & had deliberately sold records at prices below the fixed prices.—COLUMBIA GRAPHOPHONE CO., LTD. *v.* THOMS (1924), 41 R. P. C. 294.

SUB-SECT. 7.—SCOPE OF INVENTION.

A. Ascertainment from Specification.

2345. Rights limited to the true construction of specification.]—The specification of a patent for "improvements in the process of finishing hosiery, & other goods manufactured from lamb's-wool, etc., "stated the invention to consist in submitting hosiery, & other similar goods, to the finishing process of a press heated by steam, etc., in the manner hereinafter mentioned." A description was then given, by letters, of a drawing which represented a press, which consisted of a box heated by steam, up to which another box similarly heated was to be pressed by means of hydraulic pressure, or by screws, or other well known means. After describing the method of pressing the goods between these hot boxes, the specification concluded by confining the inventor's claim to the process as above described:—*Held:* a method of finishing hosiery goods, by passing them through heated rollers, was not included in this patent, & therefore was no infringement of it.—BARBER *v.* GRACE (1847), 1 Exch. 339; 17 L. J. Ex. 122; 154 E. R. 144.

Annotation:—**Refd.** Smith *v.* L. & N. W. Ry. (1853), Macr. 188.

2346. ——.]—UNWIN *v.* HEATH, No. 2505, *post.*

7 O. L. R. 570; 2 O. W. R. 465; 3 O. W. R. 496.—CAN.

k. *Offer to sell articles which might be infringements.*]—GWYNNE *v.* DRYSDALE (1886), 3 R. P. C. 65.—SCOT.

PART XIV. SECT. 1, SUB-SECT. 7.—A.

2345 l. *Rights limited to the true construction of specification.*]—An invention consisted in the substitution of an improved device for one formerly in use as part of a machine:—*Held:* the patent must be given a narrow construction & be limited to a device substantially in the form described in the patent & specification.—SHARPLES & MCCORNACK *v.* NATIONAL MANU-

Sect. 1.—*What constitutes infringement: Sub-sect.*

2347. ——.]—One cannot consider any patent case properly without construing the specification. . . . It really is the first thing to be done (KEKEWICH, J.).—OSBORNE *v.* BOARD (1896), 13 R. P. C. 740.

2348. ——.]—U., the patentee of a machine, sold his patent to a co., but did not execute an assignment He then manufactured certain machines which the co. alleged were made according to the patent, &, therefore, infringements of their rights. They accordingly brought an action against the patentee claiming an assignment &, among other things, relief on the basis that the patentee's machines were infringements of the patent. The patentee did not dispute pltfs.' right to an assignment, but there was a question as to the form of the assignment, & it was agreed that an order should be made directing the assignment to be settled by the judge in chambers, & the only question left for the decision of the ct. was whether deft.'s machines were infringements of the patent :—*Held :* upon the true construction of the specification, deft.'s machines were not infringements.—AUTOMATIC DIVERSIONS SYNDICATE *v.* URRY (1897), 14 R. P. C. 365.

2349. ——.]—This action was for the infringement of a patent relating to the separation of cream from milk. The claim was for " In centrifugal separators or creamers the combination of the conical plates with the rotating drum or bowl substantially as described." Defts. denied infringement, & alleged the invalidity of the patent on the grounds of want of novelty & subject-matter, & anticipation ; but, at the trial, these issues were abandoned, & the only question was infringement. Defts.' apparatus had not conical plates, but a cylindrical block with inclined radial passages drilled therein :—*Held :* according to the true construction of the specification, the claim was not for separate conical plates simply, but for separate conical plates fastened rigidly by screws or otherwise into one solid mass or block ; defts. had infringed ; & pltfs. were entitled to relief.—AKT. SEPARATOR *v.* DAIRY OUTFIT CO. (1898), 15 R. P. C. 327, C. A.

2350. ——.]—The owners of a patent for a starting device for gas engines brought an action to restrain defts. from infringing. Defts. alleged that they had not infringed, & that the letters patent were invalid :—*Held :* according to the true construction of the specification, defts. had not infringed.—BRITISH MOTOR SYNDICATE, LTD. *v.* ANDREWS (J. E. H.) & CO., LTD. (1900), 18 R. P. C. 85, H. L.

2351. ——.]—WARDROPER *v.* GIBBS (GEORGE), LTD. (1903), 20 R. P. C. 355, C. A.

2352. ——.]—The grantee of a patent for " improvements in electrical meters " sued defts. for infringement. Defts. denied infringement, & alleged that the patent was invalid :—*Held :* on the true construction of the specification, defts. had not infringed.—DE FERRANTI *v.* BRITISH THOMSON-HOUSTON CO., LTD. (1903), 20 R. P. C. 145, C. A.

2353. ——.]—The owners of a patent for an improvement in galvanic batteries having commenced an action for infringement, defts. denied infringement & alleged that the patent was invalid by reason of being anticipated, of want of subject-matter, & of inutility. The specification, after stating that the invention related to galvanic batteries constructed & arranged as was thereinafter described, described a particular battery having two layers, the outer of which consisted preferably of sal-ammoniac, chloride of zinc, plaster of Paris, & flour. The specification contained the following passage : " The materials mentioned as electrodes & as exciting & depolarising agents & their proportions may be varied, as the important feature of the invention is the inter-position between the positive & negative electrodes of two layers of exciting composition, in a semi-solid or plastic state, the one in contact with the negative electrode having intermixed with it depolarising agents & the one in contact with the positive electrode having no such depolarising agents in its composition " ; & the patentee claimed : " A galvanic battery having the space between its positive & negative electrodes filled with a semi-solid or plastic exciting agent in two layers, the one layer in contact with the negative electrode having depolarising agents intermixed therewith, & the other layer in contact with the positive electrode having no such depolarising agents, substantially as set forth." Defts. substituted in the outer layer of their cell folds of blotting paper for the plaster of Paris & flour, & there were other differences as to proportions. The specification had been construed by the House of Lords in an action by same pltfs., in which it was held that there was novelty & subject-matter, & the meaning of the words " semi-solid or plastic " in the specification were considered. Defts. in the present action again contested the validity of the patent, setting up further anticipations & adducing fresh evidence on the issue of novelty ; they also denied infringement, alleging that the layers in their battery were not semi-solid or plastic within the meaning of the specification. It was held at the trial, which took place before the delivery of the judgments of the House of Lords, that the alleged invention had been anticipated ; & that even if the patent were valid, defts. had not infringed. The action was dismissed with costs. Pltfs. appealed, & on the hearing of the appeal defts. relied solely on non-infringement :—*Held :* the outer layer of defts.' cell was not semi-solid or plastic within the meaning of the specification, & defts. had not infringed.—PATENT EXPLOITATION, LTD. *v.* AMERICAN ELECTRICAL NOVELTY & MANUFACTURING CO., LTD. (1905), 22 R. P. C. 316, C. A.

2354. ——.]—Letters patent were granted in 1900 to B. & C. for " improvements in or relating to gas burners." The first claim was for " A Bunsen burner for incandescent gas lighting, in which the mantle is suspended head downwards, provided with an isolator, preferably made of bad heat conducting material, with a deflecting cone on said isolator, the latter terminating in a burner head provided, if required, with a sleeve with perforated sides, projecting into the interior of the incandescent mantle for the purpose of obtaining a downwardly directed flame, approximately of the shape of the mantle, & without the necessity of employing special mechanical means for producing a high gas pressure, substantially as described." In 1903 letters patent were granted to F. for " improvements in incandescent gas burners," the first claim being for " improvements in downwardly burning incandescent gas burners

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FACTURING CO. (1904), 9 Exch. C. R. 460 ; 25 C. L. T. 146.—**CAN.**

1. *Rights strictly limited to claim in patent.*]—A person claiming that his patent is being infringed, will be held strictly to the particular mechanical means claimed in his patent, & those having *bonâ fide* employed a different system are not guilty of infringing.—HOSIERS, LTD. *v.* PENMANS, [1925] Exch. C. R. 93.—**CAN.**

comprising a device for keeping cool the burner tubes thereof, said device consisting of a protecting tube, insulated from the burner tube, by a layer of air, substantially as described." The owners of these patents brought an action for infringement, complaining of two burners; one of these had a jacketing tube, but not closed at the upper end, as F.'s specification described. This burner was alleged to infringe both patents. It had not an inverted conical deflector, but an inverted cup. The other burner had no jacket, but had, at the upper end of the tube, an inverted cone, similar in form but not in position, to that described in the specification of the first patent. Both the burners had ordinary brass tubes. Defts., besides denying infringement, alleged that both patents were invalid:—*Held:* without deciding the issues of validity, neither of the alleged infringements infringed; in neither of them was there an isolator, nor a deflector in the sense of the specification of the first patent; & the jacket of the first mentioned alleged infringement had no cooling effect, but rather the reverse.—NEW INVERTED INCANDESCENT GAS LAMP CO., LTD. *v.* COPE & TIMMINS, LTD. (1906), 23 R. P. C. 103.

2355. ——.]—Letters patent were granted to B. & C. for "improvements in or relating to gas burners." The first claim was for "a Bunsen burner for incandescent gas lighting in which the mantle is suspended head downwards provided with an isolator preferably made of bad heat-conducting material, with a deflecting cone on said isolator, the latter terminating in a burner head provided, if required, with a sleeve with perforated sides, projecting into the interior of the incandescent mantle for the purpose of obtaining a downwardly directed flame, approximately of the shape of the mantle, & without the necessity of employing special mechanical means for producing a high gas pressure, substantially as described." In an action for infringement of the patent, defts. relied ultimately on infringement only, admitting validity, but contending that the claim ought to be construed as being for the particular combination. The burner complained of had a tube of thin metal which pltfs. alleged to act by reason of its length & thinness as an isolator, & an umbrella-shaped plate round the tube with the apex upwards, which pltfs. alleged to act as a deflector, & they contended that the defts. had taken the two essential features of the invention. Defts. on the other hand contended that the plate acted as a concentrator & that they had neither of the two features. It was held at the trial, that defts. had taken neither the isolator nor, though this was more doubtful, the deflector, & had not infringed the combination. The actior was dismissed with costs, & a certificate as to certain of the particulars of objections was given, although defts. had, at a late stage in the case, ceased to contend that the patent was invalid. Pltfs. appealed:—*Held:* defts. had not infringed, there being no deflector within the meaning of the specification on defts.' burner.—NEW INVERTED INCANDESCENT GAS LAMP CO., LTD. *v.* GLOBE LIGHT, LTD. (1906), 23 R. P. C. 157, C. A.

2356. ——.]—In 1898 a patent was granted to M. for an "improvement in the manufacture of colouring matter." In a deed of dissolution of partnership between pltfs. & deft., the latter covenanted that he would not at any time, either directly or indirectly, exercise, carry on or be concerned in, the trade or business of a manufacturer of caramel, manufactured under or by virtue of the process protected by the patent, during the term of the grant or any extension thereof. Pltfs., as exclusive licencees of the patent, brought an action to restrain an alleged breach of the covenant. The patent was for a process whereby the absorption or incorporation of ammonia with a carbohydrate, & in particular with glucose, was effected under pressure. Deft. dispensed with pressure, & contended that consequently he did not infringe. Pltfs. contended that the process protected by the patent was for the production of a colouring matter, of the class included in the terms caramel, or caramel substitute, by means of the action of ammonia on carbohydrates, such as glucose, substantially as described in the specification, & that it was not essential that the process should be conducted under pressure:—*Held:* on the true construction of the specification, deft. would be concerned in the manufacture of caramel under or by virtue of the patented process although he avoided pressure, & he had committed a breach of the covenant.—HAY *v.* GONVILLE (1907), 25 R. P. C. 161.

2357. ——.]—The owners of a patent for "improvements in sound magnifying horns for phonographs & the like" brought an action for infringement of the same. A previous action had been brought against another deft. in which the patent had been held by the Ct. of Appeal not to have been anticipated, to have subject-matter, & to be valid, & to have been infringed, & in that action the specification had been construed. In the second action deft. denied infringement, & he also alleged that the patent was invalid on the ground of anticipation, two prior publications being in particular relied on which had not been before the Ct. of Appeal in the previous case, & on the ground of want of subject-matter. The specification stated that, broadly, the invention consisted in constructing a curved tempered amplifying horn with joints such that the larger portion thereof might be adjustable on a fixed support, while the small end thereof, or that upon which the sound box was mounted, was pivoted to swing horizontally, & also had a secondary joint, which allowed the sound box to move vertically, to follow the irregularities of the record, & also to allow of the needles being inserted & removed. Defts.' tone arm was pivoted so that it swing horizontally, & it had a joint which allowed it to move vertically, but it was not tempered in all portions of the horn; it was smaller in area where it joined the sound box than it was where it joined the upper part of the trumpet, but this difference was attained by a sudden enlargement. It was held that the patented invention was limited to an amplifying horn with a lower portion, having all its portions so tempered as to allow what the patentee called the natural advance of the sound waves; that on this construction there was no infringement; & further, that one of the alleged prior publications had been established; & that the patent was invalid on that ground, as well as on the ground that the invention was not a substantial advance on what had been done before.—GRAMOPHONE CO., LTD. *v.* RUHL (1910), 28 R. P. C. 20, C. A.

2358. ——.]—A patent was granted for "improvement in or relating to apparatus for withdrawing condensed steam water, air & vapour from steam condensers." One of the claims was as follows:—"In steam condensing plant, the combination with a condenser of a receiver wherein a pressure in excess of that in the condenser from which the water is withdrawn is maintained, a head pump, *i.e.* a water lifting head producing device, adapted to withdraw water of condensation,

Sect. 1.—*What constitutes infringement: Sub-sect.* 7, *A. & B.* (*a*) *&* (*b*).]

with or without condensing water, from the condenser & discharge the same into the receiver, & means for withdrawing water without air & vapour from the receiver, the desired pressure being maintained in the receiver by placing the latter in direct communication with exhausting apparatus connected to an outlet therefrom, & the air & vapour being withdrawn from the condenser & discharged by a steam jet or jets into the receiver into which the water of condensation is being simultaneously discharged substantially as described." In an action for infringement of the patent, the pltfs. contended that an essential purpose of their combination was to avoid the waste of heat in the condensation of the steam by means of cold water circulating in an auxiliary surface condenser. The defts. contended that the specification did not disclose that purpose, or that, if it did, there was no subject-matter, in view of a prior specification that was alleged to be an anticipation :—*Held :* that, upon the true construction of the specification, the conservation of heat was not part of the alleged invention, & that, as it was admitted that on that construction there had not been any infringement, the action failed ; but that, even if the construction contended for by the pltfs. was correct, it would be difficult to find any substantial feature in the alleged invention not included in the prior specification alleged as an anticipation, except, perhaps, the substitution of a lifting pump for a water seal, & that, even if that factor were sufficient to support the patent, it was not reproduced in the alleged infringement. The action was dismissed with costs.—CONTRAFLO CONDENSER & KINETIC AIR PUMP CO., LTD. *v.* HICK, HARGREAVES & CO., LTD. (1920), 37 R. P. C. 89.

2359. —— Specification of process—Alleged infringement of article.]—Pltf. took out a patent for "improvements in the manufacture of candles, & in apparatus for applying light." In his specification he claimed (*a*) the mode of manufacturing candles by the application of peculiarly formed plaited wicks; (*b*) the mode of manufacturing candles by the application of two or more plaited wicks, so disposed that the ends always turned outwards; (*c*) the mode of applying lenses to lamps in order to concentrate & conduct a portion or portions of the rays of light to a distance. Pltf. afterwards entered a disclaimer as to (*a*) & (*c*), & he sued deft. for an infringement of (*b*). At the trial, pltf. produced a candle purchased of deft., the wicks of which were so plaited that the ends always turned outwards :—*Held :* the patent was not for the candle itself, but for the mode of manufacturing it ; & the mere production of a candle made by deft., in which the wicks were so plaited that the ends always turned outwards, was no evidence of an infringement of pltf.'s patent.—PALMER *v.* WAGSTAFF (1854), 9 Exch. 494 ; 2 C. L. R. 1052 ; 23 L. J. Ex. 217 ; 156 E. R. 211.

2360. —— Alleged specification of process—Specification construed as for particular article.]—In 1891, a patent was granted to I. for "improved apparatus employed in the manufacture of artificial sandstone," & in 1893 a patent was granted to A. for a similar object. An action was brought for infringement of these two patents, but the first only was relied upon at the trial. Deft. denied infringement & denied the validity of the patents, & delivered particulars of objections. It was contended for pltf. that on the true construction of the specification the claim was not for a special form of apparatus but for a process, & that deft. was employing this process :—*Held :* pltf.'s claim was not for a process but for an improved apparatus, & the whole object was to secure the rigidity of the moulds used by means of rings, bolts, & stays, & in deft.'s apparatus there were not rings, bolts, or stays used. Therefore deft. had not infringed.—PETERS *v.* OWEN (1899), 16 R. P. C. 83, C. A.

2361. —— To actual claim—Not what might have been claimed.]—NOBEL'S EXPLOSIVES CO., LTD. *v.* ANDERSON, "CORDITE" CASE, No. 2441, *post.*

2362. —— —— ——.]—MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* MULLARD RADIO VALVE CO., LTD., No. 3107, *post.*

2363. —— ——.]—PALMER TYRE, LTD. *v.* PNEUMATIC TYRE CO., LTD., No. 2433, *post.*

2364. —— ——.]—MARTIN & JAMES *v.* CONSETT IRON CO. LTD., No. 2473, *post.*

2365. —— ——.]—MARCONI & MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* BRITISH RADIO-TELEGRAPH & TELEPHONE CO., LTD., No. 2474, *post.*

2366. —— Matters beyond specification cannot infringe.]—(1) The patentee is bound to act towards the public *uberrimâ fide*, & to tell them all that he knows which is requisite to enable them to carry out the invention to the best effect. Now in this case the patentee had either made the dyes with the naphthols or he had not. If he had, he must have known that the temperatures necessary to success were vastly higher than those he had given in the case of the phenols, & the fact that he has not given that knowledge to the public must invalidate his patent. If, on the other hand, he had never made the dyes from the naphthols, he could not, in the then state of knowledge, know that they could be so produced. He had, in fact, not made an important part of the invention which he claimed. He did not & could not "describe & ascertain" in his specification the manner in which his invention, so far as relates to these bodies, was to be performed, for he did not know it himself. They were inserted on speculation only, in the hope that somebody by experiment & research would find out that these bodies could be used, in which case he would claim the benefit of that which, of right, would belong to another (FLETCHER MOULTON, L.J.).

(2) It is settled law that alike as regard validity & infringement, the rights of a patentee must be judged as they would have been judged at the date when the patent was granted. On the one hand, no subsequent discovery can invalidate the patent if it was novel at that date. On the other hand, nothing is an infringement of that patent which the knowledge of the world on the publication of the specification would not have recognised as being an equivalent of the patented process (FLETCHER MOULTON, L.J.).—VIDAL DYES SYNDICATE, LTD. *v.* LEVINSTEIN, LTD., SAME *v.* READ HOLLIDAY & SONS (1912), 29 R. P. C. 245, C. A.

Annotation :—As to (2) **Refd.** Act. für Anilin Fabrikation in Berlin *v.* Levinstein (1921), 38 R. P. C. 277.

Construction of specification.]—*See* Part VI., Sect. 6, *ante.*

B. Patents of Narrow Scope.

(*a*) *In General.*

2367. Patentees confined within narrow limits—Little novelty in invention.]—WALKER & CO. *v.*

PART XIV. SECT. 1, SUB-SECT. 7.—B. (a).

m. *Patent requiring strict construction — Specific element omitted from alleged infringement.*]—MOODIE *v.* CANADIAN WESTINGHOUSE CO., LTD. (Ont.) (1916), 16 Exch. C. R. 133.—CAN.

n. —— *Subsequent patent of narrow limits.*]—The question of infringe-

SCOTT (A. G.) & CO., LTD. (1892), 9 R. P. C. 482.
Annotation :—**Refd.** *Re* Clarke's Design, [1896] 2 Ch. 38.

2368. —— ——.]—The owner of a patent for improvements in the manufacture of metallic boxes brought an action for infringement asking for the usual relief. Defts. denied infringement & put in issue the validity of the patent. Pltf.'s process was to take a blank cut to proper size & shape, the sides or flaps being so shaped that when dished & turned up to form the box the corners were rounded ; having got that blank, pltf. dished the sides, then turned them up & formed the box. At the date of the patent metal boxes with round corners were known. Boxes cut out of flat pieces of metal into proper shape with curves for the corners were known ; the process of dishing was known & had been applied to metallic boxes. At the bar it was practically admitted that pltf.'s invention was good subject-matter, & was novel, if he was confined precisely to his process. Defts. stamped all four flaps forming the sides & ends of the body of the box so as to curve the four lower corners & turn up slightly the ends which were to meet, but the remaining end was not turned up. Then the second part of defts.' process was to form by a presser on the upper edge of the ends & one side of the body of the box an L-shaped ridge so that the lid might shut down without projecting. This ridge raised the edge of the end which in the first process was left flat, & in one sense might be said to make the end dished, but it was not dished for the purpose of rounding the corners :—*Held :* the amount of invention in pltf.'s process was small, & his patent must be confined within narrow limits, namely, to the dishing of the flaps before they were folded up, so that when folded up they formed curved sides & corners, & defts.' process was essentially different because they did not round the corners by dishing.—JAHNCKE *v.* BELL (R.) & Co. (1892), 9 R. P. C. 94, C. A.

2369. —— ——.]—The owners of letters patent for "improvements in the construction of automotor waggons & similar road vehicles" brought an action for the infringement of the same, in which defts. denied infringement & alleged the invalidity of the patent on the ground (*inter alia*) anticipation. The claim was for a steam waggon (automotor) or similar steam driven road vehicle the main frame of which is formed of two side girders bracketed or connected to the boiler at the smoke-box, & at the fire-box end & carries the steam engine, mounted upon the boiler, as well as the waggon body, substantially as herein described & illustrated. The merit of the invention was that it allowed for the expansion & contraction of the boiler, & prevented it from being subjected to undue strains. It was held at the trial that the invention was a narrow one, & that the particular place & method of attaching the boiler to the side girders, having the rigid connection at the front end of the boiler, & the connection allowing of expansion & contraction at the rear end of the boiler, were of the essence of the invention, & that, on this construction of the specification the patent was valid, but had not been infringed by defts.' vehicle which differed among other respects in having an attachment of the boiler at the fire-box end giving horizontal rigidity, & having a special method of providing for expansion & contraction at the smoke-box end of the boiler :—*Held :* defts. had not infringed, their machine not being substantially identical in construction with the patented machine.—FODEN *v.* WALLIS & STEVENS, LTD. (1908), 25 R. P. C. 783, C. A.

2370. —— **Two forms of apparatus known at date of patent.**]—C., in 1893, obtained a patent for an apparatus for spraying paint. Spraying apparatus for ink, scent, whitewash, & other fluids had previously been known. These consisted of two classes : one in which the air & fluid nozzles were separate, & the fluid was raised by inductive action ; the other in which one nozzle was inside the other, & the fluid was made to rise by pressure. The apparatus described in C.'s patent was of the first class, except that he used pressure to force the paint up, this being necessary on account of its weight. W. claimed the right to use an apparatus for paint of the second class, with either the air or paint in the inner tube. C. brought an action against W. for infringement :—*Held :* W.'s apparatus did not infringe C.'s patent.—CLEAVER *v.* WALLWORK & WELLS (1896), 13 R. P. C. 277.

2371. ——.]—This was an action by a patentee for infringement of letters patent relating to "Improvements in or relating to rim brakes for velocipedes & the like." Pltf. contended that he was the first to invent rim brakes having brake blocks readily detachable without the use of tools or screws, & that the claims in his specification, in which were described means of applying this feature of detachability by the use of a spring arch, were wide enough to cover defts.' device in which a spring arch was differently applied for the same purpose :—*Held :* the claims relied upon were narrow ; if the claims were given a broad construction the patent would be invalid ; & defts. had not infringed.—BOSWORTH *v.* COMPONENTS, LTD. (1907), 24 R. P. C. 765.

(*b*) *Patents of Apparatus or Machinery.*

2372. Patentees confined to particular apparatus in specification.]—(1) A disclaimer, which disclaims all applications of the principle, except by the particular means described in the specification, does not therefore disclaim the whole of the invention comprised in the patent, & does not claim anything not originally claimed by the specification.

(2) Where the question of novelty or infringement depends merely on the construction of the specification, it is one entirely for the judge, but where it also depends on other circumstances such as the degree of difference, or of similitude between two machines, it is a mixed question of law & fact ; what the jurymen find to have been done is the matter of fact ; but the judge must apply that fact accordingly to the rules of law, & is entitled & bound to say whether what has been done amounts to an infringement.—SEED *v.* HIGGINS (1860), 8 H. L. Cas. 550 ; 30 L. J. Q. B. 314 ; 11 E. R. 544 ; *sub nom.* SEED *v.* HIGGINS, HIGGINS *v.* SEED, Macr. 351 ; 3 L. T. 101 ; 6 Jur. N. S. 1264, H. L.
Annotations :—*As to* (1) **Refd.** Daw *v.* Eley (1865), L. R. 3 Eq. 500, n. ; Ralston *v.* Smith (1865), 11 H. L. Cas. 223 ; Daw *v.* Eley (1867), L. R. 3 Eq. 496 ; Plimpton *v.* Spiller (1877), 47 L. J. Ch. 211 ; Maxim-Nordenfelt Guns &

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subsequent narrow patent, as distinguished from a pioneer patent, it should receive strict construction.—DOMINION BEDSTEAD CO. *v.* GERTLER, [1924] Exch. C. R. 158.—CAN.

PART XIV. SECT. 1, SUB-SECT. 7.—B. (b).

2372 i. *Patentees confined to particular apparatus in specification.*]—WALLACE *v.* TULLIS, RUSSELL & CO. (1921), 39 R. P. C. 3.—SCOT.

Sect. 1.—*What constitutes infringement: Sub-sect.* 7, *B.* (*b*).]

Ammunition Co. & Maxim *v.* Anderson (1897), 13 T. L. R. 262. *As to* (2) **Refd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429. *Generally*, **Refd.** Nalder *v.* Clayton (1859), Macr. 371; Potter *v.* Parr (1860), 2 B. & S. 216, n.; Curtis *v.* Platt (1863), 3 Ch. D. 135, n.; Clark *v.* Adie (1877), 2 App. Cas. 315.

2373. ——.]—EASTERBROOK *v.* GREAT WESTERN RY. CO., No. 2444, *post*.

2374. ——.]—In 1884 letters patent were granted, on a communication from abroad by D., for "Improvements in gas or oil motors." The invention related to the class of engines in which an explosion takes place on every alternate stroke. The specification, after describing how, in working, the heat of the sides of the combustion chamber, combined with the compression of the combustible mixtures, would of themselves bring about ignition at the right moment, contained the following passage: "That the mixture may also explode at the beginning of the working when the sides of the space was quite cold, a metallic priming cap *f*, the interior of which is in continuous open communication with the space of combustion, is by means of a flame from without so heated that ignition takes place from the heated sides of the priming cap." The patentee claimed, (*a*) In gas motors in which only one impulse is given for each two strokes of the working piston, the effecting of the automatic ignition of the combustible mixture at each second stroke by the compression against the hot sides of the combustion chamber by means of the movement of the crank of the working piston, & the regulation of the ignition at the exact moment in relation to the dead point by the cock *s* which admits more or less combustible mixture for the explosion charge, or by the cock *t* which regulates the heat of the igniting cap *f*, substantially as herein before described & illustrated in the drawings; (*b*) the use of the priming cap *f* for effecting the ignition when the sides of the chamber are quite cold, substantially as hereinbefore described & illustrated in the drawings." In 1885 letters patent were granted to D. for "Improvements in motor engines worked by combustible gases or petroleum vapour or spray." This patent related to the same type of engines. Claim 9 was as follows:—"The method of regulating the speed of a gas or petroleum motor engine by causing the discharge valves for the products of combustion to remain closed when the normal speed is exceeded, so that the products of combustion are retained under pressure in the cylinder, whereby the admission valves *b* & *c* for combustible mixture are also kept closed & no fresh charge is consequently admitted, either above the piston or from the pump below, until the speed is again reduced & the discharge valve opened substantially as herein described." In 1885 another patent was granted to D. for an "improved vehicle propelled by a gas or petroleum motor engine." The first claim was for "The combination of a vehicle having a driving & a steering wheel running on one & the same track, with a centrally arranged gas or petroleum motor engine & its reservoir, the centre of gravity of which lies in the vertical plane of the wheel-track, substantially as herein described." In 1896 the registered owners of the three patents brought an action against a co. for infringement of the same, as well as of a fourth patent, as to which the claim for infringement was dropped at the trial. The main points on which defts. relied at the trial were, as to the first patent, that there was insufficiency of description, inasmuch as an engine constructed according to the description would not work, that the inventor contemplated, for starting the engine, the use of a heated surface, the shape being immaterial, in continuous communication with the cylinder, whereas the ignition tubes used by them, which were much longer in proportion to their diameter than *f*, operated by the spent gas in the tube being compressed & so unmasking the heated portion of the tube at the right moment, that the patent was anticipated, & that the patentee contemplated the use of *f* only for starting the machine. As to the second patent, that the patentee was not the first to affect the inlet valve through the action of the exhaust valve, & that they did not infringe, they operating by locking the exhaust valve open. As to the third patent, that, if construed broadly, there was no subject-matter, &, if otherwise construed, no infringement:—*Held:* the first patent was valid, & defts. had infringed it, but defts. had not infringed either the second or third patents, the claim of the second patent only claiming the particular device, &, unless the first claim of the third patent was limited to the combination substantially as described, there would not be subject-matter for a patent.—BRITISH MOTOR SYNDICATE, LTD. *v.* UNIVERSAL MOTOR CARRIAGE & CYCLE CO., LTD. (1899), 16 R. P. C. 113.

2375. ——.]—D. obtained letters patent for "Improvements in nursery chairs." The essence of his invention was to convert the chair from a high chair to a low chair by so revolving the seat & back as to make the seat of the high chair become the back of the low chair & *vice versâ*. In his chair as manufactured he introduced a hinged frame to support the seat, but he made no claim for this in his specification.

T. also obtained a patent for "Improvements in nursery chairs," & shortly afterwards assigned his patent & business to T. & Co., Ltd. In the manufacture of their chairs under this patent the co. used a hinged frame similar to that used by D., & a subsidiary spring which was also introduced by D. In 1899 D. brought an action for infringement against the co. The validity of D.'s patent was not disputed, & had been upheld in a previous action:—*Held:* there was no infringement, as pltf. made no claim in his specification for the portions of his chair which defts. introduced into theirs.—DAVIES *v.* TOWNSEND & CO., LTD. (1899), 16 R. P. C. 497.

2376. ——.]—A patent was granted to pltfs. in 1898 for (*inter alia*) "Improvements in shuttle-box mechanism for looms for weaving." The improvement consisted in effecting a change from one cylinder, which controlled the weaving of the body of a handkerchief, to another cylinder which controlled the weaving of the border, & *vice versâ* by direct action from each cylinder to the other, thus dispensing with all intermediate mechanism which had formerly been employed to effect this change. The invention also enabled plain cards to be employed instead of a more expensive kind of cards which had formerly been necessary, & it also had other advantages. Pltfs. had in practice departed in one respect from the method of working described in their specification, but claimed that such departure was a matter of detail & did not affect the principle of the invention. Defts. had made or used a machine following the lines of pltfs.' machine as changed & made in practice, & denied that it was covered by the invention. They also alleged invalidity on the grounds of want of subject-matter & of anticipation:—*Held:* the patent was valid & had not been anticipated, but defts. had not infringed.

The fair construction of pltf.'s specification is that they have described a process & a particular way by which they propose to effect these operations. . . . Have defts. infringed that particular process? (HALL, V.-C.).—WHITE *v.* HARTLEY (1903), 20 R. P. C. 265.

2377. ——.]—The owner of a patent for "Improvements in seltzogenes & like apparatus" having brought an action for infringement, defts. denied infringement, & contended that, if the claim covered what they did, the patent was invalid. The claim was for "An apparatus for the direct saturation of gaseous liquids consisting substantially of a syphon head fixed permanently on the bottle & closed at its upper part by a screw cap or stopper carrying a tube into which is introduced a removable and readily replaceable receptacle or cartridge containing compressed or liquified gas which is to be gradually emitted through an indicator dip tube by means of a screw threaded rod fixed in the cap or stopper above the opening of the receptacle or gas cartridge."

Defts. contended that the claim only covered the details of the particular apparatus; whilst pltf. contended that the claim covered apparatus for holding a removable cartridge for aerating the liquid, which cartridge did not itself form any part of the machine. Defts.' apparatus had not the particular parts described in the claim, but pltf. alleged they took them substantially:—*Held:* the patent was for the particular apparatus, & defts. had not infringed.—CROCKER *v.* AERATORS, LTD. (1903), 20 R. P. C. 621.

2378. ——.]—The specification of letters patent claimed "a clinical thermometer having two or more chambers formed within the bore of the tube & a comparatively open contraction within each chamber substantially as herein shown & described, & for the purpose stated." The owner of the patent brought an action for infringement of the same, in which deft. relied on non-infringement. In deft.'s thermometer there were two contractions, but, at all events in its final state, only one chamber. The object of the two contractions was to overcome the difficulty which existed with one contraction only, in obtaining the return of the mercury after the temperature has been read; the chambers were necessary in manufacture for the purpose of obtaining the contractions. Each of pltf.'s chambers was formed in a manner previously well-known, but deft.'s chamber & contractions were made in a new way by one operation. It was held at the trial that the two contractions formed the pith & marrow of the invention; that, notwithstanding the reference in the claim to two chambers, deft. had infringed:—*Held:* the claim was limited to a thermometer having two or more chambers, with a comparatively open contraction within each chamber, & deft. employed a new method & had not infringed.—HICKS *v.* SIMMONS (1904), 21 R. P. C. 632, C. A.

2379. ——.]—A patent was granted to pltfs. & another in 1897 for "Improved apparatus for use in the production of acetylene." The apparatus was so constructed as to cause the acetylene, in its passage from the generator to the gas-holder, to be washed by passing through water in a vessel arranged on the outside of the gas-holder & supplied with water from a second vessel at a higher level. By means of valves controlled by the motion of the gas-holder the vessels & generator could be put in communication so that the washing water could be caused to pass gradually into the generator & be used for the hydration of calcium carbide, a saving of the acetylene dissolved in the water being alleged to be thereby effected. In defts.' apparatus, when fresh water was poured into the washing vessel, the water that had been used for washing the acetylene passed from the part in which the washing took place & over partitions to another part of the vessel & thence to a lower vessel & into the generator, its passage being controllable by the motion of the gas-holder:—*Held:* the patentees had claimed the special arrangement set forth in their specification, defts.' machine was not an infringement.—BAILEY *v.* AIREY & CO. (1906), 23 R. P. C. 277, C. A.

2380. ——.]—Pltfs. were the owners of a patent granted in 1898 for "Improved treatment of glass for coating purposes as a backing for slabs, tiles, facing plates & the like," which consisted in painting on to the back of the glass tiles a hot mixture of British pitch & gas tar, & sprinkling thereon coarse granulated clinker or coarse coke breeze having absorbent qualities. Defts. were alleged to have infringed this patent by backing glass tiles with a mixture of pitch, "marine glue," a kind of pitch, & shellac, sprinkled with broken pottery which was of a non-absorbent character as regards pitch. Defts. alleged anticipation by certain other specifications as part of their defence:—*Held:* pltfs.' claims only covered the use of material with absorbent properties of the type of those possessed by breeze or granulated clinker, & pltfs. had not proved that the broken pottery of defts. was within the fair meaning of these claims.—NEWELLITE GLASS TILE CO., LTD. *v.* LAWSON'S NON-CONDUCTING COMPOSITION, LTD. (1907), 24 R. P. C. 305, C. A.

2381. ——.]—The owners of a patent for "Improvements in & relating to one-way clutches for velocipedes & other machinery" brought an action for infringement. The claim relied on was for a one-way clutch "in which the pawls are carried in recesses in the circumference of the inner part & adapted to engage with ratchet teeth in the inner circumference of the outer part & in which the said pawls have their inner ends rounded to engage in rounded seatings"—all this was common—"& their outer ends acted upon by spiral springs inserted in tangential holes in such a way that the said springs tend both to force the engaging ends of the panels outwards into engagement with the ratchet & to force each pawl as a whole back against its setting, substantially as set forth." Deft. relied at the trial on non-infringement:—*Held:* the claim was a very limited one & deft. had not taken the special features of the invention, & had not infringed the patent.—RILEY *v.* TAYLOR (1910), 27 R. P. C. 747, C. A.

2382. ——.]—Letters patent were granted to pltf. for an invention relating to "Improvements in photographic cameras." There had been several prior attempts to obtain the object pltf. had in view, which was, in a reflecting camera, to enable the plate carrier to be brought nearer to the lens than was usual in that type of camera, & yet to enable the whole of the picture to be seen on the focussing screen whether a short or long focus lens was used. Deft. endeavoured to obtain the same result about the same time as pltf., & also obtained a patent, but of later date than pltf.'s patent. Pltf. sued deft. for infringement of his patent:—*Held:* pltf.'s claims were each of them confined to a particular movement, & the movement which deft. used was essentially different from pltf.'s, & deft. had not infringed pltf.'s patent.—NICHOLLS *v.* KERSHAW (1910), 27 R. P. C. 237.

Sect. 1.—*What constitutes infringement: Sub-sect.* 7, *B.* (*b*); *sub-sect.* 8.]

2383. ——.]—The owners of letters patent for "Improvements in apparatus for automatically lighting & extinguishing lamps at predetermined times" brought an action for infringement of the patent, in which defts. denied infringement, & alleged that the patent was invalid on the grounds of want of novelty & want of subject-matter:—*Held:* the claims of the specification of pltfs.' patent must be construed as claims for the specific mechanism described; the mechanism of defts.' apparatus differed in two material respects from that described in the specification; & defts. had not infringed.—BRITISH FOREIGN, & COLONIAL AUTOMATIC LIGHT CONTROLLING CO., LTD. *v.* METROPOLITAN GAS METERS, LTD. (1911), 29 R. P. C. 209; *affd.* (1912), 29 R. P. C. 571, C. A.

2384. ——.]—Prior to the date of pltfs.' patent the old & well-known machine for grinding steel balls for bicycle wheels consisted of two discs with concentric grooves which could be revolved in close proximity to one another. In order to ensure uniformity it was necessary for a workman to shuffle the balls every now & then so as to prevent any particular ball from revolving continually in the same groove. The patentee's invention consisted of a disc machine for grinding balls in which one of the discs had a segmental pocket or open space to permit the balls to change from one groove to another as they were carried round. He trusted to the law of averages to insure that the same ball would not always run in the same groove. The owners of the patent brought an action for infringement. In defts.' machine there was no segmental pocket, but they had a device whereby all the balls were caused to follow each other practically in Indian file in all the grooves from the centre to the periphery of the discs. Owing, however, to the depth of the groove in defts.' machine, the balls would occasionally leap-frog over one another, & so have their sequence changed:—*Held:* pltfs.' invention consisted of a particular device described in the specification; defts.' device was also substantially different from pltfs., it could not be said to be an infringement; the fact that the balls in defts.' machine sometimes altered their sequence was purely accidental & might be omitted altogether in determining whether there was an infringement or not; & defts. were entitled to judgment.—HOFFMAN MANUFACTURING CO., LTD. *v.* AUTO MACHINERY CO., LTD. (1911), 28 R. P. C. 141, C. A.

2385. ——.]—In 1904 a patent was granted for "Improvements in or relating to knitting machinery." One of the claims was for "A latch needle for knitting machines, provided with a loop expanding finger pivoted to the stem of the needle & movable on its pivot substantially as & for the purpose described." In an action for infringement of the patent it was proved that deft.'s needle had a piece of metal projecting laterally from the stem so as to expand a loop passing over it, but deft. contended that his needle was adapted for use in a cone knitting machine, & could not be used in a cylinder knitting machine, & in that respect differed from pltf.'s needle, & was not an infringement:—*Held:* on the true construction of the specification, the claim was for a needle adapted for use only in a cylinder machine; deft.'s needle was adapted for use in a cone machine; & there was no infringement.—GRIEVE *v.* SPIERS (1913), 30 R. P. C. 235.

2386. ——.]—Pltfs. were the owners of a patent granted for an invention of "[illegible] hair curlers." Claim 1 of the specification follows:—"A hair curler comprising a tube, a rod-like element with said tube & projecting somewhat from the open end of said tube, & a ratchet & detent connection between the tube & the rod-like element, whereby the latter element may be rotated within the tube in one direction, but not in the other."

The patented hair curler was intended for [illegible] in connection with a process for what is known as the permanent waving of ladies' hair, practised by the patentee for some years prior to the date of the patent. In 1920 pltfs. commenced an action for infringement of the patent against defts., & on Feb. 11, 1921, judgment was given for pltfs., & defts. were restrained by perpetual injunction from infringing pltfs.' patent. Subsequently to the judgment, defts. commenced to use & offer for sale a hair curler which pltfs. alleged was an infringement of their patent. Pltfs. moved for leave to issue a writ of sequestration & to commit the managing director of deft. co. for contempt of ct. Pltfs. contended that, although in defts.' hair curler the rod-like element could be rotated in either direction, it was an infringement of their patent, since Claim 1 of the specification should be construed to mean that the limitation of rotation to one direction was solely directed to the prevention of backlash, & that the true meaning of the words of the claim, when read in the light of the specification as a whole, was that the rod-like element could be rotated in one direction by the operator, but not in the other by the coiled tress of hair:—*Held:* the patented invention was limited to a device capable of rotation in one direction & not in the other direction.—NESTLE (C.) & CO., LTD. *v.* EUGENE, LTD. (1922), 39 R. P. C. 38, C. A.

2387. ——.]—A patent was granted for "Improvements in & relating to the manufacture of electrical resistances." One of the claims was for "A resistance for motor starters & the like consisting of a continuous series of grids bent upon themselves so as to form a compact rheostat with no intervening joints."

In an action for infringement, defts. alleged that the patent was invalid for want of novelty & of subject-matter, & that in the specification the words "with no intervening joints" were ambiguous, & did not differentiate between a rheostat with a continuous & homogeneous strip, & one in which the material had been made continuous by welding or otherwise. Defts.' rheostat consisted of a series of grids stamped separately & with a flap or fin for joining the grids to one another by welding. At the trial it was held, that defts.' rheostat, with its numerous joints, was not an infringement of the patent, & that the patent was valid. Judgment was given for the defts. on the issue of infringement, & for pltfs. on the issue of validity.

Pltfs. & defts. appealed to the Ct. of Appeal as to infringement & validity, respectively. The appeal was argued as to infringement only, but defts. reserved to themselves the right to contest validity in the event of there being an appeal to the House of Lords:—*Held:* defts.' rheostat was not an infringement of the patent.—ELECTRO-MECHANICAL BRAKE CO., LTD. *v.* RHEOSTATIC CO., LTD. (1925), 42 R. P. C. 254, C. A.

2388. ——.]—A patent was granted for "Improvements in or relating to hand levers for operating railway points." The first claim was as follows: "In a hand-operated self-reversing lever mechanism for railway points, the arrange-

ment of mechanism which permits the operating hand lever only one direction of movement for the setting of the points in either of the two ways, comprising combination with a hand lever (*a*) a mechanical selector consisting of a sliding bolt engaging with the hand lever & a pivoted V-shaped block with lateral arms. (*b*) a toggle mechanism consisting of a pivotal lever connected with the V-shaped block & articulated to a known-spring-controlled ram-rod telescopically mounted in a fulcrum block, substantially as described." In an action for infringement of the patent, as pltfs. were the assignees of the patent from deft., it was not open to deft. to attack its validity. The alleged infringement consisted of a hand-operated self-reversing still toggle mechanism lever. The toggle mechanism had pivoted on it a block with lateral arms, but without a V-shaped centre, the central part being sometimes slightly curved & sometimes flat, & there was a slight recess in the corner of each projecting arm :—*Held :* there was not in deft.'s mechanism a block having the shape or the function described in pltfs.' specification, & deft. had not infringed claim (*a*), which was the only claim alleged to have been infringed.—WILLIAMS (HENRY), LTD. *v.* WILLIAMS (1925), 42 R. P. C. 493.

2389. ——.]—*Held :* pltf.'s claims were narrow & the patent would be infringed only by the use of substantially the same apparatus ; defts.' apparatus differed in various essential respects . . . & contained at least one integer essential to its working of which no counterpart was to be found in the pltf.'s apparatus.—HIGGINSON & ARUNDEL *v.* PYMAN, SAME *v.* SAME (1926), 43 R. P. C. 291, C. A.

SUB-SECT. 8.—INVENTION TAKEN IN SUBSTANCE.

2390. Amounts to infringement.]—Where there is a grant of a new invention by patent, a small variation of the invention will not entitle another to break in upon the patent.—GIBBS *v.* COLE (1734), 3 P. Wms. 255 ; 1 Dick. 64 ; 24 E. R. 1051, L. C.

2391. ——.]—HILL *v.* THOMPSON, No. 2934, *post.*

-.]—WALTON *v.* POTTER & HORSFALL, . 2954, *post.*

2393. ——.]—BACK *v.* RENNIE (1843), 1 L. T. O. S. 431.

2394. ——.]—In an action for infringing a patent for paving streets, etc., with "sexagonal" blocks of wood :—*Held :* paving with "hexagonal" blocks was an infringement.—STEAD *v.* WILLIAMS (1843), 2 Web. Pat. Cas. 126 ; 2 L. T. O. S. 34, 99 ; *subsequent proceedings* (1844), 7 Man. & G. 818.

Annotation :—**Refd.** Plimpton *v.* Spiller (1877), 6 Ch. D. 412.

2395. ——.]—Pltf. was the patentee of an invention for the manufacture of sheathing for ships, composed of zinc & copper in certain proportions, & of the qualities known respectively as "best selected copper," & "foreign zinc" ; which qualities, being the purest, were essential to the success of the invention. Defts. manufactured & sold sheathing, which by analysis was proved to be precisely similar to that made by pltf. ; but they professed to work according to a patent for the manufacture of sheathing from zinc & copper, granted many years previously, which, up to that time, had not been worked, & of which pltf. was ignorant when he obtained his own patent. It appearing by the evidence, that defts. must either have originally employed materials of the purest, & not the ordinary quality, or else that they had purified the latter during the process, by some method not described in the earlier patent :—*Held :* in the former case, there had been a direct, & in the latter, a colourable invasion of pltf.'s patent.—MUNTZ *v.* FOSTER (1843), 2 Web. Pat. Cas. 93 ; 1 L. T. O. S. 454 ; 8 Jur. 206 ; *subsequent proceedings* (1844), 6 Man. & G. 1017.

Annotation :—**Refd.** Hills *v.* Evans (1862), 4 De G. F. & J.

2396. ——.]—In an action for the infringement of a patent for the manufacture of sulphate of soda, it appeared that pltf.'s patent consisted of two retorts, connected by an inclined plane, & also connected with the rest of an extensive apparatus, consisting of receivers, etc. Pltf.'s claim, after describing by drawings the apparatus to be employed, proceeded—"I do not claim the exclusive use of iron retorts, but I do claim as my invention iron retorts worked in connection with each other, as above described." The jury found "that the invention of two separate chambers & furnaces was not new, but that pltf.'s mode of connecting the same was new" :—*Held :* (1) this amounted to a verdict for deft., upon the pleas, denying that pltf. was the first inventor, & the novelty of the invention ; (2) the material employed was no part of the essence of the invention, & deft. having used a contrivance similar to that patented by pltf., except that one of the retorts was made of brick instead of iron, pltf. was entitled to retain his verdict upon the plea of not guilty.—GAMBLE *v.* KURTZ (1846), 3 C. B. 425 ; 7 L. T. O. S. 431 ; 136 E. R. 170.

2397. ——.]—(1) In an action for the infringement of a patent, the question of infringement or not is for the jury & not the judge, although there be no question with respect to whether deft. has or has not used the particular machine or process which is alleged to be an infringement.

(2) The specification of a patent for an invention of "improvements in the manufacture of envelopes" described a machine in which a piece of paper was held upon a platform, whilst the flaps of the envelope were folded & concluded by claiming "the so arranging machinery that the flaps of envelopes may be folded thereby as herein described" :—*Held :* a machine in which the flaps of an envelope were folded might be an infringement of the patent, although the envelope was not held down during the operation of folding.

The judge was right in telling the jury that there might be an infringement without a contrivance to hold the flap, if, without such a contrivance, the two modes of folding were substantially the

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PART XIV. SECT. 1, SUB-SECT. 8.

2390 i. *Amounts to infringement.*]—Where the essential & principal parts of a patented machine have been imitated, such imitation will be held an infring[illegible], notwithstandin[illegible] dis-

mechanical combination is not infringed unless the combination is taken in essence & in substance.—JONES *v.* GALBRAITH & SONS (1903), 9 B. C. R. 521. —**CAN.**

2390 iii. ——.]—There is infringement where pltf.'s patent bears directly on deft.'s device which does not disclose invention, & which involves the very substance of the invention covered by pltf.'s device.—PANYARD MACHINE & MANUFACTURING CO. *v.* BOWMAN, [1926] Exch. C. R. 158.—**CAN.**

o. —— *Though new result produced.*]—A patent for a mechanical combination, which produces a new result, is infringed if the combination is taken in essence & in substance.—SHORT *v.* FEDERATION BRAND SALMON CANNING CO. (1900), 7 B. C. R. 197.—**CAN.**

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same.—DE LA RUE *v.* DICKENSON (1857), 7 E. & B. 738; 29 L. T. O. S. 194; 3 Jur. N. S. 841; 5 W. R. 704; 119 E. R. 1420.

2398. ——.]—This case comes before me on a motion for an interlocutory injunction upon a patent which has been already established, & therefore there is no question of the validity of the patent on this occasion, & the only question I have to decide is, whether there is a case for an injunction. Now, what is the meaning of infringement? I wish to take the law upon that subject from an address to the jury by the late Chief Justice Tindal in the case of *Walton* v. *Potter & Horsfall*, No. 2954, *ante*: "Where a party has obtained a patent for a new invention or a discovery he has made by his own ingenuity, it is not in the power of any other person, simply by varying in form or in immaterial circumstances the nature or subject-matter of that discovery, to obtain either a patent for it himself or to use it without the leave of the patentee, because that would be, in effect & in substance, an invasion of the right." Then comes the passage which I think is most important. The Chief Justice is speaking to the jury: "&, therefore, what you have to look at upon the present occasion is, not simply whether in form or in circumstances, that may be more or less immaterial, that which has been done by defts. varies from the specification of pltf.'s patent, but to see whether in reality, in substance, & in effect defts. have availed themselves of pltf.'s invention in order to make that fabric or to make that article which they have sold in the way of their trade; whether, in order to make that, they have availed themselves of the invention of pltf." That is, he treats it as substance. Then the question is, whether the claim made by pltf. of his machine is in substance invaded or evaded by what deft. has done. In my opinion it is. It is a deliberate attempt of a man who has seen pltf.'s patent to make in substance the same thing with a mere colourable change or variation, so that he shall not take something which can be conceived to be more or less a material part of pltf.'s specification. That being so, I think pltfs. are entitled to the injunction they ask (JESSEL, M.R.).—THORN *v.* WORTHING SKATING RINK CO. (1876), 6 Ch. D. 415, n.

Annotation:—**Refd.** Plimpton *v.* Spiller (1876), 4 Ch. D. 286.

2399. ——.]—A patent was obtained for "improvements in the destructive distillation of shale, etc., & in apparatus therefor." The specification stated that the "invention has for its object the economical & satisfactory obtainment & application of the heat required for the destructive distillation of shale, etc., & it comprises improved arrangements for the utilisation of the spent shale, etc., itself as fuel for supplying the heat or a portion thereof."

The claim in the specification was for—"(*a*) The conducting of the destructive distillation of shale, etc., substantially according to the system, & by means of the arrangements & apparatus hereinbefore described; (*b*) the arranging of two or more retorts in one oven, but with a separate passage or space for the transference of the contents of each retort directly in a common fire chamber, substantially as hereinbefore described; (*c*) the applying of a valve in the passage or space through which the contents of each retort are transferred to the common fire chamber, such valve being in addition to the door or cover which closes the discharge opening of the retort, substantially as & for the purposes hereinbefore described."

The real object of the patentee was to utilise the spent shale when drawn from the retort as fuel for the next charge, which had already been unsuccessfully attempted to be done by other patentees, &, at the same time, to provide that low & equable heat which is essential for the best results in oil distillation. To effect this satisfactorily it was necessary to pass the spent shale directly from the retort into the furnace, as by exposure to the air it was found to lose heat so much that it could not be effectively rekindled, &, at the same time, to keep the retort door from actual contact with the furnace, otherwise the door would be burned through, & the heat in the retort unduly raised. This object the patentee attained simply & effectively by the grouping of retorts in an oven over a common fire chamber, & by an arrangement of the doors of the retorts in relation to corresponding doors or valves in the roof of the furnace or fire chamber.

In an action of interdict, brought by the patentee to prevent an alleged infringement of the patent:—*Held:* (1) the patent sufficiently set forth an improved process for the distillation of shale by the use of certain apparatus; (2) the use of a common fire chamber was not an essential part of the invention; & (3) that the dispensing of a common fire chamber did not save the apparatus used by resps. from being an infringement of the patent, it being in other respects a colourable imitation of the complainer's apparatus.—HENDERSON *v.* CLIPPENS OIL CO. (1883), 10 R. (Ct. of Sess.) (H. L.) 38; *sub nom.* CLIPPENS OIL CO. *v.* HENDERSON, 8 App. Cas. 873, H. L.

2400. ——.]—DAVIS *v.* FELDMAN (1884), Griffin's Patent Cases (1884–1886), 75.

2401. ——.]—HAYWARD *v.* PAVEMENT LIGHT CO. (1884), Griffin's Patent Cases (1884–1886), 124.

2402. ——.]—HINDE *v.* OSBORNE, No. 2991, *post*.

2403. ——.]—KAYE *v.* CHUBB & SONS, LTD., No. 3155, *post*.

2404. ——.]—The grantees of a patent for improvements in type or blocks for printing posters, brought an action, alleging that deft., who had taken out a subsequent patent, infringed their patent; & that his subsequent patent was not materially different from their patent, & claiming the usual relief. Deft. denied infringement, & put in issue the validity of pltf.'s patent, alleging (*a*) that the claim was too vague in claiming, etc.; (*b*) that the specification did not particularly ascertain the nature of the invention, & how it was to be performed; (*c*) that the claim was not within the title; & (*d*) that the alleged invention was anticipated. Deft. also alleged that pltfs. were disentitled to relief on the ground of laches:—*Held:* pltfs.' patent was valid & had been infringed, deft.'s patent being practically the same as that of pltfs., & there had been no such laches as to disentitle the latter to relief.—SHAW *v.* JONES (1889), 6 R. P. C. 328.

2405. ——.]—*Held:* pltf. had attained a new result, a new instrument, the differences between his card & deft.'s new card were mere colourable differences introduced by the latter for the purpose of avoiding the appearance of imitation, & deft.'s second card was an infringement.—MOORE *v.* THOMSON (1890), 7 R. P. C. 325, H. L.

2406. ——.]—L., the owner of a patent for a chemical compound for killing beetles, etc., brought an action for infringement of this patent against H., who was using a similar compound for similar

purposes. The validity of the patent was not on issue :—*Held :* deft. was using the patented invention with certain immaterial additions, & an injunction to restrain infringement must be granted.—LAINE *v.* HEROLD (1892), 9 R. P. C. 447.

2407. ——.]—The patentee of an invention of improvements in trunk locks brought an action for infringement. Deft. denied infringement, & alleged there was no subject-matter in the invention. Cast-iron locks with the staple cast solid were known, but had disadvantages; wrought metal locks were also known. It was the custom to rivet a cast staple to them, but this had disadvantages, as the cast staple worked loose. Pltf.'s invention consisted in making the staple & the loops of the hasp out of the wrought metal plate itself. Deft.'s witnesses admitted pltf.'s invention was novel & useful. Deft. himself stated it took him two years to devise his lock, which he alleged to be an improvement :—*Held :* pltf.'s device involved sufficient exercise of ingenuity & invention to be the subject of a patent, & deft. had infringed.—LEGGE *v.* WAKELAM (1893), 10 R. P. C. 379.

2408. ——.]—This was an action for infringement of a patent for improvements in & connected with angle clamps for uniting the corners of boxes of wood, cardboard, leather, & the like. Clamps for the corners of boxes were previously known, but they all had projections of some kind of greater length than the thickness of the side of the box, which projections were either sent through holes in or forced through the side of the box, & then clinched inside. Pltfs.' invention had a strip of metal with small stamped-out claws, not long enough to go through the sides of the box, & so placed that they entered the sides at an acute angle ; the clamps could be fastened on the corners by a blow, by hammer & anvil, & required no further clinching. Deft. had a strip of metal in which holes were puched so as to produce four projections at the back of each hole ; these projections formed claws, of which, at any rate, the inner ones were, from their position, substantially the same as pltfs.' claws. The deft. denied infringement, & alleged anticipation by various prior specifications. Utility was admitted :—*Held :* the defence of anticipation was not in any way made out ; pltfs.' invention was extremely useful ; & deft.'s strips were the same as pltfs.' & used in the same way ; & deft. had infringed.—ACT. FÜR CARTONNAGEN INDUSTRIE *v.* SCHROEDER (1896), 13 R. P. C. 466.

2409. ——.]—INCANDESCENT GAS LIGHT CO., LTD. *v.* DE MARE INCANDESCENT GAS LIGHT SYSTEM, LTD., No. 2469, *post.*

2410. ——.]—Evidence was given to the effect that defts. had constructed & used a fishing apparatus similar to pltf.'s, with the difference that, instead of the metal bracket, which gave a rigid attachment, they had substituted (*a*) a metal post placed in the centre of the wire ropes, &, on complaint of pltf., (*b*) a wooden post or chock of wood similarly placed, the post or chock in each case effecting a rigid attachment. Defts. contended that their user was merely experimental :—*Held :* defts.' apparatus was a colourable imitation of pltf.'s ; deft.'s user was not experimental.—SCOTT *v.* HULL STEAM FISHING & ICE CO., LTD. (1896), 14 R. P. C. 143.

2411. ——.]—I have come to the conclusion that the applt. co. have in point of fact appropriated & used the pith & marrow of the patented invention (LORD WATSON).—GORMULLY & JEFFERY MANUFACTURING CO. *v.* NORTH BRITISH RUBBER CO. (1898), 14 T. L. R. 335 ; 15 R. P. C. 245, H. L. ; *affg.* S. C. *sub nom.* NORTH BRITISH RUBBER CO., LTD. *v.* GORMULLY & JEFFERY MANUFACTURING CO. (1896), 13 T. L. R. 217, C. A.

Annotations :—**Refd.** Pneumatic Tyre Co. & Dunlop Pneumatic Tyre Co. *v.* Tubeless Pneumatic Tyre & Capon Heaton (1898), 14 T. L. R. 341 ; Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 164.

2412. ——.]—FABRIQUES DE PRODUITS CHIMIQUES DE THANN, ETC. *v.* CASPERS, No. 3191, *post.*

2413. ——.]—In 1893 a patent was granted for "Improvements in or connected with cases or covers for the chains or gear of velocipedes." In 1897 a co., in whom the patent had become vested, commenced an action for infringement of the same. At the trial, the only question substantially contested was that of infringement. The patentees' first claim, which was one of those alleged to be infringed, was for "A case or cover for the chain or gear of velocipedes, composed of a frame, covering the inner part of the chain gear, mounted on the bottom stay tube, & having upper & lower longitudinal guides in combination with an outer case or cover divided transversely, & adapted to take into & slide endwise upon such fixed guides, to cover the outer parts of the gear, all substantially as & for the purposes herein set forth." Defts.' gear case consisted also of two parts, one a frame almost identical with the frame described in the specification, & the other part consisting of a cover divided into parts, but divided longitudinally & not transversely. In attaching this cover to the frame there was a certain amount of sliding along the grooves on the short vertical edges of the frame. Gear cases in parts were old, but not gear cases which could be removed from the velocipede without disturbing any of the parts of the velocipede :—*Held :* defts. had taken pltfs.' frame & had also in substance taken pltfs.' cover, & had consequently infringed their combination. Pltfs. were granted the usual relief, but execution, except as regards the injunction, was stayed in the event of an appeal within a fortnight.—PRESTO GEAR CASE & COMPONENTS CO., LTD. *v.* SIMPLEX GEAR CASE CO., LTD. (1898), 15 R. P. C. 635.

2414. ——.]—Letters patent were granted to G. & G. for "Improvements in closing devices for preserve jars or other receptacles," the claim being for "A closure for preserve jars & like receptacles in which the inner part of the cover is formed with a shoulder a^1 a^2 applied to the packing material in a tangential direction & having an extension a^2 a^3 applied at a^3 against the conical rim *b* under the action of a vacuum produced in the interior of the vessel substantially as described." Defts. in an action for infringement denied infringement, & alleged invalidity on the grounds of prior publication, prior user, & want of utility. They contended that it was of the essence of the invention that there should be contact all round between the extension & the conical rim, & that this was not useful, & was not used by pltfs. or themselves. Pltfs. said that their cover was the first to fasten by air pressure, & gave evidence of very large sales, & denied that they had abandoned the contact :—*Held :* the invention was new & useful, & had been infringed.

(1) Deft. has used pltf.'s actual invention (SWINFEN-EADY, J.).—AUTOMATIC AIR-TIGHT COVER, LTD. *v.* STOCKFORD (1902), 19 R. P. C. 453.

2415. ——.]—The owners of the Welch Patent having brought an action for infringement, defts. denied infringement. Defts.' tyre complained of had in its edges wires which had hooks at their

Sect. 1.—*What constitutes infringement: Sub-sects.* 8, 9, 10 & 11.]

ends, & where the ends met there was in each edge a slotted tube. Defts. alleged that as sold & in use the hooks did not engage in the slots, & that the tyre was kept on by other forces than those in the Welch tyre, & did not depend on the inextensibility of the wires:—*Held:* it was not proved that in ordinary operation defts.' tyre depended on a complete engagement of the hooks in the slots, but the arrangement was one putting a limit on extensibility & securing the benefits of pltfs.' invention by a slight variation of it, & defts. had infringed.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* OSTRICH TYRE & RIM CO. (1902), 19 R. P. C. 365.

2416. ——.]—A patent was granted in 1898 for "Improvements in centrifugal fans & pumps." The alleged improvements consisted, in part, in employing blades of a depth not greater than about one-eighth of the diameter of the fan or pump. In an action for infringement against a co. & an individual, defts. having submitted to an injunction in respect of a fan in which the depth of the blades was about one-twelfth, made a modification in which the depth was about one-sixth. Pltf. alleged that this was an infringement. On a motion to commit individual deft. & to sequestrate the property of deft. co. it was shown that the alteration from one-eighth to one-sixth did not make a substantial difference of efficiency:—*Held:* defts.' fan was an infringement.—DAVIDSON *v.* SUN FAN CO., LTD. (1906), 23 R. P. C. 493.

2417. ——.]—The terms of the specification of a patent must be read as incorporated into an agreement of licence for the exclusive manufacture of goods made under the patent.

Applt. was assignee of a patent for the manufacture of golf balls with a core consisting of incompressible fluid, which in the specification was described as "such as water or other liquid or semi-liquid." He granted to resps. an exclusive licence for the manufacture of balls under the patent. The core of these balls was water. Resps. subsequently made & sold other balls with a core composed of gelatine & water in the proportion of fifteen to eighty-five:—*Held:* this core constituted an "incompressible fluid," & the balls made therewith were an infringement of the patent.—ROGER *v.* COCHRANE, [1909] A. C. 285; 78 L. J. P. C. 124, H. L.

·.]—*See, also,* Nos. 2423, 2424, *post.*

SUB-SECT. 9.—ATTAINMENT OF SAME RESULT.

2418. Not conclusive of infringement—Patent claiming only a particular process.]—UNWIN *v.* HEATH, No. 2505, *post.*

2419. —— **Difference in method.**]—*Held:* deft.'s invention was no infringement of pltf.'s but each was a new method of accomplishing a well known [illegible] *v.* PIMM (1856), 11 Exch. 718; 26 L. T. O. S. 312; 156 E. R. 1019.

Annotation:—**Refd.** Thomas *v.* Foxwell (1858), 5 Jur. N. S. 37.

2420. —— **Use of different machinery.**]—As pltf. is therefore confined by his disclaimer to the precise machine which he has described, & the machinery of defts. is not similar to it, though producing the same result, the jury at the trial ought to have been told, that there was no evidence of infringement (LORD CHELMSFORD).—SEED *v.* HIGGINS (1860), 8 H. L. Cas. 550; 30 L. J. Q. B. 314; 11 E. R. 544; *sub nom.* SEED *v.* HIGGINS, HIGGINS *v.* SEED, Macr. 351; 3 L. T. 101; 6 Jur. N. S. 1264, H. L.

Annotations:—**Folld.** Potter *v.* Parr (1860), 2 B. & S. 216, n. **Consd.** Curtis *v.* Platt (1863), 3 Ch. D. 135, n.; Daw *v.* Eley (1867), L. R. 3 Eq. 496; Clark *v.* Adie (1877), 2 App. Cas. 315. **Refd.** Nalder *v.* Clayton & Shuttleworth (1859), Macr. 378; Ralston *v.* Smith (1865), 11 H. L. Cas. 223; Daw *v.* Eley (1867), L. R. 3 Eq. 500, n.; Plimpton *v.* Spiller (1877), 47 L. J. Ch. 211; Maxim-Nordenfelt Guns & Ammunition Co. & Maxim *v.* Anderson (1897), 13 T. L. R. 262.

2421. —— ——.]—BROWN *v.* HASTIE & CO., LTD. (1906), 23 R. P. C. 361, H. L.

2422. —— **Difference not an equivalent.**]—POTTER *v.* PARR (1860), 2 B. & S. 216, n.; 121 E. R. 1053.

Annotation:—**Refd.** Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194.

2423. —— **Substantial identity.**]—Pltfs. were patentees of an invention for "stopping bottles containing aerated or gaseous liquids by means of a cylinder or plug of hard wood, having a greater specific gravity than water, such as *lignum vitæ*, or other suitable material." Subsequently deft. obtained letters patent for "an improved means for effecting the closing or stopping of aerated liquid bottles," having internal stoppers of less specific gravity than the liquid contained in the bottles, the stopping being effected by means of "a weight or closing device arranged to be temporarily applied to the stopper," so that the weight of the stopper, & closing device combined, exceeded the specific gravity of the liquid contained in the bottles:—*Held:* deft.'s invention was a colourable imitation & an infringement of pltfs.' patent.—BARRETT *v.* VERNON (1876), 35 L. T. 755; 25 W. R. 343.

2424. —— ——.]—In an action for infringement of a patent for "improvements in & connected with the working of fused silica," defts. denied infringement, & alleged that the patent was invalid on the grounds, mainly, of want of subject-matter & insufficiency of the specification. The specification described the fusing of silica by embedding a carbon core, connected to electrodes, in sand & passing an electric current through it, causing the sand round the core to fuse. In the process described, gas was formed on the surface of the core causing an "initial separation" between the core & the inner surface of the plastic cylinder. At the ends of the core the material kept close round it, hence a pressure of gas resulted, & a hollow sausage-shaped body of fused silica was obtained. The principal points urged at the trial on behalf of defts. were, that the articles complained of had not been made by means of the gas pressure & with the "initial separation" & that the directions for obtaining the "initial separation" were insufficient:—*Held:* the articles complained of had been made by a process the same, or substantially the same, as the patentees' invention, & defts. had infringed.—THERMAL SYNDICATE, LTD. *v.* SILICAWARE, LTD. (1911), 28 R. P. C. 665.

2425. —— **Same result attained by combination of known methods.**]—Pltfs. were proprietors of a patent for a machine by means of which two operations heretofore done singly could be performed simultaneously. Defts. brought about the same result, & effected a similar saving of time by means of a machine constructed in a different manner which involved nothing more than a combination of old methods:—*Held:* defts. had not infringed pltfs.' patent.—JOHN VAREY, LTD. *v.* WALKER, MITCHELL & CO. (1899), 16 R. P. C. 596.

2426. —— Material difference in process.]—Injunction refused where a material difference in process of defts.—MUNTZ *v.* VIVIAN & WALKER (1840), 2 Web. Pat. Cas. 87.

Patents of principle.]—*See* Sub-sect. 12, *post*.

See, also, Sub-sect. 8, *ante*.

SUB-SECT. 10.—ATTAINMENT OF DIFFERENT RESULT.

2427. Whether amounting to infringement.]—SCHERMULY *v.* PAIN (1901), 18 R. P. C. 529.

2428. ——.]—A patent was granted in 1903 for "Improvements in swath turners." The specification stated that the invention related to an improved swath turner wherein a series of single tines or forks was pivoted around a common axis & so arranged that each tine or fork was individually free to follow the inequalities of the ground & in turning the swath to remain in contact with the ground for a sufficient length of time to ensure the turning. An action for infringement of the patent having been brought, defts. pleaded (*inter alia*), that if upon the true construction of the specification, defts.' swath turner was constructed or operated in infringement of the patent, which was denied, the patent was invalid for the reasons set out in the particulars of objections. At the trial, defts. contended that their machine did not operate in the same way as pltfs.' with regard to the following of the irregularities of the ground & the long sweep obtained by the resting of the tines upon the ground. It was proved that in both pltfs.' & defts.' machines there was an increased sweep of the tines :—*Held :* defts.' machine did not give the same results as pltfs.' machine; the patentees in their claim referred to the device that gave the vertical movement, & not to that which gave the increased length of sweep; & defts.' machine was not an infringement.—BLACKSTONE *v.* BAMFORD & SONS (1909), 27 R. P. C. 125.

SUB-SECT. 11.—PATENTS POSSESSING ESSENTIAL FEATURE.

2429. Infringement dependent on inclusion of essential feature.]—NETTLEFOLDS, LTD. *v.* REYNOLDS (1892), 9 R. P. C. 270, C. A.; *previous proceedings* (1891), 65 L. T. 699, C. A.

Annotation :—**Refd.** Castner Kellner Alkali Co. *v.* Commercial Development Corpn. (1899), 68 L. J. Ch. 402.

2430. ——.]—In 1890, letters patent were granted to W. for an invention of "improvements in rubber tyres & metal rims of bicycles." The tyres described in the provisional specification were of an arch shape, & a method of fastening on by wires in the edges of the tyres was described. After describing special forms of rims, the patentee stated that his rubber tyres were applicable to wheels in present use. The provisional specification further stated that he might also fit his tyre "to the ordinary rims by modifying the inner surface of the rubbers." Pltfs. in whom the patent was vested commenced this action for infringement thereof. The alleged infringement was a rubber tyre with metal bands in pockets at the edges of it; these bands nearly met, when in position, under the air tube, the rim being almost flat at the bottom & having edges somewhat inclined inwards. The bands overlapped longitudinally, but the ends were not fastened together. Defts. alleged disconformity & non-infringement, relying as to disconformity chiefly so far as the trial was concerned on Fig. 20 of the complete specification, on which no express decision had previously been given :—*Held :* there was no disconformity, & the patent was valid, but defts. did not infringe it, inasmuch as in W.'s invention the tyre was held on by the inextensibility of the wires, whereas the bands in deft.'s were not inextensible & were not in tension.—PNEUMATIC TYRE CO., LTD. *v.* IXION PATENT PNEUMATIC TYRE CO., LTD. (1897), 14 R. P. C. 853.

2431. ——.]—In 1887, a patent was granted for "improvements in the manufacture of explosives." According to the provisional specification, the invention consisted "in the employment of a nitrated body such as nitrated woody matter or fibre which is dissolved in a solvent such as ether & then dried & reduced to powder." In the complete specification, the patentee claimed, first, "the manufacture of an explosive suited for use in small arms or ordnance by taking vegetable fibres, woody matters, cellulose, or the like . . . & nitrating them & then completely dissolving them in acetic ether or acetone or like solvents of equal strength, until they assume a gelatinous plastic consistency, & forming the mass into suitable shapes, & drying or allowing to dry or distilling off the solvent from the mass, & finally, when required, reducing the product to a powder or granular or other required form, with or without the use therewith of an oxygen yielding substance, or both an oxygen yielding substance & a hydro-carbon all substantially as hereinbefore described." H., in whom the patent had become vested, brought an action for infringement thereof against the S. co., who alleged want of novelty, want of subject-matter, insufficiency, disconformity, anticipation by (*inter alie*) publication of W.'s German patent. Defts., in their manufacture of powder, treated nitro-cellulose with acetone, but they alleged that the grated part of the fibre was not dissolved. The evidence showed that it was known at the date of the patent that nitro-cellulose could be dissolved by the substances named by the patentee; that

PART XIV. SECT. 1, SUB-SECT. 9.

2426 i. *Not conclusive of infringement—Material difference in process.*]—It is always open to a subsequent inventor to accomplish the same results as a former inventor by substantially different means.—DOMINION BEDSTEAD CO. *v.* GERTLER, [1924] Exch. C. R. 158.—**CAN.**

2426 ii. —— ——.]—Where resp.'s machine is substantially different from the complainer's, although producing the same results, there is no infringement.—MACKIE *v.* BERRY (1885), 2 R. P. C. 146.—**SCOT.**

p. *By same means—On same principle—Different arrangement of same elements.*]—COLLETTE *v.* LASNIER (1886), 13 S. C. R. 563.—**CAN.**

A device constructed on the same principle, having the same mode of operation & accomplishing the same results as another, by the same means or by equivalent means, is the same device; & one cannot escape infringement by adding to or subtracting from a patented device or machine by changing its form or making it more or less efficient while retaining its principal mode of operation.—WRIGHT & CORSON *v.* BRAKE SERVICE, LTD., [1925] Exch. C. R. 127.—**CAN.**

r. —— *Difference in details only.*]—CLINTON WIRE CLOTH CO. *v.* DOMINION FENCE CO., LTD. (1907), 27 C. L. T. 340; 11 Exch. C. R. 103.—**CAN.**

PART XIV. SECT. 1, SUB-SECT. 10.

2427 i. *Whether amounting to infringement.*]—FINLAY *v.* ALLAN (1857), 19 Dunl. (Ct. of Sess.) 1087; 29 Sc. Jur. 493.—**SCOT.**

2427 ii. ——.]—PLATE WALL SYNDICATE *v.* PIPES (1907), 28 N. L. R. 30.—**S. AF.**

PART XIV. SECT. 1, SUB-SECT. 11.

2429 i. *Infringement dependent on inclusion of essen ial feature.*]—Where a patentee by his specification claims a particular element as being essential to his invention, there is no infringement of his patent if that element is not used by the alleged infringer.—DREW, ROBINSON & CO. *v.* SHEARER (1914), 18 C. L. R. 209.—**AUS.**

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the solvents were of two classes, & one, which included acetone, dissolving both trinitro-cellulose, & dinitro-cellulose, & the other, which included ether-alcohol, dissolving dinitro-cellulose only; that the result of solution was to reduce the nitro-cellulose to an amorphous condition, although chemically unchanged, & that the solvent could be evaporated off. W.'s patent described the manufacture of cartridge cases out of an explosive material obtained by adding chlorate of potash to guncotton, drying & pouring such a quantity of collodion thereon until the saturation effected a dissolution of the cotton, & a gelatinous mass was produced:—*Held:* it was an essential feature of the invention that there should be complete dissolution of the fibre of the nitro-cellulose; the provisional specification included both classes of nitro-cellulose & both classes of solvents, & there was no disconformity or insufficiency of description; on the above-mentioned construction of the patent it was not shown to be anticipated, except by W.'s patent, but was anticipated by that; defts. had not infringed, since in their powder the fibre remained undissolved to a considerable extent.—HEIDEMANN *v.* SMOKELESS POWDER CO., LTD. (1898), 15 R. P. C. 305.

2432. ——.]—In 1893, letters patent were granted to A. for "an improvement in water closets or water closet basins," & in 1897 A. commenced an action against P. & others. Defts. denied infringement, & alleged anticipation (*inter alia*) by the specification of F.'s patent of 1886:—*Held:* the inclined pipe was of the essence of the invention, & therefore defts. had not infringed.—ALLEN *v.* ABRAHAM PYATT & CO. (1899), 16 R. P. C. 135, C. A.

2433. ——.]—The owners of three patents—Thomas', Trigwell's & Palmer's—brought an action for infringement of the same. The complete amended specification of Thomas' Patent, which was for "Improvements in tires & fellies for the wheels of vehicles," contained the following paragraphs:—"My invention consists of a tire made of a sheet of flexible material impervious to liquids or fluids, & such as may be caused to assume a cylindrical form in its engagement with an angular felly provided with grooves, slits, recesses or sunken channels in the side walls or edges thereof, & caused to maintain said form after inflation. . . . My invention consists also of a flexible or elastic tire capable of inflation by means of air, gas, water or other liquid or fluid, & the tire provided with two or more ribs or projections for engagement with an improved felly made in one or more parts, & adapted to receive & firmly hold the same in position in the outer face thereof by means of cement or other glutinous or adhesive material or substances." After descriptions of the drawings, the patentee stated that he made "no claim to any method of constructing tires other than such in which the tire or tire cover is made with longitudinal ribs or has enlarged edges which pass into & are held within grooves or their equivalents formed in the rim of the wheel, but subject thereto"; he claimed (6) "An inflatable tire composed of flexible material, having the sides enlarged in combination with a felly having grooves or channels in the sides or edges thereof to receive the enlargements of the tire & a tube with a cock secured into said felly, substantially as & for the purposes set forth." Trigwell stated in his complete (amended) specification that his invention related to an improved rim & tire for the wheels of velocipedes & other road vehicles; that the cross-section of the rim which he preferred to use resembled a letter Y, & continued as follows:—"The small flanges on the upper part of the rim are shaped to form small longitudinal U-shaped channels on the edges of the rim. The tire, which may be of the pneumatic or cushion type, has an outer tread, preferably arch-shaped in cross-section, & thicker at the top than at the sides. With this outer cover or tread is incorporated a lining of wire gauze or equivalent material to afford greater protection from puncturing. The edges of the arch-shaped cover or tread are made in the form of enlarged beads, & the said edges are fixed in the channels on the edges of the rim by passing a cord or band through or over each bead, the said cord or band being adapted to be drawn up taut by any suitable device." All the drawings showed U-shaped channels; the first & second claims were general claims referring back to the specification, & in the third & fourth claims a rim having longitudinal channels on its edges adapted to receive the beads was expressly mentioned as part of the combination claimed. Palmer in his Complete amended specification stated (*inter alia*) that his invention related to that class of fabric which was used in the manufacture of pneumatic tires; that in any fabric where the threads cross each other in immediate contact the bending, folding, twisting or other manipulation caused a sawing action, & continued:—"Primarily my fabric comprises a sheet of rubber having embedded therein, before vulcanising, parallel fibrous threads, or threads of any character capable of retaining their continuity these threads being so applied to the sheet as to be out of contact with each other. When vulcanised, or partly vulcanised, the fabric thus produced can be stretched very little, if at all, longitudinally, but can be stretched very much transversely. Two plies of such fabric are then arranged one upon the other, with the threads in one separated from the threads in the other by the rubber part of the fabric, & so arranged that the threads of one are at right angles to the threads of the other, this arrangement taking place preferably before vulcanising, so as to produce a single sheet having a double set of parallel fibrous threads, one set at right angles to the other. . . . More than two plies may be vulcanised together. Instead of vulcanising them together they may be secured in any other satisfactory way, the point of the invention being the fabric made by embedding in a sheet of rubber & vulcanising therein two or more sets of threads parallel to each other & out of contact with each other. . . . I am aware that fabrics have been made of various materials in conjunction with parallel or various plies of parallel threads for the purpose of thickening & strengthening the same, & for the purpose of resisting longitudinal strains & stretching as in driving belts & hose pipes & also in different makes of paper, & I would have it understood that I make no general claim to fabric so constructed." The claims were (1) a fabric made of two or more plies of rubber, each having embedded therein parallel fibrous threads, the threads in one ply presenting an angle to the threads in the other, no two threads being in contact, substantially as described & subject to the disclaiming note; (2) a fabric made of two or more plies of rubber, each ply having embedded & vulcanised therein substantially non-extensible parallel fibrous threads out of contact with each other, the threads in adjacent plies presenting

an angle to each other, substantially as described & subject to the above disclaiming note." Defts. denied infringement, & alleged the invalidity of the patents on the grounds of (*inter alia*)—as to Thomas, insufficiency; as to Trigwell, prior grant to Welch; & as to Palmer, anticipation by (*inter alia*) prior user by M. & co. The alleged infringement was the manufacture & sale of a Welch-Dunlop tyre & rim, the tyre having an inner tube, an outer arch-shape cover with wires in its edges of less diameter than the edges of the rim within which the wires were placed. Pltfs. contended that a wide interpretation should be given to Thomas' Patent, he being the first to have, instead of a complete tube, a tyre or tyre cover in the form of a sheet of flexible material engaging with the edges of the rim so as to form with it a complete tube. They alleged that defts.' cover had enlarged edges, & that the rim had grooves in it corresponding to Thomas' enlargements & grooves respectively, & that defts. had substantially Trigwell's U-shaped channels omitting the inner side of them; also that defts. had taken the substance of Trigwell's invention, viz. the wiring on; they set up that Palmer's patent was in substance for the application of the fabric to pneumatic tyres & the like for the purpose of avoiding sawing action. The prior user set up by defts. of Palmer's invention consisted of the production of a fabric at a certain stage in the manufacture of a solid tyre, the fabrics being afterwards rolled up to form such tyre:—*Held:* (1) as to Thomas' patent, its claims were limited to methods of construction, in which the tyre had longitudinal ribs or enlarged edges passing into & held within grooves or their equivalents, & defts.' tyre had no ribs or any enlargements that performed the function of Thomas' enlargements, nor had defts.' rim any grooves equivalent to Thomas' grooves, & defts. had not infringed this patent; (2) as to Trigwell's patent, it was a narrow patent for the particular combination, & on that construction defts. had not infringed, but, no new evidence having been given to materially alter the case as to the validity of the Welch Patent, which patent was prior in date to Trigwell, the question of infringement did not arise; (3) as to Palmer's patent, that it was a patent for a fabric; "embedding" meant that each thread was to be buried in the rubber so as to be kept out of contact with the ones parallel to it, & vulcanisation was essential; the threads in defts.' fabric were in close contact with one another, & defts., not having "embedding" nor vulcanisation, did not infringe; furthermore, the patent was invalidated by the prior user of M. & co.—PALMER TYRE, LTD. *v.* PNEUMATIC TYRE CO., LTD. (1899), 16 R. P. C. 451.

2434. ——.]—*Held:* The patent was invalid for want both of novelty & invention & even if valid deft. had not infringed as grooving before bending the felt was of the essence of the invention.—COOPER & CO. (BIRMINGHAM), LTD. *v.* BAEDEKER (1900), 17 R. P. C. 209, C. A.

2435. ——.]—In 1893 a patent was granted for "Improvements in or connected with cases or covers for the chains or gear of velocipedes." In 1889 a co., in whom the patent had become vested, commenced an action for infringement of the same. The patentee's first claim, which was one of those alleged to be infringed, was for "A case or cover for the chain or gear of velocipedes composed of a frame, covering the inner part of the chain gear, mounted on the bottom stay tube, & having upper & lower longitudinal guides in combination with an outer case or cover divided transversely & adapted to take into & slide endwise upou such fixed guides, to cover the outer parts of the gear, all substantially as & for the purposes herein set forth." The fourth claim was for "The general construction, arrangement, & combination of parts composing my improved cases or covers for the chain or gear of velocipedes, all substantially as & for the purposes herein described with reference to the accompanying drawings":—*Held:* although detachable gear cases were old at the date of the patent, a divided case, in which one part was to be attached to the frame, & the other was a movable part which fitted into the fixed part, was new; sliding in fixed guides was not of the essence of the invention as described; & even if defts. did not infringe the first claim, they infringed the fourth claim, which was wider than the first claim, & claimed the substantial & important parts.—PRESTO GEAR CASE & COMPONENTS CO., LTD. *v.* ORME, EVANS & CO., LTD. (1900), 18 R. P. C. 17, C. A.

2436. ——.]—The owners of the Welch patent, having brought an action for infringement of the same, defts. denied infringement. The tyre complained of by pltfs. had in its edges wires, each of which had an overlap of more than half the circumference, & had its end joined by a spiral spring, & on either side of such spring loops were formed which projected through the canvas pocket, & which could be connected by hooks with the loops in the other wire. Defts. contended that the edges of the tyre were extensible:—*Held:* in operation the wires acted as practically inextensible wires, & defts. had infringed.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* UNITED RUBBER WORKS, LTD., & WOOD (1902), 19 R. P. C. 406.

2437. ——.]—An action was brought for an infringement of letters patent granted for "Improvements in studs, solitaires, & the like." The specification described a stud in two parts, the head having a bifurcated stem attached to it with enlargements at the lower end of the stem, which, when in place, engaged under a shoulder formed in the lower portion; a small central pillar passed through the centre of the head, &, when pushed down, kept the parts of the bifurcated stem apart & kept them engaged with the shoulder. The bottom of the central pillar was slightly enlarged, so that, when it was withdrawn to disengage the stud, it could not be drawn through the head of the stud, but drew the head off. The essential element was stated in the specification, to consist in the use of the central pillar, which, by forcing & keeping apart the arms of the bifurcated stem, ensured the engagement of the projections underneath the shoulder. The claim was:—In studs, etc., "consisting of two separate parts, the means of locking & releasing the two separate parts, constructed, arranged, operated & controlled by the action of the central pillar as described & illustrated & for the purpose set forth." Deft.'s stud was also made in two parts, a head & lower portion, & the shank of the head had an aperture through it, communicating with a hollow in the base; there was a central pin or pillar in two parts, the parts having a spring action between them with a tendency to spring outward, & one having an enlarged end; when the central pin was pushed in this part, by reason of the spring action, penetrated through the hole in the shank into the base, thus preventing the shank from being withdrawn; the central pillar could be withdrawn from the head. Defts. denied validity & infringement. At the trial the defence of non-infringement was mainly relied on:—*Held:* defts. had not taken the essential element claimed,

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namely, the central pillar described in the specification, & in their stud there was no bifurcated stem, no projection, & no shoulder, & they had not infringed.—COLLINS (C. H.) & SONS *v.* GREEN & CADBURY, LTD. (1912), 29 R. P. C. 217.

2438. ——.]—HAMER *v.* HAWORTH, No. 3222, *post.*

2439. ——.]—The owners of letters patent for "Improvements in the manufacture of non-conducting coverings or insulations for heat & sound applicable for walls, floors, ceilings, & the like" commenced an action for infringement of the patent. The first claim of the specification was as follows:—"A non-conducting covering or insulation for walls, floors, ceilings or the like, comprising a plurality of independent units or slabs, each composed of a primary layer of tough organic material such as compressed cork or cork substitute, coated on what will be the inner face of the slab with a secondary layer of oxychloride or Portland cement in a plastic state & pressed into one inherent mass & dried the said units or slabs being applied to or built up against the surface to be protected & bound together by a jointing composition." Before the date of the patent there was known & used a method of constructing insulating linings for cold storage chambers which consisted in lining the inside of the chamber with slabs of compressed cork which were attached to the walls, etc., of the chamber by Portland cement or other means & afterwards covering the lining with a layer of cement in a continuous sheet, both Portland cement & oxychloride having been commonly used. The defences relied upon were non-infringement, & want of novelty by reason of prior publication, prior public user, & prior common general knowledge, & want of subject-matter: —*Held:* upon the true construction of the specification, it was an essential part of all the claims, alleged to have been infringed by defts., that the units or slabs of tough organic material to which a secondary layer of cement is applied in a plastic state should thereupon be compressed by pressure applied to the cement layer, so as to form one coherent mass, & defts. had not employed the method of compression by pressure described in the specification, & accordingly defts.' process did not constitute an infringement of the patent.—J. D. INSULATING & REFRIGERATING CO., LTD. *v.* ANDERSON (THOS.), LTD. (1923), 41 R. P. C. 1.

2440. Adoption of material part of process.]—RUSSELL *v.* LEDSAM, No. 1675, *ante.*

Ascertainment of essential feature of specification.]—*See* No. 2474, *post.*

Combination possessing a novel component.]—*See* Sub-sect. 13, D., *post.*

SUB-SECT. 12.—PATENTS OF PRINCIPLE.

2441. Infringement as of other patents.]—Several cases were cited to show the canons of construction on which the cts. have acted in different cases relating to infringements. But it is not necessary for me to deal with these cases in detail, for I desire emphatically to state that, in my view, one principle only governs all the cases, whether they relate to so-called "master" patents, or patents dealing with discoveries in matter of principle, or to any other kind of patent; & that principle is this: In order to make out infringement, it must be established, to the satisfaction of the ct., that the alleged infringer, dealing with what he is doing as a matter of substance, is taking the invention claimed by the patent: not the invention which the patentee might have claimed if he had been well advised as holder, but that which he has in fact & substance claimed on a fair construction of the specification (ROMER, J.).—NOBEL'S EXPLOSIVES CO., LTD. *v.* ANDERSON, "CORDITE" CASE (1894), 10 T. L. R. 277; 11 R. P. C. 115; *affd.*, 10 T. L. R. 599, C. A.; (1895), 11 T. L. R. 266, H. L.

Annotations:—**Refd.** Marconi & Marconi's Wireless Telegraph Co. *v.* British Radio-Telegraph & Telephone Co. (1911), 27 T. L. R. 274; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369; Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239; Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323.

2442. Protection of principle if coupled with mode of effecting it.]—You cannot take out a patent for a principle. You may take out a patent for a principle coupled with a mode of carrying the principle into effect, provided you have not only discovered the principle but invented some mode of carrying it into effect. But then you must start with having invented some mode of carrying the principle into effect. If you have done that, then you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as a piracy of your original invention (ALDERSON, B.).—JUPE *v.* PRATT (1837), 1 Web. Pat. Cas. 144; Goodeve's Patent Cases, 274.

Annotations:—**Consd.** Automatic Weighing Machine Co. *v.* Knight (1889), 6 R. P. C. 297; British United Shoe Machinery Co. *v.* Simon Collier (1908), 25 T. L. R. 74. **Refd.** Badische Anilin und Soda Fabrik *v.* Levinstein (1883), 24 Ch. D. 156; Easterbrook *v.* G. W. Ry. (1886), Griffin's Patent Cases (1884–1886), 81; Edison & Swan United Electric Light Co. *v.* Holland (1888), 4 T. L. R. 686; Pneumatic Tyre Co. & Dunlop Pneumatic Tyre Co. *v.* Tubeless Pneumatic Tyre & Capon Heaton (1898), 14 T. L. R. 341.

2443. ——.]—UNWIN *v.* HEATH, No. 2505, *post.*

2444. ——.]—(1) E. & H., as owners of a patent for "Improvements in machinery & apparatus for actuating & controlling railway points & signals," the main object of which was to prevent points & signals being set antagonistic to each other, brought an action against the G. W. Ry. co. for infringement by using certain apparatus. The co. denied the alleged infringement, & set up the invalidity of the patent, upon, among other grounds, absence of utility in the invention. They proved at the trial that pltfs.' apparatus could be so worked as to give conflicting signals, or signals conflicting with the points:—*Held:* the patent was invalid, as pltfs.' invention described by the specification was not only not useful but dangerous, but even if the patent were valid, defts. had not infringed, as the patent was not for locking the catch rods of a signalling apparatus in any way, but only in the way described in the specification, & the catch rods in defts.' apparatus were locked in a different way to that in which the catch rods in pltfs.' apparatus were locked.

It is not the fact that with this apparatus, tried in its simplest form & under the easiest conditions, you may go on for a good while without accident, but the alleged fact that it is safe under all circumstances that constitutes the particular kind of usefulness needed & aimed at in such

PART XIV. SECT. 1, SUB-SECT. 12.

t. *General rule.*] — A patent of invention of machinery may be infringed by the use of a machine dissimilar in appearance, if the principle patented be interfered with.—PINKERTON *v.* COTE (1886), M. L. R. 3 Q. B. 133; 10 L. N. 365.—**CAN.**

2442 t. *Protection of principle if coupled with mode of effecting it.*]—MERRILL *v.* COUSINS (1866), 26 U. C. R. 49.—**CAN.**

apparatus, & further, the specification here points to its universal application for railway signalling, including its use at the most complicated junctions & sidings. If it be useful for one very small & insignificant section of its proposed work & for the rest is, as in my opinion it is proved to be, fraught with danger & death, the specification is bad, as "not distinguishing between its useful & useless applications" (WILLS, J.).

(2) It appears to me to be pretty clear upon the authorities that although there cannot be a patent for an idea or a principle apart from its physical embodiment in adequate apparatus, yet, that, if the specification discloses the idea, shows a method by which it can be carried out, & does not limit the claim of the patentee, any apparatus which by different mechanical means carries out the same idea is an infringement of the patent (WILLS, J.).—EASTERBROOK *v.* GREAT WESTERN RY. CO. (1885), 2 R. P. C. 201; Griffin's Patent Cases (1884–1886), 81.

2445. ——.]—As regards principle, the patentee discovered a very remarkable new manufacture & described its essential conditions, & pointed out how it was to be performed, & indicated some practical modes of carrying it into effect, & the law does not require him to describe every way of carrying it out, or limit the protection it confers to the modes particularly described. If defts. place a diaphragm in their apparatus which performs the function of the diagram in pltfs.' apparatus, they cannot escape the charge of infringement by making a non-essential variation in the position, material, or form of the diaphragm (NORTH, J.).—UNITED TELEPHONE CO., LTD. BASSANO & SLATER (1886), 2 T. L. R. 459; 3 R. P. C. 295; Griffin's Patent Cases (1884–1886), 220; *affd.*, 2 T. L. R. 840, C. A.

2446. ——.] — The owners of a patent for improvements in weighing machines which consisted substantially in the application of coin-receiving mechanism to weighing mechanism, brought an action alleging infringement & asking for an injunction. Deft. denied infringement, & alleged that the patent was invalid on the ground (*inter alia*) of want of subject-matter & anticipation:—*Held:* (1) pltfs. were not entitled to claim every combination of coin-receiving mechanism & weighing mechanism, as that would be in effect a claim for a principle, & they did not so claim, but only for every combination of substantially the same mechanism as their own.

A patent cannot be taken out for a principle. It can only be taken out, if in addition to the principle shown, the patentee shows some mode of carrying that effectually into operation (COTTON, L.J.).

(2) The essential part of pltf.'s machine was the introduction of the break in the weighing & indicating part of the mechanism, so that the index did not operate to show the weight on the dial till the coin was inserted.

(3) Deft.'s mechanism was different in that it had a stop which prevented the machine being set in operation till a coin was put in, which was in effect equivalent to putting a lock on his machine.

(4) Though both attained the same result by the operation of the coin process, it was in a different way, & deft. had not infringed & the difference of automatism was immaterial.—AUTOMATIC WEIGHING MACHINE CO. *v.* KNIGHT (1889), 5 T. L. R. 359; 6 R. P. C. 297, C. A.

Annotations:—As to (1) **Reld.** Pneumatic Tyre Co. & Dunlop Pneumatic Tyre Co. *v.* Tubeless Pneumatic Tyre & Capon Heaton (1893), 14 T. L. R. 341. *As to* (4) **Foll.** Ticket Punch Register Co. *v.* Colley's Patents (1895), 12 R. P. C. 171. **Reld.** Higginson & Arundel *v.* Pyman, Higginson & Arundel *v.* Pyman (1926), 43 R. P. C. 291.

2447. ——.]—PETERS *v.* OWEN, No. 2360, *ante*.

2448. ——.]—The law on this subject is free from doubt & I do not know that it has been better stated than it was by ANDERSON, B., in the well-known case of *Jupe* v. *Pratt*, No. 2442, *ante* (LORD DAVEY).—CHAMBERLAIN & HOOKHAM, LTD. *v.* BRADFORD CORPN. (1903), 20 R. P. C. 673, H. L.

Annotations:—**Reld.** British United Shoe Machinery Co. *v.* Simon Collier (1908), 25 T. L. R. 74: Crosfield *v.* Techno-Chemical Laboratories (1913), 29 T. L. R. 378; Moore Filter Co. *v.* Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239.

2449. ——.]—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* THOMPSON, No. 970, *ante*.

2450. —— **Principle must be for new process of attaining new result.**]—BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN, No. 2944, *post*.

2451. —— ——.]—In an action for infringement of a patent, if the merit of the invention consists in the idea or principle which is embodied in it & not merely in the means by which that idea or principle is carried into effect, the patentee must show that the idea or principle is new; & must fail if the merit of his invention lies merely in a new combination of known features.

Where applts., patentees for improvements in hose-coupling, had produced a coupler of pipes or hose attached to two railway cars, so as to secure a steam-tight fastening which would permit an automatic separation of the two ends when the cars were uncoupled; while resp.'s coupler was in all material respects the same as applts.' & produced the same result, but omitted the use of one particular feature called a "rib" or hinge joint, which was proved to have been a very material element in the success of applts.' coupler, their specification showing that they never contemplated its omission or that their invention could be operated without it:—*Held:* there had been no infringement, for respt.'s coupler was shown to have been a different & a new way of achieving the end contemplated by applts.' coupler.—CONSOLIDATED CAR HEATING CO. *v.* CAME, [1903] A. C. 509; 72 L. J. P. C. 110; 89 L. T. 224; 19 T. L. R. 692; 20 R. P. C. 745, P. C.

Annotation:—**Reld.** *Re* Van Berkel & Booth (1906), 23 R. P. C. 573.

2452. —— ——.]—It appears from the judgment of ANDERSON, B., in *Jupe* v. *Pratt*, No. 2442, *ante*, approved by the House of Lords in *Chamberlain & Hookham, Ltd.* v. *Bradford Corpn.*, No. 2448, *ante*, that though you cannot take out a patent for a principle, yet if the principle is new, & you show one mode of carrying it into effect, you may protect yourself against all other modes of carrying the principle into effect. If, however, the principle is not new, you can only protect yourself against those modes of carrying it into effect which are substantially the same as the mode you have yourself invented, the question in each case being what is the pith & marrow of the invention sought to be protected, & it being impossible to treat any principle already known as part of such pith & marrow (PARKER, J.).—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* SIMON COLLIER, LTD. (1908), 25 T. L. R. 74; 26 R. P. C. 21; *on appeal* (1909), 25 T. L. R. 415, C. A.; (1910), 26 T. L. R. 587, H. L.

2453. —— **Pioneer patent.**]—LAMBERT *v.* INTERNATIONAL PHONOGRAPH INDESTRUCTIBLE RECORD CO., LTD. (1904), 48 Sol. Jo. 261, C. A.

2454. —— **Improvements immaterial.**] — (1) A claim to a principle to be carried into effect in any

Sect. 1.—*What constitutes infringement: Sub-sects.* 12 & 13, *A.*]

way you will is a claim to the principle. The principle of this invention is, that you are to use hot air instead of cold. At the trial the notice of objections must be proved.

(2) If the invention consist in applying the air heated while *in transitu*, then, however great the improvement which defts.' apparatus may be on that described in the specification, it is no less an infringement.—NEILSON *v.* HARFORD (1841), 8 M. & W. 806; 1 Web. Pat. Cas. 295; 11 L. J. Ex. 20; 151 E. R. 1266.

Annotations:—*As to* (1) **Refd.** Edison & Swan United Electric Light Co. *v.* Holland (1888), 4 T. L. R. 686; Ticket Punch Register Co. *v.* Colley's Patents (1895), 12 R. P. C. 171; Pneumatic Tyre Co. & Dunlop Pneumatic Tyre Co. *v.* Tubeless Pneumatic Tyre & Capon Heaton (1898), 14 T. L. R. 341. *As to* (2) **Refd.** Crane *v.* Price (1842), 12 L. J. C. P. 81; Unwin *v.* Heath (1855), 5 H. L. Cas. 505. *Generally*, **Refd.** Cook *v.* Pearce (1844), 8 Q. B. 1054; Stead *v.* Williams (1844), 7 Man. & G. 818; Allen *v.* Rawson (1845), 1 C. B. 551; Millingen *v.* Picken (1845), 1 C. B. 799; Beard *v.* Egerton (1846), 3 C. B. 97; Beard *v.* Egerton (1849), 8 C. B. 165; Hull *v.* Bolland (1856), 27 L. T. O. S. 221; Hills *v.* London Gas Light Co. (1860), 5 H. & N. 312; Betts *v.* Menzies (1862), 10 H. L. Cas. 117; Hill *v.* Evans (1862), 4 De G. F. & J. 288; Simpson *v.* Holliday (1865), 5 New Rep. 340; Stoner *v.* Todd (1876), 4 Ch. D. 58; *Re* North Western Rubber Co. & Hüttenbach, [1908] 2 K. B. 907; British Vacuum Cleaner Co. *v.* L. & S. W. Ry. (1912), 29 R. P. C. 309. **Mentd.** Berwick *v.* Horsfall (1858), 4 C. B. N. S. 450; Peek *v.* North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Lewis *v.* G. W. Ry. (1877), 47 L. J. Q. B. 131.

2455. —— ——.]—WARD BROTHERS (BLACKBURN), LTD. *v.* MOORE & AVERY (BLACKBURN), LTD., No. 2648, *post*.

2456. Use of equivalents.]—At the trial the pltfs. alleged infringement of four of the claims, & substantially the only contest was as to the construction of the claims & as to infringement. In the described form of pltfs.' apparatus molten type metal was injected into a mould & then pushed forward by a reciprocated plunger; the mould was left empty after each cast & the product consisted of a continuous strip of metal built up of successive casts, each cast being welded on to the one preceding it. In deft.'s apparatus molten metal was introduced at one end of a mould, & intermittently worked grippers pulled forward the strip of metal produced. The mould was never emptied. Deft. contended that his process was a continuous process involving no break in the continuity of the strip & no re-fusion of the metal once it had solidified, & that it differed from the patented process, which was an intermittent one & involved re-fusion of the solidified metal in order to weld the succeeding cast on to it:—*Held:* upon the evidence a break occurred in deft.'s process, & the purpose of the intermittence in both pltfs.' & deft.'s operation was to allow the metal to cool & contract sufficiently to pass through the mould; there was sufficient subject-matter in pltfs.' invention to support a wide construction of pltfs.' specification; the patent was for a process & also was for apparatus; deft.'s process was similar in essentials to the process described in pltfs.' specification & it was carried out in an apparatus, which *qua* the essentials of the process as described, as distinct from the described apparatus, produced the product desired by equivalent means; a cast was none the less ejected from the mould because it was drawn out by traction instead of being pushed from behind.—LANSTON MONOTYPE CORPN., LTD. *v.* SLATTERY (1925), 42 R. P. C. [illegible]

SUB-SECT. 13.—PATENTS OF COMBINATION.

A. In General.

2457. Patent is for combination—Not for component parts.]—Letters patent were granted for "improvements in agricultural machines." The specification claimed the construction of reaping or grain cutting & gathering machines, according to improvements described—viz. "the constructing & placing of holding fingers, cutting blades, & gathering reels respectively in a manner described, & the embodiment of these parts as so constructed & placed, all or any of them, in machines for reaping purposes." In an action for the manufacture & sale of cutting blades similar to pltf.'s:—*Held:* there was no infringement, the patent having been granted for the combination of the parts into a machine, & not for the several parts themselves.—MCCORMICK *v.* GRAY (1861), 7 H. & N. 25; 31 L. J. Ex. 42; 4 L. T. 832; 9 W. R. 809; 158 E. R. 377.

Annotation:—**Apld.** Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 164.

2458. —— ——.]—In a patent for an arrangement & combination of parts so as to form an entire machine, & not for any particular part of the machine, protection will not be given to a particular part, the advantages of which are altogether collateral to the invention for which protection is claimed by the specification, & which would not in itself be patentable.—PARKES *v.* STEVENS (1869), 5 Ch. App. 36; 22 L. T. 635; 18 W. R. 233, L. C.

Annotations:—**Consd.** Murray *v.* Clayton (1872), 7 Ch. App. 570; Harrison *v.* Anderston Foundry Co. (1876), 1 App. Cas. 574. **Refd.** Clark *v.* Adie (1875), 10 Ch. App. 667; Thomson *v.* Moore (1889), 6 R. P. C. 426.

2459. ——.]—The patentee of an apparatus to be used in manufacturing wine glasses brought an action for infringement of this patent, & by his particulars of breaches alleged that defts. were using the process described in the specification. Defts. denied infringement, & put in issue the validity of the patent, & alleged prior user of the invention by several persons:—*Held:* (1) the process described in the particulars of breaches was not that which pltf. claimed to have invented; (2) according to the true construction of the specification the patent was one for a particular combination; (3) defts. had not used this combination, & had not therefore infringed; (4) the prior user gone into was proved.—RICHARDSON *v.* CASTREY & GEE (1887), 4 R. P. C. 265.

2460. —— **Combination of chemical substances—Restriction to proportions specified.**]—MAXIM-NORDENFELT GUNS & AMMUNITION CO. & MAXIM *v.* ANDERSON (1898), 14 T. L. R. 487; 15 R. P. C. 421, H. L.

2461. —— —— **Unless components novel—& claimed in specification.**]—(1) Where a patent is taken out for an invention consisting of the combination in one thing of several subordinate parts, the question whether or not a person taking & using a certain number of such parts & omitting others has taken the substance of the invention &

PART XIV. SECT. 1, SUB-SECT. 13.—A.

2457 i. *Patent is for combination—Not for component parts.*]—MACDONALD *v.* FRASER (1894), 11 R. P. C. 169.—**SCOT.**

2457 ii. —— ——.]—LYNCH *v.* PHILLIPS & Co. (1909), 25 R. P. C. 694; 26 R. P. C. 389.—**SCOT.**

a. *Substitution of well known equivalent part.*]—If an alleged infringer omits one element of the combination he does not infringe the combination; but if instead of omitting an element he substitutes a well-known equivalent he, in fact, uses the combination.—BARNETT-MCQUEEN CO. *v.* CANADIAN STEWART CO. (1910), 13 Exch. C. R. 186.—**CAN.**

b. *Use of some new & ..... parts.*]—A patent for a combination

thereby infringed the patent is a question not of law, but of fact, to be decided by the jury or ct. with reference to the circumstances of the particular case.

(2) Where a patent is taken out for a combination, it will protect the several subordinate parts & all subordinate combinations of such parts, provided the subordinate parts or combinations be themselves properly subjects for a patent, & also provided that it is clearly & precisely defined by the specification what are the subordinate parts or combinations of parts in respect of which, as well as the entire combination, protection is claimed.

A patent was taken out for "improvements" in a machine for clipping horses & other animals: one of the improvements relied upon was the combination in the machine of four things, viz.—the arching of the cutter-plate so as to give elasticity; the use of fixed stems instead of screws to connect the cutter-plate & comb-plate; the adjustment of certain nuts & washers so as to prevent friction; the mode of communicating motion to the cutter-plate so as to bring it into the true time of cutting. The first item was not described or referred to in the specification, but was merely shown by certain drawings attached to the specification; each of the three other items was admitted to have been well known & used in the trade; the specification did not contain any distinct claim in respect of the combination:—*Held:* the specification was not sufficient, & the combination of the four items was not protected by the patent.—CLARK *v.* ADIE (1877), 2 App. Cas. 315; 46 L. J. Ch. 585; 36 L. T. 923; 26 W. R. H. L.

Annotations:—As to (1) **Apld.** Proctor *v.* Bennis (1887), 36 Ch. D. 740. *As to* (2) **Consd.** Dudgeon *v.* Thomson (1877), 3 App. Cas. 34; Cropper *v.* Smith (1884), 1 R. P. C. 81; Ellington *v.* Clark, Bunnett (1887), 58 L. T. 40. **Apld.** Muirhead *v.* Commercial Cable Co. (1894), 12 R. P C. 39; Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System (1896), 13 R. P. C. 559; Consolidated Car Heating Co. *v.* Came, [1903] A. C. 509; Patent Exploitation *v.* Siemens (1904), 21 R. P. C. 549. **Expld.** Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 164. **Apld.** Sirdar Rubber Co. *v.* Wallington, Weston, [1905] 1 Ch. 451. **Distd.** Hattersley *v.* Hodgson (1906), 23 R. P. C. 193. **Apld.** British United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631; Harrison Patents Co. *v.* Nicholson (1908), 25 R. P. C. 393. **Consd.** Pugh *v.* Riley Cycle Co. (1914), 31 R. P. C. 266. **Refd.** Thomson *v.* Moore (1889), 6 R. P. C. 426; Dowler *v.* Keeling (1898), 14 T. L. R. 257; Leeds Forge Co. *v.* Deighton's Patent Flue & Tube Co. (1904), 21 R. P. C. 487; Van Berkel *v.* Booth (1906), 23 R. P. C. 573; Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323. *Generally,* **Refd.** Gosnell *v.* Bishop (1888), 4 T. L. R. 397.

2462. Use of subordinate part—Such part new & material.]—(1) A patent for a combination does not import a claim that each of its parts is new; & the patent may be valid though each part is old.

(2) The use of a subordinate part only of a combination may be an infringement of a patent for the combination if the part so used be new & material.—LISTER *v.* LEATHER (1858), 8 E. & B. 1004; 27 L. J. Q. B. 295; 4 Jur. N. S. 947; 120 E. R. 373, Ex. Ch.; *affg.* (1857), 3 Jur. N. S. 811.

Annotations:—As to (1) **Consd.** Lister *v.* Eastwood (1864), 9 L. T. 766. **Dbtd.** Harrison *v.* Anderston Foundry Co. (1876), 1 App. Cas. 574. **Consd.** Clark *v.* Adie (1877), 2 App. Cas. 315. **Dbtd.** British United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631. **Refd.** Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194; Thomson *v.* Moore (1889), 6 R. P. C. 426.
(1857), 7 E. & B. 725. **Distd.** Parkes *v.* Stevens (1869), 5 Ch. App. 36. **Consd.** Saxby *v.* Clunes (1874), 43 L. J. Ex. 228. **Refd.** Thomas *v.* Foxwell (1858), 5 37; Wright *v.* Hitchcock (1870), L. R. 5 Exch. 37. *Generally,* **Refd.** Betts *v.* Menzies & Wildey (1860), 6 Jur. N. S. 1290; Soc. Anon. des Manufactures de Glaces *v.* Tilghman's Patent Sand Blast Co. (1883), 25 Ch. D. 1; Dunlop Pneumatic Tyre Co. *v.* Moseley (1904), 91 L. T. 40.

2463. Use for different purpose—Of combination.]—To adopt a combination of machinery or arrangement of apparatus originally directed, to one purpose, & to use it for another & additional purpose, is an infringement of the patent which first introduced that combination or arrangement.—CANNINGTON *v.* NUTTALL (1871), L. R. 5 H. L. 205; 40 L. J. Ch. 739, H. L.

Annotations:—**Consd.** Pneumatic Tyre Co. *v.* East London Rubber Co. (1896), 75 L. T. 488. **Refd.** *Re* Gaulard & Gibbs Patent (1890), 7 R. P. C. 367; Vickers *v.* Seddell (1890), 7 R. P. C. 292; Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Pirrie *v.* York Street Flax Spinning Co. (1894), 10 R. P. C. 34.

—— **Of essential part.**]—*See* Sub-sect. 13, D., *post.*

2464. Use of some component parts—Whether substance of patent adopted—Question of fact.]—CLARK *v.* ADIE, No. 2461, *ante.*

2465. Combination giving same result—But of different elements.]—NEEDHAM & KITE *v.* JOHNSON & Co. (1884), 1 R. P. C. 49; Griffin's Patent Cases (1884–1886), 168, C. A.

2466. Use of combinations with colourable variations.]—EHRLICH *v.* IHLEE & SANKEY, No. 2519, *post.*

2467. ——.]—The owner of a patent for improvements in gas lamps brought an action against M. & co. alleging infringement & asking for the usual relief. Defts. denied infringement & put in issue the validity of the patent. The only material difference between their combination & that of pltfs.' was, that whereas in pltfs.' lamp there were gauze coverings placed in two distinct positions & serving the purpose of moderating & equalising the currents of air, in defts.' lamp there was only one gauze covering, which did not occupy precisely the same position as either of the two in pltfs.' lamp, but which, according to the evidence, answered the same purpose, although less effectively. The allegation of invalidity was abandoned by defts. at the bar:—*Held:* having regard to the evidence & to the fact that upon the specification the equalising of the currents by the gauze, rather than the exact position of the gauze, appeared to be the aim of the invention, defts.' combination was an infringement of pltfs.'—WENHAM CO., LTD. *v.* MAY & Co. (1887), 4 R. P. C. 303.

2468. ——.]—The proprietors of a patent granted for an invention in respect of "Improvements in & connected with vacuum cleaners" brought an action for infringement. Claim 1 of the complete specification was as follows: "A vacuum cleaner consisting of a single acting bellows the upper end of which is provided with a handle & is slidable with the said handle on a central stale or handle secured to the lower end of the said single acting bellows, which lower end forms part of a chamber containing a porous bag & having a lid provided with a tube extending into the said bag, which tube serves to receive a nozzle, both the said upper & lower ends of the said single acting bellows being provided with suitable valves." Deft. denied that he had infringed & alleged that the patent was invalid by reason (*inter alia*) of prior publication & want of subject-matter. It was contended on behalf of deft. that

several improvements is infringed the adoption & use of some new & material part of those improvements.—[illegible] (1879), 6 Nfld. NFLD.

c. ——.]—A valid patent for an entire combination for a process gives protection to each part thereof, which is new, & material for that process.—BUTLER *v.* ADAMJI BAHUBA (1904), I. L. R. 26 All. 96.—IND.

d. *All essential & characteristic parts must be used.*]—If a patent is for a combination, there is no infringement unless all the essential & characteristic

Sect. 1.—*What constitutes infringement: Sub-sect.* 13, *A., B. & C.*]

the nature of the patent was such that the patentee must be held strictly to what he had claimed & that, if the claim was wide enough to include the alleged infringing article, the patent was invalid for want of subject-matter:—*Held:* pltf.'s patent was for the combination of six elements; the deft.'s machine contained every element of the said combination with the exception that the position of the exhaust valve in the bellows was different; the difference was insufficient to distinguish the two machines; & the deft.'s machine was an infringement.—ROTH *v.* CRACKNELL (1921), 38 R. P. C. 120.

2469. —— Chemical equivalent.]—In 1885, a patent was granted to W. for the manufacture of an illuminant appliance for gas & other burners. For this purpose, he stated in his specification that he employed a compound of oxide of lanthanum & zirconium, or of these with oxide of yttrium; that instead of using oxide of yttrium, ytterite earth, & instead of oxide of lanthanum, cerite earth, containing no didymium & but little cerium might be employed. The process described consisted in impregnating a fabric with a solution of nitrates or acetates of the oxides, exposing it to ammonia gas, & afterwards burning off the fabric, leaving the earthy matters in the form of a skeleton hood or cap. He claimed "the manufacture, substantially as herein described, of an illuminant appliance for gas & other burners, consisting of a cap or hood made of fabric impregnated with the substances mentioned & treated as set forth." Pltfs., in whom this patent had become vested, commenced an action for infringement against defts., who were threatening to make & sell fringes of threads to be used as illuminant appliances. The substances which deft. threatened to use for making the fringes consisted of certain salts of zirconium & magnesium, & as alleged by them, nitrate of erbium, but, as alleged by pltfs. from analyses, a soluble salt of the oxides of the yttrium group. The process was substantially that of pltfs., by impregnating with a solution of the salts, & after burning off the carbon of the threads in the flame, leaving an earthy residuum in the form of the threads; but the ammoniation was omitted. Defts. contested the validity of the patent on several grounds:—*Held:* patentee claimed a combination of his whole process, including the use of lanthanum; defts. though omitting the use of lanthanum, had taken the substance of patentee's process & had infringed.—INCANDESCENT GAS LIGHT CO., LTD. *v.* DE MARE INCANDESCENT GAS LIGHT SYSTEM, LTD. (1896), 12 T. L. R. 495; 13 R. P. C. 559, C. A.

Annotation:—**Distd.** Crosfield *v.* Techno-Chemical Laboratories (1913), 29 T. L. R. 378.

2470. Use with differences.]—MOORE *v.* BENNETT, No. 2946, *post.*

2471. —— One integer having no counterpart in plaintiff's apparatus.]—HIGGINSON & ARUNDEL *v.* PYMAN, SAME *v.* SAME, No. 2389, *ante.*

B. New Combination producing New Result.

2472. General rule.]—(1) Where a patent has been granted for a combination which produces a new result, the patent is infringed if in substance & in essence the combination is taken.

(2) In an action by P., patentee of a stoking machine, for infringement against persons who had purchased stoking machines made by B., it was proved that before the purchase P., knowing that they were going to set up stoking machines, went to them & asked them to try his machine, saying that they would find it a better machine than B.'s, without giving any intimation that he considered B.'s machine to be an infringement of his patent, though he admitted that he did at that time consider it to be so & intended to take legal proceedings when he was in funds:—*Held:* as the purchasers did not depose that when they bought B.'s machines they were ignorant of P.'s patent, nor was there any reason to believe that they were ignorant of it, or that P. supposed them to be so, P. had not on the ground of acquiescence or estoppel lost his right to sue them for an infringement in using B.'s machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, & P.'s conduct not amounting to a representation it was not an infringement.—PROCTOR *v.* BENNIS (1887), 36 Ch. D. 740; 57 L. J. Ch. 11; 57 L. T. 662; 36 W. R. 456; 3 T. L. R. 820; 4 R. P. C. 333, C. A.

Annotations:—*As to* (1) **Consd.** Automatic Weighing Machine Co. *v.* Combined Weighing Machine Co. (1888), 6 R. P. C. 120; Automatic Weighing Machine Co. *v.* Knight (1889), 6 R. P. C. 297; Thomson *v.* Moore (1890), 6 R. P. C. 426. **Apld.** Muirhead *v.* Commercial Cable Co. (1894), 12 R. P. C. 39: Ticket Punch & Register Co. *v.* Colley's Patents (1895), 11 T. L. R. 262; Perry *v.* Soc. des Lunetiers (1896), 13 R. P. C. 664; Akt. Separator *v.* Dairy Outfit Co. (1898), 15 R. P. C. 327. **Consd.** Consolidated Car Heating Co. *v.* Came, [1903] A. C. 509. **Apld.** British United Shoe Machinery Co. *v.* Thompson (1905), 22 R. P. C. 175. **Consd.** Van Berkel *v.* Booth (1906), 23 R. P. C. 573. **Refd.** Gosnell *v.* Bishop (1888), 4 T. L. R. 397; Proctor *v.* Sutton Lodge Chemical Co. (1888), 5 R. P. C. 184; Boyd *v.* Horrocks (1889), 6 R. P. C. 152; Crampton *v.* Patents Investment Co. (1889), 6 R. P. C. 287; Nobel's Explosives Co. *v.* Anderson (1894), 11 R. P. C. 519; Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System (1896), 13 R. P. C. 559; Incandescent Gas Light Co. *v.* Sunlight Incandescent Gas Lamp Co. (1896), 13 R. P. C. 333; Presto Gear Case & Components Co. *v.* Simplex Gear Case Co. (1898), 15 R. P. C. 635; Van Beskel *v.* Simpson (1906), 23 R. P. C. 237; Lynch & Wilson *v.* Phillips (1909), 25 R. P. C. 694; Roth *v.* Cracknell (1921), 38 R. P. C. 120.

2473. ——.]—The owners of letters patent for "Improvements in machinery for breaking pig iron" brought an action for infringement. The patentees in their specification described mechanism for feeding the mass in position, clamping it, breaking off pigs from the sow, & breaking the sow, & for each of these operations they described plungers working in ram cylinders. In their first claim they claimed the machine comprising the four rams for the four operations, substantially as described. The specification stated that plungers, instead of being operated by hydraulic power, might be actuated by steam or other motive agent. In defts.' machine the operations were effected by means of eccentrics, toggle links, levers & cams, off a mechanically driven shaft, whereas pltfs.' machine had no revolving parts. The question of infringement turned on the point whether the claims were confined to machines such as described & operated by means of rams, or whether they included machines with similar or analogous working parts operated by means of a power driven shaft:—*Held:* pltfs. could only claim the invention specified, that is, the machine with four rams for four definite purposes, & defts. had not infringed.

I have always taken the view so far, that when you get an absolutely new result, carried out by new machinery, it is just—I object to use the word "benevolent"—to construe the specification

features of the patented combination are used.—GWYNNE *v.* DRYSDALE & Co. (1886), 13 R. (Ct. of Sess.) 684; 23 Sc. L. R. 465.—**SCOT.**

e. Omission of material part.] —STONE & CO., LTD. *v.* BROADFOOT & LTD. (1909), 26 R. P. C.

PART XIV. SECT. 1, SUB-SECT. —B.

f. Commercial success—Not to achieved.]—GENERAL ENGINEERING

as describing the essential operations to be performed in order to carry the invention into effect. If you find that the alleged infringer has taken a known mechanical substitute, but the operations described in the specification are being carried out, infringement is established. . . . Under these circumstances when you find a new operation successfully carried out, the construction to be put on such a specification ought to be to give a patentee the fair benefit thereof, if he has not so limited his claim that anything whereby the same sequence of operations is carried out cannot fairly be said to come within it (LORD ALVERSTONE, C.J.).—MARTIN & JAMES *v.* CONSETT IRON CO., LTD. (1907), 25 R. P. C. 27, C. A.

2474. ——.]—Where the patent is for a combination of parts or a process, & the combination or process, besides being itself new, produces new & useful results; every one who produces the same results by using the essential parts of the combination or process is an infringer, even though he has, in fact, altered the combination or process by omitting some unessential part or step & substituting another part or step, which is, in fact, equivalent to the part or step he has omitted (PARKER, J.).

The question here, again, is a question of the essential features of the invention said to have been infringed. If that part of the combination, or that step in the process for which an equivalent has been substituted, be the essential feature, or one of the essential features, then there is no room for the doctrine of equivalents, & to ascertain the essential features of an invention, the specification must be read & interpreted by the light of what was generally known at the date of the patent (PARKER, J.).—MARCONI & MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* BRITISH RADIO-TELEGRAPH & TELEPHONE CO., LTD. (1911), 27 T. L. R. 274; 28 R. P. C. 181.

Annotations:—**Refd.** Fellows *v.* Lench (1916), 34 R. P. C. 45; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369. **Mentd.** Amalgamated Properties of Rhodesia (1913), Ltd. *v.* Globe & Phœnix Gold Mining Co. (1916), 116 L. T. 111.

2475. ——.]—A patent was granted in 1900 for "Improvements in apparatus for wireless telegraphy." One of the claims was for "A transmitter for electric wave telegraphy consisting of a spark producer having its terminals connected through a condenser with one circuit of a transformer, the other circuit being connected to a conductor & to earth or a capacity the time period of electrical oscillations in the two circuits being the same or harmonics of each other." In a previous action, *Marconi & Marconi's Wireless Telegraph Co., Ltd.* v. *British Radio-Telegraph & Telephone Co., Ltd.*, No. 2474, *ante*, for infringement of the patent, it was held that the invention consisted in the substitution for a single circuit, in both transmitter & receiver, of a pair of circuits, one radiating or absorbing readily, & the other oscillating persistently & being a conserver of energy, the two circuits being tuned together, & linked by means of a transformer, so that electrical oscillations in the closed & persistently oscillating circuit built up & maintained similar oscillations in the open & readily vibrating secondary, & the two circuits of the receiver, with similar interaction, being tuned to the same time-period as the circuit of the transmitter; that the invention was useful, & the patent was valid; that the claim was for a new combination producing a new result, & the two-coil transformer was not an essential part of the invention, & that defts., notwithstanding the fact that they had used an auto-transformer, had infringed. In a subsequent action for infringement of the patent it was proved that defts.' apparatus was, for electrical purposes, identical with that previously held to be an infringement except for the introduction into the primary circuit of two additional spark gaps & a through-charging coil. Defts. contended that in their apparatus the working was improved, as the presence of the spark gaps substantially reduced the length of the primary wave train, & after the primary had ceased to oscillate, the secondary continued to oscillate:—*Held:* it was not an essential feature of the invention that the primary should persistently replenish the secondary with energy, & maintain the radiating secondary; in both pltfs.' & defts.' installations the primary oscillations died down before the secondary oscillations ceased, & the question was one of degree, depending largely on the radiator employed; defts. had in substance taken the patented invention & had infringed; the invention had not been anticipated; & the patent was valid.—MARCONI *v.* HELSBY WIRELESS TELEGRAPH CO. (1914), 30 T. L. R. 688; 31 R. P. C. 399.

C. New Combination producing Known Result.

2476. Patent restricted to particular combination—Use of mechanical equivalents.]—CURTIS *v.* PLATT, No. 2479, *post.*

2477. —— ——.]—The assignees of a patent for improvements in machinery for rolling metals, brought an action for suspension & interdict against alleged infringers, on the ground that the material part of a patented combination had been used by them. The material part consisted of a tilter, forming a convenient means for turning & moving transversely across the feed roller bars, or slabs of metal when being conducted along the feed rollers towards the grooves of the rolls. The specification further described improved arrangements of hydraulic apparatus acting on ingots, or blooms, or masses of metal after each passage between the rolls, "so as to turn or assist in moving them into the positions for passing through the successive grooves of the rolls," according to two alternative modifications, in both of which vertical hydraulic cylinders, with lifter heads attached to their rams, were distinctive features for actuating, by a direct upward thrust, the tilting process by which the metals were turned into their positions for passing through the rolls. The machinery used by defenders embraced an oscillating vertical hydraulic cylinder, which was claimed to be a mechanical equivalent for the stationary vertical hydraulic cylinder in pursuers' patent. Defenders maintained there were substantial differences, as they used two carriages & four hydraulic cylinders, instead of one carriage & two cylinders. Alternatively pursuers alleged that their fourth claim for the combination of the fixed horizontal hydraulic cylinder, or cylinders, with the traversing vertical hydraulic cylinder, substantially as & for the purposes hereinbefore described, was infringed:—*Held:* applts.' invention consisted in the substitution of a combination of mechanical equivalents for the mechanism previously known & used for attaining the same end, they, therefore, could not claim mechanical equivalents as infringements, & nothing could be an infringement unless in

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v. DOMINION COTTON AMERICAN STOKER CO. . C. R. 309; 20 C. L. T. AN.

PART XIV. SECT. 1, SUB-SECT. 13. —C.

g. Same result by well-known equivalents—Not colourable evasion.]—Where an invention relates to the production of an old result by means of a novel combination of old parts, or to

Sect. 1.—*What constitutes infringement: Sub-sect.* 13, *C. & D.*]

substance identical; resps.' apparatus was not identically the same as applts.', as resps.' lifters operated in concert & not separately, & the duplication of carriages & cylinders was advantageous, if not necessary, for the effective working of their lifters, consequently there was no infringement; as to the alternative claim, to support this applts. required to extend their claim to the combination in any apparatus for shifting metal, however differing in other respects, & the claim from its language could not be so extended.—MILLER & CO. *v.* CLYDE BRIDGE STEEL CO., LTD. (1892), 9 R. P. C. 470, H. L.

2478. —— ——.]—Pltf. was the owner of a patent for an automatic electric time check, & brought this action for infringement of his patent. Time checks were old, & pltf.'s invention was of a special combination of parts. Defts. were working under a subsequent patent for time-checking apparatus. They denied infringement & alleged the invalidity of pltf.'s patent:—*Held:* (1) the question of infringement was whether defts. had taken, with slight variations or mechanical equivalents, the substance of pltf.'s combination; in the present case, even if pltf. & defts. had the same object, which was doubtful, defts. had not taken the substance of pltf.'s combination, & the action was dismissed, with costs; (2) although the question of the validity of the patent was not decided, several of the particulars of objections relating to the question of validity were allowed as reasonable.—JARDINE *v.* KING MENDHAM & CO. (1896), 13 R. P. C. 411.

2479. —— **Adoption with slight variation.**]—(1) Where an invention consists of the discovery of particular means for attaining a result, which result is already perfectly well known, the invention is only for the means; & the invention of one set of particular means does not interfere with the invention of another set of means to the same end, provided that the two sets of means are distinct, & the latter does not involve a colourable imitation of the former, or an incorporation of the former, with additions.

(2) Ignorance of the existence of a former invention is no answer to a charge of infringement, where the second invention is capable of being accurately represented as an imitation of the former.

(3) Where an inventor described his invention as improvements applicable to certain machines commonly known as self acting mules, particularly those constructed with the improvements of L. & R. & a second inventor having taken the same elements of construction produced a new combination of agents, arriving at the same result, but by a process of thought in which he did not appear to have derived assistance from his knowledge of the former invention, there was held to be no infringement.—CURTIS *v.* PLATT (1864), 3 Ch. D. 138, n.; 11 L. T. 245; Goodeve's Patent Cases, 144, L. C.; *affd.* (1866), 35 L. J. Ch. 852, H. L.

Annotations:—*As to* (1) **Consd.** Adie *v.* Clarke (1876), 3 Ch. D. 134. **Apld.** Badische Anilin und Soda Fabrik *v.* Levinstein (1883), 24 Ch. D. 156. **Distd.** Proctor *v.* Bennis (1887), 36 Ch. D. 740; Thomson *v.* Moore (1889), 6 R. P. C. 426. **Apld.** Boyd *v.* Horrocks (1889), 6 R. P. C. 152; Miller *v.* Clyde Bridge Steel Co. (1892), 9 R. P. C. 470; Nettlefolds *v.* Reynolds (1892), 9 R. P. C. 270; Ticket Punch & Register Co. *v.* Colley's Patents (1895), 11 T. L. R. Harrison Patents Co. *v.* Nicholson (1908), 25 R. P. C. [illegible]. **Refd.** Gosnell *v.* Bishop (1888), 4 T. L. R. 397; Jahncke *v.* Boll (1891), 9 R. P. C. 94; Presto Gear Case & Components Co. *v.* Simplex Gear Case Co. (1898), 15 R. P. C. 635; British United Shoe Machinery Co. *v.* Thompson (1904), 22 R. P. C. 177. *As to* (3) **Refd.** Akt. Separator *v.* Dairy Outfit Co. (1898), 15 R. P. C. 327. *Generally*, **Refd.** Murray *v.* Clayton (1873), 21 W. R. 498; Siddell *v.* Vickers (1888), 39 Ch. D. 92.

2480. —— ——.]—(1) The evidence of experts is legitimate and important to inform the ct. what are or are not mechanical equivalents. (2) Pltfs. in this action were proprietors of a patent for an invention of "improvements in apparatus for cancelling & registering cheques," chiefly used for omnibus bell punches, & defts. were proprietors of a subsequent patent for similar objects. Pltfs. alleged that defts.' bell punches were infringements of pltfs.' patent. Defts. denied this. In pltfs.' machine, when the ticket was inserted in position to be punched, it moved a rod sliding longitudinally in the punch, & thus turned a lever & disengaged it from a stop wheel. Until the lever was disengaged the apparatus could not be set in motion. The conductor then pushed another rod & so caused a ratchet wheel to rotate & act by a tooth on another lever, which effected the punching, & the registering & bell-ringing mechanism were effected at the same time by the shaft & another tooth of the ratchet wheel. The insertion of the ticket, therefore, by releasing the stop-wheel unlocked the machine. In defts.' machine, after the ticket was inserted, the conductor pressed down a handle & so pushed forward the punch; a rod sliding in the punch was moved forward to the ticket by a spring & was stopped by the ticket; the punch was still pushed forward, as the handle was pressed further down, & carried on with it the other parts of the machinery; as the rod was kept stationary by the ticket, the other parts of the machinery carried on by the punch moved forward on the rod & dropped on to a lower part of it, & so engaged with the bell-ringing & registering apparatus; the handle pressed further down forced the punch through the ticket & the rod was then pushed by its spring through the hole, & the forward movement of the rod raised up the other part of the machinery again to its original position. If the ticket were not inserted, the handle, if lowered, would work the punch forward & with it the rod & the other machinery, but as the rod would not be stopped by the ticket, the other machinery would not fall & engage with the bell-ringing & registering devices. In effect, the inserted ticket formed a part of the machine when in operation, but did not unlock the machine:—*Held:* pltfs. only claimed for a combination to bring about a known result & were therefore confined to their special combination; defts. had not taken pltfs.' combination in substance, with colourable variations, but had invented a substantially different combination, & had therefore not infringed.—TICKET PUNCH & REGISTER CO., LTD. *v.* COLLEY'S PATENTS, LTD. (1895), 11 T. L. R. 262; 12 R. P. C. 171, C. A.

Annotation:—**Refd.** Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System (1896), 13 R. P. C. 559.

2481. —— ——.]—JARDINE *v.* KING MENDHAM & CO., No. 2478, *ante*.

2482. —— ——.]—The owners of a patent for a cigar piercer brought an action for infringement

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a machine utilising an old principle or system, the patentee is protected only in respect of the particular means specified & set forth in his specifications & claims; & in such circumstances it may be no infringement to achieve the same result by the use of well-known equivalents, provided it is not a mere colourable evasion.—GERRARD WIRE TYING MACHINE CO., LTD. *v.* LAIDLAW BALE-TIE CO., LTD., [1926] 4 D. L. R. 5; [1926] Exch. C. R. 193.—**CAN.**

h. *Material & characteristic parts not adopted.*]—WALLACE *v.* JACK (ALEXANDER) & SON, LTD. (1905), 22 R. P. C. 581.—**SCOT.**

The alleged infringing cigar piercer differed in some details from the patented article; in particular it had not a tubular scoop-like cutter. Defts. at the trial relied mainly on anticipation, insufficiency of description in the specification, & non-infringement. At the trial it was held, that the patent was for the particular cigar piercer described in the specification & delineated in the drawings; that the patent had not been anticipated & that the specification was sufficient; & that, although the patent was confined to the machine described, defts. had infringed, as they had taken the patented machine with immaterial differences:—*Held:* the patent was for a combination to obtain a known result & was valid, but defts. had not taken pltf.'s combination & had not infringed.—HARDMUTH *v.* BAKER & SON (1904), 22 R. P. C. 66, C. A.

2483. —— —— "Colourably."]—(1) When a combination of instruments is the invention patented, an infringement of the patent must be an infringement of the combination.

(2) A patentee having altered his specification by disclaimer, lodged a complaint against certain manufacturers for breach of an interdict granted anterior to the disclaimer:—*Held:* the patentee ought to have instituted a new action; & although the instrument of the manufacturers was intended to execute the same work, it was no infringement; although it was cognate, it had not the characteristic feature of the patentee's invention.

Applt.'s invention as it stood before the disclaimer may have been new, useful, & legal, but it might not have been so under the altered specification. After the disclaimer the question of enforcing the old interdict could not be entertained (LORD CAIRNS, C.).

(3) The phrase "colourably" is very apt to mislead in these cases. If part of the property in the invention be really taken there is an infringement, however much that may be disguised (LORD BLACKBURN).—DUDGEON *v.* THOMSON (1877), 3 App. Cas. 34, H. L.

Annotations:—As to (1) **Refd.** Miller *v.* Clyde Bridge Steel Co. (1892), 9 R. P. C. 470; Ticket Punch & Register Co. *v.* Colley's Patents (1895), 11 T. L. R. 262; Wallace *v.* Tullis Russell (1921), 39 R. P. C. 3. *As to* (2) **Consd.** Thomson *v.* Moore (1889), 6 R. P. C. 426. *As to* (3) **Apld.** Automatic Weighing Machine Co. *v.* Knight (1889), 6 R. P. C. 113, 297. **Refd.** Ellington *v.* Clark, Bunnett (1887), 58 L. T. 40; Higginson & Arundel *v.* Pyman, Same *v.* Same (1926), 43 R. P. C. 291. *Generally*, **Refd.** Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System (1896), 13 R. P. C. 301; Harrison Patents Co. *v.* Nicholson (1908), 25 R. P. C. 393 *Re* Kenrick & Jefferson's Patent (1911), 29 R. P. C. 25.

2484. —— Adoption with distinct variation.]—A patent for a mechanical arrangement whereby a particular operation may be performed for a particular purpose, the parts of the apparatus so arranged not being new in themselves, but thus first combined for that particular purpose, is not infringed by the adoption of the same arrangement or combination of parts for a similar purpose, if the mode of operation is sufficiently distinct & different on principle from that which was described or claimed in the patent & the object achieved is also sufficiently distinct or novel & does not form an essential part of the patent.—SAXBY *v.* CLUNES (1874), 43 L. J. Ex. 28, H. L.

-.]—In 1891, letters patent were granted to I. for an "Improved apparatus employed in the manufacture of artificial stone," & in the amended specification the patentee, after describing his apparatus, stated that he desired it to be understood that he was aware that it was not novel to employ a steam chamber containing high pressure steam in the manufacture of artificial sandstone; or to submit a mixture of slaked lime & sand to the action of high pressure steam in a closed chamber; or to mix & mould sand & caustic lime in a dry state, & then to allow the mixture to absorb water or steam; or to submit a mixture of sand & lime in moulds to pressure by applying weight thereto while subjected to the action of high pressure steam; & that he made no claim to any such apparatus separately; or to either of such processes separately, but he claimed "an apparatus for the production of artificial stone, consisting of a closed chamber within which moulds, or boxes charged with a mixture of caustic lime & sand are subject to high pressure steam, the moulds being so placed together that they offer each other mutual support to withstand the bulging strain produced by the expansion of the lime in slaking, while the strain which is transmitted to the outermost surfaces is effectually resisted in the one direction by circular rings, & in the other direction by stay bolts, substantially as described." In 1893, letters patent were granted to A. for "Improvements in & connected with moulding boxes for the manufacture of artificial stone." The patentee claimed a system of moulding boxes, one of the features of which was that the bottom & side plates of the boxes were held together by plates forming the common ends of the system. Both patents became vested in P. who brought an action for infringement of the same. Defts., besides raising questions as to validity, denied infringement. Defts. used their moulds in a pile, which was tied together by rails or girders at the top & bottom connected at the ends by tie-rods, the latter, however, did not touch or support the ends; they employed no circular rings, stay-bolts or end plates. It was contended for pltf. that the principle of *Proctor* v. *Bennis*, No. 2472, *ante*, was applicable to I.'s specification, since it was based on a new process. I.'s specification had already been construed by the Ct. of Appeal:—*Held:* the principle of *Proctor* v. *Bennis*, No. 2472, *ante*, did not apply to I.'s specification & neither patent had been infringed by defts.—PETERS *v.* OWEN STONE CO., LTD. (1899), 17 R. P. C. 80.

D. Combination of Old and New Features.

2486. Infringement depends upon user of novel part.]—BODMER *v.* BUTTERWORTH (1846), 7 L. T. O. S. 224.

2487. ——.]—There may be a patent for a combination of old & new mechanism; & such patent will be infringed by using so much of the combination as is material; & it will not be less an infringement because the result is attained by the substitution of a mechanical equivalent.—SELLERS *v.* DICKINSON (1850), 5 Exch. 312; 20 L. J. Ex. 417; 15 L. T. O. S. 163; 155 E. R. 134.

Annotations:—**Consd.** Lister *v.* Leather (1858), 8 E. & B. 1004. **Apld.** Thomson *v.* Moore (1889), 6 R. P. C. 426. **Refd.** Holmes *v.* L. & N. W. Ry. (1852), 12 C. B. 831; Wren *v.* Weild (1869), L. R. 4 Q. B. 730.

2488. ——.]—It is an infringement of patent for a combination, parts of which are material & new, to take a part which is new material & apply it to a machine which employs mechanical equivalents for other parts of the process described in the specification.—BOVILL *v.* KEYWORTH (1857), 7 E. & B. 725; 29 L. T. O. S. 194; 3 Jur. N. S. 817; 5 W. R. 686; 119 E. R. 1415.

Annotations:—**Refd.** Thomas *v.* Foxwell (1858), 5 Jur. N. S. 37; Bovill *v.* Goodier (2) (1866), L. R. 2 Eq. 195; Bovill *v.* Smith (1868), Griffin's Patent Cases (1887), 49.

2489. ——.]—A patent was granted to an invention for the purification of gas by means of

Sect. 1.—*What constitutes infringement: Sub-sect.* 13, *D. & E.; sub-sect.* 14.]

precipitated or hydrated oxides of iron, & the specification stated the mode of obtaining such oxides. The use of a natural substance containing precipitated oxide of iron was held not to be an infringement of the patent; but upon this substance being revivified in the manner described in the specification, an injunction to restrain the use of the substance so revivified was granted.—HILLS *v.* LIVERPOOL UNITED GASLIGHT CO. (1862), 32 L. J. Ch. 28; 7 L. T. 537; 9 Jur. N. S. 140, L. C.

Annotation:—**Refd.** Barrett *v.* Vernon (1876), 35 L. T. 755.

2490. ——.]—If a patent be taken out for an invention by means of a combination, the use of a subordinate part of the combination is no infringement of the patent, unless such part is new & material.—WHITE *v.* FENN (1867), 15 L. T. 505; 15 W. R. 348.

2491. ——.]—Now I come to the infringement. The infringement does not make use of that part of the described invention. What is the result? Not, I agree, that you at once say that there is no infringement which would enable shifty persons dealing with a patent, which consisted of several meritorious parts, if they happened to be described with the conjunction " & " to use any of them or all but one of them, & to say that they had not infringed because they had not infringed all: that would not be the result; but I apprehend the true result is that you must show that that which had been infringed & made by the alleged pirate is a use in his machine of such part of that which is described in the specification as could stand by itself in respect of invention, & in respect of use as the subject of a distinct patent (WILLES, J.).—TATHAM *v.* DANIA (1869), Griffin's Patent Cases (1884–1886), 213.

2492. ——.]—Pltfs., as owners of two patents, one dated in 1881 & the other in 1884, both being for improved safety gear for starting engines, brought an action against defts. for infringement of these patents. The defence was that the patents were not valid, but if they were that defts. had not infringed them:—*Held:* whether the patent of 1884 was for a combination of old mechanical means for a new & useful purpose, or a combination of old means & a new essential part, defts. had not imitated the whole or an essential part of pltfs.' invention, & they had not infringed the patent of 1881.—MUSGRAVE & SONS *v.* HICKS, HARGREAVES & CO. (1886), 3 R. P. C. 49.

2493. ——.]—Separate parts not in themselves novel & common to both pltfs. & defts., had been taken by defts. & combined by them in a different way, so as in the result to produce what, in his opinion, was not an infringement but a separate machine (COTTON, L.J.).

The idea of stretching trousers was not new at all & there was no novelty in the use of a screw for that purpose. The idea was old & the principle was old & the invention, if it was to be upheld, must be for the particular machine described (LINDLEY, L.J.).—GOSNELL *v.* BISHOP (1888), 5 R. P. C. 151; 4 T. L. R. 397, C. A.

Annotations:—**Refd.** Auster *v.* Perfecta Motor Equipments (1924), 41 R. P. C. 482; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1924), 41 R. P. C. 241.

2494. ——.]—AUTOMATIC WEIGHING MACHINE CO. *v.* KNIGHT, No. 2446, *ante*.

.]—The patentee of an apparatus for softening of water & preventing incrustation brought an action for i...ringen The claim in pltf.'s specification was for the apparatus as fully set forth & described in the specification & drawings. The apparatus consisted of a number of vegetable fibres bent round a small ring so that the ends on each side of the ring were the same length, & to keep them in position a plate was put on each side of the ring, & these plates were screwed tight by a bolt running through them. The apparatus was put into boilers & the lime in the boiling water was deposited on the apparatus instead of on the bottoms & sides of the boiler. Deft.'s apparatus consisted of fibres bent round a wire which was twisted into a circular shape, & there was a device in metal which clipped the ends of the fibres & kept them in position. Deft. said there was no infringement, & alleged that pltf.'s patent was invalid on the ground that pltf. claimed the parts of which his apparatus was composed as well as the combination, & that these parts were old:—*Held:* pltf. simply claimed his whole combination, the patent was valid & had been infringed, the essential part being taken with mechanical equivalents for some of the parts.—PECKOVER *v.* ROWLAND (1893), 10 R. P. C. 234, C. A.

2496. —— **User for different purpose.**]—A patent was taken out for causing sheets of metal to be passed through molten zinc in such a way as to secure their complete immersion. This was effected by the sheets passing between rollers in contact with metal kept molten in a suitable pot. Another mode was by causing the sheets to be passed under a bar placed below the surface of molten metal, in combination with certain guides. *Qu.:* whether a bar alone, when so placed for the purpose of ensuring complete immersion by passing sheets of metal under it, is the proper subject of a patent. *Semble:* if the patent is good for the bar alone, the use of the bar by defts., though for a purpose different from that of pltfs., is an infringement.—MOREWOOD *v.* TUPPER (1855), 3 C. L. R. 717; 24 L. T. O. S. 278.

2497. —— ——.]—Where a patent is for a combination, a person who takes a new & material part of the combination, but does not apply it to a similar purpose to that for which it was applied in the patented combination, does not infringe the patent.—LISTER *v.* EASTWOOD (1864), 9 L. T. 766.

2498. Equivalent of novel part cannot be used.]—MARCONI & MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* BRITISH RADIO-TELEGRAPH & TELEPHONE CO., LTD., No. 2474, *ante*.

E. Combination the Only Novel Feature.

2499. Protection only for combination.]—DUDGEON *v.* THOMSON, No. 2483, *ante*.

2500. Infringement by use of equivalents.]—A patent was granted for " Improvements relating to lubricating apparatus." The apparatus was of the kind known as grease guns or ejectors, used for forcing lubricating grease or oil into the joints & bearings of motor vehicles & other machinery, & had for its object to provide improved means for effecting a grease or oil-tight detachable connection between the ejector & the part to be lubricated, & preventing escape of grease or oil

PART XIV. SECT. 1, SUB-SECT. 13.—E.

k. *General rule.*]—Where a patent is claimed, not for a discovery or invention, but simply for a combination of a number of old & known materials, it is no infringement of the patent to use a part of this combination.—LUSK *v.* MILLER (1872), N. B. Dig. 574.—CAN.

l. ——.]—In a patent for a combination of old elements, the subject matter of the patent is the combination itself taken as a whole, which cannot be infringed unless the whole combination be used, without omitting any element which the inventor

from the ejector after disconnection. The claim was as follows: "In lubricating apparatus of the kind described the combination with a screwed fitting which receives lubricant from an ejector & is provided with a spring controlled valve, of a screwed union provided internally with a cup leather which passes over the exterior of the fitting to form a grease or oil tight joint, & a valve which is pressed off its seating in the union by contact with the said fitting to permit the passage of lubricant, & which on disconnection of the union returns to its seat under pressure & closes the outlet, the whole being constructed substantially as described & illustrated. In an action for infringement of the patent, it was proved that pltfs.' apparatus could be used with pressures much greater than any previously used for the purpose, & that it had had a great & immediate commercial success. Defts. did not allege anticipation of the invention, but they contended that the patent was bad for want of subject-matter; that the claim was extremely narrow; & that defts. had not infringed because (*inter alia*) an essential part of pltfs.' device was a cup leather, & that the washer used in defts.' device was not a cup leather. Pltfs. alleged that defts.' washer, when in use, became a cup leather, & that defts. had taken pltfs.' combination:—*Held:* the claim was not extremely narrow; all the particulars of pltfs.' combination were old, but the combination was new; the invention was useful, & the patent was valid; the defts.' device was a colourable imitation of pltfs.' or, if that was not so, that defts. had infringed by the use of equivalents for the similar parts in pltfs.' apparatus.—BENTON & STONE, LTD. *v.* DENSTON (T.) & SON (1925), 42 R. P. C. 284.

See, also, Sub-sect. 13, C., *ante*.

SUB-SECT. 14.—EQUIVALENTS.

2501. Definition.]—ECCLES & BRIERLY *v.* GREGOR, No. 200, *ante*.

2502. ——.]—BATEMAN *v.* GRAY, No. 2974, *post*.

2503. ——.]—That phrase "mechanical equivalent" according to my experience in patent cases, is always used when a man intends to disguise something else which he cannot clearly express in any other way (BLACKBURN, J.).—JOHNSON *v.* RYLANDS (1873), Griffin's Patent Cases (1884–1886), 138.

2504. Whether equivalent an infringement—New equivalent.]—UNWIN *v.* HEATH, No. 2505, *post*.

2505. —— **Equivalent known at date of patent.**]—Where a patent has been obtained for the use of a known substance, described by its specific name, & it is afterwards discovered that the use of two other & equally known substances will produce the same effect, though the evidence of scientific men may go to show that the two substances become, in the act of so using them, the one substance described in the patent, their use will not constitute an infringement of the patent.

A. obtained a patent for an improved mode of manufacturing cast steel by the use of "carburet of manganese." This substance was well known, but was very expensive. At the time the patent was taken out, it was known that carburet of manganese might be obtained from the combination of two inexpensive articles, oxide of manganese & coal tar. Some little time after the patent had been in existence, it was found that if oxide of manganese & coal tar were put into the melting pot with the metal, cast steel would be produced equal to that which was produced by the aid of the "carburet of manganese." Some of the witnesses said that the carburet was produced in the melting pot at the instant of the fusion of all the ingredients therein contained:—*Held:* the use of these two articles in that manner was not an infringement of the patent.—UNWIN *v.* HEATH (1855), 5 H. L. Cas. 505; 16 C. B. 713; 2 Web. Pat. Cas. 279; 25 L. J. C. P. 8; 26 L. T. O. S. 141; 3 W. R. 625; 10 E. R. 997, H. L.; *revsg.* S. C. *sub nom.* HEATH *v.* UNWIN (1852), 12 C. B. 522, Ex. Ch.

Annotations:—**Distd.** Renard *v.* Levinstein (No. 3), (1865), 11 L. T. 766; Incandescent Gas Light Co. *v.* De Mare Incandescent Gas Light System (1896), 13 R. P. C. 301. **Consd.** Marconi & Marconi's Wireless Telegraph Co. *v.* British Radio-Telegraph & Telephone Co. (1911), 27 T. L. R. 274. **Apld.** Vidal Dyes Syndicate *v.* Levinstein (1912), 29 R. P. C. 245; Follows *v.* Lench (1916), 34 R. P. C. 45. **Refd.** Heath *v.* Smith (1854), 3 E. & B. 256; Booth *v.* Kennard (1856), 1 H. & N. 527; De la Rue *v.* Dickenson (1857), 7 E. & B. 738; Higgins *v.* Seed (1858), 8 E. & B. 771; Seed *v.* Higgins (1858), 32 L. T. O. S. 42; Badische Anilin und Soda Fabrik *v.* Levinstein (1885), 29 Ch. D. 366; Edison Bell Phonograph Corpn. *v.* Smith & Young (1894), 11 R. P. C. 389; Act. für Anilin Fabrikation in Berlin *v.* Levinstein (1921), 38 R. P. C. 277.

2506. —— **Equivalent not known at date of patent.**]—BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN, No. 2944, *post*.

2507. —— **Equivalents for details.**]—AUTOMATIC WEIGHING MACHINE CO. *v.* NATIONAL EXHIBITIONS ASSOCN., LTD., No. 3272, *post*.

2508. —— ——.]—*Held:* deft. had infringed pltf.'s patent by substituting a mechanical equivalent for pltf.'s weighted lever.—AUTOMATIC WEIGHING MACHINE CO. *v.* FEARLY (1893), 10 T. L. R. 22; 10 R. P. C. 442.

2509. —— **Equivalent for one stage in process.**]—I doubt whether the substitution of a known mechanical equivalent for producing a step in the patented process can ever negative infringement unless in some respects it betters the step (VAUGHAN WILLIAMS, L.J.).—BUNGE *v.* HIGGINBOTTOM & CO., LTD. (1902), 19 R. P. C. 187, C. A.

2510. ——.]—NEWTON *v.* GRAND JUNCTION RY. CO., No. 311, *ante*.

2511. ——.]—The owner of a patent for an improvement in carriage lamps, by which the candle tube was prevented from falling out, brought an action for infringement. The patentee's object was effected by means of a flat sliding bolt engaging with a knob on the tube; the bolt was pushed in by the coachman's hand, or simply by shutting the lamp door. Deft. had a sliding bolt, which was made to catch a collar on the tube by a spring. In both cases the sliding bar was kept in its place so long as the door of the lamp was shut. Deft. did not dispute the validity of the patent, but merely denied infringement:—*Held:* deft. had merely substituted a mechanical equivalent, & the appeal should be dismissed.—HOWES & BURLEY *v.* WEBBER (1895), 13 R. P. C. 39, C. A.

2512. ——.]—The owners of the Welch Patent for "Improvements in rubber tyres & metal rims or felloes of wheels for cycles & other light vehicles," having brought an action for infringement, deft. denied infringement. The fourth

considered material.—CAMPE *v.* CONSOLIDATED CAR HEATING CO. (1901), Q. R. 11 K. B. 103.—**CAN.**

PART XIV. SECT. 1, SUB-SECT. 14.

2501 i. *Definition.*]—The tests of equivalency are identity of function, & substantial identity of ways of performing that function.—HOSIERS, LTD. *v.* PENMANS, LTD., [1925] Exch. C. R. 93.—**CAN.**

m. *Whether equivalent an infringement—Mechanical equivalent.*]—WOODWARD *v.* CLEMENT (1885), 10 O. R. 348.—**CAN.**

n. ——.]—PATRIC *v.* SYLVESTER (1876), 23 Gr. 573.—**CAN.**

Sect. 1.—*What constitutes infringement: Sub-sects.* 14 & 15. *Sect.* 2: *Sub-sect.* 1, *A.*]

claim of pltfs.' specification was for "a rubber or elastic tyre having the form of a saddle or arch in section lined with canvas in combination with two wires or sufficiently inelastic cores for securing the same to the rims or tyres, substantially as herein described." Deft. had an arrangement partly of string & partly of wire in the edges of his tyre, which he contended was not the equivalent of & did not perform the functions of pltfs.' wires or inelastic cores, & did not in use lie in the same position in the rim:—*Held:* deft. had infringed.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* HYDE RUBBER CO. (1904), 21 R. P. C. 208.

—— **Combination for producing known result.**]—*See* Sub-sect. 13, C., *ante.*

—— **Combination for producing new result.**]—*See* Sub-sect. 13, B., *ante.*

—— **Combination the only novel feature.**]—*See* Sub-sect. 13, E., *ante.*

—— **Equivalent of novel feature in combination.**]—*See* Sub-sect. 13, C., D., E., *ante.*

—— **Patent of principle.**]—*See* Sub-sect. 12, *ante.*

2513. Chemical equivalent.]—K., in effect, had taken the same substance as B. & treated it with an oxidisable substance, which was within pltfs.' patent, using pltfs.' process, & obtaining pltfs.' result, & had infringed.—LEONHARDT & CO. *v.* KALLÉ & CO. (1895), 12 R. P. C. 103.

Annotation:—**Distd.** Crosfield *v.* Techno-Chemical Laboratories (1913), 29 T. L. R. 378.

2514. ——.]—INCANDESCENT GAS LIGHT CO., LTD. *v.* DE MARE INCANDESCENT GAS LIGHT SYSTEM, LTD., No. 2469, *ante.*

——.]—*See* Patents & Designs Act, 1919 (c. 80), s. 11.

SUB-SECT. 15.—IMPROVEMENTS.

2515. Whether an infringement.]—RUSSELL *v.* LEDSAM, No. 1675, *ante.*

2516. ——.]—UNWIN *v.* HEATH, No. 2505, *ante.*

2517. ——.]—(1) A patent for a new combination of machinery for a specified process is not a claim that each part thereof is new.

(2) A patent for an improvement on an invention already the subject of a patent, if confined to the improvement, is not an infringement of the former patent.

(3) A patent for a combination for a specified process may be infringed without using the whole combination for that process: & if deft. takes & uses one of such subordinate parts, which is new & material in pltf.'s process, such user may be an infringement, although the other subordinate parts were not taken or used, & such user of one subordinate part which is new & material may be an infringement, whether the other subordinate parts forming the whole are new or old.

(4) In an action for the infringement of a patent for a new combination of machinery it is correct to lay it down to the jury that the workman applying the invention must be taken to know the former specification, referred to in the specification of the patent in question.

(5) Deft. having given notice to admit a large number of specifications of other patentees, &, besides these, all specifications of pltf., a judge made an order on deft. to give the names & dates of the specifications of pltf. intended to be used, or that they should be excluded. Deft. then gave notice for all pltf.'s specifications between 1840 & 1850:—*Held:* this was not a compliance with the judge's order, & evidence of a specification of pltf. in 1840 was properly excluded, & it having been tendered to disprove novelty, it could not be read to the jury as possibly bearing upon the construction of the specification in issue on the trial.—LISTER *v.* LEATHER (1857), 8 E. & B. 1004; 29 L. T. O. S. 142; 3 Jur. N. S. 811; 5 W. R. 603; 120 E. R. 373; *affd.* (1858), 8 E. & B. p. 1031, Ex. Ch.

Annotations:—*As to* (2) **Refd.** Parkes *v.* Stevens (1869), 5 Ch. App. 36. *As to* (3) **Consd.** British United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631. **Refd.** Thomas *v.* Foxwell (1858), 5 Jur. N. S. 37; Harrison *v.* G. N. Ry. (1860), 6 Jur. N. S. 993; Wright *v.* Hitchcock (1870), L. R. 5 Exch. 37. Saxby *v.* Clunes (1874), 43 L. J. Ex. 228; Harrison *v.* Anderston Foundry Co. (1876), 1 App. Cas. 574; Clark *v.* Adie (1877), 2 App. Cas. 315; Dunlop Pneumatic Tyre Co. *v.* Moseley (1904), 91 L. T. 40. *Generally,* **Refd.** Bovill *v.* Keyworth (1857), 7 E. & B. 725; Betts *v.* Menzies & Wildey (1860), 6 Jur. N. S. 1290; Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194; Soc. Anon. des Manufactures de Glaces *v.* Tilghman's Patent Sand Blast Co. (1883), 25 Ch. D. 1.

2518. ——.]—A manufacturer who professes to sell to the public a machine under his own name, as one with all the newest improvements, will not be restrained from selling same on an allegation that it is an infringement of pltfs.' patent for a machine which was an old machine, but which had not the modern improvements to it.—WILLCOX & GIBBS SEWING MACHINE CO. *v.* WOOD (1869), 20 L. T. 10.

2519. —— Where invention taken in substance.]—The grantee of a patent for improvements in mechanical musical instruments brought an action for alleged infringement. Defts. denied infringement, & alleged that the patent was invalid on the ground that the alleged invention was anticipated, & that part of it, viz., the second claim, was not useful:—*Held:* (1) defts. had substantially taken pltf.'s machine with colourable variations.

(2) When a deft. has substantially infringed a patent, it is no defence to say he has made improvements.—EHRLICH *v.* IHLEE & SANKEY (1888), 5 R. P. C. 437, C. A.

Annotations:—**Refd.** Gadd & Mason *v.* Manchester Corpn. (1892), 67 L. T. 569; Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 12 R. P. C. 232; Shrewsbury & Talbot S. T. Cab Co. *v.* Sterckx (1895), 12 T. L. R. 122; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre & Automatic Valve Co. (1899), 16 R. P. C. 50; Wilson *v.* Wilson, Barnsley (1899), 16 R. P. C. 315.

2520. —— ——.]—Defts.' apparatus, though they had made modifications of & improvements on the invention, fell within the words & spirit of pltf.'s invention.—AUTOMATIC COAL GAS RETORT CO., LTD. *v.* SALFORD CORPN. (1897), 14 R. P. C. 450.

Annotation:—**Refd.** British Thomson-Houston Co. *v.* Naamlooze Vennootschap Popes' Metaaldraadlampenfabriek, British Thomson-Houston Co. *v.* Charlesworth Peebles, British Thomson-Houston Co. *v.* King (1923), 40 R. P. C. 119.

2521. —— Convenient way of making patent workable.]—The specification of letters patent for "Improvements in atmospheric or power hammers" ended with five claims, the first of which was as follows: "In an atmospheric hammer, arranging the closed ends of the hammer & air pump cylinders in proximity to each other, & directly connecting them through short passages of small capacity controlled by one or more valves, the arrangement being such that air can be drawn direct from the hammer-head into the air pump cylinder, at each suction stroke of the

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2519 i. *Whether an infringement—Where invention taken in substance.*]—AMERICAN DUNLOP TIRE CO. *v.* ANDERSON CO. (1896), 5 Exch. C. R. 194.—CAN.

pump to cause the hammer-head to rise & air can be forced direct from the said pump into the hammer cylinder at each compression stroke of the pump, to cause the hammer-head to descend, so that the hammer-head will work in unison with & will promptly respond to the movements of the pump piston substantially as herein described." Claims 2, 3 & 4 commenced with the words " an atmospheric hammer of the kind specified in Claim 1." Claim 5 was for the particular hammer described & shown. The hammer described in the specification had the capacity of regulating the force of the blow & of the hammer-head being held up or down whilst the air pump continued to work. The owners of the patent having commenced an action for infringement, defts. relied mainly on non-infringement, although they also contended that the hammer described & shown would not work practically. Defts.' hammer had both ends of the cylinders closed, & a by-pass between the ends of the air cylinder, & the upper passage was free, & they contended that the claims in the specification only extended to hammers in which the pressure of the atmosphere was employed in raising them; also that Claim 1 did not include the holding up & down actions, & the parts relating thereto, or, if it did, it was for the specific hammer described, & that they had not got the patented devices; & that Claims 2, 3 & 4 were appendant claims, so that unless the alleged infringement was covered by Claim 1 there was no infringement:—*Held:* the objection to validity failed; the claims were not limited to hammers in which atmospheric pressure was used; Claim 1 included the parts for holding up & holding down, & was for a specific hammer; Claims 2, 3 & 4 were appendant claims; defts.' by-pass was a convenient way of making the invention workable where both ends of the cylinders were closed; & defts. had infringed.—PILKINGTON (PETER), LTD. *v.* MASSEY (1904), 21 R. P. C. 712, C. A.

2522. —— Part of improvement used in further improvement.]—WEISS *v.* MAW, No. 2827, *post.*

Patent of principle.]—*See* No. 2454, *ante;* No. 2648, *post.*

SECT. 2.—LEGAL PROCEEDINGS IN RESPECT OF INFRINGEMENT.

SUB-SECT. 1.—PARTIES.

A. Plaintiffs.

See, generally, R. S. C., Ords. 16, 17.

2523. Assignee.]—SPILSBURY *v.* CLOUGH, No. 2633, *post.*

2524. ——.]—DUNNICLIFF & BAGLEY *v.* MALLET, DUNNICLIFF & BAGLEY *v.* BIRKIN, No. 1535, *ante.*

2525. ——.]—WALTON *v.* LAVATER, No. 1536, *ante.*

2526. ——.]—ANDERSON *v.* PATENT OXONITE CO., LTD., No. 1572, *ante.*

2527. ——.]—Patentees, after commencing an action for infringement, entered into a conditional contract for sale of the patent with a clause providing that the patentees should prosecute the action to trial, & by a subsequent further agreement the patentees agreed to instruct the purchasers' solrs., & that such solrs. should prosecute the action to final judgment or settlement, the purchasers indemnifying them against costs. At the trial the action was dismissed on the ground (*inter alia*) of the invalidity of the patent, & pltfs. appealed. Before the trial the patentees sold the patent, subject to the agreements, to a trustee for defts. in the action. Defts. applied to strike out the appeal, & the patentees applied subsequently in person to withdraw it. These applications stood over to allow the first purchasers to bring an action & move for an injunction restraining the patentees from so applying, which they did:—*Held:* the patentees could not defeat the rights of the first purchasers, & the latter were entitled to prosecute the appeal in the patent action.—COMMERCIAL DEVELOPMENT CORPN., LTD. *v.* ATKINS & APPLEGARTH, ATKINS & APPLEGARTH *v.* CASTNER-KELLNER ALKALI CO., LTD. (1902), 19 R. P. C. 93, C. A.

2528. ——.]—In June, 1897, B. applied for letters patent for an invention the subject of this action. By a deed of Dec. 1897, B. assigned to pltfs. all that the said invention & the benefit of the protection of the application of June, 1897. The patent was subsequently granted to B., & in accordance with the provisions of Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 13, was dated back to June, 1897, the date of the application. In June, 1903, the writ in this action to restrain an alleged infringement of this patent was issued. B. was at this time entered in the register of patents as the owner. In Oct. 1903, B., in pursuance of the deed of Dec. 1897, assigned the said letters patent to pltfs. B. had since died:—*Held:* the assignment of Dec. 1897, did not amount to an assignment of the letters patent, & consequently pltfs. at the date of the commencement of this action were equitable assignees only of the patent, & were not entitled to maintain this action without bringing the legal owner of the patent before the ct. Leave was accordingly given to pltfs. to amend their writ & statement of claim by adding the exors. of B. as pltfs. on the terms of allowing defts. to amend their statement of defence & particulars of objections; the costs of the day & any costs thrown away by reason of the necessity for making this amendment to be defts.' costs in any event.—BOWDEN'S (E. M.) PATENTS SYNDICATE, LTD. *v.* SMITH (H.) & CO., [1904] 2 Ch. 86; 73 L. J. Ch. 522; 52 W. R. 630; 21 R. P. C. 438; *affd.* on other grounds, [1904] 2 Ch. 122, C. A.

Annotation:—**Consd.** Performing Right Soc. *v.* London Theatre of Varieties, [1924] A. C. 1.

2529. GILLETTE SAFETY RAZOR CO. *v.* GAMAGE (A. W.), LTD., No. 2642, *post.*

2530. DUNCAN *v.* LOCKERBIE & WILKINSON (BIRMINGHAM), LTD. (1912), 56 Sol. Jo. 573; 29 R. P. C. 454.

2531. Agent—Agent for sale.]—To a bill stating an agreement made between a general agent of the patentees of an American invention to introduce & sell the invention in Great Britain, & pltf., whereby pltf. was to have the sole agency & control of the working of the patent in England, upon certain terms, including a share of royalties & profits, praying for an account for damages, & an injunction to restrain future infringement, defts., who were alleged to be using the invention, demurred:—*Held:* pltf. was a mere agent for the sale of the invention, & was in no such position as gave him the right to file such a bill, which was in the form of a patentee's bill for infringement.—ADAMS *v.* NORTH BRITISH RY. CO. (1873), 29 L. T. 367.

2532. ——.]—MOUCHEL *v.* CUBITT & CO., No. 1583, *ante.*

Alien owner—In time of war.]—*See* ALIENS, Vol. II., p. 161, No. 309.

2533. Co-owners—Non-joinder—Defendant not objecting.]—Where there is a *primâ facie* case of infringement of a patent, the length of time which the patent has been enjoyed by the patentee will

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 1, A. & B.]

influence the ct. in granting an injunction against the parties who are alleged so to have infringed upon the patentees rights. Letters patent were dated in Nov. 1851, which were duly assigned to pltfs. Defts. letters patent were dated in Jan. 1859, after the passing of Patent Law Amendment Act, 1852 (c. 83):—*Held:* the first patentees without registration were to be considered as sole owners.

On the question of parties, although there appeared to be two others besides pltfs. who probably might participate in the profits; still, as defts. had not demurred, the bill was sufficient in that respect (WOOD, V.-C.).—DAVENPORT *v.* RICHARD (1860), 3 L. T. 503.

2534. —— —— Objection of defendant—Prompt objection necessary.]—One of several co-owners of a patent has a right to sue alone for the recovery of profits due for the use of the patent. An objection by a deft. that other persons should have been joined as plaintiffs should be made promptly, under R. S. C., Ord. 16, rr. 13 & 14, & may not be postponed till the hearing where no impediment exists to raising the objection at once.—SHEEHAN *v.* GREAT EASTERN RY. CO. (1880), 16 Ch. D. 59; 50 L. J. Ch. 68; 43 L. T. 432; 29 W. R. 69.

Annotation:—**Refd.** Van Gelder, Apsimon *v.* Sowerby Bridge United District Flour Co. (1890), 38 W. R. 625.

2535. —— Rights of one to sue alone.]—SHEEHAN *v.* GREAT EASTERN RY. CO., No. 2534, *ante*.

2536. Licencee—Exclusive licencee.]—An exclusive licencee of a patent has a right to use the name of the patentee to restrain any infringement of the patent, & an interlocutory injunction for that purpose will, in a proper case, be granted.—RENARD *v.* LEVINSTEIN (1865), 2 Hem. & M. 628; 5 New Rep. 301; 11 L. T. 766; 13 W. R. 382; 71 E. R. 607.

Annotations:—**Refd.** Heap *v.* Hartley (1889), 38 W. R. 136; Scottish Vacuum Cleaner Co. *v.* Provincial Cinematograph Theatres & British Vacuum Cleaner Co. (1915), 32 R. P. C. 353.

2537. —— —— Notice of licence to infringer.]—HEAP *v.* HARTLEY, No. 1584, *ante*.

2538. Mortgagors—Without joining mortgagees.]—VAN GELDER APSIMON & CO. *v.* SOWERBY BRIDGE UNITED DISTRICT FLOUR SOCIETY, No. 1562, *ante*.

B. Defendants.

See, generally, R. S. C., Ord. 16, 17.

2539. Alien.]—(1) Injunction granted against subjects of the kingdom of Holland, to restrain them from using on board their ships within the dominions of England, without the licence of pltfs., an invention, to the benefit of which pltfs. were exclusively entitled under the Queen's patent.

(2) Foreigners in this country, as well as British subjects, are liable to actions for the injury done by their infringing upon the sole & exclusive right granted by the Crown to patentees of inventions in conformity with the law & constitution of this country; & the powers of the Ct. of Equity, which are founded on the insufficiency of the legal remedy, must be enforced against them as well as against British subjects.

(3) Principles upon which the ct. will interfere to protect a patentee before he has established his right at law in the case of patents which have been long used or enjoyed, or will, in the case of new patents, suspend its interference until the right at law has been established.

(4) It is part of the duty of this ct. to protect property pending litigation; but when it is called upon to exercise that duty, the ct. requires some proof of title in the party who calls for its interference. In the case of a new patent, this proof is wanting: the public, whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, & the ct. therefore refuses to interfere until his right has been established at law. But in a case where there has been long enjoyment under the patent, the enjoyment of course including use, the public have had the opportunity of contesting the patent; & the fact of their not having done so successfully affords, at least *primâ facie*, evidence that the title of the patentee is good; & the ct. therefore interferes before the right is established at law (TURNER, V.-C.).—CALDWELL *v.* VANVLISSENGEN, CALDWELL *v.* VERBECK, CALDWELL *v.* ROLFE (1851), 9 Hare, 415; 21 L. J. Ch. 97; 18 L. T. O. S. 192; 16 Jur. 115; Goodeve's Patent Cases, 101; 68 E. R. 571.

Annotations:—*As to* (1) **Apld.** Betts *v.* Neilson (1865), 3 De G. J. & Sm. 82. **Consd.** Betts *v.* Neilson (1868), 3 Ch. App. 429; Betts *v.* Willmott (1871), 6 Ch. App. 239. **Apld.** Nobel's Explosives Co. *v.* Jones, Scott (1880), 7 Ch. D. 721. (*See* 8 App. Cas. 5.) **Refd.** Adair *v.* Young (1879), 12 Ch. D. 13; United Telephone Co. *v.* Sharples (1885), 29 Ch. D. 164. *As to* (4) **Overd.** Jackson *v.* Needle (1884), Griffin's Patent Cases (1884–1886), 132. *Generally*, **Mentd.** North-Western Salt Co. *v.* Electrolytic Alkali Co. (1912), 107 L. T. 439.

2540. Representative defendants.]—Numerous suits had been instituted for the infringement, by different defts., of the same patent. Defts. moved to stay proceedings in the several suits, on the ground that pltf. ought first to establish the validity of his patent, which they denied:—*Held:* the ct. would take measures to have the question of validity tried first, & would allow all defts. to be represented at the trial by three selected by the rest.—FOXWELL *v.* WEBSTER (1863), 4 De G. J. & Sm. 77; 9 L. T. 528; 10 Jur. N. S. 137; 46 E. R. 844; *sub nom.* FOXWELL *v.* BRADBURY, FOXWELL *v.* WEBSTER, 3 New Rep. 180; 12 W. R. 186, L. C.

Annotation:—**Refd.** Bovill *v.* Crate (1865), L. R. 1 Eq. 388.

2541. Directors of company.]—BETTS *v.* NEILSON, BETTS *v.* DE VITRE, No. 2299, *ante*.

2542. ——.]—The directors of a co. cannot be made liable for an infringement of patent by the co. merely by reason of their position as directors, even in a case where they are the sole directors & shareholders of the infringing co.—BRITISH THOMSON-HOUSTON CO., LTD. *v.* STERLING ACCESSORIES, LTD., SAME *v.* CROWTHER & OSBORN, LTD., [1924] 2 Ch. 33; 93 L. J. Ch. 335; 131 L. T. 535; 40 T. L. R. 544; 68 Sol. Jo. 595; 41 R. P. C. 311.

Annotation:—**Mentd.** Prichard & Constance (Wholesale) *v.* Amata (1924), 42 R. P. C. 63.

PART XIV. SECT. 2, SUB-SECT. 1.—A.

2536 i. *Licencee—Exclusive licencee.*]—COCHRANE (J. P.) & CO. *v.* MARTINS (BIRMINGHAM, LTD.) (1911), 28 R. P. C. 284.—SCOT.

2536 ii. —— ——.]—An exclusive licencee has a sufficient title to sue in his own name.—SCOTTISH VACUUM CLEANER CO., LTD. *v.* PROVINCIAL CINEMATOGRAPH THEATRES, LTD. (1915), 32 R. P. C. 353.—SCOT.

PART XIV. SECT. 2, SUB-SECT. 1.—B.

o. *Vendors outside jurisdiction — Manufacturing under alleged patent.*]—To an action by the holder of a patent of invention against persons resident within the jurisdiction for an injunction against infringement of the patent & damages, other persons not within the jurisdiction, who make & sell to defts. the goods which are the subject of pltf.'s complaint under another patent which pltf. alleges to be null & void, are neither necessary nor proper parties.—MAW *v.* MASSEY-HARRIS CO. T. 26; 14 Man. L. 252.—CAN.

p. *Officers of company.*]—A

2543. Manager of company.] — BETTS *v.* NEILSON, BETTS *v.* DE VITRE, No. 2299, *ante*.

2544. Company.]—BETTS *v.* NEILSON, BETTS *v.* DE VITRE, No. 2299, *ante*.

2545. User of infringing article.]—(1) Patent Law Amendment Act, 1852 (c. 83), s. 43, empowers a judge before whom an action is tried to certify on the record that the validity of the letters patent in the declaration mentioned came in question; & it is enacted that the record, with such certificate, being given in evidence in any suit or action for infringing the letters patent shall entitle pltf. in any such suit or action, on obtaining a decree, to his full costs, charges & expenses, as between attorney & client, unless the judge shall certify that he ought not to have such full costs :—*Held :* this sect. does not apply to the costs of a first trial, whether at law, or of issues of fact in this ct., but only to the costs of a second trial, upon production of the record of the first trial, with the certificate endorsed.

(2) Where bills to restrain the infringement of a patent have been filed against both the person who manufactures & the person who uses the article & issues of fact have been found for pltf. it is the right of pltf. to have not only an account against the manufacturer, but also damages against the person using the article wherever it be found.

(3) After a trial before the Vice-Chancellor, without a jury, in which issues were found for pltf. a motion for a new trial having been refused by the Vice-Chancellor, & on appeal refused by the Lord Chancellor, was being taken by appeal to the House of Lords. The ct. declined to suspend the final order for an injunction pending the appeal to the House of Lords.—PENN *v.* BIBBY, PENN *v.* JACK, PENN *v.* FERNIE (1866), L. R. 3 Eq. 308; 36 L. J. Ch. 277; 15 L. T. 385; 15 W. R. 192; *subsequent proceedings, sub nom.* PENN *v.* JACK, (1867), L. R. 5 Eq. 81.

Annotations :—As to (2) **Consd.** Boyd *v.* Tootal, Broadhurst, Lee Co. (1894), 11 R. P. C. 175. **Refd.** British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122.

2546. ——.]—BOYD *v.* TOOTAL, BROADHURST, LEE CO., LTD., No. 3060, *post*.

2547. —— **Foreign user.**] — CALDWELL *v.* VANVLISSENGEN, CALDWELL *v.* VERBECK, CALDWELL *v.* ROLFE, No. 2539, *ante*.

2548. —— **Manufacturers not joined.**]—ADAIR *v.* YOUNG, No. 2298, *ante*.

2549. —— **Alleged to be licencee.**]—The owner of two patents relating to cooling towers brought an action for infringement of the patents by the use of a cooling tower erected for defts. by F. C. T., Ltd. Defts. by their defence alleged that under an agreement F. C. T., Ltd., were licencees of the patents, & that their use of it did not constitute an infringement. Pltfs. denied that the agreement gave F. C. T., Ltd., the right to use the inventions & they also alleged that all the rights of F. C. T., Ltd., under the agreement had been determined at a date prior to the commencement of the alleged infringement. Defts. applied to have F. C. T., Ltd., added as defts. :—*Held :* the issues in the action could be properly & conveniently tried without adding F. C. T., Ltd., as defts., & the application must be dismissed.—EVANS *v.* CENTRAL ELECTRIC SUPPLY CO., LTD. (1923), 40 R. P. C. 357.

2550. Manufacturer of infringing article.]—PENN *v.* BIBBY, PENN *v.* JACK, PENN *v.* FERNIE, No. 2545, *ante*.

2551. ——.]—BOYD *v.* TOOTAL, BROADHURST, LEE CO., LTD., No. 3060, *post*.

2552. —— **Manufacturer of part only—No knowledge of patent.**]—SAVAGE (F.) & CO., LTD. *v.* BRINDLE (1869), 13 R. P. C. 266.

2553. —— **Foreign manufacturer.**]—Pltf., the patentee of a machine, brought an action against deft. for using a machine which he alleged was an infringement of his patent. M., [a foreign manufacturer] the maker & patentee of deft.'s machine, applied to be added as deft., alleging that a judgment in the action would injure him, & that present deft. would not efficiently defend the action :—*Held :* M., not being directly interested in the issues between pltf. & deft., but only indirectly & commercially affected, the ct. had no jurisdiction to add him as deft.—MOSER *v.* MARSDEN, [1892] 1 Ch. 487; 61 L. J. Ch. 319; 66 L. T. 570; 40 W. R. 520; 36 Sol. Jo. 253, C. A.

Annotations :—**Refd.** Montforts *v.* Marsden, [1895] 1 Ch. 11. **Mentd.** Montgomery *v.* Foy, Morgan (1895), 43 W. R. 691.

2554. Purchasers of infringing article.]—PROCTOR *v.* BENNIS, No. 2472, *ante*.

2555. —— **Subsequent assignment.**] — SACCHARIN CORPN., LTD. *v.* LYLE (D. T. J.) & SON, LTD. (1904), 21 R. P. C. 604, C. A.

2556. Foreign sovereign.]—The ct. has no jurisdiction to prevent a foreign sovereign from removing his property in this country. A foreign sovereign who, for the purpose of obtaining his property, submits to be made deft. in an action, does not thereby lose his rights. There is a right of property in an article made in an infringement of a patent although the ct. would order the article to be destroyed. A foreign sovereign bought in Germany shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, & the patentee obtained an injunction against the agents of the foreign sovereign & the persons in whose custody the shells were, restraining them from removing the shells. The foreign sovereign then applied to be & was made deft. to the suit. An order was then made by the Master of the Rolls, & affirmed on appeal, that notwithstanding the injunction he should be at liberty to remove the shells.

The right of property in articles made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer, if he would otherwise have the right of property in them, but the ct. will prevent the use of those articles to the derogation of the patentee's right by ordering their destruction.—VAVASSEUR *v.* KRUPP (1878), 9 Ch. D. 351; 39 L. T. 437; 27 W. R. 176; 22 Sol. Jo. 702, C. A.

Annotations :—**Consd.** *Re* Miller's Patent (1894), 63 L. J. Ch. 324. **Refd.** Moser *v.* Marsden, [1892] 1 Ch. 487; British Westinghouse Electric & Manufacturing Co. *v.* Electrical Co. (1911), 55 Sol. Jo. 689. **Mentd.** The Parlement Belge (1880), 5 P. D. 197; Aksionairnoye Obschestvo A. M. Luther *v.* Sagor, [1921] 3 K. B. 532; The Tervaete, [1922] P. 259; Duff Development Co. *v.* Kelanton Government, [1923] 1 Ch. 385; The Jupiter (1924), 93 L. J. P. 156.

2557. Principal — Infringement by agent.]—SYKES *v.* HOWARTH, No. 2286, *ante*.

2558. Importers—Joinder of consignees out of jurisdiction.]—The owners of a patent commenced an action to restrain infringement against a steamship co. who had brought certain goods, alleged

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was filed against a joint stock co. to restrain the infringement of a patent, to which certain officers of the co. were made parties. A demurrer on the ground that the officers were improperly made parties was overruled with costs, these officers being charged personally with committing the acts complained of, & relief being prayed against them.—CLINE *v.* MOUNTAIN-VIEW CHEESE FACTORY (1873), 20 Gr. 227.—CAN.

q. *Crown — Condition precedent to action—Report of commissioner.*]—By Patent Act, s. 44, the Govt. of Canada may at any time use a patented invention, paying to the patentee such sum as the Comr. of Patents reports to be a reasonable compensation therefor :—*Held :* a report by the

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 1, B. & C.; sub-sects. 2 & 3, A.]

to be an infringement, from America to Liverpool. Under the bill of lading the goods were to be delivered at Liverpool to the agent of the consignees, who themselves resided at Dublin. The validity of the patent had been established in a previous action. Pltfs. having moved for & obtained an injunction against the co., & another co. to whom part of the goods had already been delivered for transhipment to Dublin, then obtained leave to add the consignees as parties to the action, & to serve the writ on them out of the jurisdiction. Pltfs. moved for an injunction against the consignees, & the consignees moved to discharge the order for services & to set aside the service:—*Held:* (1) the action was properly brought against the steamship co., the consignees would, if within the jurisdiction, have been proper parties to the action, & they were rightly made parties, though out of the jurisdiction. (2) In exercise of the discretion given by R. S. C., Ord. 11, r. 2, in the case of a deft. living in Ireland, & of the general discretion possessed by the ct., in reference to service out of the jurisdiction, this was a proper case for ordering such service without any special terms.—WASHBURN & MOEN, ETC., CO. *v.* CUNARD S.S. CO. & PARKES (J. C.) & SONS (1889), 5 T. L. R. 592; 6 R. P. C. 398.

Annotation:—Generally, **Mentd.** The Elton, [1891] P. 265.

2559. Partners—Infringement by one with consent of other.]—DAY *v.* DAVIES (1904), 22 R. P. C. 34.

2560. The Crown—Action against Air Council.]—An action was brought by R., the trustee in bkpcy. of K., against the Air Council, claiming a declaration that a patent of 1918 granted to K. was valid & that the making user & exercise of certain machines was an infringement of the patent, & that the terms of compensation might be decided, & for damages for breaches of a contract for the supply to the War Office of aeroplanes embodying the invention of K. Defts., among other defences, set up the defences that they were a public department of His Majesty's Govt. & were not liable to be sued in respect of any contract made on behalf of His Majesty, & they relied upon Patents & Designs Act, 1907 (c. 29), s. 29, as a defence to the action so far as founded upon the alleged infringement of the patent, & said that by reason of the provisions they were entitled to use & exercise the alleged invention the subject of the patent, & that in default of agreement between the parties the sum, if any, to be paid by defts. in respect of the user, if any, of the alleged invention should be settled by the Treasury under the sect. & not otherwise. The points of law raised were ordered to be set down for hearing & disposed of before the trial of the action. On the points coming before the ct. for argument, pltfs. relied on Air Force (Constitution) Act, 1917 (c. 51), s. 14, which enacted that the Air Council might sue & be sued by that name. Defts. who had in their defence denied the validity of the patent, refused to consent to the validity of the patent being taken into consideration:—*Held:* the Air Council being the body established for the administration of matters relating to the Air Force & to the defence of the realm by air, stood in the fullest sense in the position of the Crown, & the action so far as it claimed relief for breach of contract was not sustainable.—ROWLAND *v.* AIR COUNCIL (1923), 39 T. L. R. 228; 47 Sol. Jo. 365; 40 R. P. C. 87; *on appeal,* 39 T. L. R. 455, C. A.

—— **Rights of Crown generally.**]—*See* Part XI., Sect. 4, *ante.*

C. Third Parties.

See, generally, R. S. C., Ord. 16, rr. 48–55.

2561. Manufacturer—Covenant to indemnify defendant.]—EDISON & SWAN UNITED ELECTRIC LIGHT CO. *v.* HOLLAND (1886), 33 Ch. D. 497; 56 L. J. Ch. 124; 55 L. T. 587; 3 R. P. C. 395; Griffin's Patent Cases (1884–1886), 86; *sub nom.* EDISON ELECTRIC LIGHT CO. *v.* JABLOCHKOFF ELECTRICITY CO., 35 W. R. 178.

SUB-SECT. 2.—SERVICE OF WRIT.

See R. S. C., Ords. 9, 10, 11.

2562. Outside jurisdiction—Infringement within jurisdiction.]—WASHBURN & MOEN, ETC., CO. *v.* CUNARD S.S. CO. & PARKES (J. C.) & SONS, No. 2558, *ante.*

2563. —— ——.]—A foreign co. owing English letters patent for the manufacture of certain articles, commenced an action against another co., also domiciled abroad, for alleged infringement of those letters patent. Subsequently pltfs. obtained an order for service upon defts. out of the jurisdiction. That order defts. moved to discharge. It was admitted that defts. had by their agents solicited from persons in England orders for articles to be executed & delivered abroad; but it was contended that this did not amount to using, exercising, or vending the invention claimed by pltfs.' letters patent:—*Held:* the evidence before the ct. showed information coming from perfectly trustworthy persons which pointed to infringement by defts. of pltfs.' letters patent within the jurisdiction; the legislature had not imposed upon the ct. the duty of trying the action before giving leave for service on the defts. out of the jurisdiction, in order to have the parties before the ct.; if there was *primâ facie* evidence the necessary conditions had been fulfilled that there had been a breach within the jurisdiction; & that there were sufficient facts to raise the question which the ct. was not bound at present to finally decide, viz. that the acts of defts. amounted to infringements.—BADISCHE ANILIN UND SODA FABRIK *v.* CHEMISCHE FABRIK VORMALS SANDOZ (1903), 88 L. T. 490; 19 T. L. R. 382; 47 Sol. Jo. 434; 20 R. P. C. 413, C. A.; *on appeal, sub nom.* CHEMISCHE FABRIK VORMALS SANDOZ *v.* BADISCHE ANILIN UND SODA FABRIKS (1904), 90 L. T. 733, H. L.

2564. Foreign corporation—Trading within jurisdiction—Hire of stand at exhibition.]—Defts., a foreign corpn. who were manufacturers of motor cars abroad, hired a stand at the Crystal Palace for the exhibition of articles of their manufacture at a cycle show, & exhibited at the show, which lasted for nine days, among other articles, a motor car fitted with tyres, which were alleged by pltfs. to be an infringement of their patent. Defts. stand was in charge of a person employed by them as their representative, whose duty it was to explain the working of the article, & to take orders for & press the sale of defts.' goods:—*Held:* during

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Comr. is a condition precedent to any right of action for such compensation.—MCDONALD *v.* R. (1906), 26 C. L. T. 779; 10 Exch. C. R. 338.—**CAN.**

r. ——.]—MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* R. (1912), 31 N. Z. L. R. 732.—**N.Z.**

PART XIV. SECT. 2, SUB-SECT. 2.

t. Out of registry nearest residence of defendants.]—In an action for damages for infringement of a patent, the writ need not be issued out of the registry nearest the place of residence or business of defts., but Patent Act.

the continuance of the show, defts. were carrying on business so as to be resident at a place within the jurisdiction, & therefore could be served there with a writ in an action by pltfs. for infringement of their patent under R. S. C., Ord. 9, r. 8.—DUNLOP PNEUMATIC TYRE CO. *v.* ACT. FÜR MOTOR UND MOTORFAHRZEUGBAU VORM. CUDELL & CO., [1902] 1 K. B. 342 ; 71 L. J. K. B. 284 ; 86 L. T. 472 ; 50 W. R. 226 ; 18 T. L. R. 229, C. A.

Annotations :—**Refd.** De Beers Consolidated Mines *v.* Howe, [1905] 2 K. B. 612 ; Saccharin Corpn. *v.* Chemische Fabrik von Heyden Akt., [1911] 2 K. B. 516 ; Okura *v.* Forsbacka Jernverks Aktiebolag, [1914] 1 K. B. 715 ; Employers' Liability Assce. *v.* Sedgwick, Collins (1926), 95 L. J. K. B. 1015.

SUB-SECT. 3.—PLEADINGS.

A. Statement of Claim.

See, generally, R. S. C., Ord. 19.

2565. Full statement of specification—Necessity for.]—A bill filed by a patentee, to restrain the piracy of his patent & for an account, did not distinctly state the specification, or explain the nature of the invention for which the patent right was claimed ; but it alleged that the specification was duly enrolled & that the drawings & description in the specification could not be set out in the bill, & it charged that pltf. was the inventor & that the invention was new : the ct. held that the bill was not demurrable.—WESTHEAD *v.* KEENE (1838), 1 Beav. 287 ; 8 L. J. Ch. 89 ; 2 Jur. 1061 ; 48 E. R. 950.

2566. Action in respect of renewed patent—Condition imposed on renewal—Averment that condition complied with.]—(1) The assignees of letters patent may, under 5 & 6 Will. 4, c. 83, ss. 1, 4, lawfully obtain a renewal of such patents.

(2) The statute does not authorise the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed. The authority of the Committee is limited to reporting on matters as between the public & the party applying.

(3) There is nothing in the statute to fetter the discretion of the Crown in the renewal, except the length of time for which that renewal is to be granted, & which must not exceed seven years.

(4) An application for a renewal is " prosecuted with effect " within the terms of the statute, if the party applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent.

(5) The Crown is not restricted as to the time within which it may act upon such report, & renewed letters patent are not void, because they are dated after the expiration of the original letters patent.

(6) If the Judicial Committee should impose a condition on a party applying for the renewal of a patent, such party need not, in an action for the infringement of the patent, aver that such condition was complied with before the patent was renewed.—LEDSAM *v.* RUSSELL (1848), 1 H. L. Cas. 687 ; 9 E. R. 931, H. L. ; *affg.* (1847), 16 M. & W. 633, Ex. Ch.

Annotations :—Generally, **Refd.** R. *v.* Edwards (1853), 9 Exch. 32 ; Williams *v.* Nash (1859), 28 Beav. 93 ; *Re* Markwick's Patent (1860), 13 Moo. P. C. C. 310. **Mentd.** Sturm *v.* Jeffree (1847), 8 L. T. O. S. 415 ; Isaacs *v.* Royal Insce. (1870), 39 L. J. Ex. 189 ; Goldsmith's Co. *v.* West Met. Ry., [1904] 1 K. B. 1 ; English *v.* Cliff, [1914] 2 Ch. 376 ; Brakspear *v.* Barton, [1924] 2 K. B. 88.

2567. Novelty of invention.]—In a bill to restrain an infringement of a patent an express averment of the novelty of the invention protected by the patent is not necessary.—AMORY *v.* BROWN (1869), L. R. 8 Eq. 663 ; 38 L. J. Ch. 593 ; 17 W. R. 849 ; *sub nom.* AMERY *v.* BROWN, 20 L. T. 654.

Annotation :—**Refd.** Harris *v.* Rothwell (1887), 35 Ch. D. 416.

2568. Statement amended.]—The statement of claim as against all defts. is embarrassing. . . . As against deft. cos., I think the statement of claim though embarrassing, may possibly be amended. Pltfs. therefore will have leave to amend (COLLINS, L.J.).—EDWARDS *v.* PNEUMATIC TYRE CO., LTD., DUNLOP PNEUMATIC TYRE CO., LTD. & DU CROS (1900), 16 T. L. R. 308.

2569. Statement struck out—Different cause of action from that stated in writ.]—An action was commenced by pltfs. in 1884 against defts. for alleged infringement of pltfs.' patent. That action was, however, discontinued in consequence of the evidence adduced by the defts. on interlocutory proceedings, & pltfs. paid the costs.

Pltfs., in May, 1888, commenced another action against defts. for the same object ; & by their writ they claimed an injunction, delivery up of the infringing instruments, & an account, or damages & costs. The statement of claim in the second action contained an allegation that, since discontinuing the former action, pltfs. had discovered that defts.' evidence which led to its discontinuance was false. The statement of claim then contained a claim, which did not appear in the writ, that the second action might be treated as supplemental to the previous action, & that defts. might be ordered to repay the costs paid to them in the previous action, & to pay the costs, charges, & expenses of pltfs. of that action as between solr. & client :—*Held :* it was irregular to introduce into the statement of claim a different cause of action not mentioned in the writ ; the causes of action contained in the statement of claim were entirely separate & distinct ; & the two paragraphs above mentioned must be struck out, leaving pltfs. to bring a separate action.—UNITED TELEPHONE CO., LTD. *v.* TASKER, SONS & CO. (1888), 59 L. T. 852.

2570, —— Embarrassment of defendant.]—EDWARDS *v.* PNEUMATIC TYRE CO., LTD., DUNLOP PNEUMATIC TYRE CO., LTD., & DU CROS, No. 2568, *ante*.

2571. Particulars of breach as part of statement.]—In an action for infringement of a patent, pltf., upon motion for judgment heard as a short cause, asked for such judgment as upon his statement of claim the ct. should consider him to be entitled to. In the statement of claim it was stated that particulars of breaches are delivered herewith :—*Held :* the particulars of breaches should be considered as forming part of the statement of claim.—UNITED TELEPHONE CO. *v.* SMITH, UNITED TELEPHONE CO. *v.* MITCHELL (1889), 61 L. T. 617 ; 38 W. R. 70.

Particulars of breaches.]—*See* Sub-sect. 3, B., *post*.

s. 30, is complied with if the venue is laid at the place of such registry.—SHORT *v.* FEDERATION BRAND SALMON CANNING CO. (1898), 6 B. C. R. 385.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 3.—A.

a. *Claim for two distinct & separate causes of action—Against different parties.*]—The statement of claim did not allege that non-resident parties had done anything as to which an injunction could be asked against them in M., & upon its allegations the only relief pltfs. could possibly claim against them would be a declaration that their patent was null & void, thus raising two distinct & separate causes of action, one against the parties within the jurisdiction & the other against the non-resident parties, both of which issues should not be tried in one action.—MAW *v.* MASSEY-HARRIS CO. (1902), 14 Man. L. R. 252.—**CAN.**

b. *Whether defendant entitled to particulars of statement of claim—Defendant alleging intention to attack validity.*]—WARREN *v.* WATEROUS ENGINE WORKS CO., LTD., [1925] Exch. C. R. 92.—**CAN.**

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 3, B. (a).]

B. Particulars of Breaches.

(a) In General.

See R. S. C., Ord. 53A, rr. 11, 14, 17, 19.

2572. Power of court to order.]—In an action for infringing a patent, the ct. has a general power to order a particular of the alleged infringements. But, where the specification claimed a combination of numerous improvements, in electric telegraphs, the ct. refused to compel pltfs. to give defts. such particulars, conceiving that, from the nature of the patent, pltfs. would be thereby put to great difficulty & embarrassment, & that, under the circumstances, the matter having been debated in Chancery upon a motion for an injunction, defts. must be taken to possess adequate information on the subject.—ELECTRIC TELEGRAPH CO. *v.* NOTT (1847), 4 C. B. 462; 16 L. J. C. P. 174; 9 L. T. O. S. 125; 11 Jur. 590; 136 E. R. 587.

Annotation:—**Consd.** Needham *v.* Oxley (1863), 9 Jur. N. S. 598.

2573. Distinguished from particulars of objection.]—Particulars of breaches must be distinguished from particulars of objection for want of novelty. In the latter case the particular instances may not be within the knowledge of the patentee, & must be specified; in the former deft. must know whether & in what respect he has been guilty of infringement. Where three patents of pltf. all related to one article, a kiln for burning bricks, & the second & third in date were for improvements upon the invention specified in the first, & pltf. alleged a particular kiln constructed & used by dett., & in his plaint not only referred to his patents, but indicated in the case of each of them the infringements which he complained of:—*Held:* this was a sufficient compliance with Patent Law Amendment Act, 1852 (c. 83).—LEDGARD *v.* BULL (1886), 11 App. Cas. 648.

Annotation:—**Apld.** Cheetham *v.* Oldham & Fogg (No. 3) (1888), 5 R. P. C. 624.

2574. ——.]—Pltf. in an action for infringement delivered particulars of breaches alleging infringement of the first five claims of the specification, but not referring to any pages or lines of the specification, & not identifying pltf.'s processes with those of defts.', in respect of which breaches were alleged to have been committed. Defts. took out a summons for further & better particulars of breaches:—*Held:* particulars of breaches must be distinguished from particulars of objections for want of novelty, inasmuch as they relate to matters which must be within defts.' knowledge & where, as in this case, the invention is not difficult to describe & the claims in the specification are short & defined, it is enough in particulars of breaches to refer to the claims in the specification alleged to have been infringed, & references by page & line need not be given: the particulars sufficiently enabled defts. to know what in effect they had to meet at the trial, & the application must be refused.—CHEETHAM *v.* OLDHAM & FOGG (No. 3) (1888), 5 R. P. C. 624.

2575. Function of particulars—Not to answer interrogatories as to construction.]—A patentee whose specification contained four claims for (1) a lamp; (2) a modified form of lamp; (3) a method of supplying heated air; (4) a method of distributing the heated air—brought an action for infringement. By his particulars of breaches he alleged infringement by deft. by using the mechanism claimed in these four claims, & complained of a particular lamp sold by defts. Defts. applied for further & better particulars, asking what parts of the specification & figures had been infringed, which of the lamps described in the specification had been infringed, & whether pltf. claimed all lamps with the methods of sup & distributing the heated air, or only the lamps described in the specification. At the hearing of the application pltfs. withdrew the allegation of infringement of the first claim:—*Held:* the particulars as so amended performed the office required, namely, to tell deft. what pltf. alleged he had done in infringement, & it was not the office of particulars to answer an interrogatory as to the construction of the patent.—WENHAM CO., LTD. *v.* CHAMPION GAS LAMP CO., LTD. & TODLENHAUPT & CO. (1890), 63 L. T. 827; 8 R. P. C. 22.

2576. —— **Prevention of surprise to defendant.**]—The function of particulars of breaches being to point out to deft. what were the particular acts complained of, so that he should not be taken by surprise at the trial, paragraph 1 of the particulars being a mere general allegation did not comply with that requirement, & the first & second interrogatories must therefore be disallowed.—AKT. FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM CO., [1919] 2 Ch. 67; 88 L. J. Ch. 366; 121 L. T. 168; 36 R. P. C. 199, C. A.

2577. Sufficiency — Full & fair notice to defendant.]—Particulars of breaches delivered with a view to a jury trial of a patent case in this ct. are sufficient, if, taken together with the pleadings, they give deft. full & fair notice of the case to be made against him.—NEEDHAM *v.* OXLEY (1863), 1 Hem. & M. 248; 2 New Rep. 267; 8 L. T. 532; 9 Jur. N. S. 598; 11 W. R. 745; 71 E. R. 108.

Annotations:—**Apprvd.** Ledgard *v.* Bull (1886), 11 App. Cas. 648. **Refd.** Murray *v.* Clayton (1873), 21 W. R. 498.

2578. —— ——.]—Although upon the trial of questions in a patent suit pltf.'s particulars of breaches should give deft. full, fair, & distinct notice of the case intended to be made against him, it is not necessary, in the case of an alleged infringement of a patent for improvements of a particular article, *e.g.* cartridges, for the particulars to point out the precise portions of the specification alleged to have been infringed when the thing alleged to be an infringement has been made an exhibit.—BATLEY *v.* KYNOCK (No. 2) (1874), L. R. 19 Eq. 229; 44 L. J. Ch. 219; 31 L. T. 573; 23 W. R. 209; Goodeve's Patent Cases, 36.

Annotation:—**Consd.** Tilghman's Sand Blast Co. *v.* Wright (1884), Griffin's Patent Cases (1884–1886), 216.

2579. —— **Acts of infringement—Time & place of acts.**]—In an action for infringement of a patent, it is sufficient for pltf. to furnish such particulars of the infringement as show distinctly what are the acts of infringement he complains of—that is to say, the article, the making or selling of which he alleges is an infringement upon his patent, & the places at which, & the period during which, he proposes to prove such making or selling; & it is not necessary to specify in what respects, or as to what parts or processes of the invention it is an infringement.

If, indeed, the processes are so entirely separate & distinct, as that different kinds of articles or results are produced, as if one produce pictures in oil & another in water colours, it seems that the particulars should specify the one, an infringement

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PART XIV. SECT. 2, SUB-SECT. 3.—B. (a).

c. *Necessity for.*]—In a suit for the infringement of certain inventions:—*Held:* pltf. should have delivered with his plaint particulars of the breaches complained of; the general allegation as to infringement contained in the plaint did not amount to such particulars; & pltf. came into ct. with a case which could not be tried.—PETMAN *v.* BULL (1883), I. L. R. 5 All. 371.—**IND.**

d. *Sufficiency of.*]—Particulars of

upon which is complained of; but if they are merely different modes of producing the same kind of article or result, it is not necessary so to distinguish; & it is not necessary to specify particular persons to whom, or the times at which, the article alleged to be a piracy has been sold; it is enough to state some period within which the sales took place.—TALBOT *v.* LA ROCHE (1854), 15 C. B. 310; 2 C. L. R. 836; Goodeve's Patent Cases, 452; 139 E. R. 442.

Annotations:—**Apld.** Ledgard *v.* Bull (1886), 11 App. Cas. 648. **Refd.** Tilghman's Sand Blast Co. *v.* Wright (1884), Griffin's Patent Cases (1884–1886), 216.

2580. —— —— No obligation to answer interrogatories.]—WENHAM CO., LTD. *v.* CHAMPION GAS LAMP CO., LTD. & TODLENHAUPT & CO., No. 2575, *ante*.

2581. —— ——.]—LEDGARD *v.* BULL, No. 2573, *ante*.

2582. —— Precise portion of specification infringed.]—BATLEY *v.* KYNOCK (No. 2), No. 2578, *ante*.

2583. —— Allegation of substantial similarity—Between patent & infringement.]—The owner of two patents, the first having a single claim for an improved dog muzzle, & the second having two claims: (*a*) for providing the muzzle with guides, & (*b*) the improved dog muzzle described, brought an action for infringement of both patents. By his particulars of breaches, pltt. alleged that defts. had sold muzzles substantially in accordance with the muzzle described & claimed in his first patent, & also substantially in accordance with the muzzle described & claimed in the second patent, the muzzles sold by defts. being guided substantially in accordance with the first claim of the second patent.

Defts. took out a summons for further & better particulars, contending that pltf. ought to state whether the entirety of the muzzle described in the first patent was infringed, or only parts of it:—*Held:* the particulars were sufficient.—EGLETON *v.* NICHOLS & SON (1890), 7 R. P. C. 423.

2584. —— Patent complicated—Combination of numerous improvements.]—ELECTRIC TELEGRAPH CO. *v.* NOTT, No. 2572, *ante*.

2585. Statement of instances of breaches—By way of example.]—Upon an order for the delivery of further particulars of breaches in an action for the infringement of letters patent pltfs. enumerated certain instances, & added, & pltfs. state these particular instances, by way of example only, & not so as to preclude them from proving any of the infringements mentioned in the former particulars of breaches:—*Held:* that clause should be struck out of the particulars.—PATENT TYPE-FOUNDING CO. *v.* RICHARDS (1860), 2 L. T. 359.

Annotation:—**Refd.** Tilghman's Sand Blast Co. *v.* Wright (1884), Griffin's Patent Cases (1884–1886), 216.

2586. —— By way of illustration.]—The C. co. brought an action for infringement of a patent against the W. co., & delivered particulars of breaches, alleging infringement of the second, third & fourth claims of the patent, but not referring to any pages or lines of the specification, & complaining in particular by way of illustration of certain specified machines. Defts. took out a summons for further & better particulars, which was dismissed:—*Held:* pltfs. ought to omit the words in particular by way of illustration, & on pltfs. agreeing to do this the appeal ought to be dismissed.—CHURCH (WALTER C.) ENGINEERING CO., LTD. *v.* WILSON & CO. (1886), 3 R. P. C. 123; Griffin's Patent Cases (1884–1886), 236, D. C.

Annotation:—**Consd.** Cheetham *v.* Oldham & Fogg (No. 3) (1888), 5 R. P. C. 624.

2587. Plaintiff bound by particulars given—Evidence of infringements not particularised.]—Pltf., by bill in Chancery, alleged an infringement of his patent. The patent was granted in 1854, & specified a combination of mechanism applicable to spinning mules; & the first claim was for the novel construction, combination & application of mechanism hereinbefore described, whereby one half of the clutch or catch box, hereinbefore described, or any mechanical equivalent therefor, is connected with or acts upon cams or other similar parts of mechanism direct. There were other claims, but in respect of these breaches were not alleged in pltf.'s particulars of breaches. Deft.'s patent, granted in 1860, specified a combination of mechanism which embodied the leading idea of pltf.'s patent, & by which one half of a clutch box was made to act upon cams direct, & he adopted some of the elements combined by pltf., but he disposed them in a different manner. These were important parts of the prior combination, &, though old mechanical contrivances, were new in respect of the particular mode in which pltf. applied them; & the immediate object of their combination by him was new, viz. to make a clutch box act on cams direct. The effect brought about by the direct action of the clutch box on the cams had long previously been produced, but less advantageously, by other contrivances of various kinds. Deft.'s mode of combination effected the common object of each patent in a more beneficial manner than it was or could be effected by the mode of combination specified in pltf.'s patent, & it displayed an equal amount of inventive genius:—*Held:* pltf. was bound by the particulars of breaches delivered, & the principle of Patent Law Amendment Act, 1852 (c. 83), s. 41, was applicable to trials in Chancery, in which particulars of breaches were ordered, as well as to trials at common law.—CURTIS *v.* PLATT (1866), as reported in 35 L. J. Ch. 852, H. L.; *affg.* (1864), 3 Ch. D., p. 138, n., L. C.

Annotations:—**Refd.** Adie *v.* Clarke (1876), 3 Ch. D. 134; Badische Anilin und Soda Fabrik *v.* Levinstein (1883), 24 Ch. D. 156; Proctor *v.* Bennis (1887), 36 Ch. D. 740; Gosnell *v.* Bishop (1888), 4 T. L. R. 397; Siddell *v.* Vickers (1888), 39 Ch. D. 92; Boyd *v.* Horrocks (1889), 6 R. P. C. 152; Thomson *v.* Moore (1890), 6 R. P. C. 426; Miller *v.* Clyde Bridge Steel Co. (1892), 9 R. P. C. 470; Nettlefolds *v.* Reynolds (1892), 9 R. P. C. 270; Ticket Punch & Register Co. *v.* Colley's Patents (1895), 11 T. L. R. 262; Akt. Separator *v.* Dairy Outfit Co. (1898), 15 R. P. C. 327; Presto Gear Case & Components Co. *v.* Simplex Gear Case Co. (1898), 15 R. P. C. 635; British United Shoe Machinery Co. *v.* Thompson (1905), 22 R. P. C. 17; Harrison Patents Co. *v.* Nicholson (1908), 25 R. P. C. 393. **Mentd.** Jahncke *v.* Bell (1891), 9 R. P. C. 94.

2588. —— ——.]—This was an action by the owners of a patent for improvements in home training or exercising machines for cyclists. The invention consisted in an arrangement of two rollers connected by a shaft with another roller in front which could be adjusted to suit the distance between the wheels of a bicycle. The bicycle was supported on these rollers, the driving wheel being on the two rollers, & the other wheel over the third roller. The motion of the driving wheel drove the two rollers, & the motion was communicated by the shaft to the other roller, & thence to the steering wheel of the cycle. By this

breaches must be set forth in accordance with the forms of process of the Cts. of Scotland, in the condescendence, & not in a separate statement; & must specify the manner in which the infringement had taken place, & which of two protected processes of manufacture have been infringed.—MICA INSULATOR CO., LTD. *v.* BRUCE PEEBLES & CO., LTD. (1905), 7 F. (Ct. of Sess.) 944; 42 Sc. L. R. 700; 13 S. L. T. ,—SCOT.

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 3, B. (a) & (b), & C. (a).]

means the rider could exercise himself just as if he were riding on a road.

Defts. were supplied by pltfs. with one of the patented machines, & they made two more in imitation, & used all three side by side to represent a race at a theatre. One of pltfs. was present on the first occasion when the three were used, & objected to the use as an infringement, but after saying that he must consult his solr. he consented for the use for that night & two other nights on which he was present, actually himself riding his own machine after the performance. Pltfs. complained of this user, & subsequent performances as an infringement. Defts. contended that the user on the three nights was licensed, & as to subsequent users, they adduced evidence to show that they took away the front roller & connecting apparatus & gave only a dummy representation of a race, driving the front wheel of the bicycle by hand. In their answer to interrogatories, defts. stated that they did not infringe because they had only driven the front wheel by hand. Pltfs. alleged that they were misled by this answer; it did not say that the front roller was removed, & was taken to mean that the front roller, also called a wheel, was driven by hand, & no notice was given by defts. of the actual way in which the machines were worked:—*Held:* there was no infringement during the nights when pltf. was present; pltfs. could not complain of the manufacture as they did not allege it as an infringement in their particulars of breaches.—HENSER & GUIGNARD *v.* HARDIE (1894), 11 R. P. C. 421.

2589. —— ——.]—The B. T. H. co., Ltd., commenced an action to restrain infringement of their patent against I. L. W., Ltd., & the directors of that co., & by their statement of claim alleged that defts., other than deft. co., were actively engaged in the affairs of deft. co. & authorised, took part in or permitted the alleged infringement. Defts. applied for particulars of that allegation:—*Held:* the plea was capable of meaning that defts., other than deft. co., had impliedly authorised, permitted & taken part in the alleged infringement, & those defts. were not entitled to the particulars asked for, but pltfs. would not be allowed to give evidence of express directions given by those defts. unless they should have given particulars thereof.—BRITISH THOMSON-HOUSTON CO., LTD. *v.* IRRADIANT LAMP WORKS, LTD. (1924), 41 R. P. C. 338.

2590. Infringement of numerous patents—Plaintiff limited to group of patents.]—In a patent action for infringement, as in every other kind of action, the *onus* is on pltf. to prove that he has a definite cause of action against deft., & he is not entitled to call upon deft. to disprove the alleged infringement—in other words, to prove that pltf. has no cause of action against him. This is so even where pltf. may be suing upon several patents in one action upon the ground that it is impossible for him, unless deft. discloses the process of manufacture of the infringing article, to state definitely which of the patents in particular have been infringed.

Pltfs., the owners of twenty three patents for "Saccharin," sued deft., a trader who had purchased & imported from foreign manufacturers an article called "Sucramine," for alleged infringement, all twenty three patents being united in one action. In their particulars pltfs. stated generally that deft. had infringed "all" the patents, but alleged only two specific cases of infringement. To enable him to prepare & deliver his defence with particulars of objections as required by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 19 (2), deft., who said he did not know the process of the manufacture of sucramine, applied to the judge by summons that pltfs. might be ordered to give further and better particulars of breaches, specifying which of the twenty three patents they relied on as having been infringed, or that, under R. S. C., 1883, Ord. 18, rr. 1, 8, 9 & Ord. 19, r. 27, the trial of the action might be limited to such of the twenty three patents, as being separate causes of action, as to the ct. might seem just. The evidence on the summons showed that the patents were capable of division into three separate groups, so that the infringements specifically charged, if infringements of one group, could not be infringements of the others; but pltf. professed his inability to say which of the groups had been infringed:—*Held:* pltfs. were not entitled to unite the twenty three patents in one action, but must be limited to selecting a certain number of them, not exceeding three in the first instance, upon which they would proceed with their action.

In a patent action further evidence by affidavit & cross-examination thereon is not admissible upon an appeal except under special circumstances, or by the consent of the parties.—SACCHARIN CORPN., LTD. *v.* WILD, [1903] 1 Ch. 410; 72 L. J. Ch. 270; 88 L. T. 101; 19 T. L. R. 154; 20 R. P. C. 243, C. A.

Annotations:—**Consd.** Saccharin Corpn. *v.* White (1903), 88 L. T. 850. **Refd.** Saccharin Corpn. *v.* Jackson (1903), 20 R. P. C. 611.

2591. —— ——.]—Where an action is brought for the alleged infringement of numerous different letters patent all relating to the same process of manufacture, the order limiting the number of letters patent to be sued upon should not be qualified by the words in the first instance.—SACCHARIN CORPN., LTD. *v.* WHITE (R.) & SONS, LTD. (1903), 88 L. T. 850; 47 Sol. Jo. 618; 20 R. P. C. 454, C. A.

2592. —— ——.]—SACCHARIN CORPN. *v.* ALLIANCE CHEMICAL CO., LTD. (1905), 22 R. P. C. 175, C. A.

2593. Delivery of particulars.]—The practice prescribed by Patent Law Amendment Act, 1852 (c. 83), s. 41, with respect to actions at law for the infringement of letters patent ought to be followed in suits in equity as closely as circumstances will permit. Pltf. in a patent suit ought either to state in his bill the particulars of the breaches complained of, or to deliver along with his bill a written statement of such particulars, which statement need not be filed. Deft. in a patent suit ought to set forth in his answer the particulars of any objections on which he relies.—FINNEGAN *v.* JAMES (1874), L. R. 19 Eq. 72; 44 L. J. Ch. 185; 23 W. R. 373.

Annotations:—**Apld.** Crossley *v.* Tomey (1876), 2 Ch. D. 533; Patterson *v.* Gaslight & Coke Co. (1876), 2 Ch. D. 812; Birch *v.* Mather (1883), 22 Ch. D. 629. **Consd.** Hayward *v.* Lely (1887), 56 L. T. 418. **Refd.** Parnell *v.* Mort, Liddell (1885), 29 Ch. D. 325.

2594. Amendment of particulars.]—UNITED TELEPHONE CO. *v.* FLEMING (1886), 3 R. P. C. 268.

2595. Form of particulars—Infringement of dye patent.]—The Ct. of Appeal settled the particulars of breaches in the following form: (*a*) Defts. have, since the date of the said patent, manufactured or caused to be manufactured, & have sold dye stuffs, the same, or substantially the same, as pltfs.' Naphtol Black. (*b*) The dye stuffs complained of are those sold by defts. under the name of "Naphtol Black, O.D." (*c*) The dye stuffs complained of are made according to the process

described & claimed in pltfs.' specification in all respects.—CASSELLA *v.* LEVINSTEIN & CO. (1891), 8 R. P. C. 473, C. A.

2596. Particulars of secret ideas—Communicated in breach of agreement.]—HELPS *v.* OLDHAM CORPN., No. 3314, *post.*

(b) Further Particulars.

See R. S. C., Ord. 53A, r. 18.

2597. Form of further particulars—Reference to drawings.]—PERRY *v.* MITCHELL (1840), 1 Web. Pat. Cas. 269.

Annotation:—**Consd.** Electric-Telegraph Co. *v.* Nott (1847), 4 C. B. 462.

2598. —— References to pages & lines—Infringement of complicated patent.]—LAMB *v.* NOTTINGHAM MANUFACTURING CO. (1874), cited L. R. 19 Eq. at p. 232.

Annotation:—**Distd.** Batley *v.* Kynock (No. 2) (1874), L. R. 19 Eq. 229.

2599. —— Specific instances coupled with general words.]—Pltfs. in an action for infringement delivered particulars of breaches alleging that defts. had infringed by importing into this country, selling, exposing for sale, & otherwise dealing with glass globes, shades, & moons, having their surfaces wholly or in part roughened in a particular way. Defts. took out a summons for further & better particulars. It appeared that pltfs. complained of all globes imported by defts. since a certain date, & that pltfs. had bought some of such globes. The judge expressed an opinion that pltfs. ought to give two or three specific instances of globes which they alleged to be infringements, but ought to be at liberty to add general words so as not to be confined to such instances at the trial; & he therefore made an order for further & better particulars.—TILGHMAN'S SAND BLAST CO. *v.* WRIGHT (1884), Griffin's Patent Cases (1884–1886), 216; 1 R. P. C. 103.

2600. At what stage ordered—Intention of plaintiff to interrogate defendant.]—Pltf. in an action for infringement of his patent delivered particulars of breaches, alleging sales to the G. N. Ry. co., & to others. Deft. applied for an order for further & better particulars, & the chief clerk made an order that pltf. should give the names of the persons to whom he alleged deft. had sold, & the dates of the sales. Pltf. moved to reverse this order, alleging that he did not know the names of the persons to whom deft. had sold, but that he intended to interrogate deft.:—*Held:* pltf. ought not to be called upon to give any further particulars at that stage of the action, but the refusal of the order was not to prejudice any subsequent application by deft.—RUSSELL *v.* HATFIELD (1885), 2 R. P. C. 144; Griffin's Patent Cases (1884–1886), 204.

2601. Application refused.]—ELSEY *v.* BUTLER (1886), Griffin's Patent Cases (1884–1886), 96.

2602. Indication of particular claims in specification.]—In an action for alleged infringement of a patent for improvements in refrigerative processes & apparatus for preserving meat, pltfs., by their particulars of breaches, complained of the manufacture, etc., by defts. of certain refrigerating machines containing an arrangement of machinery described & claimed in pltf.'s patent, & also of certain pipes used for a particular purpose, & also "by way of example" & not of "limitation" of the machines fitted by defts. on board the "S." Defts. applied for further & better particulars, & obtained an order from a master in chambers that pltfs., so far as concerned machines fitted to ships, might be confined to the "S.," unless further names were given. Part of their application asked for a direction that pltfs. should state whether they claimed in respect of all or only of some, & which of the claims in the specification, but this direction the master refused to give:—*Held:* defts. were entitled to the direction asked for, & that the order ought to be varied accordingly, but not in any other respect. Where the sufficiency of particulars of types of engines alleged to be infringements is questioned, it lies on the party who alleges that, for the honest purpose of his litigation, he wants further information or limitation to satisfy the ct. that he is really placed in a difficulty by the particulars as they stand (WILLS, J.).—HASLAM & CO. *v.* HALL (1887), 4 R. P. C. 203, D. C.

Annotation:—**Folld.** Cheetham *v.* Oldham & Fogg (No. 3) (1888), 5 R. P. C. 624.

2603. Vendor of articles entitled to more detailed particulars than manufacturer.]—A person who only sells alleged infringing arts. may require more detailed particulars of breaches than a person who manufactures.—MANDLEBERG *v.* MORLEY (1893), 10 R. P. C. 256.

2604. Particulars of manner of infringement.]—In an action for infringement of letters patent for a process of marking cloth, pltf. was ordered to give further & better particulars of breaches, so as to give at least one instance of the acts of infringement complained of. Pltf. delivered particulars which defts. alleged to be insufficient, & on the application coming before the judge, he considered the particulars sufficient subject only to the addition of certain words thereto, & he made an order accordingly. Defts. appealed:—*Held:* pltf. ought to describe the manner in which the acts which he alleged to be infringement were carried out, & the particulars were insufficient. An order for further & better particulars was made.—MARSDEN *v.* ALBRECHT & ALBRECHT (1910), 27 R. P. C. 785, C. A.

2605. Infringement of more than one patent.]—Pltfs. in an action for infringement sued in respect of a patent, No. 11575 of 1897. On a petition for extension of the term of this patent an order had been made in 1911 for the grant of a new patent for a term of seven years from the expiration of the existing patent but confined to certain claims in the specification, & a new patent was granted accordingly & numbered 11575 of 1897. Pltfs. also sued in respect of a patent, No. 7777 of 1900. Defts. applied for an order for further & better particulars of the patents & claims alleged to be infringed. The judge in chambers refused to make the order & defts. appealed to the Ct. of Appeal. After a prolonged discussion, an order was made by consent that pltfs. should deliver an amended statement of claim & amended particulars by a certain date, &, peremptorily, that the defence & particulars of objections should be delivered by a certain other date.—MARCONI *v.* SIEMENS BROTHERS & CO., LTD. (1912), 29 R. P. C. 146, C. A.

C. Defence.

(a) In General.

See Patents & Designs Act, 1907 (c. 29), ss. 4, 25, 33, 38.

2606. No infringement.]—In an action for the infringement of a patent, the ct., since the C. L. P.

PART XIV. SECT. 2, SUB-SECT. 3.—C. (a).

e. *Want of novelty—Prior invalid patent.*]—A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, & does not require to be cancelled or repealed by *sci. fa.*,

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Act, 1852 (c. 76), allowed deft. to plead, (1) not guilty; (2) that the patentee was not the inventor; (3) *non concessit;* (4) that the invention was not a manufacture; (5) that the invention was not new; & (6) that no sufficient specification was enrolled.—PLATT *v.* ELSE (1853), 8 Exch. 364; 22 L. J. Ex. 192; 20 L. T. O. S. 226; 17 Jur. 188; 155 E. R. 1388.

Annotation:—**Refd.** Hancock *v.* Noyes (1854), 9 Exch. 388.

2607. Want of novelty.]—WALTON *v.* POTTER & HORSFALL, No. 2954, *post.*

2608. ——.]—PLATT *v.* ELSE, No. 2606, *ante.*

2609. ——.]—The patentee of an invention of an improved method of & apparatus for effecting circulation in, & supply of water to, steam boilers, brought an action for infringement. Defts. denied infringement, & alleged the invalidity of the patent on the ground that (*a*) pltf. was not the first & true inventor; (*b*) the alleged invention was not new; (*c*) & was previously published by certain specifications; (*d*) the complete specification did not sufficiently describe the alleged invention; (*e*) & was misleading, as it did not show what the patentee claimed:—*Held:* (1) so much information had been given to the world by the specification of one W., even though it had not been practically used, that pltf. must be taken to have only used common knowledge, & the patent failed on that ground; (2) defts. had not taken the particulars of pltf.'s combination, & had not infringed. The objection that pltf. is not the first & true inventor should not be introduced unless it is intended to actually raise the question, whether he, or somebody else, was in fact the first & true inventor.—THOMSON *v.* MACDONALD & CO. (1890), 8 R. P. C. 5.

2610. —— As to whole invention—& as to undisclaimed part.]—In an action for the infringement of a patent, to which a disclaimer as to part has been entered under 5 & 6 Will. 4, c. 83, deft. will not be allowed to plead that the whole invention was not new, & also that the undisclaimed part was not new.—CLARK *v.* KENRICK (1843), 12 M. & W. 219; 1 Dow. & L. 392; 13 L. J. Ex. 6; 152 E. R. 1177.

2611. —— —— & as to part.]—(1) Case for the infringement of a patent for certain improvements in machinery; breach, the making, using & putting in practice the invention & also a part thereof. The specification described the invention as a combination of several parts, & also appeared to claim each part separately:—*Held:* deft. was entitled to plead that parts of the invention were not a new manufacture within Statute of Monopolies, 1623 (c. 3), as well as that the whole was not a new manufacture within that statute.

(2) The notice of particulars of objection delivered by deft. in pursuance of 5 & 6 Wm. 4, c. 83, s. 5, stated amongst other grounds of objection, that the invention was known to "A. B. & others" who were the true inventors thereof & had first used & exercised the same in England:—*Held:* deft. was not bound to specify the names of the other parties.—BENTLEY *v.* KEIGHLEY (1844), 1 Dow. & L. 944; 6 Man. & G. 1039; 7 Man. & G. 652; 7 Scott, N. R. 987; 8 Scott, N. R 372; 13 L. J. C. P. 167; 3 L. T. O. S. 221; 134 E. R. 1213.

2612. —— Defendant original patentee—Assignment of patent.]—WALTON *v.* LAVATER, No. 1536, *ante.*

2613. —— Separate plea from common knowledge.]—PHILLIPS *v.* IVEL CYCLE CO., No. 3178, *post.*

2614. —— At date of grant.]—I am, therefore, of opinion that in this case deft.'s right to succeed can be established without an examination of the terms of the specification of pltfs.' letters patent. I am aware that such a mode of deciding a patent case is unusual, but from the point of view of the public it is important that this method of viewing their rights should not be overlooked. In practical life it is often the only safeguard to the manufacturer. It is impossible for an ordinary member of the public to keep watch on all the numerous patents which are taken out & to ascertain the validity & scope of their claims. But he is entitled to feel secure if he knows that that which he is doing differs from that which has been done of old only in non-patentable variations, such as the substitution of mechanical equivalents or changes of material shape or size. The defence that "the alleged infringement was not novel at the date of pltf.'s letters patent" is a good defence in law, & it would sometimes obviate the great length & expense of patent cases if deft. could & would put forth his case in this form, & thus spare himself the trouble of demonstrating on which horn of the well known dilemma pltf. had impaled himself, invalidity or non-infringement (LORD MOULTON).—GILLETTE SAFETY RAZOR CO. *v.* ANGLO-AMERICAN TRADING CO., LTD. (1913), 30 R. P. C. 465, H. L.

2615. Subject-matter not ground for patent.]—BETTS *v.* WALKER, No. 2660, *post.*

2616. Patentee not inventor.]—PLATT *v.* ELSE, No. 2606, *ante.*

2617. Invention not a manufacture.]—PLATT *v.* ELSE, No. 2606, *ante.*

2618. No sufficient specification enrolled.]—PLATT *v.* ELSE, No. 2606, *ante.*

2619. No machine made according to specification.]—ECCLES & BRIERLY *v.* MCGREGOR, No. 200, *ante.*

2620. Property not vested in plaintiff.]—In an action by an assignee of a patent for the infringement, a plea that the property is not vested in pltf. is bad, as "embarrassing" under C. L. P. Act, 1852 (c. 76), s. 52, & will be set aside.—COTTULA *v.* SOAMES (1862), 3 F. & F. 93.

2621. Patent irregularly obtained.]—To an action for the infringement of a patent, deft. pleaded (*inter alia*) that the patent was granted on the petition of pltf., & the report of the Solicitor-General, confiding in pltf.'s representation that a paper writing deposited by him with the Solicitor-General contained a true statement of the heads of the invention; that pltf. enrolled a specification in which he claimed three distinct things, & falsely described as part of the invention the third claim, whereas such third claim was not part of the invention in the petition paper writing & letters patent mentioned, & was not any part of the invention for which the letters patent were granted. An application having been made under C. L. P. Act, 1852 (c. 76), s. 52, to strike out the

whether it is vested in deft. or in a person not a party to the suit.—SMITH *v.* GOLDIE (1882), 9 S. C. R. 46.—**CAN.**

2616 i. *Patentee not inventor.*]—Pltf. complained of deft. having infringed his patent obtained for a new & useful mode of generating & distributing

in dwelling houses. Plea, that pltf. was not the true & first of the improvement. Detraversing something *eld:* plea good.—*v.* SCOTT (1859), 6 U. C. R. 205.—**CAN.**

f. *Infringement by third party.*]—SMITH *v.* POWELL (1858), 7 C. P. 332.—**CAN.**

g. *Infringing apparatus subject of patent not revoked.*]—The infringement of pltf.'s patent for a pump, which was complained of, was by a pump for

plea :—*Held :* it was a plea containing matter of evidence, & calculated to embarrass the fair trial of the action ; & the ct. ordered it to be struck out, deft. to be at liberty to plead *non concessit*, & pltf. did not specify the invention for which the letters patent were obtained.—HANCOCK *v.* NOYES (1854), 9 Exch. 388 ; 2 C. L. R. 1060 ; 23 L. J. Ex. 110 ; 156 E. R. 165.

Annotation :—**Refd.** Foxwell *v.* Bostock (1864), 10 L. T. 144.

2622. No specification of invention.]—HANCOCK *v.* NOYES, No. 2621, *ante*.

2623. Invention capable of two patents—Appropriation of one by defendant.]—The bill alleged that T., a British subject, residing abroad, the first discoverer of a useful invention, had in Aug. 1854, sent a description of it to England by the son of deft. M., at the same time desiring him, the son, to apply for a patent on account of T. ; that the description was complete enough to have two specimens made according to it, which answered the purposes of the invention ; & that thereupon deft. M. took out letters patent in his own name & for his own benefit. Pltf., treating these letters patent as conferring no beneficial right on M., by arrangement with T. made other specimens under the description so previously sent from abroad by T. M. sued pltf. for infringement of the patent ; on which pltf. filed the present bill to restrain the action, alleging, in addition to the facts above mentioned, that M. was a trustee for T., & also intending to allege that M. was the general agent of T., but by mistake the word "pltf." was printed instead of "T" :—*Held :* M. had under the circumstances stated in the bill, a legal right to the patent for his own benefit, which this ct. would not restrain.—STEEDMAN *v.* MARSH (1856), 2 Jur. N. S. 391 ; 4 W R. 476.

2624. Patent unenrolled when infringed—Patent statutorily validated—After infringement.]—A subsequent plea stated, that after the four months for the enrolment of pltf.'s patent had expired, & before the passing of the statute, deft. took out letters patent for an improvement upon pltf.'s invention, & that the same could not be used without using pltf.'s invention, & that since the passing of the statute deft. had used his invention in exercise of the licence granted to him by his letters patent, & in so doing necessarily used the invention of pltf., as he lawfully might, etc. On special demurrer :—*Held :* the plea was bad ; the licence to deft. to use his own patent gave him no licence to use that of pltf. ; & the statute was sufficiently public in its nature to conclude the interests of deft. as well as of the rest of the public. —STEAD *v.* CAREY (1845), 1 C. B. 496 ; 14 L. J. C. P. 177 ; 5 L. T. O. S. 74 ; 9 Jur. 511 ; 135 E. R. 634.

2625. Plaintiff's patent altered by disclaimer—Grant to defendant of similar patent prior to disclaimer—Allegation of invalidity of plaintiff's patent.]—This plea is a bad plea. It ought to have shown that pltf.'s patent is void, & there is no allegation to show that it is void, unless it arises from the disclaimer under the statute, or the subsequent grant of B.'s patent. Then is the patent void on account of the subsequent grant to B. ? Pltf.'s patent was granted in 1836, that of B.'s in 1840, & pltf.'s disclaimer in 1844 ; now does it necessarily appear that the grant to B. made the precedent grant to pltf. void in point of law ? No such inference arises, because the patent having been granted to pltf. in 1836, & the specification of the invention having been made within six months following, it is necessary to say that the registered specification of that invention having been made what B. has himself entered his patent for in 1840, must be of the same subject-matter ; otherwise the plea is altogether bad, inasmuch as it admits the infringement in respect of the invention which it alleges is covered by the patent of B. (TINDAL, C.J.).—STOCKER *v.* WARNER (1845), 1 C. B. 148 ; 14 L. J. C. P. 90 ; 4 L. T. O. S. 315 ; 9 Jur. 136 ; 135 E. R. 493.

2626. Estoppel of plaintiff.]—Pltfs. under their patent manufactured a pneumatic tyre for cycles, which consisted of a rubber or elastic tyre lined in canvas in combination with two wires for securing the same to the rims of the wheels. Deft., at the request of an agent of pltf. co., who brought him one of pltf.'s tyres, which was old & worn out, placed over the old wires a new canvas cover & a new rubber tyre. The agent had been sent by pltfs. to find out whether deft. was infringing their parent, but there was nothing to show that the agent was authorised by them to request deft. to do what he did :—*Held :* (1) what deft. had done went beyond fair repair of the tyre, & amounted to its reconstruction, & he had therefore infringed the pltfs.' patent ; (2) pltfs. were not estopped by the act of their agent from complaining of the infringement ; (3) though only the one act of infringement by deft. was proved, & there was no evidence of any threat by him to infringe again, yet, as he had accepted the order from pltf.'s agent in the ordinary course of his business, it must be assumed that he would accept similar orders again, if they were offered to him, & consequently he must be restrained by injunction from infringing the patent.—DUNLOP PNEUMATIC TYRE CO. *v.* NEAL, [1899] 1 Ch. 807 ; 68 L. J. Ch. 378 ; 80 L. T. 746 ; 47 W. R. 632 ; 16 R. P. C. 247.

Annotations :—*As to* (1) **Consd.** Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 612. **Distd.** Sirdar Rubber Co. *v.* Wallington, Weston, [1905] 1 Ch. 451.

2627. ——.]—In 1908 letters patent were granted to W., P. & M. for "Improvements in fabric breaking machines." In 1917 W. & P. Ltd. who received W. & P. in the beneficial ownership of two-thirds of the patent, & P. commenced an action against a limited co. & M. for infringement of the patent & deft. co. justified their acts by alleging a licence by M. in 1909 with the consent of W. & P. W. died in 1913. M. had been in the employment of W. & P. & afterwards entered the employment of deft. co. The main issue in the action was whether deft. M. did obtain antecedently to or contemporaneously with the grant of a licence to deft. co. the consent of his co-owners thereto. Further it was contended on behalf of defts. that P. & through P. deft. co. had such knowledge of what deft. co. was doing as to preclude it from recovering damages from deft. co. :—*Held :* (1) defts. had not established any express consent either antecedent to or contemporaneous with the alleged grant of the licence & it had not been brought home to P. or through him to pltf. co. that a condition of things

which deft. had obtained a patent, & it was objected that this patent was an answer to the action until set aside ; but *semble*, not.—MERRILL *v.* COUSINS (1866), 26 U. C. R. 49.—CAN.

h. *Use of other patented process under licence.*]—Action for damages & injunction for violation of patent. Defence that deft. was making use of another patent with the consent & licence of the patentee & that the machine so used possessed advantages superior to pltf.'s patent. Injunction granted & deft. condemned in nominal damages.—FEDERATION BRAND SALMON CANNING CO. *v.* SHORT (1900), 31 S. C. R. 378.—CAN.

k. *Non-joinder of owners of patent.*]—As a defence to an action for infringement of a patent of invention it was pleaded that the patent was the property of certain joint-owners who were not pltfs. :—*Held :* this was in effect pleading a *jus tertii*, & was not

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existed from which consent ought to be implied; (2) the same principles which underlie the raising of an equity against a pltf. or litigant by means of acquiescence are involved when an attempt is made to raise a consent under Patents & Designs Act, 1907 (c. 29), s. 37, by implication.—WHITEHEAD & POOLE, LTD. *v.* FARMER (SIR JAMES) & SONS, LTD. (1918), 35 R. P. C. 241.

2628. Previous action with identical cause—Prior defendant successful.]—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* RIMINGTON BROTHERS & CO., LTD. (1900), 17 R. P. C. 665, C. A.

2629. Illegal purpose of invention.]—Defence that the invention was for an illegal purpose, namely gambling, held not to be established on a motion for an interlocutory injunction.—PESSERS & MOODY *v.* HAYDON & CO. (1908), 26 R. P. C. 58.

2630. Infringement under contract with government department.]—In 1910 letters patent were granted to M. In 1911 M. assigned the patent to the Pyrene Manufacturing co., who, on Dec. 14, 1916, assigned it to the Pyrene co., Ltd. On Feb. 8. 1917, the last mentioned co. & its assignors, the Pyrene Manufacturing co., commenced an action for infringement & alleged manufacture & offer for sale by defts. prior to Dec. 14, 1916. Defts. denied infringement & alleged that the patent was invalid. On May 22, 1919, defts. delivered an amended defence by which they pleaded Patents & Designs Act, 1907 (c. 29), s. 29, as a defence, & alleged that, if they had manufactured any goods in infringement of the patent, they had done so as contractors to His Majesty's Govt. On Jan. 6, 1920, deft.'s solrs. by letter abandoned the plea of invalidity:—*Held:* defts. had not manufactured or sold machines in infringement of the patent otherwise than under a contract with a govt. department; the contract compelled manufacture without obtaining the licence of the patentees; defts. were contractors within sect. 29, & the action must be dismissed with costs, except so far as the costs were increased by the issue of invalidity; & defts must pay so much of pltf.'s costs of the issue of invalidity as were incurred prior to the receipt of the letter of Jan. 6, 1920.—PYRENE CO., LTD. *v.* WEBB LAMP CO., LTD. (1920), 37 R. P. C. 57.

2631. Patented process mainly carried on abroad—Establishment of primâ facie case—Prior cross-examination of witnesses.]—The S. Corpn. brought an action against the N. S. co. for the infringement of three patents for the manufacture of saccharin. Defts. alleged anticipation, common knowledge, & that the manufacture was carried on exclusively or mainly outside the United Kingdom. In cross-examining pltfs.' witnesses counsel for defts. put questions with a view to supporting the defence founded upon Patents & Designs Act, 1907 (c. 29), ss. 25, 27. Upon objection taken that it was necessary in the first instance for defts. to lay the foundation for the proposed questions by establishing a *primâ facie* case under sect. 27:—*Held:* defts. need not, before asking the proposed questions, give evidence in support of their defence under sect. 27. Defts. in the present case were attacked on the ground that they had infringed pltfs.' rights & were entitled to put questions to pltfs.' witnesses as in an ordinary action to support their defence.—SACCHARIN CORPN., LTD. *v.* NATIONAL SACCHARIN CO., LTD. (1911), 28 R. P. C. 287.

Annotation:—**Refd.** Vidal Dyes Syndicate *v.* Read, Holliday (1911), 28 R. P. C. 323.

2632. Combination of similar defences.]—In an action for the infringement of a patent for improvements in cards, the ct. refused to allow defts. to plead that the art. in respect of which the patent was granted was generally known previously, & that the alleged improvements were not an invention in respect of which a patent could lawfully be granted & a similar plea as to part of the alleged invention in addition to a plea that the invention was not a new manufacture within Statute of Monopolies, 1623 (c. 3).—WALTON *v.* BATEMAN (1842), 3 Man. & G. 773; 4 Scott, N. R. 397; 133 E. R. 1350.

2633. Ambiguous defence.]—Under 5 & 6 Will. 4, c. 83, s. 1, authorising any person, who, as grantee, assignee, or otherwise, hath obtained letters patent for using an invention, to disclaim any part of the title of such invention, or of the specification, the proper person to disclaim is the original grantee. Although he may have parted with all his interest. Statute of Monopolies, 1623 (c. 3), s. 6, protects letters patent & grants of privilege, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true & first inventor. In an action for infringing pltf.'s patent, a plea, founded on the above clause, that the said invention was not, at the time of making the patent, a new manufacture within this realm, within the true intent & meaning of Statute of Monopolies, 1623 (c. 3), is bad for ambiguity.—SPILSBURY *v.* CLOUGH (1842), 2 Q. B. 466; 1 Web. Pat. Cas. 255; 2 Gal. & Dav. 17; 11 L. J. Q. B. 109; 6 Jur. 579; 114 E. R. 184.

Annotation:—**Refd.** Ledsam *v.* Russell (1847), 16 M. & W. 633.

2634. Annexation of copies of drawings—Plea setting out specification.]—BETTS *v.* WALKER, No. 2660, *post.*

2635. Amendment of defence—On discovery of new facts.]—The ct. will at any time during the progress of a patent suit allow deft. to raise a fresh issue on the discovery of facts which could not with due diligence have been discovered before.—HOLSTE *v.* ROBERTSON (1876), 4 Ch. D. 9; 46 L. J. Ch. 1; 35 L. T. 457; 25 W. R. 35, C. A.

2636. —— Striking out unnecessary but not embarrassing plea.]—A. obtained a patent & assigned it to B. B. brought an action against A. for infringement. A. by his defence—(1) denied infringement; (2) alleged that if according to the true construction of the patent it covered what he had done, then the patent was bad as having been anticipated by the specifications of R. & C. B. took out a summons under Ord. 19, r. 27, to strike out (2). The judge refused to do so:—*Held:* (2), so far as admissible by way of defence, was included in (1), & therefore was unnecessary, but that as it did not tend to prejudice, embarrass, or delay the fair trial, it need not necessarily be struck out.—HOCKING *v.* HOCKING (1886), Griffin's Patent Cases (1884–86), 129; 3 R. P. C. 291, C. A.

Annotation:—**Refd.** Ashworth *v.* Law (1890), 7 R. P. C. 231.

a good defence in law to the action.—TORONTO TYPE FOUNDRY CO. *v.* REID (1908), 12 Exch. C. R. 8.—**CAN.**

l. *Patented process condemned by health authorities.*]—In an action for infringement of a patented process paragraphs of the statement of defence alleging that the process had been condemned by various foreign health boards were struck out.—AISOP PROCESS CO. *v.* CULLEN (1912), 23 O. W. R. 106; 4 O. W. N. 135; 6 D. L. R. 859.—**CAN.**

m. *Grant of subsequent patent.*]—A subsequent patent is no defence to an action of infringement.—PANYARD MACHINE & MANUFACTURING CO. *v.* BOWMAN, [1926] Exch. C. R. 158.—**CAN.**

(*b*) *Estoppel as to Validity.*

See Patents & Designs Acts, 1907 (c. 29), s. 35 ; 1919 (c. 80), sched.

2637. Plea by assignor.]—WALTON *v.* LAVATER, No. 1536, *ante.*

2638. ——.]—Upon the dissolution of a partnership between pltfs. & deft., deft. assigned to pltfs. all his interest in a patent which formed part of the assets :—*Held :* deft. could not afterwards set up the invalidity of the patent as against pltfs.—CHAMBERS *v.* CRICHLEY (1864), 33 Beav. 374 ; 55 E. R. 412.

Annotation :—**Folld.** Gonville *v.* Hay (1903), 21 R. P. C. 49.

2639. ——.]—The owner of a licence under a patent executed a declaration of trust of it in favour of a firm of which he was a member. A partnership action was commenced by G., one of the partners, & an order was made for a stay of proceedings on certain terms, including an assignment by G. to his partners of his share in the partnership at a price to be fixed by arbn., & a term that the form or deed of dissolution & assignment & any other question arising in respect thereof should be referred to the arbitrator. On a motion by G. to set aside the arbitrator's award : —*Held :* on the construction of the submission to arbn. the arbitrator had not exceeded his jurisdiction in inserting in the deed of dissolution a covenant prohibiting G. from manufacturing according to the patent. The assignor of a licence under a patent is not entitled as against his assignee to dispute the validity of the patent. —GONVILLE *v.* HAY (1903), 21 R. P. C. 49.

2640. —— Compulsory assignment in bankruptcy.]—(1) If a patentee becomes bankrupt, & his trustee in bkpcy. assigns the patent, the patentee is not estopped from afterwards denying the validity of the patent, as against the assignee.

(2) A patentee having gone into liquidation his trustee in liquidation assigned the patent. The patentee afterwards went into a trade partnership with S. The assignees of the patent brought an action against the patentee & S. for an injunction & damages for infringements of the patent alleged to have been committed in partnership. The defence alleged the invalidity of the patent, & defts. delivered particulars of objections, viz., that defts. would deny the infringement, & that deft. S. would rely on their objections to the validity of the letters patent on the ground of want of novelty & insufficiency of the specification : —*Held :* under Patent Law Amendment Act, 1852 (c. 83), s. 41, it was not necessary for every one of two or more defts. defending in the same interest to deliver particulars of objections, & the patentee was not precluded from setting up at the trial the invalidity of the patent on the ground of want of novelty & insufficiency of the specification.—SMITH *v.* CROPPER (1885), 10 App. Cas. 249 ; 55 L. J. Ch. 12 ; 53 L. T. 330 ; 33 W. R. 753, H. L. ; *varying* S. C. *sub nom.* CROPPER *v.* SMITH (1884), 26 Ch. D. 700, C. A

Annotations :—*As to* (2) **Consd.** Shoe Machinery Co. *v.* Cutlan, [1896] 1 Ch. 108. *Generally,* **Mentd.** *Re* Crighton & Law Car & General Insce. Corpn., [1910] 2 K. B. 738 ; Pirie *v.* Richardson (1926), 70 Sol. Jo. 1023.

2641. Plea by assignor's partner.]—The rule that an assignor of a patent is estopped from disputing its validity does not prevent his partner from separately raising that defence to an action for infringement.—HEUGH *v.* CHAMBERLAIN (1877), 25 W. R. 742.

2642. Purchaser of patented article.] — The owners in equity of a patent together with the patentee may maintain an action for infringement of the letters patent. The owners in equity & the patentee of a patented article granted to purchasers of articles made in pursuance of the invention, or any person into whose hands the same might come, a limited licence to use or sell the same on the express condition that they were not to be sold or advertised for sale at less than a specified price, & on every cardboard box in which the articles were made up the provisions of the licence were stated, with a warning that any sale in breach of the provisions would be an infringement of the patent :—*Held :* a purchaser of the patented article was not bound to accept the position of licencee, & was not estopped from attacking the validity of the patent.—GILLETTE SAFETY RAZOR CO. *v.* GAMAGE (A. W.), LTD. (1909), 25 T. L. R. 808 ; 26 R. P. C. 745.

Annotation :—**Refd.** Gillette Safety Razor Co. *v.* Luna Safety Razor Co., [1910] 2 Ch. 373.

2643. Where other defences set up.]—To an action for the infringement of a patent for certain improvements in a cabriolet, three pleas were pleaded : (*a*) the general issue ; (*b*) that the alleged improvements were not new ; & (*c*) that pltfs. were not the true & first inventors of the improvements :—*Held :* (1) on this state of the pleadings it could not be contended that the patent was illegal as being a monopoly.

(2) Though all the improvements claimed must be shown to be new, yet it need not be shown that deft.'s cabriolet was an imitation of the whole of them, but an imitation of one was sufficient to maintain the action.

(3) The validity of the patent might be considered as having come in question under plea (*b*) so as to entitle pltf. to a certificate to that effect under 5 & 6 Will. 4, c. 83, s. 3.—GILLETT *v.* WILBY (1839), 9 C. & P. 334 ; 1 Web. Pat. Cas. 270, N. P.

2644. Validity of patent certified in previous action—Against different defendant.]—CROSSKILL *v.* TUXFORD, No. 2845, *post.*

2645. English & foreign patent—Foreign patent dropped—Decree establishing English patent.]—DAW *v.* ELEY, No. 3039, *post.*

2646. Necessity for previous notice of grounds of objection.]—SMITH *v.* CROPPER, No. 2640, *ante.*

2647. Previous injunction against defendant—Action for second infringement.]—In a case where deft. has once submitted to an injunction, it is improper for him on being attached for a second infringement, either directly or indirectly, to raise arguments against the validity of the patent.—MOORE *v.* THOMSON (1890), 7 R. P. C. 325, H. L.

2648. Agreement amounting to novation—Plaintiffs not parties thereto.]—At the trial the issue was

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n. *Plea by assignor — Extent of estoppel.*]—Where the original owner of a patent had assigned it, & was subsequently proceeded against by the assignee for infringement thereof, the assignor was held to be estopped from [illegible] validity thereof ; but, [illegible] he was in no worse than any independent person [illegible]tted the validity of the was allowed to show that, on a fair construction of the patent, he had not infringed.—INDIANA MANUFACTURING CO. *v.* SMITH (1904), 24 C. L. T. 387 ; 9 Exch. C. R. 154.—**CAN.**

[illegible] assignor of a patent, sued as an infringer by his assignees, is estopped from saying that the patent is not good ; but he is not estopped from showing what it is good for, *i.e.* he can show the state of the art or manufacture at the time of the invention, with a view to limiting the construction of the patent.—INDIANA MANUFACTURING CO. *v.* SMITH (1905), 26 C. L. T. 458 ; 10 Exch. C. R. 17.—**CAN.**

p. *Inconsistent defences.*] — In an action for infringement of certain patents for invention, deft. pleaded that the patents were invalid. By counterclaim deft. alleged that pltf. was a trustee for deft. in respect of the patents, & sought a declaration of its right as trustee by the ct. :—*Held :* while the evidence did not support the

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(*inter alia*) whether defts. were precluded from contesting the validity of the patent by an agreement to which pltfs. were not parties, but with regard to which they alleged a novation :—*Held :* (1) defts. were not precluded from disputing the validity of pltf.'s patent ; (2) the improvements forming the subject-matter of pltf.'s patent referred to mechanism which formed the subject of a prior patent of 1913 referred to in the specification of pltf.'s patent & not a much larger class of selecting & separating apparatus of which the mechanism covered by the patent of 1913 was only a sample & consequently deft. had not infringed.—WARD BROTHERS (BLACKBURN), LTD. *v.* MOORE & AVERY (BLACKBURN), LTD. (1922), 40 R. P. C. 247, C. A.

See, also, ESTOPPEL, Vol. XXI., pp. 146, 171, 179, 186, 187, 210, 257, 272, 331, Nos. 101, 265, 302, 344, 345, 501, 810, 902, 1252.

D. Particulars of Objections.

(a) In General.

See R. S. C., Ord. 53A, rr. 15-19.

2649. Necessity for particulars.] — (1) Patent Law Amendment Act, 1852 (c. 83), s. 41, requires deft. in an action for the infringement of a patent, to deliver with his pleas the particulars of any objections on which he means to rely at the trial ; & where he intends to rely upon a prior user or publication, the particulars must state the place or places at which, & in what manner, the invention has been used or published prior to the date of the patent ; & in the absence of such statement, deft. will be precluded from giving evidence of such prior user or publication.

(2) Pltf.'s particulars of breaches cannot be called in aid of the defective particulars of objection.

(3) Though a judge at chambers has power to order the amendment of the particulars, he cannot introduce into such order any terms relative to the admissibility of evidence at the trial under such particulars which are inconsistent with the provisions of sect. 41.—PALMER *v.* COOPER (1853), 9 Exch. 231 ; 2 C. L. R. 430 ; 23 L. J. Ex. 82.

2650. ——.]—FINNEGAN *v.* JAMES, No. 2593, *ante*.

2651. Function of particulars.]—The notice of objections is to apprise pltf. of what he has to meet.—LOSH *v.* HAGUE (1838), 1 Web. Pat. Cas. 202.

Annotations :—**Refd.** R. *v.* Cutler (1847), 3 Car. & Kir. 215 ; Tetley *v.* Easton (1857), 2 C. B. N. S. 706 ; Edison & Swan Electric Light Co. *v.* Woodhouse (1887), 3 T. L. R. 367 ; Morgan *v.* Windover (1887), 3 T. L. R. 748 ; Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 431. **Mentd.** Booth *v.* Kennard (1856), 5 W. R. 85 ; Brook & Hirst *v.* Aston (1859), 5 Jur. N. S. 1025.

2652. ——.]—The principle upon which the ct. proceeds in regulating the form of particulars of objections on the trial of a patent case, is to guard against a surprise upon pltf. by production on the trial of evidence of prior user or publication of which he has no notice. Therefore it will require deft., in stating those instances on which he intends to rely, to put pltf. in possession of all he himself knows, so far as to enable him to identify the instances alleged.—CURTIS *v.* PLATT (1863) 8 L. T. 657 ; Goodeve's Patent Cases, 144 ; *subsequent proceedings* (1866), 35 L. J. Ch. 852. H. L.

2653. ——.]—S. brought an action against the owners of a patent, for improvements in the construction of wire ropes, to restrain the issue of threats & for a declaration that the patent was invalid. Amongst his particulars of objections he alleged that the alleged invention was previously published by the manufacture, sale, use, or public exhibition of wire ropes made according to the alleged invention by W. from the years 1832 to 1862. W. had made depositions in an action by defts. in the present action against F., which depositions were filed in ct. with certain exhibited specimens. Defts. applied for further & better particulars of this objection :—*Held :* as the object of particulars was to prevent any surprise, the particulars in the case were not sufficient, pltf. could not be tied down to continuous user during the period, & he must give some further particulars if he was able to do so.—SMITH *v.* LANG (1890), 7 R. P. C. 148, C. A.

2654. Proof of delivery—Necessity for.]—NEILSON *v.* HARFORD, No. 2454, *ante*.

2655. Time for delivery—After delivery of defence.]—If, in an action for the infringement of a patent, deft. neglect to deliver with his pleas the objections required by 5 & 6 Will. 4, c. 83, it seems doubtful if the ct. have power to allow him to deliver them afterwards *nunc pro tunc ;* but if they are satisfied on the merits, they will grant him leave to plead *de novo*, & then deliver the objections with the fresh pleas.—LOSH *v.* HAY (1838), 2 Jur. 157.

2656. Sufficiency—Must be in distinct & intelligible language.]—In the particulars of objections delivered under 5 & 6 Wm. 4, c. 83, s. 5, the substantial objections must be stated in distinct & intelligible language, & the particulars must not be confined to giving merely general information.—FISHER *v.* HEWITT (1838), 6 Dowl. 739 ; *sub nom.* FISHER *v.* DEWICK, 4 Bing. N. C. 706 ; 1 Web. Pat. Cas. 264 ; 1 Arn. 282 ; 6 Scott, 587 ; 7 L. J. C. P. 279 ; 132 E. R. 961.

Annotations :—**Apld.** Heath *v.* Unwin (1842), 10 M. & W. 684. **Distd.** Jones *v.* Berger (1843), 5 Man. & G. 208. **Apld.** Morgan *v.* Fuller (2) (1866), L. R. 2 Eq. 297. **Refd.** Neilson *v.* Harford (1841), 8 M. & W. 806 ; Betts *v.* Walker (1849), 14 Jur. 647 ; Flower *v.* Lloyd (1876), 45 L. J. Ch. 746 ; Sugg *v.* Silber (1877), 2 Q. B. D. 493.

2657. —— More than merely general information.]—FISHER *v.* HEWITT, No. 2656, *ante*.

2658. —— More information than pleas.]—NEILSON *v.* HARFORD, No. 2454, *ante*.

2659. —— ——.]—JONES *v.* BERGER, No. 2695, *post*.

2660. —— ——.]—A plea which refers for explanation to drawings, not traced on the record but annexed to it, is inadmissible ; & the ct., on motion, where the pleading related to the specification enrolled by a patentee, ordered such plea to be struck out. *Qu. :* whether such plea would have been allowable, unless by consent, if the drawings had been traced on the record. In an action for infringing a patent, deft., after pleading that the patent was granted on a representation that the invention was an invention of improvements in a specified art., whereas it was not an invention of improvements in such art., & so the

counterclaim, in any event deft. could not, on the one hand, deny the validity of the patents, &, on the other, assert a right depending upon the patents being treated as valid & effective.—IMPERIAL SUPPLY CO. *v.* GRAND TRUNK RY. CO. (1912), 11 E. L. R. 340 ; 14 Exch. C. R. 88.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 3.—D. (a).

q. *Sufficiency.*]—In an action for an infringement of pltf.'s patent, upon an order that deft. should deliver to pltf. particulars of any objections on which he intended to rely in support of his plea that the invention was not new but had been wholly & in part used, practised, & vended in Great Britain before the patent :—*Held :* a notice that he intended to object at the trial to the patent altogether, as being granted for what was not a new invention, was sufficient.—MILLS *v.*

patent was void, averred, by another plea, that the supposed invention was not of such use, benefit & advantage to the public as by law required to make it a consideration for granting a patent, whereby the patent was void. The ct., on motion, struck out the latter plea. In an action for infringing a patent, if deft.'s notice of objections under 5 & 6 Will. 4, c. 83, s. 5 (see Patent Law Amendment Act, 1852 (c. 83), s. 41), is too general to give such information as pltf. is entitled to, it is no answer to a motion for better notice that the notice is as specific as the pleas.—BETTS *v.* WALKER (1849), 14 Q. B. 363; 14 Jur. 647; 117 E. R. 144.

2661. —— Not to go beyond pleas.]—Whatever objections defts. may have given you notice of, they cannot go beyond their pleas. I apprehend that the statute does not make the notice of objections stand in the place of pleas (LORD ABINGER, C.B.).—MACNAMARA *v.* HULSE (1842), Car. & M. 471; 2 Web. Pat. Cas. 128, n.

Annotations:—**Refd.** Wegmann *v.* Corcoran, Witt (1878), 27 W. R. 357; Edison & Swan Electric Light Co. *v.* Holland (1889), 6 R. P. C. 243; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95.

2662. —— Sufficient to prevent surprise.]—SMITH *v.* LANG, No. 2653, *ante*.

2663. —— Manufacture of patent abroad.]—THERMOS, LTD. *v.* BRITISH CALORIS CO. (1909), 26 R. P. C. 827.

2664. —— ——.]—COLMAN *v.* COOK & CO., No. 2701, *post*.

2665. Defective particulars—Whether plaintiffs particulars can be called in aid.]—PALMER *v.* COOPER, No. 2649, *ante*.

2666. Admissibility of evidence having regard to particulars—Evidence within meaning of particulars as delivered—Particulars defective.]—HULL *v.* BOLLARD, No. 2720, *post*.

2667. —— Cross-examination limited by particulars.]—THERMIT, LTD. *v.* WELDITE, LTD. (1907), 24 R. P. C. 441.

2668. Action against partners—Particulars delivered by one only—Effect of.]—In an action against joint contractors, where defts. set up separate defences, & one deft. only pleads facts which, when proved show that pltf. is not entitled to recover, & that deft. is entitled to judgment, the defence is available to all defts., though not pleaded by the others, & the action fails altogether.

If partners were sued as partners for infringement of a patent, & one of them put in the necessary particulars of defence, it was obviously for the defence of the case in which he was interested, & the failure of the other partner to put in similar particulars would not result in separate judgments against the two (LORD HANWORTH, M.R.).—PIRIE *v.* RICHARDSON, [1927] 1 K. B. 448; 96 L. J. K. B. 42; 136 L. T. 104; 70 Sol. Jo. 1023, C. A.

Certificate of reasonableness of particulars.]—*See* Sub-sect. 11, C., *post*.

(*b*) *Want of Novelty.*

i. *In General.*

See R. S. C., Ord. 53A, r. 16.

2669. R. S. C., Ord. 53A, r. 16—Object of rule.]—(1) The keynote of the provision in above rule—that where prior user is alleged as an objection to the validity of a patent the particulars of the prior user must contain a description, accompanied by drawings if necessary, sufficient to identify such alleged prior user, & if such user relates to any machinery or apparatus shall specify whether the same is in existence & where the same can be inspected—is in the words sufficient to identify such alleged prior user, & the object of the rule was to meet the difficulties which arose under the former practice by reason of a party being ignorant up to trial as to the case of prior user which he had to meet, & his opponent being unfettered as to what at the trial he should adduce as an example of prior user.

(2) Nature of order to be made on application for further particulars of prior user.—CROSTHWAITE FIRE BAR SYNDICATE *v.* SENIOR, [1909] 1 Ch. 801; 78 L. J. Ch. 417; 100 L. T. 646.

2670. —— Particulars of patent of process—Distinguished from particulars of patent of machinery or apparatus.]—Above rule which deals with particulars of objection as to want of novelty in a patent action, distinguishes between a patent for a process, & a patent for machinery or apparatus, & requires less detailed particulars in the former case than in the latter; & where prior user is alleged & pltf.'s patent is for a process only, if deft. has satisfied the requirements of the rule as to names, places, & dates, he will only be required in addition to give a description sufficient to identify the alleged prior user; he will not be required to give particulars of the apparatus employed by him in working the process relied upon by him as an anticipation nor to allow inspection of any samples in his possession of substances treated by that process.—MINERALS SEPARATION, LTD. *v.* ORE CONCENTRATION CO. (1905), LTD., [1909] 1 Ch. 744; 78 L. J. Ch. 604; 100 L. T. 753; 26 R. P. C. 413, C. A.

Annotation:—**Follid.** *Re* Stahlwerk Becker Akt. (1917), 34 R. P. C. 332.

2671. Sufficiency of particulars—Lack of distinction in specification between old & new.]—JONES *v.* BERGER, No. 2695, *post*.

2672. —— To what part of patent objections apply.]—BODMER *v.* BUTTERWORTH, No. 2691, *post*.

2673. —— Grounds in respect of want of novelty.]—At present the Act which is operative upon the matter is Patents, Designs & Trade Marks Act, 1883 (c. 57). Deft. wished us to construe that to mean this, that where one of the grounds is want of novelty the one thing that the party who impeaches the patent on the ground of want of novelty is bound to state is, first, I impeach it on the ground of want of novelty, & then to state the time & place of the previous publication or user alleged by him, & no more. I apprehend that that is putting too narrow a construction upon that subsection, & that it must state on what grounds he disputes it, & if one of those grounds is want of novelty he must state reasonably on what grounds in respect of want of novelty, he disputes it, & he must also state the time & place of the previous publication or user alleged by him (DENMAN, J.).—FOWLER *v.* GAUL (1886), 3 R. P. C. 247; Griffin's Patent Cases (1884–1886), 99, D. C.

Annotation:—**Refd.** Holliday *v.* Heppenstall (1889), 41 Ch. D. 109.

2674. —— Time & place must be shown—Of user or publication.]—FOWLER *v.* GAUL, No. 2673, *ante*.

2675. —— Particular instances.]—LEDGARD *v.* BULL, No. 2573, *ante*.

SCOTT (1849), 5 U. C. R. 360.—CAN.

r. *Form of order—Exclusion of evidence—Striking out defence.*]—In making an order for particulars of the defence in a patent action, the better practice is to provide merely for exclusion of evidence in case of no particulars or insufficient particulars being delivered, & not to order the excision of the defence, if good *per se*.—NOXON BROTHERS MANUFACTURING CO. *v.* PATTERSON & BROTHER CO. (1894), 16 P. R. 40.—CAN.

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 3, D. (b) i., ii. & iii.]

2676. —— ——.]—BOYD *v.* FARRAR, No. 2685, *post.*

2677. Objection to specification describing two inventions—Evidence of want of novelty of one—Whether sufficient.]—Under notice of objection by a deft. to an action for infringing a patent, that the invention was not new, deft. can at the trial show that one of two inventions described in the specification is not new, & that the patent is therefore bad.—SUGG *v.* SILBER (1877), 2 Q. B. D. 493, C. A.

ii. *Prior Publication.*

See R. S. C., Ord. 53A, r. 16.

2678. What particulars must be given—Particulars enabling identification of instances of prior user.]—CURTIS *v.* PLATT, No. 2652, *ante.*

2679. —— —— **Page & line.**]—In an action for infringement of a patent defts. disputed the validity of the patent on the grounds of want of novelty & anticipation, & delivered particulars of objections, in which they referred to about twenty specifications, stating that in each case they relied on the whole specification, & to passages, some of them of considerable length, in above twenty books. Pltf. applied for better particulars. The judge ordered defts. to deliver better particulars as to the specifications, but made no order as to the extracts from books:—*Held:* defts. must be ordered to strike out from their particulars all the publications on which they relied simply as proving the state of general public knowledge at the time when the patent was granted to have been such that there was no invention in the patented process; &, as regarded alleged anticipations, they must state the nature of the anticipations on which they relied, & point out distinctly, though not necessarily by page & line, where such anticipations were to be found.—HOLLIDAY *v.* HEPPENSTALL BROTHERS (1889), 41 Ch. D. 109; 58 L. J. Ch. 829; 61 L. T. 313; 37 W. R. 662; 6 R. P. C. 320, C. A.

Annotations:—**Refd.** Phillips *v.* Ivel Cycle Co. (1890), 62 L. T. 392; Nettlefolds *v.* Reynolds (1891), 65 L. T. 699; Siemens *v.* Karo, Barnett (1891), 8 R. P. C. 376.

2680. —— **Whether special parts need be pointed out—Reliance on whole of specification.**]—Deft. in an action for infringement of a patent, the specification of which was complicated & contained six claims, delivered particulars of objections, alleging twelve instances of prior publications & three of prior use, but did not in any case point out which of the six claims was alleged to be thereby anticipated. When referring to a specification as anticipated the particulars alleged that the whole was relied upon, but more particularly certain portions which were mentioned. When referring to a book as anticipation, the particulars alleged that it contained a description of pltf.'s invention, especially as set forth at the pages mentioned. On a summons by pltf. for further & better particulars:—*Held:* further & better particulars must be delivered, stating at which of the claims in pltf.'s specification each of the objections was pointed, & omitting the words denoting reliance on the whole of the specifications mentioned in the particulars, & the whole of the book therein also mentioned.—HARRIS *v.* ROTHWELL (1886), 3 R. P. C. 243; Griffin's Patent Cases (1884–1886), 109.

2681. —— —— ——.] — SIDEBOTTOM *v.* FIELDEN, No. 2899, *post.*

2682. —— **Particulars showing where anticipation found—Reference to books & writings.**]—JONES *v.* BERGER, No. 2695, *post.*

2683. —— —— ——.]—In an action for infringement of a patent deft. delivered particulars of objections alleging that the invention was not subject-matter having regard to the general state of public knowledge & the particulars specified, & that the alleged invention was not new, having been published by seven specifications, in six of which the whole specification was relied on, in the other, Fig. 1, & the letterpress referring thereto, & by the general use of regenerative gas lamps. Pltf. applied by summons for further particulars, & at the hearing asked that all the particulars of the specifications except one, & the particulars of general use might be struck out. Defts. were willing to state they relied on the whole specification except the claiming parts, to give further particulars as to W.'s, C.'s, & S.'s lamps, & to strike out particulars of general use of regenerative lamps simply:—*Held:* (1) as it appeared defts. *bonâ fide* relied on the whole specifications, & these were not long, & described a particular thing, a lamp, & the substance of pltf.'s patent was a lamp, that such part of the particulars must stand, though it is always in the discretion of the ct. to see how far deft. really does rely on the whole specification, & (2) further & better particulars specifying sufficiently the particular lamps of W., C., & S. before referred to, with time & place of user, should be given.—SIEMENS *v.* KARO, BARNETT & CO. (1891), 8 R. P. C. 376.

2684. —— —— ——.]—Defts. who in their particulars of objections alleged prior publication in several specifications, alleging as to some that all parts were relied on against all the claims of pltfs.' specification, were not ordered to give further particulars.—EDISON-BELL CONSOLIDATED PHONOGRAPH CO. *v.* COLUMBIA PHONOGRAPH CO. (1900), 18 R. P. C. 4.

2685. —— ——.]—In an action for infringement of a patent for complicated machinery where the specification contained seventeen separate claims, deft. delivered particulars of objections, under Patents, Designs & Trade Marks Act, 1883 (c. 57), alleging (*a*) prior publication by articles made according to the supposed invention being publicly exhibited in use by H. & Son; & (*b*) prior publication in certain specifications which were enumerated & identified with references to pages & lines. Pltf. applied for further & better particulars:—*Held:* (1) deft. ought to specify the particular machines or articles which were alleged to be anticipations of pltf.'s patent; but he need not state the parts of pltf.'s invention which were anticipated thereby, as pltf. must be taken to know his own invention.

(2) Deft. must state which of pltf.'s claims he alleged to be anticipated by the respective specifications mentioned; &, therefore, the particulars required must be given.—BOYD *v.* FARRAR (1887), 57 L. T. 866.

2686. —— **General allegation insufficient.**]—The owners of a patent brought an action for infringement. Defts. pleaded, amongst other things, that pltfs. were not entitled to the exclusive rights claimed by them, inasmuch as these rights had been granted to another patentee by an earlier patent. Pltfs. applied for an order to strike out this plea as embarrassing, or, in the alternative, for further & better particulars of the grounds on which defts. disputed the validity of pltfs.' patent:—*Held:* further particulars must be given.—ROTHWELL *v.* MACINTOSH & CO., LTD. (1894), 11 R. P. C. 274.

iii. *Prior User.*

2687. Particulars allowed on proper notice.]—The object in directing issues to be tried at law is to ascertain the real state of the facts; & therefore the ct. in a patent case will allow further particulars of prior user of the invention to be brought forward on proper notice.—BOVILL *v.* GOODIER (1867), 36 L. J. Ch. 360; *previous proceedings* (1866), L. R. 2 Eq. 195.

2688. What particulars may be ordered—Particulars enabling identification of instances of prior user.]—CURTIS *v.* PLATT, No. 2652, *ante*.

2689. —— Names of users — Before patent granted.]—By 5 & 6 Will. 4, c. 83, s. 5, it is enacted that, in any action brought against any person for infringing any letters patent, deft., in pleading thereto, shall give to pltf., & in any *sci. fa.* to repeal such letters patent, pltf. shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action:—*Held:* the ct. or a judge, in virtue of their general jurisdiction over the proceedings in a cause, may require the party to deliver further & better objections. *Semble:* where the objection to the patent is its want of novelty, & deft. intends to rely on a previous user of the supposed invention by divers persons, he cannot be compelled in his notice to give the names & descriptions of those persons.—BULNOIS *v.* MACKENZIE (1837), 4 Bing. N. C. 127; 6 Dowl. 215; 3 Hodg. 251; 5 Scott, 419; 7 L. J. C. P. 33; 1 Jur. 945; 2 Carp. Pat. Cas. 406; 1 Web. Pat. Cas. 260; 132 E. R. 737.

Annotations:—**Folld.** Russell *v.* Ledsam (1843), 11 M. & W. 647. **Refd.** Electric Telegraph Co. *v.* Nott (1847), 4 C. B. 462.

2690. —— —— Names of particular persons "& others."]—BENTLEY *v.* KEIGHLEY, No. 2611, *ante*.

2691. —— ——.]—In an action for the infringement of a patent, the particulars of objection must show to what parts of the patent the objections are intended to apply, but an objection that the inventions were in public use before the granting of the letters patent need not state the names & addresses of the persons by whom they were so used.—BODMER *v.* BUTTERWORTH (1844), 2 L. T. O. S. 368.

2692. —— ——.]—In a suit to restrain the infringement of a patent deft. was required to state whether he was not making articles in all respects identical with those of pltf., & to set forth in what respects they differed & by what process they were made:—*Held:* (1) deft., who alleged prior user by himself & others, had sufficiently answered by stating that, save so far as the articles manufactured by him before the date of the patent were similar to those of pltf., the articles he now made differed from those made by pltf., but he could not show in what they differed without ocular demonstration; (2) deft. was bound, in alleging prior user by other persons, to set forth the names of some of those persons.—CROSSLEY *v.* TOMEY (1876), 2 Ch. D. 533; 34 L. T. 476.

Annotation:—**Refd.** Birch *v.* Mather (1883), 22 Ch. D. 629.

2693. —— ——.]—SIDEBOTTOM *v.* FIELDEN, No. 2899, *post*.

2694. —— —— Where names cannot be given—Class of articles with respect to which user alleged.]—In a suit to restrain the infringement of a patent for improvements in the construction of carriages, the alleged invention consisting of a particular mode of opening & closing the heads of carriages, particulars of objections stating that head-joints similar to those used in pltf.'s alleged invention had been, before the date of the patent, commonly used by carriage builders generally throughout Great Britain, & that head-joints, similar to those described in the specification, had been actuated in their motions in the way described, before the date of the patent, by various carriage builders in or near London, Liverpool, Manchester, & Southampton, & various other of the principal towns of Great Britain, were held insufficient. *Semble:* where the objection points to the public use of a particular preparation, the words "by various makers in or near London," might be sufficient. If deft. could not give the names of the carriage builders in or near London, etc., he would be required to specify the class or classes of carriages with respect to which the alleged prior user had taken place; & might have been held sufficient.—MORGAN *v.* FULLER (2) (1866), L. R. 2 Eq. 297; 14 L. T. 353.

Annotation:—**Apld.** Flower *v.* Lloyd (1876), 45 L. J. Ch. 746.

2695. —— —— Description of class of users.]—(1) The notice of objections to a patent delivered by deft. under 5 & 6 W. 4, c. 83, s. 5, ought to contain more particular information than that which is necessarily conveyed by deft.'s pleas.

(2) In an action for the infringement of a patent "for improvements in treating, or operating upon, farinaceous matter & other products, & in manufacturing starch," one objection stated, that the alleged invention had been published in the specification of two previous patents, particularising them, "& also by other persons in other books & writings":—*Held:* the books, etc., should be specified.

(3) A second objection stated, that pltf.'s specification did not "sufficiently distinguish between what was old & what was new":—*Held:* sufficient, as the objection was to an omission in the specification.

(4) The same objection alleged that pltf. did not state in his specification "the most beneficial method with which he was then acquainted, of practising his said invention":—*Held:* sufficiently precise.

(5) A third objection stated that the invention was in use by many persons before the patent, & particularly that the use of rice starch was "known & practised by persons engaged in the manufacture, & finishing, of lace & similar fabrics at Nottingham & elsewhere":—*Held:* upon striking out the words "& elsewhere," the objection was sufficiently precise.—JONES *v.* BERGER (1843), 5 Man. & G. 208; 6 Scott, N. R. 208; 12 L. J. C. P. 179; 7 Jur. 883; 1 Web. Pat. Cas. 544; 134 E. R. 540.

Annotations:—*As to* (5) **Consd.** Russell *v.* Ledsam (1843), 11 M. & W. 647; Bentley *v.* Keighley (1844), 7 Man. & G. 652. **Apld.** Morgan *v.* Fuller (2) (1866), L. R. 2 Eq. 297.

2696. —— —— ——.]—Where, in an action for the infringement of a patent, deft. relies on a general user of the supposed invention, it is sufficient to state, in his particulars of objection, under Patents, Designs & Trade Marks Act, 1852 (c. 83), s. 41, that the invention was used by manufacturers generally at a particular place, without naming any person or specifying any manufactory.—PALMER *v.* WAGSTAFFE (1853), 8 Exch. 840; 1 C. L. R. 448; 22 L. J. Ex. 295; 21 L. T.

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 3, D. (b) iii., (c), (d) & (e).]

O. S. 169; 17 Jur. 581; 1 W.R. 438; 155 E. R. 1594.

Annotations:—**Refd.** Hull *v.* Bollard (1856), 25 L. J. Ex. 304; Alliance Pure White Lead Syndicate *v.* Mac Ivor's Patents (1891), 39 W. R. 487.

2697. —— —— ——.]—MORGAN *v.* FULLER (2), No. 2694, *ante.*

2698. —— **Description of user.**]—BULNOIS *v.* MACKENZIE, No. 2689, *ante.*

2699. —— **Time & place of user—Including user by defendant.**]—PALMER *v.* COOPER, No. 2649, *ante.*

2700. —— ——.]—SIEMENS *v.* KARO, BARNETT & Co., No. 2683, *ante.*

2701. —— ——.]—In an action for infringement of two patents for "improvements in knot tying implements." Defts. stated in their defence that they would rely upon the fact that the patented arts. had been manufactured exclusively or mainly outside the United Kingdom. Pursuant to an order, defts. gave particulars in which they stated (*inter alia*) that the place of manufacture was R. in America, or some other place or places in the United States unknown to defts. Pltfs. made an application for further particulars as to the place or places where the alleged manufacture had taken place & the time or times during which it had taken place at each alleged place. The application was refused & pltfs. appealed: —*Held:* particulars must be given to identify the situation in R. or the individuals by whom the arts. were said to have been made in R., & the statement as to some other place of manufacture must be struck out, without prejudice to any application to deliver further particulars.—COLMAN *v.* COOK & Co. (1912), 29 R. P. C. 175, C. A.

2702. —— **Particulars enabling identification of articles used.**]—CROSTHWAITE FIRE BAR SYNDICATE *v.* SENIOR, No. 2669, *ante.*

2703. —— **When patent of process infringed.**]—MINERALS SEPARATION, LTD. *v.* ORE CONCENTRATION Co. (1905), LTD., No. 2670, *ante.*

2704. Form of order.]—CROSTHWAITE FIRE BAR SYNDICATE *v.* SENIOR, No. 2669, *ante.*

(c) *Common Public Knowledge.*

2705. Reference to books—Whether permissible.]—HOLLIDAY *v.* HEPPENSTALL BROTHERS, No. 2679, *ante.*

2706. Reference to single prior specifications.]—Although it is unnecessary to specify every publication which is relied on as common knowledge, defts. will not be allowed to refer to a single specification as showing common knowledge without giving notice of it by their particulars.—ENGLISH & AMERICAN MACHINERY Co., LTD. *v.* UNION BOOT & SHOE MACHINE Co., LTD. (1894), 11 R. P. C. 367, C. A.

Annotations:—**Refd.** Sutcliffe *v.* Abbott (1902), 20 R. P. C. 50; British Thomson-Houston Co. *v.* Stonebridge Electrical Co. (1916), 33 R. P. C. 166.

2707. ——.]—Deft. in an action for infringement alleged in the particulars of objections that the alleged invention was not the subject-matter of valid letters patent, having regard to the state of public knowledge, & stated that he relied under this objection on the anticipations alleged, & also referred to two specifications therein specified. At the trial, deft. having stated that he did not rely on anticipation, it was objected that one of the two specifications mentioned in the particulars could not be referred to:—*Held:* the specification having been mentioned in the particulars of objections, could be referred to.—SUTCLIFFE *v.* ABBOTT (1902), 20 R. P. C. 50.

2708. Particulars of documents not relied on as anticipations.]—ACETYLENE ILLUMINATING Co. *v.* UNITED ALKALI Co., No. 3432, *post.*

2709. Available public knowledge distinguished from general public knowledge—Further particulars ordered.]—In an action for infringement of a patent for the manufacture of tungsten electric lamp filaments, by their particulars of objections defts. alleged (*inter alia*) that the alleged invention was not subject-matter by reason of "common &/or public knowledge," & said that they proposed to refer to certain specifications as disclosing part of the public knowledge, & that they would contend that the alleged invention was not subject-matter by reason that it was merely a statement of an alleged discovery, that tungsten is ductile whilst heated, together with a descrip- of matters specified more in detail in another of the particulars, of "common &/or public knowledge" & practice relative to the working & drawing of metals in a ductile state, &, when necessary or desirable, prevention of oxidation during the process of working or drawing. One of the matters specified more in detail was as follows:—"Some metals which cannot be successfully drawn when cold, can be successfully drawn when in a heated condition." Pltfs. applied for further particulars as to the documents disclosing the alleged public knowledge. At the hearing of the application, defts. contended that, from defts.' point of view, public knowledge was the same as common knowledge, & that, having stated the matters of public, or common, knowledge upon which they relied, they ought not to be required to give particulars of documents in which those matters were disclosed. They undertook to give to pltfs. a list of the metals alleged to be capable of being drawn only when in a heated condition: —*Held:* what defts. called public knowledge was not anything more than available, as distinguished from general, public knowledge; & particulars of documents must be given; & that the costs of the application should be pltfs.' in any event.—BRITISH THOMSON-HOUSTON Co., LTD. *v.* STONEBRIDGE ELECTRICAL Co., LTD. (1916), 33 R. P. C. 166.

(d) *Insufficiency of Description.*

2710. Sufficiency—Most beneficial method not described.]—JONES *v.* BERGER, No. 2695, *ante.*

2711. —— **Directions not sufficient for skilled workman.**]—Deft. in an action for the infringement of a patent denied the validity of the patent, & stated the objection that the specification did not sufficiently describe the nature or the invention & how it was to be performed. In compliance with an order for further particulars he repeated the above objection, with the addition that the specification did not contain a sufficient direction to enable skilled workmen to make a machine having the advantages alleged by the inventor.

PART XIV. SECT. 2, SUB-SECT. 3.—D. (c).

——— *manufacture must be distinguished.*]—MACEWAN *v.* HOPKIRK (1912), 31 N. Z. L. R. 1143. —N.Z.

b. *Particulars of prior specifications.*]—If a patent is attacked on the ground that there was common general knowledge of the public of the invention at the time of the patent a plea of such general knowledge need give no individual instances, but specifications of other patents cannot be used as evidence of general knowledge unless they have been specially mentioned, either on a plea of want of novelty or a plea of common knowledge.—RIDD MILKING Co. *v.* TRELOAR MILKING Co. (1914), 34 N. Z. L. R. 34.—N.Z.

The judge ordered further particulars, & deft. appealed :—*Held :* this order ought to be affirmed, for that, if deft. knew of a particular defect in the specification, he ought to point it out, that pltf. might not be taken by surprise.—CROMPTON *v.* ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPN. (1887), 35 Ch. D. 283 ; 56 L. J. Ch. 802 ; 57 L. T. 291 ; 35 W. R. 789 ; 3 T. L. R. 521, C. A.

2712. —— Old not sufficiently distinguished from new.]—JONES *v.* BERGER, No. 2695, *ante*.

2713. —— ——.] —BOXWELL *v.* COCHRAN (1895), 12 R. P. C. 169.

2714. —— Specification too wide.]—BOXWELL *v.* COCHRAN, No. 2713, *ante*.

2715. —— Specification ambiguous & calculated to mislead.]—BOXWELL *v.* COCHRAN, No. 2713, *ante*.

2716. What particulars may be ordered—Defect relied on to be pointed out.]—CROMPTON *v.* ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPN., No. 2711, *ante*.

2717. —— ——.] —Defts. must state the grounds on which they dispute the validity of the patent. I think, therefore, that pltf. is entitled to be told in what respects his specification fails to sufficiently describe the nature of the invention. I must assume this objection is a substantial one, & if that is so, defts. can state it without injuring themselves. If it is not a substantial one the sooner it is discovered to be so the better (NORTH, J.).—HEATHFIELD *v.* GREENWAY (1893), 11 R. P. C. 17 ; 38 Sol. Jo. 59.

(e) Further Particulars.

See R. S. C., Ord. 53A, r. 18.

2718. Power of court to order.]—BULNOIS *v.* MACKENZIE, No. 2689, *ante*.

2719. —— Discretionary exercise—Plaintiff not prejudiced by refusal.]—In an action for infringement of a patent defts. denied infringement & counterclaimed for the revocation of the patent on the ground of invalidity, & in their particulars of objections they stated that the patent was void for want of subject-matter & utility. Pltfs. applied for further & better particulars of objections. The application was refused by the judge in chambers. Pltfs. appealed, & contended that they were entitled to know if any special case of non-utility was relied on by defts. :—*Held :* in this case no difficulty could arise by reason of pltfs. not knowing the line of criticism that would be adopted by defts. at the trial, particulars would therefore be unnecessary, & there was no ground for interfering with the discretion of the judge.—PRESTO COAT COLLAR CO. *v.* LEVY BROTHERS (1911), 28 R. P. C. 362, C. A.

2720. Duty of plaintiff to apply for—Particulars too general.]—In an action for the infringement of a patent, if the particulars of objections, delivered with the pleas in pursuance of Patent Law Amendment Act, 1852 (c. 83), s. 41, are too general, the party who means to object to them must procure an order for better particulars. The Act does not prevent defective particulars from being available at the trial, & pltf. cannot resist the admission of evidence, which is within the literal meaning of the particulars, on the ground that the statement is too general, & that the particulars do not give the required information as to the place in which the invention is alleged to have been used.—HULL *v.* BOLLARD (1856), 1 H. & N. 134 ; 25 L. J. Ex. 304 ; 27 L. T. O. S. 221.

Refd. Chollet *v.* Hoffman (1857), 7 E. & 686 ; Sykes *v.* Howarth (1879), 48 L. J. Ch. 769,

2721. Liability of plaintiff for costs.]—In an action for infringement of a patent for a combined evaporating & propagating pan, defts. denied infringement, & alleged that pltf. was not the first & true inventor. By their particulars of objections defts. alleged that the means described in pltfs.' specification for constructing propagating pans had been in ordinary & common use for 40 years prior to the date of the patent. In their further answers to interrogatories defts. gave a description of the particular method they relied on to support their plea of general user. At the trial, evidence was given by defts.' witnesses of another method which had been used at a large number of places & which appeared to be a complete anticipation of pltf.'s invention. Pltf. objected that no particulars had been given of this, & asked that the case might stand over :—*Held :* the action must stand over, but at pltf.'s risk as to costs. Defts., whose witnesses had given many instances of this use, to be allowed to give particulars of further instances. An application that pltf. might have a certain time, after the delivery of the fresh particulars, to elect whether he would discontinue the action on paying costs up to the first delivery of particulars, but to get the subsequent costs refused.—PASCALL *v.* TOOPE (1890), 7 R. P. C. 125.

2722. Election of plaintiff to discontinue action—After further particulars delivered.]—PASCALL *v.* TOOPE, No. 2721, *ante*.

Prior publication.]—*See* Nos. 2679–2686, *ante*.

Prior user.]—*See* Nos. 2670, 2683, 2687, 2689, 2701, *ante*.

Common knowledge.]—*See* No. 2709, *ante*.

Insufficiency of description.]—*See* Nos. 2711, 2713, 2717, *ante*.

2723. Defendant relying on whole of number of specifications.]—In an action for infringement of a patent deft., in his particulars of objections, alleged publication by seventeen prior specifications, relying in some cases on the whole & in other cases giving pages & lines & pointing out the claims in pltfs.' specification to which the anticipations referred. Pltfs. applied for further & better particulars, asking that deft. should be ordered to state what, in the case of each specification, was the nature of the anticipation on which he relied, & in what part of each specification such alleged anticipation was to be found. Pltfs. referred to one of the alleged anticipating specifications, as to which the whole was relied on, as an instance ; that specification contained fourteen pages of letterpress, seven sheets of drawings, twenty-three figures, & had fifteen claiming clauses. Deft.'s counsel stated they had considered this carefully & relied on the whole of it. It was held, without examining the particular instance in detail, that there must be some definition or limitation of what was intended to be referred to & what was not ; & that speaking generally a specification should not be referred to as a whole, but that the picking out of some parts was desirable & proper, & without laying down any general rule, further & better particulars must be given in all the cases in which objection was made. Deft. appealed :—*Held :* deft. appeared to have honestly done his best to give proper particulars, & in such a case, unless there was some obvious or grievous mistake, the ct. ought not to tie his hands too tight, & in the present case the particulars given were all which could be reasonably required.—NETTLEFOLDS *v.* REYNOLDS (1891), 65 L. T. 699 ; 8 R. P. C. 410, C. A.

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 3, D. (f) i., ii., iii., iv. & v.;

(*f*) *Amendment.*

i. *In General.*

. S. C., Ord. 53A, r. 17.

2724. Power of court to allow.]—BRITAIN *v.* HIRSCH (1888), 5 R. P. C. 226, C. A.

Annotation:—**Refd.** Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424.

ii. *When Allowed.*

See R. S. C., Ord. 53A, r. 17.

2725. On discovery of new facts.]—In a suit to establish the validity of a patent, where the patent is impeached on the ground of want of novelty & prior user of the invention, deft. will not be allowed, in the course of the hearing before the ct. without a jury, to introduce evidence of prior user not disclosed by the particulars of objection, although such evidence may have only come to his knowledge since the delivery of the particulars of objection. *Semble:* the ct. will give deft. leave, on short notice of motion, to amend his particulars of objection, so as to introduce such newly-discovered evidence.—DAW *v.* ELEY (1865), L. R. 1 Eq. 38; 13 L. T. 399; 11 Jur. N. S. 923; 14 W. R. 48.

Annotations:—**Refd.** Parnell *v.* Mort, Liddell (1885), 29 Ch. D. 325; Moss *v.* Malings (1886), 33 Ch. D. 603.

2726. —— Not previously discoverable with due diligence.]—HOLSTE *v.* ROBERTSON, No. 2635, *ante.*

2727. —— ——.]—In the course of the hearing of a patent action, after the examination & cross-examination of pltf. had been concluded, deft. asked for leave to amend the particulars of objection, alleging that since the close of the cross-examination deft. had discovered some new facts showing that pltf.'s alleged invention was not new at the date of the patent; & to have the further hearing of the action postponed:—*Held:* the application must be refused, there being nothing to show that deft. could not, with reasonable diligence, have discovered the new facts sooner.—MOSS *v.* MALINGS (1886), 33 Ch. D. 603; 56 L. J. Ch. 126; 35 W. R. 165; Griffin's Patent Cases (1887), 166.

Annotation:—**Refd.** Slazenger *v.* Feltham (1889), 5 T. L. R. 364.

2728. After refusal of defendant to amend particulars.]—In 1873 letters patent for improvements in lace machines were granted to H. In 1877 H. went into liquidation, & the patent was sold by the trustee to pltfs. H. afterwards entered into partnership with S. This action was brought against S. & H. to restrain them from infringing the patent. By an order made when the action came on for trial it was postponed, with liberty to S. & H. to deliver specified objections, when S. & H. denied infringement, & S. objected to the validity of the patent on the ground of want of novelty & insufficiency of the specification.

The cross-examination of pltfs.' witnesses showed want of novelty in one of the subsidiary combinations in the machine:—*Held:* H. never having asked for leave to amend his particulars of objection, but having to the last argued the case on the ground that no such amendment was necessary, leave ought not to be now given, but his appeal must be dismissed.—CROPPER *v.* SMITH Ch. D. 700; 53 L. J. Ch. 891; 51 L. T. 729; 33 W. R. 60, C. A.; *revsd.* on other grounds, *sub nom.* SMITH *v.* CROPPER (1885), 10 App. Cas. 249, H. L.

Annotations:—**Consd.** Shoe Machinery Co. *v.* Cutlan, [1896] 1 Ch. 108. **Apld.** Pirie *v.* Richardson (No. 1) (1926), 70 Sol. Jo. 1023. **Mentd.** *Re* Crighton & Law Car & General Insce. Corpn., [1910] 2 K. B. 738.

iii. *What Amendments may be Allowed.*

2729. Prior user.]—DAW *v.* ELEY, No. 2725, *ante.*

2730. ——.]—AVELING *v.* MCLAREN (1880), 17 Ch. D. 139, n.

Annotation:—**Folld.** Edison Telephone Co. of London *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1881), 29 W. R. 496.

2731. ——.]—Deft. in one of these actions which had been ordered to be tried one after the other, applied shortly before the trial for leave to amend his particulars of objections by adding a public user at the South Kensington Museum of particular engines, which it transpired had, by leave of the authorities, been removed to deft.'s premises, where, however, deft. was willing to give pltf. facility for inspecting same:—*Held:* leave must be granted; but the costs of & consequent on the amendment & the application were to be pltf.'s in any event.—OTTO *v.* STEEL, OTTO *v.* STERNE (1885), 2 R. P. C. 139; Griffin's Patent Cases (1884–1886), 179; *subsequent proceedings*, 31 Ch. D. 241.

Annotation:—**Refd.** Harris *v.* Rothwell (1886), Griffin's Patent Cases (1884–1886), 109.

2732. Prior specification.]—AVELING *v.* MCLAREN, No. 2730, *ante.*

2733. —— Additional prior specifications—Prior use of similar contrivances.]—DARRAH *v.* PURSER (1889), 6 R. P. C. 365.

2734. Misrepresentation.]—TECALEMIT, LTD. *v.* EX-A-GUN, LTD. (1926), 44 R. P. C. 62, C. A.

2735. —— Where common use pleaded.]—In an action for infringement of a patent deft. pleaded that if pltfs. alleged that deft. used a material part of pltfs.' invention, such part of the invention was old & in common use. Deft. gave no particulars of objections. The action was consolidated with an action to restrain threats by the patentees, in which action on a motion for an injunction, deft. had given evidence by affidavit that the pltfs.' patent was anticipated by certain specifications. No order was made on the motion. At the trial of the two actions consolidated, deft. wished to rely on these specifications as evidence that the parts of pltfs.' machine were old:—*Held:* pltfs. might reasonably conclude the defence of anticipation was abandoned, & the specifications could not be received in evidence. Leave to amend the particulars was given on the terms stated in the *Edison Telephone Company* v. *India Rubber Co.*, No. 2736, *post.*—MACKIE *v.* SOHO LAUNDRY SUPPLY CO., LTD., SOHO LAUNDRY SUPPLY CO., LTD. *v.* MACKIE (1893), 9 T. L. R. 301; *sub nom.* SOLVO LAUNDRY SUPPLY CO., LTD. *v.* MACKIE, MACKIE *v.* SOLVO LAUNDRY SUPPLY CO., LTD., 10 R. P. C. 68.

2736. New instances of prior publication.]—In granting deft. in a patent action after issue joined, & a day has been fixed for the hearing, leave to amend his particulars of objection, the ct. will place pltf. in the same position as to discontinuing the action, or disclaiming a [illegible] of his invention, as he would have been original particulars of objection had contained

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PART XIV. SECT. 2, SUB-SECT. 3.—D. (f) i.

c. *Power of court to allow — Amendment by Court of Appeal—After trial & before hearing of appeal.*]—Particulars of objections allowed to be amended by Ct. of Appeal after trial & before the hearing of the appeal, by adding a specification among those relied on as prior publications.—PIRRIE *v.* YORK STREET FLAX SPINNING CO., LTD. (1892), 10 R. P. C. 34.—IR.

the new instances of prior publication proposed to be introduced by amendment; & accordingly all costs incurred by pltf. subsequently to the delivery of the original particulars of objection will be ordered to be paid to him by deft. in case he elects, within a time fixed by the order, to discontinue his action.—EDISON TELEPHONE Co. *v.* INDIA RUBBER Co. (1881), 17 Ch. D. 137; 29 W. R. 496.

Annotation:—**Reld.** Solvo Laundry Supply Co. *v.* Mackie, Mackie *v.* Solvo Laundry Supply Co. (1893), 10 R. P. C. 68.

2737. Insufficient description.]—(1) The B. co., as owners of a patent for the manufacture & production of dye stuffs, brought an action for infringement thereof against the C. co. & W., claiming the usual relief. Defts. denied infringement of the patent, & they denied validity on various grounds set forth in their particulars of objections, one being that it was anticipated by the previous specification of M. In the course of the trial they were allowed to amend their particulars by introducing a fresh objection, that one of the processes described in the specification, by way of example, was insufficiently described:—*Held:* pltf.'s patent was not anticipated by M.'s patent, but it was invalid on the ground of insufficiency of the description of one of the processes given by way of example in the specification. Judgment was given for defts. in respect of the first patent & on the issue as to the validity of the second patent. Special order was made as to costs.

(2) Test tube experiments are not nearly so satisfactory as those carried out on a commercial scale . . . I think a chemical patent, dealing with very subtle & delicate reactions, is entitled to the benefit of being tested by the results of its working in the hands of persons not merely practised in chemistry generally, but having acquired the necessary familiarity with the processes, & . . . I think that persons accustomed to produce pure 6 G, are much more likely to work it to success than persons accustomed to produce only the impure product, or persons, however skilful, accustomed only to laboratory experiments (WILLS, J.).—BADISCHE ANILIN UND SODA FABRICK *v.* SOCIETÉ CHIMIQUE DES USINES DU RHONE & WILSON (1898), 14 R. P. C. 875; *affd.*, 15 R. P. C. 359, C. A.

Annotations:—*As to* (1) **Refd.** Acetylene Illuminating Co. *v.* United Alkali Co., [1902] 1 Ch. 494; Flour Oxidising Co. *v.* Carr (1908), 25 R. P. C. 428.

iv. *Terms on which Allowed.*

2738. Payment of costs thereof in any events.]—OTTO *v.* STEEL, OTTO *v.* STERNE, No. 2731, *ante.*

2739. —— Plaintiff's right to continue or discontinue.]—EDISON TELEPHONE Co. *v.* INDIA RUBBER Co., No. 2736, *ante.*

2740. ——.]—PARKER *v.* MAIGNEN'S FILTRE RAPIDE Co. (1888), 5 R. P. C. 207.

2741. ——.]—AVELING *v.* MCLAREN, No. 30, *ante.*

2742. ——.]—The settled rule in patent actions, that deft. may have leave to amend his particulars upon the terms that pltf. may discontinue his action within a given time, & in that case deft. must bear the costs between the times of delivery of the first & of the amended particulars, is applicable to actions for the infringement of registered designs.—MORRIS WILSON & Co. *v.* COVENTRY MACHINISTS Co., [1891] 3 Ch. 418; 60 L. J. Ch. 524; 8 R. P. C. 353; 40 W. R. 152.

Annotation:—**Consd.** Woolley *v.* Broad, [1892] 2 Q. B. 317.

2743. ——.]—In an action for an infringement of a patent defts., on July 28, 1898, delivered particulars of objections with their defence. On Jan. 23, 1899, they obtained an order to amend their particulars, the costs of the amendment to be pltfs.' in any event; pltfs. to have six weeks to elect to discontinue; if they discontinued defts. were to be at liberty to tax their costs up to & including July 28, 1898, & pltfs. were to be at liberty to tax their costs subsequently to that date. On Jan. 30, 1899, defts. delivered their amended particulars, & on April 12, 1899, pltfs. delivered their reply with notice of trial. On May 9, 1899, defts. obtained an order from the master to re-amend their particulars of objections on terms similar to those of the previous order, except that in the event of discontinuance defts. were to be at liberty to tax their costs up to Jan. 30, 1899, & pltfs. to tax their costs subsequently to that date. This order having been confirmed by the judge in chambers, pltfs. appealed to the Ct. of Appeal, on the ground that they ought to have their costs subsequent to July 28, 1898, instead of only subsequent to Jan. 30, 1899:—*Held:* the order appealed from was right, & the appeal should be dismissed with costs.—WILSON (HERBERT WILLIAM) & WILSON BROTHERS BOBBIN Co., LTD. *v.* WILSON & Co. (BARNSLEY), LTD. (1899), 16 R. P. C. 315, C. A.; *subsequent proceedings* (1902), 20 R. P. C. 1, H. L.

2744. Plaintiff not to be prejudiced.]—In granting defts. in a patent action leave to amend the particulars of objection, the ct., even where pltf., the patentee, has been aware of the existence of the alleged anticipation before the commencement of the action, will impose terms upon defts. which will place pltf. in the same position as if the amended particulars had been those originally delivered with the statement of defence.—EHRLICH *v.* IHLEE (1887), 56 L. T. 819; 4 R. P. C. 115.

Annotation:—**Distd.** Wilson & Wilson Bobbin Co. *v.* Wilson (Barnsley) (1899), 16 R. P. C. 315.

v. *Effect of Amendment.*

2745. Defendant successful—Deprived of costs.]—ALLEN *v.* HORTON (1893), 10 R. P. C. 412.

2746. ——.]—BADISCHE ANILIN UND SODA FABRICK *v.* SOCIETÉ CHIMIQUE DES USINES DU RHONE & WILSON, No. 2737, *ante.*

SUB-SECT. 4.—INTERLOCUTORY INJUNCTION.

A. Grounds for Granting or Refusing.

(*a*) *In General.*

See Patents & Designs Acts, 1907 (c. 29), s. 34; 1919 (c. 80), s. 10, sched.; &, *generally*, INJUNCTION, Vol. XXVIII., pp. 371 *et seq.*

2747. Discretion of court.]—In the case of the alleged infringement of a patent, this ct. must grant, or refuse, the injunction according to the opinion it may form after an examination of the affidavits. But those, who best know the mode of our proceedings in cases of this kind, must all

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PART XIV. SECT. 2, SUB-SECT. 4.—A. (a).

..... *of court — Proceed-* ..... *in two courts of concurrent jurisdiction.*]—Where the exchequer ct. was asked to grant an *interim* injunction to restrain an infringement of a patent of invention, & similar proceedings had been previously taken in a provincial ct. of concurrent jurisdiction, which had not been discontinued at the time of such application being made, the ct. refused the application.—AUER INCANDESCENT LIGHT MANUFACTURING Co. *v.* DRESCHEL (1897), 5 Exch. C. R. 384.—**CAN.**

e. Claim to more than nominal damages must be waived.]—To entitle

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 4, A. (a) & (b).]

agree in thinking that such opinion, to whichever side it may lean, ought to have no influence with the ct. of common law (LORD ELDON, C.).—HILL *v.* WILKINSON (1817), 2 Coop. *temp.* Cott. 57 ; 47 E. R. 1049, L. C.

2748. Injunction granted—Infringement admitted.]— —— *v.* ——, No. 1625, *ante*.

2749. —— Though defendant promise no further infringement.]—(1) Upon the invasion of a patent right the party complaining has a right to the protection of an injunction, although the other party may promise to commit no further infringement, & may offer to pay the costs of preparing the bill ; & if deft. does not, after injunction obtained, offer to pay the costs of it, pltf. may bring the suit to a hearing, & will be entitled to the costs of the suit.

(2) *Qu.:* whether in such a case the ct. will give an account of damages.—GEARY *v.* NORTON (1846), 1 De G. & Sm. 9 ; 63 E. R. 949.

Annotations:—As to (1) **Distd.** Proctor *v.* Bailey (1889), 42 Ch. D. 393. **Refd.** Davenport *v.* Rylands (1865), L. R. 1 Eq. 302.

2750. —— Infringement clear.] — THORN *v.* WORTHING SKATING RINK CO., No. 2398, *ante*.

2751. —— —— Dispute as to licence fee.]—S., when purchasing a certain machine, was told by the vendor that he would have to obtain a licence from the owners of the patents which would cost £5 ; he thereupon forwarded £5 to the owners of the patents "for perpetual licence for graphophone for public exhibition ; also licence plate for same." The owners of the patents acknowledged the receipt of £5 for royalty, & enclosed a licence plate, but no formal licence was executed. On the owners of the patents making further inquiries of S., he wrote saying that the machine in question was a graphophone grand. S., refusing to pay a further sum of £45 to make up the charge of £50 which the owners of the patents alleged to be their charge for a licence for a graphophone grand, the latter commenced an action for infringement of their patents, alleging that they were misled by the terms of the application to them, & that the graphophone grand was a different instrument from the graphophone, which name by itself would indicate to those in the trade one of the smaller instruments. They moved for an injunction until the trial, which was granted. — EDISON-BELL CONSOLIDATED PHONOGRAPH CO., LTD. *v.* ROSENBERG & SCOTT (1899), 16 R. P. C. 608.

2752. —— Infringement not accidental—Importance of case.]—POULTON & SON *v.* KELLEY & SON (1904), 21 R. P. C. 392.

2753. Injunction refused—Both parties having patents for same invention.]—Where two parties have obtained patents for the same invention, this ct. will not interfere by injunction but leave them to try the legal right by *sci. fa.*, being disabled, by reason of 25 & 26 Vict. c. 42, s. 1, from directing a case for the opinion of a ct. of law.—COPELAND *v.* WEBB (1862), 1 New Rep. 119 ; 11 W. R. 134.

2754. —— Invention not subject-matter of patent.]—In an action for infringement of a patent for an invention "of a new mourning coach," pltf. moved for an interlocutory injunction. The judge refused the motion with costs, expressing his opinion that the alleged invention was not subject-matter of a patent.—TADMAN *v.* OWENS (1894), 11 R. P. C. 349.

2755. Whether injunction continued—Action pending against another party.]—The fact of a pendency of an action against another party is not a sufficient ground for continuing an *ex p.* injunction without putting pltf. to bring an action against new deft.—RUSSELL *v.* BARNSLEY (1834), 2 Coop. *temp.* Cott. 58 ; 1 Web. Pat. Cas. 472 ; 47 E. R. 1049.

(b) *Primâ facie Case of Validity and Infringement.*

2756. Foundation of claim for injunction.]—Where there is one question whether a patent is valid, & another question whether it has been infringed, this ct. would be going a great way if it took upon itself to grant an injunction (LORD ELDON, C.).—WOOD *v.* COCKERELL (1819), 2 Coop. *temp.* Cott. 57 ; 47 E. R. 1049, L. C.

2757. ——.]—Deft. in a suit to restrain the infringement of a patent is entitled to dispute the validity of the patent, although pltf. has obtained a judgment at law against another person establishing its validity ; but until he has proved its invalidity he will be restrained from infringing it. —BOVILL *v.* GOODIER (2) (1866), L. R. 2 Eq. 195 ; 35 Beav. 427 ; 35 L. J. Ch. 432 ; 12 Jur. N. S. 404 ; 55 E. R. 961.

2758. ——.]—Pltfs. brought an action for an injunction to restrain the infringement of a patent vested in them, & moved for an interlocutory injunction. At the date of the hearing of the motion, the patent was ten years old. Defts. by their affidavits denied the novelty of pltfs.' patent, & also denied that what they were doing amounted to infringement:—*Held:* as the patent was ten years old, & its novelty had not previously been challenged, it must, for the purpose of an interlocutory motion be treated as a good patent, & as pltfs. had established a *primâ facie* case of infringement they were entitled to an interlocutory injunction.—SHILLITO *v.* LARMUTH & CO. (1884), 2 R. P. C. 1.

2759. ——.]—(1) In order to succeed on an interlocutory application they [patentees] must, in my opinion, establish a strong *primâ facie* case both in regard to validity & in regard to infringement (RUSSELL, J.).

(2) Pltf. must first of all establish his case for an interlocutory injunction, & then it may be that, notwithstanding that, the ct. will relieve deft. from an injunction upon his undertaking to keep an account, if he is a person of such substance that the undertaking will give the relief which pltf. requires (RUSSELL, J.).—BONNELLA *v.* ESPIR (1926), 43 R. P. C. 159.

2760. Necessity for validity.]—The rule of the ct. is that an injunction shall not be granted, unless the ct. entertains no doubt respecting the validity of the patent (LORD ELDON, C.).—COCHRANE *v.* SMETHURST (1816), Dav. Pat. Cas. 355, n. ; 2 Coop. *temp.* Cott. 57 ; 47 E. R. 1048, L. C.

2761. ——.]—(1) The ct. will not, generally, in doubtful cases, restrain by injunction the infringement of an asserted legal right, until its validity has been established by an action at law ; *secus:*

pltf. to an *interim* injunction or account, he must waive all claim to more than nominal damages at the trial.—BONATHAN *v.* BOWMANVILLE FURNITURE MANUFACTURING CO. (1870), 5 P. R. 195.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 4.—A. (b).

2756 i. *Foundation of claim for injunction.*]—A party applying for an injunction under Patent Act, 1872, s. 24, during the pendency of the action, is bound to show by his affidavits that his patent is valid & that an actual infringement has taken place, & also the particulars in which it consists.—HAMILTON *v.* THOMSON (1875), 16 N. B. R. (3 Pug.) 237.—**CAN.**

where there has been long uninterrupted enjoyment under a patent that being regarded as *prima facie* evidence of title.

(2) When the ct. grants an injunction, the order ought not merely to direct that an action shall forthwith be brought, with liberty to the parties to apply in case of delay, but to give such directions of its own, in the first instance, as will insure the speedy trial of the action.

An injunction granted pending an action to be brought by pltf., for the speedy trial of which special directions were given, was dissolved on the ground of pltf. not having duly complied with those directions.—STEVENS *v.* KEATING (1847), 2 Ph. 333; 2 Web. Pat. Cas. 176; 8 L. T. O. S. 405; 41 E. R. 971, L. C.

Annotations:—As to (1) **Consd.** Lister *v.* Leather (1857), 5 W. R. 550. *Generally*, **Reid.** Heath *v.* Unwin (1847), 15 Sim. 552; Purser *v.* Brain (1848), 17 L. J. Ch. 141; Unwin *v.* Heath (1855), 5 H. L. Cas. 505. **Mentd.** Young *v.* Fernie (1864), 4 New Rep. 218.

2762. ——.]—The ct. should be extremely cautious in exercising its power of interfering by injunction, where any doubt is thrown upon the validity of pltf.'s legal title, inasmuch as the injury which pltf. might sustain from the non-interference of the ct. cannot be equal to that sustained by deft. should it turn out that the legal title of pltf. could not be sustained. The principle on which the ct. interferes by injunction in aid of the legal title, & the extent to which non-interference in support of a *primâ facie* title at law had been carried.

If there is any doubt whatever respecting the validity of the legal right, the ct. ought to be extremely cautious in exercising its power of interfering by injunction. There are two reasons why this power of the court ought not to be lightly put in motion; the first is, that if it should turn out that appct.'s legal title should fail, the ct. would have interfered without any necessity; & the second & principal reason is, that there is no comparison in the mischief which might result with the granting & withholding of the injunction. The measure of injury which pltf. might sustain from the non-interference of the ct. could not be equal to that which defts. might suffer from the granting of an injunction which could not afterwards be sustained; the more so, as in the one case the damage done might be ascertained & recovered, but not so in the other. . . . On referring to the case of *Hill* v. *Thompson*, No. 2805, *post*, LORD ELDON . . . stated that he would not trust his judgment to pronounce an opinion as to the validity of a patent by granting an injunction, where such patent was a new one; which was carrying the principle much further than I have ever done. The rule, however, that the ct. should be cautious in restraining a deft., where it was not quite clear that pltf. had legal title, was subject to this exception; that if the patent of pltf. had been in existence for a lengthened period of time, without question it ought to be presumed that he had a legal title against all the world until such patent were proved to be invalid; & under such circumstance he was entitled to the protection of this ct. (LORD COTTENHAM, C.).—ELECTRIC TELEGRAPH Co. *v.* NOTT (1847), 2 Coop. *temp.* Cott. 41; 8 L. T. O. S. 529; 11 Jur. 157; 47 E. R. 1040, L. C.; *subsequent proceedings*, 4 C. B. 462.

2763. ——.]—Although it is the ordinary rule of the ct. not to grant an injunction unless either the validity of the patent has been established or the patent has been undisputed for many years the circumstances of the case may be such as to induce the ct. to depart from that rule.—RENARD *v.* LEVINSTEIN (1864), 10 L. T. 94; *on appeal*, 10 L. T. 177, L. JJ.

Annotation:—**Reid.** *Re* Avery's Patent (1887), 36 Ch. D. 307.

2764. ——.]—(1) There is no *primâ facie* presumption in favour of a patent which has not been established at law.

(2) Patentees, having notice of a proposed sale by R. of articles which they alleged to be an infringement of their patent, wrote to R. to obtain formal proof on which to found legal proceedings, which R. furnished to them. They subsequently issued a circular to the trade stating that they had notice of an intended infringement, & threatening proceedings in every case. On being pressed by R. to bring an action to determine the validity of the patent, they refused to do so, but continued to issue the circulars. It was proved that these circulars injured R.'s trade:—*Held:* under the above circumstances the patentees were bound either to bring an action or to cease from issuing the circulars; & upon their refusing to bring an action, an injunction was granted restraining the issue of the circulars.—ROLLINS *v.* HINKS (1872), L. R. 13 Eq. 355; 41 L. J. Ch. 358; 26 L. T. 56; 20 W. R. 287.

Annotations:—As to (1) **Dbtd.** Halsey *v.* Brotherhood (1880), 15 Ch. D. 514. *As to* (2) **Distd.** Clark *v.* Adie (1873), 21 W. R. 456. **Folld.** Axmann *v.* Lund (1874), L. R. 18 Eq. 330. **Expld.** Halsey *v.* Brotherhood (1880), 15 Ch. D. 514. **Refd.** Burnett *v.* Tak (1882), 45 L. T. 743. *Generally*, **Refd.** Hinks *v.* Safety Lighting Co. (1876), 4 Ch. D. 607.

2765. ——.]—The S. Corpn., Ltd., being the owners of several patents relating to the manufacture of saccharin, commenced an action for infringement of the same against the C. & D. co., Ltd., & moved for an interlocutory injunction. The motion was dismissed on the ground that the validity of the patents was in dispute. Pltfs. appealed, &, in the course of arguments on the appeal, applied for leave to cross-examine one of the secretaries of deft. co., who had made an affidavit, on the ground that it was evasive. Cross-examination was allowed, as an exceptional case, before the ct., by its leave. The appeal was dismissed, with costs.

(2) Affidavits made on information & belief must show what the sources of information are.—SACCHARIN CORPN., LTD. *v.* CHEMICAL & DRUGS CO., LTD. (1898), 15 R. P. C. 53, C. A.

2766. ——.]—Letters patent were granted to pltfs. for "Improvements in connection with hanging book carriers or brackets for securing books, cards, tablets, & the like purposes" on July 25, 1910. On July 23, 1910, P. was employed by pltfs. to obtain orders for advertisements in connection with covers for telephone directories, & for this purpose the invention & a draft provisional specification were communicated to him, as pltf. alleged in confidence. Subsequently P. left pltf.'s employ & made & sold the invention on behalf of a co. of which he was a director. Pltf. commenced an action for infringement against P. & the co. & moved for an *interim* injunction. Defts. alleged that the patent was invalid by reason of prior publication by deft. P. before July 25, 1910, prior to which, at pltf.'s request, he had shown & explained the invention to various people on whom he had called for the purpose of obtaining orders for advertisements. There was a conflict of testimony as to what took place at the interview when the invention was communicated to deft. P.:—*Held:* the patent not having been established, an *interim* injunction would not be granted.—TRAUTNER *v.* PATMORE (1911), 29 R. P. C. 60.

Annotation:—**Consd.** Smith *v.* Grigg, [1924] 1 K. B. 655.

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 4, A. (b), (c) & (d).]

2767. ——.]—In 1907 a patent was granted to F. for "Improvements in variable speed gear for belt driven motor vehicles." In 1911 an action was brought for infringement of this patent, & pltfs. moved for an interlocutory injunction. Defts. denied infringement & the validity of the patent:—*Held:* as the validity of the patent was disputed & the patent had not been established, an *interim* injunction should be refused on defts. undertaking to keep an account.—ZENITH MOTORS, LTD. *v.* COLLIER (H.) & SON, LTD. (1911), 28 R. P. C. 563.

Circumstances creating primâ facie case of validity—Validity established in previous action.]—*See* Sect. 2, sub-sect. 4, A. (*c*), *post.*

Undisturbed user for period of time.]—*See* Sect. 2, sub-sect. 4, A. (*d*), *post.*

Conduct of parties.]—*See* Sect. 2, sub-sect. 4, A. (*f*), *post.*

What constitutes infringement.]—*See* Part XIV., Sect. 1, *ante.*

(c) Validity Established in Previous Action.

2768. Whether injunction granted.]—Though a patentee has enjoyed his patent for a considerable time, & has succeeded in several actions for an infringement thereof in upholding his patent, & has obtained injunctions restraining the parties so infringing, yet, if there be a new infringement by a different party, an injunction to restrain him will not be granted till after a trial at law, however palpable the infringement by the party may be.—CROSSKILL *v.* EVORY (1848), 10 L. T. O. S. 459.

Annotation:—**Refd.** Bovill *v.* Goodier (1866), 35 Beav. 427.

2769. ——.]—RENARD *v.* LEVINSTEIN, No. 2763, *ante.*

2770. ——.]—This was an action for infringement of two patents; as to the first, the validity had been established in a contested action both in the lower ct. & the Ct. of Appeal, & a certificate of validity granted; as to the other, a certificate had been given in an action not contested at the trial, though validity was contested up to that time, & in a second action the validity was contested up to the trial, & then deft. submitted. Pltfs. now moved for an interlocutory injunction. Deft. relied on the fact that the judge had not granted an interlocutory injunction in the last-mentioned action, & alleged that the judgment was merely collusive & the result of a compromise, & contended that, as the validity of the patent had not been established by a contested trial, the course followed by the judge, ought to be followed, & an interlocutory injunction not granted:—*Held:* there was no collusion or compromise, & the position had been altered since the decision of the judge, & an interlocutory injunction was granted, restraining the infringement of both patents.—EDISON-BELL PHONOGRAPH CORPN., LTD. *v.* BERNSTEIN (1897), 14 R. P. C. 153.

2771. ——.]—Pltfs. come into ct. with a certificate that the validity of this patent came in question, & therefore they come with a *primâ facie* case under the order of the judge, who heard the evidence that this patent is valid (COLLINS, L.J.).—WELSBACH INCANDESCENT GAS LIGHT CO., LTD. *v.* VULCAN INCANDESCENT LIGHT SYNDICATE, LTD. (1901), 18 R. P. C. 279, C. A.

2772. ——.]—(1) Letters patent were granted in 1913 for "Improvements in incandescent electric lamps." In an action for infringement of the patent, it had been held invalid at the trial & in the Ct. of Appeal, but on appeal to the House of Lords the patent was held to be valid & a certificate of the validity was subsequently granted. After the grant of the certificate the patentees commenced an action for infringement of the patent against different defts., & moved for an *interim* injunction to restrain defts. from infringing the patent. Defts. filed evidence setting out new grounds of invalidity of the patent, & it was stated on their behalf that they intended to contest the action & do all they could to impeach the validity of the patent. Defts on these grounds resisted the motion for an *interim* injunction:—*Held:* there was no evidence before the ct. showing that defts. were doing such a business as that the granting of an injunction would inflict irreparable damage on them; & having regard to the fact that the only evidence furnished by defts.' expert was to the effect that, if the information furnished to him by defts. could be proved to be accurate, then the prospects of success were good, & in view of the fact that a certificate of validity had been granted, an injunction, to which pltfs. were *primâ facie* entitled, ought to be granted.

(2) If a *primâ facie* case were made on such a motion that defts. intended to pursue a *bonâ fide* objection to pltfs.' patent, &, if it were a case in which the granting of an injunction would inflict irreparable damage on defts. in their business & pltfs. might to some extent be protected if some lesser relief than that by way of injunction were granted, the ct. would incline to give the lesser relief.—BRITISH THOMSON-HOUSTON CO., LTD. *v.* B. T. T. ELECTRIC LAMP & ACCESSORIES CO. (1922), 39 R. P. C. 167.

2773. —— Fresh fact adduced impeaching validity—Exclusive enjoyment for considerable period.]—(1) Where a patent had been in force for twelve years & had been the subject of four suits against different persons, all of which terminated favourably to the patentee, & in two of which verdicts had been given in favour of the validity of the patent:—*Held:* in a fifth case, the patentee was entitled to an injunction pending the trial of the legal right, although a fresh fact was brought forward, tending to impeach the novelty of the invention.

(2) A patentee does not acquiesce in the infringement of his patent by omitting to proceed by *sci. fa* to set aside a subsequent patent extending to part of his invention, unless such subsequent patent is put in practice.

(3) An allegation as to deft.'s inability to be answerable in damages:—*Held:* not irrelevant upon a motion for an injunction against the infringement of a patent.—NEWALL *v.* WILSON (1852), 2 De G. M. & G. 282; 19 L. T. O. S. 161; 42 E. R. 880, L. JJ.

Annotation:—*As to* (1) **Refd.** Bovill *v.* Goodier (1866), 35 Beav. 427.

2774. —— Proceedings not taken to set aside subsequent patent—Patent not put into practice.]—NEWALL *v.* WILSON, No. 2773, *ante.*

2775. —— Where court sees no reason to doubt propriety of result—Interdict granted in Scotland.]—(1) The ct. will grant an interlocutory injunction against the infringement of a patent, where the patent is an old one & the patentee has been in long & undisturbed enjoyment of it, or where its validity has been established elsewhere, & the ct. sees no reason to doubt the propriety of the result, or where the conduct of deft. is such as to enable the ct. to say that, as against deft., there is no reason to doubt the validity of the patent.

(2) The fact of an interdict having been granted

against deft. by the Ct. of Session in Jan. 1873, held to be sufficient *primâ facie* evidence of the validity of a patent for the United Kingdom granted in 1866, to warrant the ct. granting an interlocutory injunction.—DUDGEON *v.* THOMSON (1874), 30 L. T. 244; 22 W. R. 464.

Annotation:—*Generally*, **Refd.** Ellington *v.* Clark, Bunnett (1887), 58 L. T. 40.

2776. —— No substantial question to be tried.]—The ct. is always ready to interfere upon interlocutory motion where a patent has been established, & where there really is not substantially any case to be tried at the hearing (KAY J.).—UNITED TELEPHONE CO. *v.* GEORGE (1886), 3 R. P. C. 321; Griffin's Patent Cases (1884–1886), 230.

2777. —— Defendant offering account.]—F., the owner of a patent for a dye, brought an action for infringement against B., who denied infringement, & alleged that the patent was invalid. At the trial the validity of the patent was upheld & an injunction granted. It was proved that B. bought the infringing dye from the D. co., of which D. was the manager. D. was in fact defending the action. The D. co. were dye manufacturers, & either imported the infringing dye or manufactured it. F. subsequently commenced an action against D., who submitted to an injunction. F. then commenced the present action for infringement against the D. co., who desired to dispute the validity of F.'s patent, & contended that an injunction ought not to be granted against them, they offering to keep an account:—*Held:* it was a proper case for granting an injunction.—FARBENFABRIKEN VORM. F. BAYER & CO. *v.* JOHN DAWSON, LTD. (1891), 8 R. P. C. 397.

2778. —— Appeal from action pending—Defendants offering to pay royalties.]—A patentee having obtained a decision of the Ct. of Appeal in support of a patent & an injunction against one deft., commenced an action for infringement of the same patent against other defts., who were using a machine made by the person who made first deft.'s machine, & similar to such machine:—*Held:* an interlocutory injunction should be granted, although first deft. had an appeal pending to the House of Lords, & defts. in the present action offered to pay royalties pending the appeal, such royalties to be returned if pltf. ultimately failed.—MOSER *v.* SEWELL & HUTTON (1893), 10 R. P. C. 365, C. A.

2779. —— Primâ facie case of infringement.]—HEINE, SOLLY & CO. *v.* JULIUS NORDEN & CO. (1904), 21 R. P. C. 513.

2780. —— Plaintiff not guilty of laches.]—Pltfs. were the owners of a patent, which was held valid on Jan. 28, 1896, at the trial of an action for infringement. In Feb. they discovered that present deft. was infringing the patent, & an infringing tyre was purchased from him on Feb. 14. On Feb. 24, the present action was commenced for infringement of the patent. On Mar. 24, notice of motion was given for an interlocutory injunction. Deft., on the hearing of the motion, contended (*a*) that there was no infringement; & (*b*) that pltfs. had been guilty of laches, on the ground that deft. was the agent of a Scottish co., who had to the knowledge of pltfs., been selling tyres identical with that now complained of for eighteen months or two years:—*Held:* there was infringement; there was no laches of pltfs. in taking proceedings against deft.; & an injunction should be granted.—PNEUMATIC TYRE CO., LTD. *v.* WARRILOW (1896), 13 R. P. C. 284.

2781. —— On usual undertaking as to damages.]—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* WEDGE PNEUMATIC TYRE CO. (1897), 41 Sol. Jo. 726.

(*d*) *Undisturbed User for Period of Time.*

2782. Court must consider.]—As I apprehend the circumstance, that there had been an exclusive enjoyment for a length of time under the patent, that would be, *primâ facie*, such a circumstance as would bind the ct. to recognise the question of injunction, either in granting it or dissolving it (SHADWELL, V.-C.).—BICKFORD *v.* SKEWES (1837), 1 Web. Pat. Cas. 211; 2 Coop. *temp.* Cott. 59; 47 E. R. 1050; *subsequent proceedings* (1839), 4 My. & Cr. 498, L. C.

2783. Injunction granted—General rule.]—HILL *v.* THOMPSON, No. 2805, *post*.

2784. —— ——.]—STEVENS *v.* KEATING, No. 2761, *ante*.

2785. —— ——.]—ELECTRIC TELEGRAPH CO. *v.* NOTT, No. 2762, *ante*.

2786. —— ——.]—WHEATSTONE *v.* WILDE (1861), Griffin's Patent Cases (1884–1886), 247.

2787. —— ——.]—DUDGEON *v.* THOMSON, No. 2775, *ante*.

2788. —— ——.]—R., the owner of a patent granted in 1880, brought an action for infringement thereof in 1886, & moved for an interlocutory injunction to restrain defts. from infringing until the trial of the action or further order:—*Held:* as R. had been in undisturbed enjoyment of the patent for six years he was entitled to the injunction applied for.—ROTHWELL *v.* KING (1886), 3 R. P. C. 379.

2789. —— ——.]—NATURAL COLOR KINEMATOGRAPH CO., LTD. *v.* SPEER (1912), 29 R. P. C. 669.

2790. —— Validity not previously contested.]—CALDWELL *v.* VANVLISSENGEN. CALDWELL *v.* VERBECK, CALDWELL *v.* ROLFE, No. 2539, *ante*.

2791. —— ——.]—RENARD *v.* LEVINSTEIN, No. 2763, *ante*.

2792. —— ——.]—When the patent has been in existence for ten years, & has not been challenged at the end of ten years, I think this ct. ought to give credit to the patent, & ought to assume, at all events, upon the interlocutory motion, that for the purposes of interlocutory motion the patent is a good patent (PEARSON, J.).—BRIGGS & CO. *v.* LARDEUR & LAMBERT (1884), 1 R. P. C. 126; Griffin's Patent Cases (1884–1886), 55.

2793. —— ——.]—SHILLITO *v.* LARMUTH & CO., No. 2758, *ante*.

2794. —— Validity of patent doubtful.]—In the case of patent rights, if the party gets his patent & puts his invention in execution & has proceeded to a sale, that may be called possession under it, however doubtful it may be whether the patent can be sustained, this ct. has lately said, possession under a colour of title is ground enough to injoin & to continue the injunction until it is proved at law that it is only colour & not real title (LORD ELDON, C.).—OXFORD & CAMBRIDGE UNIVERSITIES *v.* RICHARDSON (1802), 6 Ves. 689; 31 E. R. 1260, L. C.

Annotations:—**Distd.** Gardner *v.* Broadbent (1856), 2 Jur. N. S. 1041. **Refd.** Caldwell *v.* Vanvlissengen, Caldwell *v.* Verbeck, Caldwell *v.* Rolfe (1851), 9 Hare, 415; Betts *v.* Menzie (1857), 3 Jur. N. S. 357; Lister *v.* Leather (1857), 5 W. R. 550. **Mentd.** Grierson *v.* Eyre (1804), 9 Ves. 341; Manners *v.* Blair (1828), 3 Bli. N. S. 391; Performing Right Soc. *v.* London Theatre of Varieties, [1924] A. C. 1.

PART XIV. SECT. 2, SUB-SECT. 4.—A. (d).

2783 i. *Injunction granted—General rule.*]—Where it is established to the ct.'s satisfaction that pltf. has been in long, active & uninterrupted enjoyment of his patent, an *interim* injunction will be granted notwithstanding that there may be some doubt as to the validity of the patent.—DROUTLEDGE *v.* EVANS, [1926] N. Z. L. R. 368.—N.Z.

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 4, A. (d) & (e).]

2795. —— ——.]—There may be considerable doubt as to the validity of a patent, still if there has been a long exclusive enjoyment, the doctrine of the ct. is that an injunction shall go to protect the patent, until the question of its validity is duly determined at law (LORD LYNDHURST).—BEESTON *v.* FORD (1830), 2 Coop. *temp.* Cott. 58; 47 E. R. 1049, L. C.

2796. ——.]—NEWALL *v.* WILSON, No. 2773, *ante*.

2797. ——.]—(1) Although a patent is of long standing, yet if, from the nature of the alleged invention, or the conflicting evidence as to its novelty, its validity appears to be doubtful, or if the evidence of exclusive possession is not satisfactory, the ct. will not grant an injunction until the title has been established at law.

(2) After the patentee had obtained a verdict in an action brought to try the validity of the patent, the ct. refused to grant an injunction to restrain the infringement of the patent on the ground that a rule *nisi* for a new trial had been obtained & was pending in the ct. of law, & that the legal title of the patentee was therefore still undecided.—COLLARD *v.* ALLISON (1840), 4 My. & Cr. 487; 41 E. R. 188.

Annotations:—As to (1) **Consd.** Stevens *v.* Keating (1847), 2 Ph. 333. *Generally*, **Mentd.** Ridgway *v.* Roberts (1844), 4 Hare, 106.

2798. —— **Possession must be exclusive.**]—(1) Where a bill is filed to restrain the infringement by deft. of letters patent, a sufficient case to justify the injunction must be stated by pltf. on the face of the bill, & he must not depend solely on the admissions contained in deft.'s answer for the granting or continuing of the injunction.

(2) If the answer deny the invention to be new, & also the enjoyment under the letters patent, & state, as is the fact, that the specification is imperfectly set forth in the bill, the ct. will dissolve an injunction previously obtained, on affidavit, giving pltf. liberty to bring an action, although deft. admits by his answer that he has made machines upon the principle comprised in the letters patent.

(3) Long & exclusive enjoyment, under letters patent, will entitle a party to an injunction until an action can be tried at law.—CURTIS *v.* CUTTS (1839), 2 Coop. *temp.* Cott. 60; 8 L. J. Ch. 184; 3 Jur. 34; 47 E. R. 1050, L. C.

2799. ——.]—COLLARD *v.* ALLISON, No. 2797, *ante*.

2800. ——.]—(1) Deft. does not prejudice his case by not appearing on a motion for an injunction to restrain him in the infringement of a patent, provided he defends himself in the subsequent proceedings; & if he questions the validity of pltf.'s title even at the hearing, though he may not have done so on the motion for the injunction, & no issue was then directed, yet the ct. will not retain the injunction without directing pltf. to establish his right at law before it grants him further relief.

Where a person has obtained a patent, & had an exclusive enjoyment under it, the ct. will give so much credit to his apparent right as to interpose immediately by injunction to restrain the invasion of it, & continue that interposition until the apparent right has been displaced. On the other hand, if a person takes out a patent for an invention, & is unable to support it, except upon the ground of some alleged improvement in the mode of applying that which was previously in use, & it so becomes a serious question both in point of law & of fact whether the patent is not altogether invalid, then, upon an application to this ct. for what may be called the extra relief which it affords upon a *primâ facie* case, the ct. will use its discretion, & if it sees sufficient ground for doubt, will either dissolve the injunction absolutely, or direct an issue, or direct the party applying to bring an action; after the trial of which, either he may apply to revive, if successful, or else the other party may come before the ct. & say, "I have been successful in displacing this patent, & am entitled to have my costs, by being brought here upon an allegation of right which cannot be supported." . . . Deft. . . . had notice of the motion for an injunction to restrain him from doing what pltf. insisted was an infringement of his patent, & did not appear; & since the injunction has been granted, he has ceased to do the acts complained of, & permitted the injunction to continue. Under these circumstances, I do not think I should be dealing too hardly with deft. if . . . I give pltf. an opportunity of trying his right at law, if he thinks fit (WIGRAM, V.-C.).

(2) *Semble:* the ct. will not make an order for costs where it is probable that proceedings in the cause may afterwards take place which will affect the decision of the ct upon the question of costs. Therefore, where a bill to restrain the infringement of a patent was retained at the hearing, to give the patentee an opportunity of trying the right at law, the ct. refused to make an order as to the costs of the evidence, which were claimed by pltf., on the ground that deft. had not required him to establish his title at law.—WARD *v.* KEY (1846), 7 L. T. O. S. 338; 10 Jur. 792.

2801. —— **Infringement must be shown.**]—Enjoyment for twelve years a *primâ facie* case for an injunction, if an infringement be shown.

Then I have the case of a patent having been obtained in the year 1828 & actually enjoyed by the patentee for upwards of twelve years. *Primâ facie* I apprehend that gives a right to the patentee to come into ct. in a case in which he can show an infringement. . . . My present opinion is that their affidavit does amount to an admission that there has been an infringement: at least quite enough for the ct. to act upon in this way, namely that I think the ct. ought to grant the injunction (SHADWELL, V.-C.).—NEILSON *v.* THOMPSON & FORMAN (1840), 1 Web. Pat. Cas. 275; *on appeal* (1841), 1 Web. Pat. Cas. 278, L. C.

*Annotations:—***Reld.** Stevens *v.* Keating (1847), 2 Ph. 333; Davenport *v.* Jepson (1862), 4 De G. F. & J. 440; Plimpton *v.* Spiller (1876), 4 Ch. D. 286.

2802 —— —— **Primâ facie case.**]—DAVENPORT *v.* RICHARD, No. 2533, *ante*.

2803. —— **Though more injury caused to defendant than to plaintiff.**]—Where there has been long & quiet enjoyment under a patent the ct. will not refuse an interlocutory injunction to restrain infringement of it merely on the ground that deft., if ultimately successful, will have been more injured by its being granted than pltf., if ultimately successful, will have been by its having been refused.—DAVENPORT *v.* JEPSON (1862), 4 De G. F. & J. 440; 1 New Rep. 173; 45 E. R. 1254, L. JJ.

*Annotation:—***Apld.** Rothwell *v.* King (1886), 3 R. P. C. 379.

2804. —— **Must be actual user.**]—An *interim* injunction will not be granted to restrain infringement of a patent several years old but never established by legal proceedings, unless there has been actual user of the patent for a considerable time.—PLYMPTON *v.* MALCOLMSON (1875), L. R. 20 Eq. 37; *sub nom.* PLIMPTON *v.* MALCOLM-

SON, 44 L. J. Ch. 257 ; 23 W. R. 404 ; Goodeve's Patent Cases, 374.

Annotation :—**Refd.** Croysdale *v.* Fisher (1884), Griffin's Patent Cases (1887), 73.

(e) *Recency of Patent.*

2805. Whether ground for refusing injunction—General rule.]—(1) In order to obtain an injunction against a violation of a patent, the party must, at the time of applying, swear as to his belief that he is the original inventor.

(2) Where there has been a length of exclusive enjoyment under a patent, the ct. will grant an injunction in the first instance without previously putting the party to establish his right by an action at law, otherwise where the patent is recent.—HILL *v.* THOMPSON (1817), 1 Web. Pat. Cas. 235 ; 3 Mer. 622 ; 36 E. R. 239, L. C.

Annotations :—*As to* (2) **Consd.** Bickford *v.* Skewes (1827), 1 Web. Pat. Cas. 211 ; Russell *v.* Barnsley (1834), 1 Web. Pat. Cas. 472. **Apld.** Kay *v.* Marshall (1836), 1 My. & Cr. 373. **Consd.** Electric Telegraph Co. *v.* Nott (1847), 2 Coop. *temp.* Cott. 41. **Apld.** Newall *v.* Wilson (1852), 2 De G. M. & G. 282. **Refd.** Curtis *v.* Cutts (1839), 8 L. J. Ch. 184. *Generally*, **Refd.** Brunton *v.* Hawkes (1821), 4 B. & Ald. 541 ; Neilson *v.* Harford (1841), 1 Web. Pat. Cas. 295 ; Crane *v.* Price (1842), 4 Man. & G. 580 ; Cook *v.* Pearce (1843), 8 Q. B. 1044 ; Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194 ; Bovill *v.* Goodier (1866), 35 Beav. 427 ; Murray *v.* Clayton (1872), 20 W. R. 649 ; Clark *v.* Adie (1877), 2 App. Cas. 315 ; Coles *v.* Baylis, Lewis (1886), 3 R. P. C. 178.

2806. ——— ———.]—CALDWELL *v.* VANVLISSENGEN, CALDWELL *v.* VERBECK, CALDWELL *v.* ROLFE, No. 2539, *ante*.

2807. ——— ———.]—GITTINS *v.* SYMES, No. 2275, *ante*.

2808. ——— ———.]—Letters patent having been granted in 1897 to D., he in 1899 granted the W. co. a non-exclusive licence, & in the same year granted the co. an option to purchase one-sixth share in the patent, & agreed not to dispose of any further share & not to grant licences without their consent. Pending the option, but before it was exercised, he assigned one-fourth share in the patent to W., & this assignment was registered at the Patent Office. Subsequently the W. co. brought an action against the H. co. a licencee from an assignee of W., & also against D., & an assignee of all his remaining interests, to restrain the latter & the H. co. from infringing the patent ; & to restrain D. from granting any licence in breach of his covenant, & all defts. from dealing with any such licence. An interlocutory injunction was granted by the judge in chambers. Defts. appealed. Pltfs. contended that the assignment to W., which was for a small sum, was not *bonâ fide*, & that W. was a mere trustee for D. Deft. D. alleged that pltfs. were aware of the assignment to W. :—*Held :* the injunction against infringement of the patent should be dissolved, as W. had a legal title, & there was no evidence that his assignees had any notice of the agreements with pltf. co. ; &, even if the H. co. had no title, there was nothing to prevent their disputing the validity of the patent, & as the patent was a new one & had not been established an interlocutory injunction would not be granted against an infringer.—WAPSHARE TUBE CO., LTD. *v.* HYDE IMPERIAL RUBBER CO., LTD. (1901), 18 R. P. C. 374, C. A.

2809. —— **Necessity for affidavit of defendant showing invalidity.**]—(1) A patentee is entitled, for the protection of his patent, to give notice to persons intending to deal with a rival patentee that they are about to infringe his patent, provided such notices are given *bonâ fide*, & with no collateral object ; & a patentee is not bound to follow up such notices by legal proceedings, & will not be liable to an action for damages for, or to be restrained by injunction from, giving the notices.

(2) A subsisting patent is presumed, *primâ facie*, to be valid, & an interlocutory injunction will be granted to restrain an infringement, even when the patent is of recent date, unless the defendant by his affidavits shows a *primâ facie* case of invalidity to be determined at the trial.—HALSEY *v.* BROTHERHOOD (1880), 15 Ch. D. 514 ; 49 L. J. Ch. 786 ; 43 L. T. 366 ; 29 W. R. 9 ; 1 Goodeve's Patent Cases, p. 218 ; *affd.* (1881), 19 Ch. D. 386, C. A.

Annotations :—*As to* (1) **Consd.** Burnett *v.* Tak (1882), 45 L. T. 743 ; Household & Rosher *v.* Fairburn & Hall (1884), 51 L. T. 498 ; Challender *v.* Royle (1887), 36 Ch. D. 425 ; Skinner *v.* Shew, [1893] 1 Ch. 413 ; Incandescent Gas Light Co. *v.* New Incandescent (Sunlight Patent) Gas Lighting Co. (1897), 76 L. T. 47 ; St. Mungo Manufacturing Co. *v.* Hutchison Main (1908), 25 R. P. C. 356. **Refd.** Anderson *v.* Liebig's Extract of Meat Co. (1881), 45 L. T. 757 ; Sugg *v.* Bray (1884), Griffin's Patent Cases (1884–86), 210 ; Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435. *As to* (2) **Refd.** Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435. *Generally*, **Refd.** Baker *v.* Piper (1886), 2 T. L. R. 733 ; Walker *v.* Clarke (1887), 56 L. J. Ch. 239. **Mentd.** Hirschler *v.* Hertz & Collingwood (1895), 11 T. L. R. 466 ; White *v.* Mellin (1895), 43 W. R. 353 ; Ripley *v.* Arthur (1900), 45 Sol. Jo. 165 ; British Ry. Traffic & Electric Co. *v.* C. R. C. Co. & L. C. C., [1922] 2 K. B. 260.

2810. —— **Necessity for clear & distinct evidence—That patentee original inventor—& patent novel.**]

A. in May, 1856, became the purchaser of a patent, which was obtained in May, 1855, & which deft., as alleged, subequent to the date of the purchase infringed. A. obtained an injunction *ex p.* to restrain deft., on an affidavit in support, which stated that the patent had been recorded & that it became & was good & valid. On motion to dissolve :—*Held :* the recency of a patent was no ground for refusing an injunction *ex p.* to restrain its infringement, but the party seeking such injunction was bound to support his application by a clear & distinct statement, upon affidavit, that he believed the patentee was the original inventor, & that the invention had not been practised at the time when the patent was granted.—GARDNER *v.* BROADBENT (1856), 2 Jur. N. S. 1041 ; 4 W. R. 767.

2811. —— —— **Defendant refusing to keep an account.**]—The owners of a patent of July, 1887, for an "improved process & apparatus for tanning by aid of electricity," commenced an action for infringement of their patent against a patentee of a subsequent patent for "improved apparatus for tanning hides & skins by the aid of electricity," & moved for an interlocutory injunction. By pltf.'s process the skins were subjected to the action of an electric current passed through the tanning liquor in a rotating drum. The deft. in his specification disclaimed pltf.'s process, & stated that his apparatus consisted in putting the hides into a pit upon skeleton frames which were kept in motion, & then a current of electricity

PART XIV. SECT. 2, SUB-SECT. 4.—A. (e).

2805 i. *Whether ground for refusing injunction—General rule.*]—In an action for an infringement of a patent, an application under C. L. P. Act for an injunction to restrain deft. was refused, the patent being very recent, & there being conflicting affidavits as to the rights of pltf. to it :—*Held :* pltf. must establish his title at law before he would be entitled to an injunction.—BONATHAN *v.* BOWMANVILLE FURNITURE MANUFACTURING CO. (1870), 5 P. R. 195.—**CAN.**

2805 ii. ——— ———.]—An interlocutory injunction to restrain deft. from using a patented device, will not be granted in a suit for damages arising from infringement & for a perpetual injunction, when the patent is recent & has not been established by a judgment at law.—OTTAWA & HULL POWER & MANUFACTURER CO. *v.* MURPHY (1906), Q. R. 15 K. B. 230.—**CAN.**

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was transmitted. Pltfs. alleged that this was an equivalent process to theirs. Deft. disputed this, & denied the validity of the patent. It appeared that patentee of pltf.'s process had entered into an agreement with deft. not to oppose any co. formed for the purpose of purchasing his invention: —*Held:* as the patent was of recent date, & the evidence was not strong enough to show that the two processes were identical, & considering the agreement last-mentioned, although deft. would give no undertaking to keep an account, no order should be made except that the motion stand to the trial.—BRITISH TANNING CO., LTD. *v.* GROTH (1889), 7 R. P. C. 1.

2812. —— Court will consider all circumstances.]—CLARK *v.* FERGUSSON (1859), 1 Giff. 184; 5 Jur. N. S. 1155; 65 E. R. 878.

2813. —— Substantial question to be tried.]—The ct. abstains from interfering by injunction in the case of a recently dated patent where there is really a substantial question to be tried (BAGGALLAY, L.J.).—JACKSON *v.* NEEDLE (1884), Griffin's Patent Cases (1884–86), 132; 1 R. P. C. 174, C. A.

Annotation:—**Consd.** Smith *v.* Grigg, [1924] 1 K. B. 655.

2814. —— Defendant appearing & offering account.]—CLARKE *v.* NICHOLS (1895), 12 R. P. C. 310.

(*f*) *Conduct of Parties.*

i. *In General.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 419 *et seq.*

2815. Injunction granted—Contract with patentee—Joinder of patentee as co-plaintiff.]—Where parties have not only formed a contract with a patentee for the working of his patent, which in substance recited that it was valid, but have also joined him as co-pltf. in a suit against & in a motion for an injunction to restrain certain persons from infringing his patent which suit was conducted by their private solr., & of which motion the chief support was an affidavit made by the patentee, in which he swore precisely to the originality of the patent, the ct. will, for the purposes of an interlocutory application for an injunction to restrain them from infringing the patent until its validity has been tried at law, consider the same to be valid as between them & the patentee.—MUNTZ *v.* GRENFELL (1842), 2 Web. Pat. Cas. 88; 7 Jur. 121.

Annotation:—**Consd.** Dudgeon *v.* Thomson (1874), 30 L. T. 244.

2816. —— Defendant having admitted validity.]—DIRCKS *v.* MELLOR (1845), cited Halsbury's Laws of England, Vol. XXII. at p. 220.

2817. —— Defendant's conduct placing validity beyond doubt.]—DUDGEON *v.* THOMSON, No. 2775, *ante.*

2818. —— Defendant refusing to give undertaking.]—RAPID STEEL CO. *v.* BLANKSTONE (1907), 24 R. P. C. 529.

2819. Injunction refused—Plaintiff declining to answer interrogatories.]—The owners of letters patent, in respect of which a certificate of validity had been granted, commenced three actions against different defts. & applied for interlocutory injunctions; in two of the applications they failed & in the third they succeeded. In each case the unsuccessful party appealed. In each action defts. raised an issue of prior user, which was not raised in the action in which the certificate had been granted, & applied for letters of request to take evidence abroad. Letters of request had been also applied for in other actions brought by pltfs. Pltfs. alleged that they had endeavoured to obtain a speedy trial of the issue, but that this had been delayed by the letters of request. Defts. alleged that the delay was caused by the refusal of pltfs. on a technical ground to answer interrogatories in another case. In response to a question put by the ct., pltfs. declined to answer the interrogatories, whereupon pltfs.' appeals were dismissed, & the appeal of defts., against whom an interlocutory injunction had been granted, was allowed, defts. in each case undertaking to keep an account & to abide the result of another action in which the same issues of validity were raised.—WELSBACH INCANDESCENT GAS LIGHT CO., LTD. *v.* GENERAL INCANDESCENT CO., LTD., SAME *v.* BARNARD, SAME *v.* BLACKBURN INCANDESCENT CO. (1901), 18 R. P. C. 533, C. A.

ii. *Delay.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 420 *et seq.*

2820. Injunction refused.]—Where an interlocutory injunction to restrain infringement of a patent was moved for in a suit in which the bill was filed in July, & it appeared that pltf. wrote complaining of the infringement in the preceding Nov., & knew of deft.'s proceedings in the previous Aug., the injunction was refused on the ground of delay.—BOVILL *v.* CRATE (1865), L. R. 1 Eq. 388.

Annotations:—**Folld.** North British Rubber Co. *v.* Gormully & Jeffery Manufacturing Co. (1894), 12 R. P. C. 17. **Refd.** Bovill *v.* Smith (1868), Griffin's Patent Cases (1888), 49.

2821. ——.]—I think that the delay that pltfs. have been guilty of in applying to the ct. bars their right to an interlocutory injunction, but of course it may not bar their right to an injunction at the trial. The evidence shows that pltfs. knew defts. were selling this sodium so far back as Oct. 13, 1896. No doubt they wrote & said they would probably have to make defts. parties to an action in respect of sales; but pltfs. were told at the same time by defts. in this country that they were selling some of the sodium of the co-defts., & it appears it has been openly advertised twice a month in the "Chemical Trade Journal" ever since. It seems to me it is too late for them to move for an injunction a year after they knew this was going on (STIRLING, J.).—ALUMINIUM CO. *v.* DOMEIERE & ELECTRO-CHEMISCHE WERKE ACT. (1898), 15 R. P. C. 32.

2822. —— Notwithstanding strong primâ facie case of validity.]—A special injunction, on notice, to prevent the infringement of a patent refused on the ground of delay notwithstanding the ct. had a strong impression in favour of pltf.'s right.—BRIDSON *v.* BENECKE (1849), 12 Beav. 1; 13 L. T. O. S. 277; 50 E. R. 960.

Annotations:—**Consd.** Bovill *v.* Crate (1865), L. R. 1 Eq. 388. **Refd.** Bovill *v.* Goodier (2) (1866), L. R. 2 Eq. 195.

2823. —— Conditions imposed on defendant—Payment of security into court—Special circumstances of case.]—The owners of a patent for phonographs, dated in 1886, on June 16, 1894, commenced an action against H. for infringement of their patent, & now moved for an interlocutory injunction. According to pltfs.' evidence their patent was being infringed by a number of small infringers with no means, who, if legal proceedings were brought against them, contested the matter till the day of trial & then disappeared. Pltfs. of June 15, 1894, obtained judgment for an injunction to restrain infringement against Y. who did not appear at the trial, though he had contested the validity of the patent by his pleadings.

Pltfs. had obtained judgment in other cases, & also had obtained judgments against both H. & Y. for infringement of another patent, but had not been paid costs or damages. Evidence was given of infringement by H. of the patent now in question. H. alleged that pltfs.' patent was invalid & gave evidence to that effect. It appeared that pltfs. knew what H. was doing as early as Dec. 21, 1893, that in no case had pltfs. obtained an interlocutory injunction, & that another action by pltfs. against L., which action had been stayed to abide the result of the action against Y., had been allowed to proceed :—*Held :* taking all the circumstances of the case into consideration, & on deft. paying £25 into ct. as security, & on the terms that the action should be prosecuted without delay, pleadings to be delivered in the vacation, an interlocutory injunction should not be granted.—EDISON BELL PHONOGRAPH CORPN., LTD. *v.* HOUGH (1894), 11 R. P. C. 594.

2824. —— Plaintiff's course where numerous infringers.]—The owners of a patent commenced an action for infringement in Apr. 1893, & obtained judgment on June 12, 1894, with a certificate that the validity of the patent had come in question. On Nov. 15, 1894, they commenced the present action, & moved for an interlocutory injunction. For the purposes of the motion defts. admitted infringement, but they alleged that pltfs. knew as early as Jan. 1893, that defts. were infringing, and that in the interval a considerable trade on the part of defts. had grown up. Pltfs. did not contradict this by evidence, & their first complaint was made on Oct. 11, 1894. They alleged that they were put in a difficult position because there were numerous infringers. Defts. offered to pay into ct. a sum sufficient to meet the royalties until the trial, & to keep an account :—*Held :* under the circumstances of the case an injunction ought not to be granted.

LORD HATHERLEY pointed out a very reasonable course : Bring your action against one & write to the other infringers, & say that you will be under the necessity of issuing a writ against the others unless they will agree not to raise the point of delay against you. I cannot say that that is unreasonable (CHITTY, J.).—NORTH BRITISH RUBBER CO., LTD. *v.* GORMULLY & JEFFERY MANUFACTURING CO. (1894), 12 R. P. C. 17.

——.]—*See* INJUNCTION, Vol. XXVIII., pp. 421, 422, Nos. 462, 463, 467, 472.

2825. Plaintiff's knowledge of infringement.]—Pltf. has been guilty of laches, because defts.' patent being in existence since 1882 he has not brought an action until the present time, & it is said that that must be proof of the fact that pltf. must have known of the infringement ; but defts. might have cross-examined pltf. upon his affidavit ; they might have proved *aliunde* that he had stood by & suffered *Burrow's & Dawson's* patent to be worked, & never thought of interfering with it from the time the patent was granted till the time the action is commenced. I cannot entertain the notion that there has been any laches on the part of pltf. for a moment (BACON, V.-C.).—OSMOND *v.* HIRST (1885), Griffin's Patent Cases (1884–86), 179.

(*g*) *Prevention of Irreparable Injury.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 377 *et seq.*

2826. Whether injunction granted—Where irreparable mischief would ersue.]—There will be a hardship on the one side or on the other, & the question is, on which side does the balance appear to lie ? Now if the trade of deft. be an old & an established trade, I should say that the hardship upon him would be too great if an injunction were granted. But where, as here, the trade of deft. is a new trade, & he is the seller of goods to a vast number of people, it seems to me to be less inconvenient & less likely to produce irreparable damage, to stop him from selling, than it would be to allow him to sell & merely keep an account, thus forcing pltf. to commence a multitude of actions against the purchasers (BRETT, J.A.).—PLIMPTON *v.* SPILLER (1876), 4 Ch. D. 286 ; 35 L. T. 656 ; 25 W. R. 152, C. A.

Annotation :—**Refd.** Coats *v.* Chadwick, [1894] 1 Ch. 347.

2827. —— —— Danger of market being supplied.]—Injunction granted to restrain the infringement of a patent, even where its legal validity was questioned, where, from the nature of the instrument, the market for it might be supplied in a very short time.

Semble : it is piracy to use part of an improvement, for which a patent has been obtained, in another improvement.—WEISS *v.* MAW (1826), 4 L. J. O. S. Ch. 224.

2828. —— —— Plaintiff protected by lesser relief.]—BRITISH THOMSON-HOUSTON CO., LTD. *v.* B. T. T. ELECTRIC LAMP & ACCESSORIES CO., No. 2772, *ante.*

(*h*) *Balance of Convenience.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 380 *et seq.*

2829. Consideration of comparative injury.] —PLIMPTON *v.* SPILLER, No. 2826, *ante.*

2830. ——.]—B. & W., the assignees of a patent granted in 1878, brought an action for infringement against B. D. & co., & moved for an interlocutory injunction. Defts. challenged the validity of the patent on the grounds that it was bad on the face of the specification, & had been anticipated, & they sought to call a witness, who was unwilling to make an affidavit, to prove an alleged anticipation. Pltfs. contended that as defts. were a young co. with only £5,000 nominal capital, & only seventeen shareholders with £1,900 paid up, they would fail to recover any damages awarded to them at the trial, & that therefore, & as their patent was twelve years old, they were entitled to a protected interlocutory injunction :—*Held :* the question of the validity of the patent ought not to be gone into, & upon the balance of convenience pltfs. were entitled to an interlocutory injunction on giving the usual undertaking as to damages.—BRACHER *v.* BRACHER, DEAN & CO. (1890), 7 R. P. C. 420.

B. Against whom Granted.

See, generally, INJUNCTION, Vol. XXVIII., pp. 436 *et seq.*

2831. Parties working patent under articles of partnership.]—MUNTZ *v.* GRENFELL, No. 2815, *ante.*

2832. Person to whom mode of working communicated.]—COLES *v.* BAYLIS (1886), Griffin's Patent Cases (1884–1886), 57 ; 3 R. P. C. 180.

2833. Customer of infringing company.]—The A. co. brought an action for infringement of a patent against B. co., & moved for an *interim* injunction. A special order was made on this motion ; the B. co. were to pay into ct. certain sums on certain dates, & on their undertaking to keep an account of the tyres complained of, no further order was made except that defts. were to pay pltfs.' costs in any event. The A. co. then commenced an action for infringement of the same

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patent against C. & moved for an *interim* injunction. It appeared that C. was a customer of the B. co., & had bought the tyre on which the motion was based from the B. co., & that such tyre was a tyre of the kind complained of in the first action; & also that the first of the two sums payable under the order in the previous action had been paid, the second not being then due:—*Held:* as the ct. could not interfere against the B. co. it ought not to interfere against the customer of the B. co., & the motion ought not to have been made, & it was dismissed with costs.—PNEUMATIC TYRE CO., LTD. *v.* GOODMAN & SON (1896), 13 R. P. C. 723.

Aliens.]—*See* INJUNCTION, Vol. XXVIII., p. 439, Nos. 610, 611.

C. Evidence.

See Patents & Designs Act, 1907 (c. 29), ss. 78, 79; Patents Rules, 1920, rr. 108, 109; *& generally*, INJUNCTION, Vol. XXVIII., pp. 505 *et seq.*

2834. What affidavit in support must contain—Statement that invention novel & patent valid.]—HULL *v.* THOMPSON, No. 2805, *ante.*

2835. —— ——.]—GARDNER *v.* BROADBENT, ——.]—Where deft. to a bill filed for an injunction to restrain the infringement of a patent, or for leave to bring an action at law, stated by his answer that the invention was not novel, & that pltf.'s patent was invalid; the ct., on a motion by pltf., without his having made an affidavit as to the novelty of the invention or validity of the patent, refused to grant him an injunction, or to give leave to bring an action, unless he produced a clear & distinct affidavit that the invention was novel & the patent valid; but allowed the motion to stand over for that purpose.—WHITTON *v.* JENNINGS (1860), 1 Drew. & Sm. 110; 1 L. T. 395; 6 Jur. N. S. 164; 62 E. R. 320.

2837. —— ——.]—CLARKE *v.* NICHOLS, No. 2814, *ante.*

2838. —— **Nature of infringement stated with particularity.**]—HILL *v.* THOMPSON, No. 2805, *ante.*

2839. Admissions of defendant—Not sufficient.]—CURTIS *v.* CUTTS, No. 2798, *ante.*

2840. Affidavit of information & belief—Sufficiency of—On behalf of defendants.]—READ *v.* ANDREW (1885), Griffin's Patent Cases (1884–1886), 201.

2841. —— —— **Source of information must be shown.**]—SACCHARIN CORPN., LTD. *v.* CHEMICAL & DRUGS CO., LTD., No. 2765, *ante.*

2842. Evasive affidavit—Leave to cross-examine given.]—SACCHARIN CORPN., LTD. *v.* CHEMICAL & DRUGS CO., LTD., No. 2765, *ante.*

2843. Copy of specification to be put in.]—On a motion for an injunction to restrain the infringement of letters patent a copy of pltf.'s specification should be put in evidence.—BRITISH THOMSON-HOUSTON CO. *v.* MANDLER (1927), 71 Sol. Jo. 472.

D. Terms Imposed.

(*a*) *Account in lieu of Injunction.*

See Patents & Designs Acts, 1907 (c. 29), s. 34 & 1919 (c. 80), s. 10, sched.; *& generally*, INJUNCTION, Vol. XXVIII., pp. 387 *et seq.*

2844. When ordered—Validity disputed—Principle not clearly stated in specification.]—The specification should distinctly state the principle, as well as the mode of bringing it into operation. If the principle claimed be not clearly stated, but is only to be made out by construction, by comparing the several clauses of the specification, an injunction will not be granted, but deft. will only be put upon terms as to keeping accounts, etc., till the validity of the patent is tried at law.—BRIDSON *v.* M'ALPINE (1844), 3 L. T. O. S. 158; *subsequent proceedings* (1845), 8 Beav. 229.

2845. —— —— **Defendant not put on terms to set aside patent.**]—A trial at law for an infringement of a patent, in which pltf. was successful on all the pleas put in by deft., & in which the judge certified that the question of the validity of the patent came before him on the merits, & in which case also a second trial was refused, is not binding on another person who is alleged to have infringed the patent, even to the extent of precluding him from questioning its validity in a fresh action. Neither will deft. be put upon the terms of bringing a *sci. fa.* to set aside the patent, though his principal defence against the issuing an injunction to restrain him from making or selling the machine alleged to infringe the patent was the attempted proof of the invalidity of the patent, because of the existence of machines previously constructed on the same principle. An account ordered to be kept by deft., instead of an injunction, with liberty to apply.—CROSSKILL *v.* TUXFORD (1845), 5 L. T. O. S. 342.

—**Apld.** Bovill *v.* Goodier (2) (1866), L. R. 2 Eq 195.

2846. —— —— **Defendant declining to keep account—Form of order.**]—Motion for interlocutory injunction. Deft. disputing validity of patent, & declining to keep account. Order for account. Form of order.—PNEUMATIC TYRE CO. *v.* FRISWELL (1895), 13 R. P. C. 15.

2847. —— —— **Patent not established.**]—ZENITH MOTORS, LTD. *v.* COLLIER (H.) & SON, LTD., No. 2767, *ante.*

2848. —— **Where undertaking to keep account.**]—READ *v.* ANDREW, No. 2840, *ante.*

2849. —— —— **Defendant person of substance.**]—BONNELLA *v.* ESPIR, No. 2759, *ante.*

2850. —— **Facts showing no necessity for injunction—Defendants disclaiming intention to infringe.**]—In an action for infringement of a patent, commenced in Oct. 1896, against S. & C., pltfs., in Jan. 1897, gave notice of motion for an interlocutory injunction. The infringement complained of was a sale of a tyre which took place in June, 1896. At this date S. & C. were in partnership, but they dissolved such partnership in Aug. 1896, & notice of the dissolution was given to the solrs. of pltfs. Since the dissolution deft. C. had not manufactured tyres of any description, & stated that he did not intend to do so:—*Held:* on deft. S. undertaking to keep an account, there ought to be no order on the motion, but the costs were to be defts. in any event.—DUNLOP PNEUMATIC TYRE CO., LTD. & PNEUMATIC TYRE CO., LTD. *v.* STONE & CORSER (1897), 14 R. P. C. 263.

2851. —— **Defendant offering account & discontinuance of word "patent."**]—S. obtained a patent in 1902, & began to manufacture & sell articles under the patent as soon as the complete specification was accepted. Subsequently H. began to manufacture articles which were admittedly infringements of the patent if valid. S. commenced an action against H., & moved for an interlocutory injunction. H. alleged that the patent was invalid. H. stamped his articles "Patent":—*Held:* on deft. undertaking to keep an account & to discontinue using "Patent" in reference to his articles, the motion

refused, & the costs would be costs in the action.—SPENCER *v.* HOLT (1902), 20 R. P. C. 142.

(b) Undertaking as to Damages.

See Patents & Designs Acts, 1907 (c. 29), s. 34 & 1919 (c. 80), s. 10, sched.; & *generally*, INJUNCTION, Vol. XXVIII., pp. 517 *et seq.*

2852. Condition of granting injunction.]—MUNTZ *v.* GRENFELL, No. 2815, *ante.*

2853. —— Action by foreigner.]—A patentee having obtained a decision in support of a patent & an injunction against one deft., commenced an action for infringement against present defts., & moved *ex p.* for an injunction a few days before the vacation. Pltf. was a foreigner, though on the writ an address in England was given:—*Held:* an injunction should be granted on proper security being given by pltf. for any damages which defts. might suffer, & subject to the condition that defts. might move to discharge the order on giving three clear days' notice.—MOSER *v.* JONES & Co. (1893), 10 R. P. C. 368.

——.]—*See* INJUNCTION, Vol. XXVIII., p. 518, No. 1238.

E. Breach of Injunction and Remedies.

See INJUNCTION, Vol. XXVIII., pp. 525, 527, 529, Nos. 1331, 1346–1348, 1369.

2854. Attachment issued—Terms of order.]—Pltfs., who were owners of patents for illuminant appliances for gas & other burners, instituted proceedings on Sept. 8, 1899, for infringement. By consent, dated Sept. 23, deft. submitted to an injunction. On Oct. 26, the consent was made a Rule of Ct., & further proceedings were stayed, without costs. On Nov. 13, 1899, deft. sold to W. a mantle for incandescent gas lighting, which was proved to be an infringement. Pltfs. moved for an attachment. Ordered, that an attachment should issue, unless deft., within a week, made an affidavit, stating on oath what mantles she had in her possession, which were infringements, or colourable imitations, of pltf.'s patents, delivered up all such mantles to pltfs. to be destroyed, & paid the costs of the motion.—WELSBACH INCANDESCENT GAS LIGHT CO., LTD. *v.* KEEGAN (1900), 17 R. P. C. 44.

F. Costs.

See R. S. C., Ord. 53A, r. 7; INJUNCTION, Vol. XXVIII., pp. 545, 546, Nos. 1526–1528, 1534.

2855. Motion ordered to stand over—With liberty to bring action—Plaintiff declining to bring action—Defendant entitled to costs.]—PERRY *v.* TRUEFITT (1843), 6 Beav. 418; 1 L. T. O. S. 384; 49 E. R. 887.

2856. Injunction refused pending trial at law—Costs of evidence of validity.]—WARD *v.* KEY, No. 2800, *ante.*

2857. Defendant promising to cease infringing—Plaintiff may bring suit to hearing & obtain costs—Whether account of damages given.]—GEARY *v.* NORTON, No. 2749, *ante.*

2858. Defendant giving undertaking—Costs of parties costs in action.]—RAPID STEEL CO. *v.* BLANKSTONE, No. 2818, *ante.*

SUB-SECT. 5.—DISCOVERY, INSPECTION AND PRODUCTION OF DOCUMENTS.

Jurisdiction of court to order.]—*See* DISCOVERY, Vol. XVIII., pp. 49, 50, Nos. 73–77.

See, generally, DISCOVERY, Vol. XVIII., pp. 42 *et seq.*, 95 *et seq.*

2859. What documents must be disclosed or produced—Documents relating to particular ground of invalidity alleged.]—A bill of discovery insisted on the invalidity of a patent, on the ground that it had been assigned to more than five persons, & prayed a production of the documents, etc., "relating to the matters aforesaid":—*Held:* defts. were bound to produce those documents only which related to that point, & were entitled to seal up such parts as related to other matters.—FEW *v.* GUPPY (1836), 13 Beav. 457; 1 My. & Cr. 487; 51 E. R. 176, L. C.

Annotations:—**Mentd.** Irving *v.* Thompson (1839), 9 Sim. 17; Kerr *v.* Rew (1840), 5 My. & Cr. 154; Queen of Portugal *v.* Glyn (1840), 7 Cl. & Fin. 466; Richardson *v.* Hastings (1844), 7 Beav. 354.

2860. —— ——.]—CARNEGIE STEEL CO. *v.* BELL BROTHERS, LTD. (1907), 24 R. P. C. 82, C. A.

2861. —— ——.]—(1) An action for infringement of two patents having been brought, defts. alleged that both patents were invalid, & delivered particulars of objections. The specification of the first patent had been amended. As to this patent defts. alleged in their particulars want of novelty & want of subject-matter, alleging publication by certain specifications, common public knowledge & prior user, & stated in paragraph 1 (D) that they would rely by way of anticipation or, as showing the scope of the complete specification, upon the matters known to pltfs. or one of them, in consequence of which one of pltf. cos. applied for leave to amend the specification of the patent by (*inter alia*) striking out the then first claim for the reason that they were advised that the claim they desired to delete covered subject-matter of doubtful novelty. An order for discovery was made, & after pltfs.' affidavits of discovery defts. applied for further & better affidavits of documents, & in particular (*a*) in respect of the application to amend the specification of the first patent, & (*b*) the draft specification of the second patent & the correspondence passing between the Patent Office &/or appcts. &/or their agent in relation thereto. Pltfs. applied for an order on defts. to strike out paragraph 1 (D) of the particulars of objections or alternatively for better particulars:—*Held:* the issue in the action was not the validity of the patents generally, but as limited by the particulars of objections; it would tend to injustice if pltf. in a patent action were required to disclose every document in his possession suggestive of invalidity, wholly irrespective of the question whether or not

PART XIV. SECT. 2, SUB-SECT. 4.—D. (b).

1. Discretion of court—To grant reference to ascertain damages.]—When a pltf. on obtaining an injunction enters into the usual undertaking to abide by such order as the ct. may make as to damages, it is in the discretion of the ct. to grant or refuse a reference as to such damages where the injunction is afterwards not continued or is dissolved.—HESSIN *v.* COPPIN (1874), 21 Gr. 253.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 4.—E.

g. Whether attachment issued—Six years after injunction granted—Patent re-issued.]—DETROIT FUSE & MANUFACTURING CO. *v.* METROPOLITAN ENGINEERING CO. OF CANADA, LTD. (1922), 63 D. L. R. 179; 21 Exch. C. R. 276.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 5.

h. Fullest discovery must be made.]—In an action for damages for infringement of a patent deft. is entitled to the fullest discovery from pltf.—PARRAMORE *v.* BOSTON MANUFACTURING CO. (1902), 22 C. L. T. 415; 4 O. L. R. 627.—**CAN.**

k. What documents must be disclosed or produced—Foreign specifications.]—In an action to restrain the infringement of a patent, in which the defence set up that the supposed invention had been previously patented in the United States & England, copies of American patents material to deft.'s

Sect. 2.—Legal proceedings in respect of infringement: Sub-sects. 5, 6 & 7, A. & B. (a).]

it related or referred to the particular grounds of invalidity relied upon by deft.; as regards paragraph 2 of defts.' application it must be dismissed.

(2) An application was made by defts. in the course of the hearing for inspection by them, under Patents & Designs Act, 1907 (c. 29), s. 68, of the report of the Examiner in reference to the second patent:—*Held:* this should be the subject of a substantive application.—AVERY, LTD. *v.* ASHWORTH, SON & CO., LTD. (1915), 32 R. P. C. 560, C. A.

2862. —— When infringement denied—Only documents material to infringement.]—DE LA RUE *v.* DICKENSON, No. 2397, *ante.*

——.]—*See* DISCOVERY, Vol. XVIII., pp. 102, 119, 175, 216, Nos. 535, 689, 1283, 1284, 1636.

2863. Right to seal up—Irrelevant parts of documents.]—FEW *v.* GUPPY, No. 2859, *ante.*

2864. At what stage of proceedings ordered—Before application for consolidation.]—A patentee filed separate bills against one hundred & thirty-four alleged infringers. Seventy-seven of defts. applied that pltf. might be directed to proceed with one suit either to try all the questions, or to try separately the validity of the patent; & that in the meantime the proceedings in the other suits should be stated, or the time for answering should be enlarged till further order:—*Held:* at this stage of the proceedings defts. could not be absolved from giving discovery by answer, but without prejudice to any application for consolidating the suits after answer.—FOXWELL *v.* WEBSTER (1863), 2 Drew. & Sm. 250; 3 New Rep. 103; 9 L. T. 362; 9 Jur. N. S. 1189; 62 E. R. 617; *sub nom.* FOXWELL *v.* WEBSTER, FOXWELL *v.* LEA, FOXWELL *v.* BRADBURY, FOXWELL *v.* STEAD, 12 W. R. 94; *on appeal*, 4 De G. J. & Sm. 77, L. C.

Annotations:—**Refd.** North British Rubber Co. *v.* Gormully & Jeffery Manufacturing Co. (1894), 12 R. P. C. 17. **Mentd.** Bovill *v.* Crate (1865), L. R. 1 Eq. 388.

2865. Grounds for resisting production—Joint ownership in patent—Nature of joint ownership must be shown.]—A person who is required to make an affidavit of documents in his possession, & who seeks to protect himself from being compelled to produce documents by an allegation of joint ownership [in a patent], is bound to show enough to satisfy the ct. what the nature of the joint ownership is.—BOVILL *v.* COWAN (1870), 5 Ch. App. 495; 39 L. J. Ch. 768; 22 L. T. 503; 18 W. R. 533, L. J.

Annotation:—**Refd.** Kearsley *v.* Philips (1882), 10 Q. B. D. 37, n.

2866. —— Trial of infringement subject to establishing validity—Postponement till validity established.]—(1) The patentee of a chemical process brought an action for infringement. In their affidavit of documents, defendants disclosed certain books, which they objected to produce, (*a*) as containing particulars of the materials operated upon by them, & the results produced by the manufacture alleged to be an infringement, & they objected to give such [illegible] until pltf. had established his legal rights, which defts. denied; (*b*) such documents contained names of customers & details of prices, & other information which, they submitted, pltf. was not entitled to know at that stage of the action. Pltf. took out a summons for production of the books in June, 1889. This was refused by the judge in chambers. Pltf. subsequently moved for inspection of defts.' works & of the books. Inspection of the works was offered at once by defts. Pltf., in Apr. 1890, brought on his motion for inspection of the books:—*Held:* this was an attempt to review the refusal of production in June, which was not appealable, & the motion was refused.

(2) Pltf. took out a fresh summons for inspection of such of the books as contained analyses of the materials operated on in defts.' processes:—*Held:* pltf. had not made out that he was entitled, at this stage of the action, to see the documents, as the question of infringement might never be tried if pltf. failed to establish the validity of the patent, & the application was refused without prejudice to any application by pltf. during the trial.—RAWES *v.* CHANCE (1890), 7 R. P. C. 275, C. A.

2867. —— Want of jurisdiction—Provisional specification of abandoned patent—Production allowed in interests of justice.]—An action for infringement of a patent having been brought, defts. set up (*inter alia*) the defence of prior user. On deft. being called & cross-examined, pltfs.' counsel called an official from the Patent Office to produce the provisional specification of an invention, in respect of which said deft. had applied for letters patent, but had subsequently abandoned the application. Deft questioned the jurisdiction of the ct. to allow production:—*Held:* notwithstanding 48 & 49 Vict. c. 63, s. 4, the ct. could allow production of, & reference to, such provisional specification for the purposes of the administration of justice.—PNEUMATIC TYRE CO., LTD. *v.* ENGLISH CYCLE & TYRE CO. (1897), 14 R. P. C. 851.

2868. —— Documents relating solely to case of deponent—& not supporting opponent's case.]—HEY *v.* DE LA HEY, [1886] W. N. 101, C. A.

Annotations:—**N.F.** *Re* Stahlwerk Becker Akt.'s Patent (1917), 34 R. P. C. 332. **Dbtd.** O'Rourke *v.* Darbishire, [1920] A. C. 581.

2869. —— Privilege—Communications between co-defendants — Claiming ownership of secret process.]—HEY *v.* DE LA HEY, No. 2868, *ante.*

—— —— Solicitor as patent agent.]—*See* DISCOVERY, Vol. XVIII., p. 122, No. 715.

2870. Further & better affidavit—Appeal after certificate that no argument required—Requisites before certificate given.]—Before the judge is asked to give his certificate, everything which is insisted on by one side, & objected to by the other, ought to be brought before him for his serious consideration.

In an action for infringement of a patent, defts. applied in chambers for the ordinary affidavit of documents, actually pressing for only a limited

case, were procured by his solrs. of their own motion for the purposes of the action:—*Held:* such documents were privileged from production.—GUELPH C. CO. *v.* WHITEHEAD (1883), 9 P. R. 509.—**CAN.**

l. —— *Where validity disputed — & agents employed.*]—In an action for infringement of a patent in which the validity of the patent was disputed, the ct. granted diligence for the recovery of all letters, telegrams, reports, specifications, plans, sketches, memoranda & other written communications passing between pursuers & any one acting as their patent agent relating to the preparation of the specification or the grant of the letters patent, & all licences, permissions, agreements, contracts & business books of pursuers, tending to show the number of machines, or parts of machines, made or sold or licenced to be used or in use, in accordance with or under pursuers' specification & letters patent, & the names & addresses of all persons to whom such sales or licences may have been made or granted.—WALLACE *v.* TULLIS, RUSSELL & CO., LTD. (1920), 37 R. P. C. 43.—**SCOT.**

m. —— *Defendants' books.*]—BROWN *v.* EVERED & CO. (1904), 21 R. P. C. 501.—**SCOT.**

n. *Production by Commissioner of Patents—Under subpœna duces tecum.*

order, & a limited order only was made. Defts. appealed from this order, asking for a more extensive order. The judge had given a certificate that he did not require an argument in ct. On the appeal, pltf. offered to include in his affidavit certain other documents, but not all that defts. desired :—*Held :* no further order ought to be made.—THOMSON *v.* HUGHES (1889), 7 R. P. C. 187, C. A.

2871. —— Possession of certain documents admitted.]—CARNEGIE STEEL CO. *v.* BELL BROTHERS, LTD., No. 2860, *ante*.

Form of summons & grounds for order.]—*See* DISCOVERY, Vol. XVIII., p. 89, No. 403.

SUB-SECT. 6.—INTERROGATORIES.

See DISCOVERY, Vol. XVIII., pp. 183, 190, 201, 214-217, 221, 222, 227, Nos. 1345, 1346, 1391, 1392, 1486, 1617-1643, 1694-1699, 1739.

SUB-SECT. 7.—INSPECTION OF PROCESSES, APPARATUS AND MACHINERY.

A. In General.

See Patents & Designs Acts, 1907 (c. 29), s. 34 ; 1919 (c. 80), s. 10, sched.

2872. At what stage of proceedings ordered—Before delivery of statement of claim.]—An application to inspect deft.'s machinery may be made by pltf. under Patent Law Amendment Act, 1852 (c. 83), s. 42, before the delivery of the declaration in an action for infringement of pltfs.' patent ; but such inspection will not be granted as of course or without the party applying for it showing that the inspection is material for the purposes of the cause.—AMIES *v.* KELSEY (1852), Bail Ct. Cas. 123 ; 22 L. J. Q. B. 84 ; 20 L. T. O. S. 115 ; 16 Jur. 1047 ; *sub nom.* AMMIES *v.* KELSIE, 1 W. R. 54.

Annotation :—**Refd.** Patent Type-Founding Co. *v.* Lloyd (1860), 6 Jur. N. S. 103.

2873. —— ——.]—EDLER *v.* VICTORIA PRESS MANUFACTURING CO., No. 2884, *post*.

2874. What affidavit must contain—Statement that machine in possession of defendant.]—An affidavit to obtain an inspection of a machine, supposed to be an infringement of a patent, must swear that it is in the possession of deft., & that it is believed to be an infringement.—SHAW *v.* BANK OF ENGLAND (1852), 22 L. J. Ex. 26 ; 20 L. T. O. S. 70.

2875. —— Statement of all the facts.]—*Qu. :* whether a ct. of common law, in making an order under Patent Law Amendment Act, 1852 (c. 83), s. 42, that pltf. may inspect a manufacture alleged to be an infringement of a patent, has power to direct that he shall be at liberty to take specimens of the same for the purpose of analysis.

The affidavits in support of such an application should bring all the facts before the ct. precisely, & should be such as to satisfy the ct. that there has been an infringement, & that there is a necessity for their interposition.

In an action against a printer for an infringement of a patent for improvements in the manufacture of type, the improvements consisting in the use of lead, tin & antimony, in certain proportions, pltf. applied to the ct. under Patent Law Amendment Act, 1852 (c. 83), s. 42, for leave to inspect, & if necessary, to take specimens of the type for the purpose of analysis. His affidavit stated that he had obtained from deft. specimens of the type & caused them to be analysed by a chemist who was dead, & that the type so analysed was an infringement of the patent ; but did not set out the report of the chemist or state its substance, or whether or not it was in writing. The ct. refused to make an order that pltf. should be at liberty to take specimens for analysis.—PATENT TYPE FOUNDING CO. *v.* LLOYD, SAME *v.* WALTER (1860), 5 H. & N. 192 ; 1 L. T. 382 ; 6 Jur. N. S. 103 ; 157 E. R. 1153 ; *sub nom.* PATENT TYPE FOUNDRY CO. *v.* LLOYD, SAME *v.* HARRISON, 29 L. J. Ex. 207.

Annotation :—**Refd.** Bennett *v.* Griffiths (1861), 30 L. J. Q. [illegible]

— Statement of belief as to infringement.]—*See* Sub-sect. 7, B. (*a*), *post*.

—— Statement that inspection necessary.]—*See* Sub-sect. 7, B. (*b*), *post*.

2876. Effect of laches—No bar to order for inspection—Though sufficient to bar interlocutory injunction.]—PATENT TYPE FOUNDING CO. *v.* WALTER, No. 2915, *post*.

2877. Mutual inspection ordered.]—DAVENPORT *v.* JEPSON (1862), 1 New Rep. 307.

2878. Variation of order—Where defendants unable to obtain material.]—OSRAM LAMP WORKS, LTD. *v.* BRITISH UNION LAMP WORKS, LTD., No. 2885, *post*.

2879. Inspection already granted to other side.]—GERM MILLING CO., LTD. *v.* ROBINSON, No. 2890, *post*.

2880. Costs—Inspection had without order.]—In an unsuccessful action for infringement of letters patent, where a mutual inspection by counsel & experts of elaborate & heavy machinery was arranged between the solrs. without the expense of obtaining an order for the purpose under R. S. C., Ord. 50, r. 3, the costs of such inspection were allowed, but not defts.' costs of erecting machinery in London at the time of the trial, when it was not seen by either the judge or pltf.—ASHWORTH *v.* ENGLISH CARD CLOTHING CO., LTD. (No. 1), [1904] 1 Ch. 702 ; 73 L. J. Ch. 274 ; 90 L. T. 262 ; 52 W. R. 507 ; 21 R. P. C. 353.

B. When Ordered.

(*a*) *Primâ facie Case of Infringement.*

2881. General rule — Inspection ordered.]—BROWNE *v.* MOORE (1816), 3 Bli. 178, n. ; 4 E. R. 571.

2882. —— ——.]—Pltf., as patentee of an invention for improvements in the manufacture of felt hats, caps, & other head coverings, & in the apparatus employed in such manufacture, commenced an action against defts. for infringement, & moved for an inspection of defts.' processes, apparatus, & machinery ; defts. used several processes in their factory :—*Held :* (1) the question of disconformity will not be considered at this stage of a patent action ; (2) a *primâ facie* case of infringement will support a claim for inspection by a

—The Ct. of Equity has jurisdiction by *subpœna duces tecum* to direct the Comr. of Patents to produce all documents (excepting examiners' reports) lodged in connection with an application for the grant of letters patent.—BROADBENT & PARKS, LTD. *v.* BROADBENT (1925), 25 S. R. N. S. W. 406 ; 42 N. S. W. W. N. 70.—**AUS.**

PART XIV. SECT. 2, SUB-SECT. 7.—A.

o. *Inspection against Crown.*]—MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* THE COMMONWEALTH, No. 2 & No. 3 (1913), 16 C. L. R. 178.—**AUS.**

p. *Inspection of machine in defendant's possession — Anticipation.*]—In an action for infringement of a patent the ct. has power, under Patents Act, 1883, s. 30, to order inspection of a machine in the possession of deft. relied on as evidence of publication of the alleged invention within the realm prior to the date of pltf.'s patent.—VAN BERKEL *v.* BOOTH, [1906] 1 I. R. 383.—**IR.**

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 7, B. (a) & (b), & C.]

pltf.; (3) inspection must be limited to those of defts.' processes as to which a *primâ facie* case of infringement has been made out, & as pltf.'s evidence as to all defts.' processes, except one, amounted only to suspicion on his part that they constituted infringements, without the grounds of such suspicion being stated, inspection must be limited to such one process.—CHEETHAM *v.* OLDHAM & FOGG (No. 1) (1888), 5 R. P. C. 617.

2883. —— ——.]—Pltf., as owner of a patent for improvements in the manufacture of felt hats, caps, & other head coverings, & in the apparatus employed in such manufacture, commenced an action against defts. for infringement, & obtained a limited order for inspection. Defts. subsequently moved for leave to inspect pltf.'s processes, apparatus, & machinery, & to take samples of the finished & unfinished products of his manufacture: —*Held:* an order giving defts. liberty to inspect & take samples, ought to be made.—CHEETHAM *v.* OLDHAM & FOGG (No. 2) (1888), 5 R. P. C. 622.

2884. —— ——.]—In an action for infringement of a patent, pltf., before delivery of a statement of claim, applied for an order for inspection of a machine on the premises of one of defts. which he alleged to be an infringement of the patent:—*Held:* on the evidence there was at all events sufficient to justify the ct. in saying that the machine was one as to which a question might arise in the action; pltf. had *bonâ fide* reason to believe that the machine was an infringement of the patent, & he could not give proper particulars of breaches without inspection; & pltf. was, under the circumstances of the case, entitled to an order for inspection, & an order was made giving pltf., his solr., & not more than three experts liberty to inspect.—EDLER *v.* VICTORIA PRESS MANUFACTURING CO. (1910), 27 R. P. C. 114.

2885. —— ——.]—Pltfs. sued defts. for infringement of certain patents granted in 1904 & 1906 for the manufacture of incandescent electric lamps. The patents involved the use of carbon in the binding material & the subsequent removal of the carbon. Defts. denied infringement, & alleged that for the purpose of manufacturing their lamps they were supplied from Germany with a binding medium made under a process patented by letters patent No. 7092 of 1909 into which the use of carbon did not enter. Pltfs. filed expert evidence to the effect that from examination of the filaments sold by defts. it was reasonably clear that they had been made by a process involving the use of carbon in the binding medium. Upon this evidence pltfs. obtained an order in chambers for inspection of defts.' process of manufacture. Defts. moved to discharge the order, first, on the ground that there was no *primâ facie* case of infringement, &, secondly, on the ground that they were unable to comply with the order as made, because they possessed none of the binding medium which had been supplied to them, & were unable to get any more owing to a disagreement with the patentee in Germany who refused to supply them. In consequence of this they had ceased to manufacture & had dismantled their works:—*Held:* (1) a *primâ facie* case of infringement had been established sufficient to justify an order for inspection being made; (2) the order made should be varied by directing that it should not be construed so as to oblige defts. to carry out the process with a medium obtained from the German patentee, & in the event of their being unable to procure such medium the process be carried out with a medium to be prepared by pltfs. under the specification of patent No. 7092 of 1909, or, at the option of defts., by some independent person to be agreed upon by pltfs. & defts. or, in default of agreement, to be nominated by the ct.—OSRAM LAMP WORKS, LTD. *v.* BRITISH UNION LAMP WORKS, LTD. (1914), 31 R. P. C. 309.

2886. Necessity for—In affidavits supporting application.]—SHAW *v.* BANK OF ENGLAND, No. 2874, *ante*.

2887. —— ——.]—PATENT TYPE FOUNDING CO. *v.* LLOYD, SAME *v.* WALTER, No. 2875, *ante*.

2888. ——.]—In an action for the infringement of a patent for a mode of making veneers or mouldings, the ct. refused to order an inspection by pltf. of deft.'s manufactory & machinery; it being doubtful on pltf.'s affidavit whether his patent was for the kind of veneering, or for the process by which it was done; & deft. positively swearing that he used no machinery in the process. —MEADOWS *v.* KIRKMAN (1860), 29 L. J. Ex. 205.

2889. ——.]—The ct. must be satisfied that pltf. has made out such a case as at the hearing of the cause he will obtain the relief prayed, & that the previous inspection required by him of defts. was material to such a case, before it will grant inspection of defts.' process by which an alleged infringement of a patent was to be made out.—PIGGOTT *v.* ANGLO-AMERICAN TELEGRAPH CO. (1868), 19 L. T. 46.

2890. —— **Mere suspicion without statement of grounds insufficient.**]—Pltfs., as owners of a patent for "improvements in the manufacture of meal & flour from wheat, maize, & other grain," commenced an action against defts. for infringement of such patent, & moved for an inspection of defts.' mills:—*Held:* as pltfs.' evidence only amounted to a suspicion on their part, without the grounds thereof being stated, defts. were infringing the patent, inspection would not be granted.—GERM MILLING CO., LTD. *v.* ROBINSON (1884), 1 T. L. R. 38; 1 R. P. C. 217; Griffin's Patent Cases (1884–1886), 103; *subsequent proceedings* (1885), 55 L. J. Ch. 287.

Annotations:—**Folld.** Cheetham *v.* Oldham & Fogg (No. 1) (1888), 5 R. P. C. 617. **Consd.** Cheetham *v.* Oldham & Fogg (No. 2) (1888), 5 R. P. C. 622.

2891. —— ——.]—CHEETHAM *v.* OLDHAM & FOGG (No. 1), No. 2882, *ante*.

(b) Inspection Necessary for Purpose of Case.

2892. Inspection must be necessary.]—AMIES *v.* KELSEY, No. 2872, *ante*.

2893. ——.]—PATENT TYPE FOUNDING CO. *v.* LLOYD, SAME *v.* WALTER, No. 2875, *ante*.

2894. ——.]—PIGGOTT *v.* ANGLO-AMERICAN TELEGRAPH CO., No. 2889, *ante*.

2895. ——.]—Pltfs. in a suit for the infringement of a patent held by them for the manufacture of certain cartridges applied by motion for an inspection of the machinery & premises of defts., who were also large cartridge manufacturers. Defts. alleged by affidavit that the inspection was only asked for to enable pltfs. to see their machinery, & that they believed it to be unnecessary for the purposes of the suit:—*Held:* as there was no allegation by pltfs. that such inspection was necessary, & as there was an allegation by defts. that it was not necessary, the motion must be refused.—BATLEY *v.* KYNOCK (1874), L. R. 19 Eq. 90; 44 L. J. Ch. 89; 23 W. R. 52; Goodeve's Patent Cases, 36; *subsequent proceedings*, L. R. 19 Eq. 229.

Annotation:—**Refd.** Tilghman's Sand Blast Co. *v* (1884), Griffin's Patent Cases (1884–1886), 216

2896. .]—An action was brought to enforce the performance of a contract, providing that the parties should work together to improve a

certain manufacture. By the terms of the contract all information & discoveries were to be shared; the parties were to be allowed to inspect each others' works; any patents for improvements in the manufacture obtained were to be vested in pltfs., & deft. was to be entitled to work them under a licence at a royalty; the profits from royalties & the sale of any patents were to be shared. Pltfs. claimed specific performance of the contract & alleged that deft. had made & was using certain improvements of which he had not given them information; that he would not allow them to inspect his works; & that he was using their patents without paying royalties. Deft. by his defence attached the contract on the grounds of fraud, misrepresentation, failure of consideration, abandonment by both parties & breach by pltfs. He also denied that he was using any processes which came within the terms of the contract. Pltfs. applied for inspection of deft.'s works. This was resisted on the ground that for the purpose of preparing for the trial of the action, no such inspection was necessary:—*Held:* inspection must be refused.—MCDOUGALL BROTHERS *v.* PARTINGTON (2) (1890), 7 R. P. C. 351.

2897. Previous inspection in discontinued action—Second inspection refused.]—Pltf., having brought an action against defts. for an alleged infringement of a patent for the use of certain machinery, was, in company of two scientific witnesses, allowed an inspection of the machinery complained of as an infringement. That action was afterwards discontinued, & a fresh action brought after the passing of Patent Law Amendment Act, 1852 (c. 83), & pltf. applied, under Patent Law Amendment Act, 1852 (c. 83), s. 42, for a second inspection. The ct. refused to make the order, on the ground that there had already been an inspection.—SHAW *v.* BANK OF ENGLAND (1853), 22 L. J. Ex. 210; 20 L. T. O. S. 227; *previous proceedings* (1852), 22 L. J. Ex. 26.

2898. Plaintiff in position to obtain inspection without order.]—RYLANDS *v.* ASHLEY'S PATENT (MACHINE MADE) BOTTLE CO. (1890), 7 R. P. C. 175.

2899. Plaintiff already in possession of specimens—Admitted to be similar to those complained of.]—In an action for infringement of a patent relating to spindles & bobbins, pltf., by his particulars of breaches, complained of certain spindles & bobbins used by defts.; specimens, admitted by defts. to be similar to those complained of, were obtained by pltf. from the makers. Defts. denied infringement, & contested the validity of the patent, alleging prior publication in certain specifications, upon the whole of some of which they stated that they relied, & prior manufacture, sale, or user in certain years by certain persons named, including the predecessors in business of the defts. Pltf. applied for liberty to inspect the spindles & bobbins mentioned in the particulars of breaches & the spindles & bobbins mentioned in the particulars of objections as having been used by defts.' predecessors in business, & also for further particulars as to the parts of the specifications relied on as anticipations:—*Held:* (1) under the circumstances pltf. was not entitled to inspect at defts.' works the articles said to be infringements; (2) pltf. was entitled to production, but not to inspection at defts.' works, of all alleged anticipations by defts.' predecessors of which defts had retained possession; (3) defts. were entitled to rely on the whole of a specification, if necessary, & could not be forced to point out special parts, unless it appeared that no attempt at discrimination had been made; (4) in stating instances of prior sale, manufacture, or user defts. need not specify more than the kind of article referred to, the names of the prior sellers, makers, or user, & the dates.—SIDEBOTTOM *v.* FIELDEN (1891), 8 R. P. C. 266.

2900. Plaintiff unable to give particulars of breaches.]—EDLER *v.* VICTORIA PRESS MANUFACTURING CO., No. 2884, *ante*.

2901. Defendant offering to admit facts.]—In 1909 a patent was granted for "improvements in & relating to the treatment of tungsten to facilitate working." One of the claims was for "the method of manufacturing wires or filaments of tungsten which consists in rolling, swaging or hammering a heated body of coherent tungsten until it becomes ductile at ordinary temperature & then rolling or drawing the ductile tungsten to the required size." In an action for infringement of the patent, pltfs., after the delivery of the pleadings, applied by summons for an order that they might be at liberty, by their general manager, their solrs. & scientific witnesses, to inspect the process used by defts. for the manufacture of their drawn wire. An affidavit in support of the summons was made by a scientific witness, who said that it was impossible to manufacture wire similar to that made by defts. without using the processes, or some or one of them, described in the specification of the patent. Defts. alleged that they had established a process for the manufacture of tungsten & other wire; that the details of the process had been kept secret; & that the inspection sought would result in handing over to defts.' trade rivals defts.' secrets of success. At the hearing of the summons defts. offered to make admissions of facts that would, they contended, give pltfs. all the information to which they were entitled:—*Held:* if an inspection were ordered, it ought to be carried out by not more than two experts, who ought to be allowed to take samples of defts.' product in various stages of its manufacture, & to report to the ct. upon the facts disclosed, & the experts' opinion founded upon them; the experts ought to be put under terms not to disclose, without order of the ct., any part of the secret process, but they ought to be allowed to report to pltfs., without giving details whether or not, in their opinion, defts.' process did, or did not, infringe the patent; before an inspection was ordered, the summons should stand over, with liberty to pltfs. to deliver questions in writing to defts. & after defts. had given their answers in writing, the summons could be restored. The costs were ordered to be costs in the action.—BRITISH THOMSON-HOUSTON CO., LTD. *v.* DURAM, LTD. (No. 2) (1920), 37 R. P. C. 121.

C. Who may Carry out Inspection.

2902. Expert witnesses.]—DAVENPORT *v.* JEPSON, No. 2877, *ante*.

2903. ——.]—In a suit to establish the validity of a patent, & to restrain infringement by deft., upon an application by pltf. for inspection of all the sewing machines of every kind on deft.'s premises, deft. was ordered to verify on affidavit the several kinds of sewing machines which he had sold or exposed for sale, & to produce at his solr.'s office, one of each class for inspection by pltf.'s solr., & two of their scientific witnesses.—SINGER MANUFACTURING CO. *v.* WILSON (2) (1865), 5 New Rep. 505; 12 L. T. 140; 13 W. R. 560.

2904. ——.]—SWAIN *v.* EDLIN-SINCLAIR TYRE CO. (1903), 20 R. P. C. 435.

2905. ——.]—EDLER *v.* VICTORIA PRESS MANUFACTURING CO., No. 2884, *ante*.

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 7, C., D. & E.; sub-sect. 8, A. & B.]

2906. —— Named by plaintiff & not objected to by defendant.]—Pltfs. brought an action against defts. to restrain alleged infringements of a patent process for printing on metal plates. Pltfs. printed from dry lithographic stones put into relief. Defts. alleged that they defts. printed by the ordinary damp lithographic process from flat stones. Pending the proceedings, an order was made by the Ct. of Appeal that an expert named by pltfs. & not objected to by defts. should be at liberty to inspect the defts.' process, & the defts. gave an undertaking to show him the whole process. The inspector examined the process, & was shown twenty-seven stones used by defts., & reported to the effect that defts.' mode of printing was the same as the ordinary process of lithography, except that tin was used instead of paper. The action being tried on these materials, was ultimately dismissed by the Ct. of Appeal. Pltfs. shortly afterwards commenced an action to have it declared that the judgment on the appeal had been obtained by fraud, & for consequential relief. The alleged fraud was that defts., when the inspection took place, had in use not only the above twenty-seven stones, but also stones on which the designs were placed in relief—that they removed such latter stones from the place where the inspection took place, in order to conceal from the inspector the fact that they had stones on which the design was in relief—that they falsely stated to the inspector that they had no other stones than those shown to him—& that defts. stated to the inspector that the ink used by them was ordinary lithographic ink, whereas in fact they used ink specially prepared for pltfs.' use by a particular manufacturer for printing by the dry process. The Vice-Chancellor considered the case of fraud proved, & made a decree in pltfs.' favour, but the Ct. of Appeal was of opinion that no fraud was proved, & dismissed the action. *Semble:* an action to impeach a judgment on such grounds was not maintainable.—FLOWER *v.* LLOYD (1879), 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496, C. A.

Annotations:—**Refd.** Deake *v.* Muntz's Metal Co. (1886), Griffin's Patent Cases (1884–1886), 78. **Mentd.** Abouloff *v.* Oppenheimer (1882), 10 Q. B. D. 295; Boswell *v.* Coaks (1883), 52 L. J. Ch. 465; Baker *v.* Wadsworth (1898), 67 L. J. Q. B. 301; Cole *v.* Langford, [1898] 2 Q. B. 36; Wyatt *v.* Palmer (1899), 80 L. T. 639.

2907. —— On terms not to disclose secret process.]—BRITISH THOMSON-HOUSTON CO., LTD. *v.* DURAM, LTD. (No. 2), No. 2901, *ante*.

2908. Solicitors.]—DAVENPORT *v.* JEPSON, No. 2877, *ante*.

2909. ——.]—SINGER MANUFACTURING CO. *v.* WILSON (2), No. 2903, *ante*.

2910. ——.]—EDLER *v.* VICTORIA PRESS MANUFACTURING CO., No. 2884, *ante*.

2911. Parties—Plaintiffs.]—DAVENPORT *v.* JEPSON, No. 2877, *ante*.

2912. —— ——.]—SWAIN *v.* EDLIN-SINCLAIR TYRE CO., No. 2904, *ante*.

2913. —— ——.]—EDLER *v.* VICTORIA PRESS MANUFACTURING CO., No. 2884, *ante*.

2914. —— Defendants.]—CHEETHAM *v.* OLDHAM & FOGG (No. 2), No. 2883, *ante*.

D. Extent of Inspection Ordered.

2915. Inspection of competent portion.]—(1) In an action commenced by A. against B., the proprietor of a newspaper, for an alleged infringement, in the type used in printing the paper, of A.'s patent, the Ct. of Exch. refused to grant an order for the delivery to A. of a portion of the type for the purposes of analysis. Having subsequently filed a bill in equity against B., an order was made for inspection & the delivery of a competent portion of the type for the purposes of analysis.

(2) Laches sufficient to defeat pltfs.' right to an interlocutory injunction was no bar on the same motion for inspection & samples.—PATENT TYPE FOUNDING CO. *v.* WALTER (1860), John. 727; 8 W. R. 353; 70 E. R. 613.

2916. Whether of machinery in working—Machinery used in manufacture of disputed article—Referred to in affidavits.]—DAVENPORT *v.* JEPSON, No. 2877, *ante*.

2917. —— Inspection of machines produced—At all reasonable times—Production at trial.]—In the meantime all I can do is to order that pltf. has a right to inspection at the works of deft. co. of the machines which are produced, at all reasonable times, & as often as may be requisite, upon giving three days' previous notice, & then to an order to produce the machines upon any examination of witnesses in the action (BACON, V.-C.).—DRAKE *v.* MUNTZ'S METAL CO. (1886), Griffin's Patent Cases (1884–1886), 78; 3 R. P. C. 43.

2918. One machine of each class—Not all machinery in stock—Several kinds used to be verified on affidavit.]—SINGER MANUFACTURING CO. *v.* WILSON (2), No. 2903, *ante*.

2919. Inspection limited to processes primâ facie infringed.]—CHEETHAM *v.* OLDHAM & FOGG (No. 1), No. 2882, *ante*.

2920. Alleged anticipations by defendant's predecessors—If in possession of defendants.]—SIDEBOTTOM *v.* FIELDEN, No. 2899, *ante*.

E. Samples.

2921. When production ordered—Not for purpose of preparing defence.]—In an action for the infringement of a patent, pltf. will not be compelled to produce a specimen of the patent articles to enable deft. to prepare his defence to the action.—CROFTS *v.* PEACH (1836), 2 Hodg. 110; 1 Web. Pat. Cas. 268.

2922. When leave to take granted—General rule.]—DAVENPORT *v.* JEPSON, No. 2877, *ante*.

2923. —— ——.]—CHEETHAM *v.* OLDHAM & FOGG (No. 2), No. 2883, *ante*.

2924. —— For purposes of analysis.]—PATENT TYPE FOUNDING CO. *v.* WALTER, No. 2915, *ante*.

2925. —— —— Expert reporting to court on facts & opinion—To plaintiff whether any infringement indicated.]—BRITISH THOMSON-HOUSTON CO., LTD. *v.* DURAM, LTD. (No. 2), No. 2901, *ante*.

SUB-SECT. 8.—THE HEARING.

A. In General.

2926. What issues tried—Validity alone—When numerous actions instituted.]—FOXWELL *v.* WEBSTER, No. 2864, *ante*.

2927. —— —— When proof of infringement expensive—Secret government processes.]—From the evidence & the documents which I have seen, the question of validity & the question of infringement are almost entirely separate & the expense of proving infringement will be very heavy &, having

of law before trial.]—BERLINER GRAM-O-PHONE CO. *v.* COLUMBIA PHONOGRAPH CO. (1908),

regard to the secret character of the government processes, will have, if & when it comes to be tried, to be tried under particular safeguards & circumstances; but, as the validity of this patent, before any infringement question can be discussed at all, will have to be substantiated, I am of opinion that, having regard to the particular circumstances of this case, it would be a fair & proper thing to direct the question of validity to be tried first (ASTBURY, J.).—HANKS *v.* COOMBES (1927), 44 R. P. C. 305.

2928. —— Infringement alone—Admission of validity.]—Unless defts. admit the validity of the patent, the question of infringement cannot be tried by itself. I decline to take a qualified admission that it was valid for the combination & not for the competent part (KAY, J.).—UNITED TELEPHONE CO. *v.* MATTISHEAD (1886), Griffin's Patent Cases (1884–1886), 230; 3 R. P. C. 213.

2929. Right of audience—Agent of company.]—PNEUMATIC TYRE CO., LTD. *v.* WEST LONDON RUBBER & TYRE CO., LTD., No. 3278, *post*.

2930. Right to inspection of report of examiner—Necessity for substantive application.]—AVERY, LTD. *v.* ASHWORTH, SON & CO., LTD., No. 2861, *ante*.

See Patents & Designs Acts, 1907 (c. 29), s. 68; 1919 (c. 80), sched.

2931. One defendant not delivering defence—Whether motion for judgment granted.]—ACT. FÜR CARTONNAGEN INDUSTRIE *v.* REMUS (T.) & CO. & BURGON & CO. (1895), 12 R. P. C. 94.

2932. Defendant not appearing at trial—Necessity for plaintiff to prove case.]—Pltf. being the owner of a patent (No. 317 of 1878) sued deft. for infringement. Deft. put in a defence by which among other things he denied the novelty of pltfs.' invention, the sufficiency of the complete specification & that he had infringed. He also alleged prior user & publication of pltfs.' invention. Deft. at the trial did not appear:—*Held:* pltf. was not entitled to judgment without any proof of his case but that as his specification was good on the face of it & as he proved the infringement he was entitled to the relief he claimed.—PERONI *v.* HUDSON (1884), 1 R. P. C. 261; Griffin's Patent Cases (1884–1886), 183.

2933. —— ——.]—This action was for infringement of a patent for "Improvements in & apparatus for recording & reproducing speech & other sounds. Deft. denied infringement, & by his pleadings alleged the invalidity of the patent on various grounds, but did not appear at the trial. Formal evidence was called to prove the validity of the patent & pltf.'s title. An injunction was granted with an order for delivery up of infringing articles & the usual certificates.—EDISON UNITED PHONOGRAPH CO. & EDISON-BELL PHONOGRAPH CORPN., LTD. *v.* YOUNG (1894), 11 R. P. C. 489.

2934. Effect of verdict for plaintiff.]—(1) Verdict for pltf. involves the validity of the patent subject to every legal consideration & the infringement.

(2) It is scarcely necessary here to observe, that a slight departure from the specification for the purpose of evasion only would, of course, be a fraud upon the patent; &, therefore, the question will be, whether the mode of working by deft. has or has not been essentially or substantially different (DALLAS, J.).—HILL *v.* THOMPSON (1818), 8 Taunt. 375; 2 Moore, C. P. 424; 1 Web. Pat. Cas. 239; 1 Carp. Pat. Cas. 381; 129 E. R. 427.

Annotations:—Generally, **Mentd.** Brunton *v.* Hawkes (1821), 4 B. & Ald. 541; Campion *v.* Benyon (1821), 6 Moore, C. P. 71; Bloxan *v.* Elsee (1825), 1 C. & P. 558; Morgan *v.* Seaward (1837), 2 M. & W. 544; Bovill *v.* Finch (1870), L. R. 5 C. P. 523.

2935. Ground for rehearing—New evidence since trial—Failure to direct as to extension of patent.]—In this case a verdict & judgment had been given for pltf. at the trial, & defts. moved for an order that the verdict & judgment should be set aside & a new trial granted on the following grounds: (*a*) that the verdict was against the weight of evidence; (*b*) that the judge misdirected the jury in the following respects, that is to say: (i) in leaving to the jury the question whether a sum of £26 1*s*., which was by a certain agreement payable to pltf. by one H., had been so paid by the said H., or had been allowed by him & credited to pltf. in an account stated between them; (ii) in leaving to the jury the question whether H. used his best endeavours in obtaining orders; (iii) in not directing a verdict for deft. on the ground that on payment of the £100 H. became absolute owner of half the patent; (iv) in not directing the jury that in point of law the last patent & the invention protected thereby was an extension or modification of the 1867 & the 1869 patents or one of them, or of the design or principle or of a matter of detail contained or involved therein; (*c*) on the ground of surprise; (*d*) on the ground that defts. have discovered fresh evidence since the trial. Motion refused with costs.—KING *v.* OLIVER & CO., LTD. (1884), 1 R. P. C. 42, D. C.

2936. —— —— As to manufacture of infringing articles.]—The owners of two patents for improved electric lamps brought an action against deft. alleging infringement. Deft. denied infringement. At the trial deft. applied to amend his statement of defence so as to put in issue the validity of one of the patents & of the assignment of the same to pltfs. The application being refused, deft. submitted to an injunction. Subsequently deft. applied for a rehearing upon the ground that he had, since the trial, ascertained that the lamps which were held to be infringements were not manufactured by him, & had within them filaments manufactured by pltfs. The application was refused.—EDISON ELECTRIC LIGHT CO. *v.* SHIPPEY (1887), 4 R. P. C. 471.

Jurisdiction of county court.]—*See* COUNTY COURTS, Vol. XIII., p. 480, No. 304.

B. Mode of Trial.

See Patents & Designs Acts, 1907 (c. 29), s. 31 (1); 1919 (c. 80), sched.

2937. General rule — Without jury — Unless special circumstances exist.]—In the absence of special circumstances the ordinary issues in a patent suit will be tried before the ct. itself without a jury.—PATENT MARINE INVENTIONS CO. *v.* CHADBURN (1873), L. R. 16 Eq. 447; 28 L. T. 614; 21 W. R. 745.

2938. —— —— ——.]—Pltfs. by their statement of claim asked for an injunction against the infringement of their patent, & for an account & damages. Only one instance of infringement was alleged. After issue joined pltfs. set down the action for trial & defts. then gave notice under R. S. C., Ord. 36, r. 3, that they required to have the action tried before a judge & special jury. Upon an application by pltf. under R. S. C., Ord. 36, r. 26:—*Held:* the case was not one in which defts. were entitled to insist upon a jury, & the case was ordered to be tried in this division of the ct. without a jury.—SPRATT'S PATENT *v.* WARD & CO. (1879), 11 Ch. D. 240; 48 L. J. Ch. 645; 40 L. T. 250; 27 W. R. 470.

*Annotation:—***Refd.** Singer Manufacturing Co. *v.* Loog (1879), 11 Ch. D. 656.

2939. —— —— ——.]—RHODES & EDMONDSON *v.* BRITISH COTTON & WOOL DYERS ASSOCN., LTD. (1910), 28 R. P. C. 67.

Sect. 2.—Legal proceedings in respect of infringe- . 8, B. & C.;

2940. When trial by jury granted—No right ex debito justitiæ.]—Deft. in a suit to restrain the infringement of a patent has no right to have the issues of the fact referred to a jury *ex debito justitiæ;* & where the issues raised have been already determined, such reference will in general be refused. But if it appear that there is a really doubtful question at issue, the ct. will not decide it for itself, if either party desire a jury.—DAVENPORT *v.* GOLDBERG (1865), 2 Hem. & M. 282; 71 E. R. 472; *sub nom.* DAVENPORT *v.* GOLDBERG, DAVENPORT *v.* PHILLIPS, 5 New Rep. 484.

Annotation:—**Consd.** Bovill *v.* Goodier (2) (1866), L. R. 2 Eq. 195.

2941. —— ——.]—(1) Where, in a patent suit, questions of fact have to be determined, the parties have no absolute right to have those questions tried by a jury. It must be decided upon the merits of the particular case whether the assistance of a jury shall be required.

(2) The Ct. of Ch. being now compelled to decide legal rights is to decide them according to its own ordinary practice.—BOVILL *v.* HITCHCOCK (1868), 3 Ch. App. 417; 37 L. J. Ch. 223; 16 W. R. 321, L. J.

2942. —— Doubtful question at issue—On application of either party.]—DAVENPORT *v.* GOLDBERG, No. 2940, *ante.*

2943. When trial by jury refused—Issues already determined.]—DAVENPORT *v.* GOLDBERG, No. 2940, *ante.*

2944. Trial behind closed doors—Alleged secret process.]—(1) Where in a patent case the evidence is conflicting & indecisive on a scientific point, the ct. is at liberty to obtain competent independent scientific assistance in determining the matters at issue.

(2) Where in a patent case deft. denies infringement, but objects to state in open ct. the process he actually practises, on the ground that it is the subject of a valuable secret, of the benefit of which he would be deprived by disclosure, the ct. will first ascertain whether the defence fails in all other respects than infringement, & then, unless deft. prefers to submit to an injunction, will hear the evidence & arguments with respect to the alleged infringement by the secret process with closed doors, & with a view to further protecting the secret, will order the shorthand notes of the private hearing to be impounded until either an appeal is entered or the right to appeal is abandoned.

(3) Where a patent is obtained for the use of particular chemical materials for arriving at a particular chemical result, it is no infringement to arrive at the same result by the use of other chemical materials which were not known to be equivalents for the materials mentioned in the specification at the time when the patent was obtained.

(4) Where a patent is obtained for a new process for arriving at a known result, it is no infringement to arrive at the same result by a different process.

(5) Where a patent is obtained for a new result, & one process of arriving at that result is described in the specification, it is an infringement to produce the same result by any process.—BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN (1883), 24 Ch. D. 156; 52 L. J. Ch. 704; 48 L. T. 822; 31 W. R. 913; *on appeal* (1885), 29 Ch. D. 366, C. A.; (1887), 12 App. Cas. 710, H. L.

[illegible] [1892] A. C. 217. *As to* (4) **Reid.** Atkins & Applegarth *v.* Castner-Kellner Alkali Co. (1901), 18 R. P. C. 281. *Generally,* **Reid.** Easterbrook *v.* G. W. Ry. (1885), 2 R. P. C. 201; Haslam Foundry & Engineering Co. *v.* Hall (1887), 4 T. L. R. 154; Kurtz *v.* Spence (1887), 58 L. T. 438; Siddell *v.* Vickers (1887), 4 T. L. R. 191; Cole *v.* Saqui & Lawrence (1888), 40 Ch. D. 132; Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 T. L. R. 294; Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369.

C. Reference to Expert.

See Patents & Designs Acts, 1907 (c. 29), s. 31; 1919 (c. 80), sched.

2945. Power of court to refer—Where contradictory evidence on scientific question.]—BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN, No. 2944, *ante.*

2946. —— For experiment.] — Pltf., being patentee of improvements in machines for cutting & trimming the hairs or bristles of brushes, sued deft. for using a machine which pltf. alleged was an infringement of his patent. Deft. alleged, (*a*) that pltf.'s patent was invalid because his specification was insufficient; (*b*) that deft.'s machine was not an infringement; (*c*) that such machine was in use before the date of the patent. It was held at the trial that the specification was sufficient, that deft.'s machine was an infringement, & that it was not in use before the date of the patent. Judgment was accordingly given for pltf., with costs. Deft. having appealed, Ct. Appeal, considering that it was necessary in order to dispose of the case, that the capability of deft.'s machine to cut brushes should be ascertained by experiment, made an order that M. should make such an experiment, & report the result to the ct. The hearing of the appeal having been adjourned for the purpose, the order was carried into effect, & M. was examined by the ct. on the resumption of the appeal. In the result the ct. allowed the appeal, reversed the judgment of the ct. below, & dismissed the action with costs on the grounds (*a*) that the specification was insufficient in not pointing out what was novel in the combination constituting pltf.'s invention, & (*b*) that deft.'s machine was not an infringement, because it did not comprise that part of pltf.'s invention on which pltf. rested his case. Pltf. having appealed to the House of Lords:—*Held:* (1) the specification was sufficient, because, where the claim is for a new combination only, & not also for subordinate elements included in that combination, then, if the combination & the mode of working it are properly described, it is not necessary to specify which of the subordinate elements are new; (2) there were differences between deft.'s machine & its operation & that of pltf. & its operation, which prevented deft.'s machine from being an infringement of pltf.'s patent; (3) the order of the Ct. of Appeal dismissing the action must be affirmed; but, as pltf. had succeeded in reversing that portion of the judgment of the Ct. Appeal which declared his patent bad, no costs of the appeal to the House of Lords would be given to deft.—MOORE *v.* BENNETT (1884), 1 R. P. C. 129; Griffin's Patent Cases (1884–86), 158, H. L.

Annotations:—*As to* (1) **Reid.** International Harvestor Co. of America *v.* Peacock (1908), 25 R. P. C. 765; United Shoe Machinery Co. *v.* Fussell (1908), 25 R. P. C. 631; Lynch & Wilson *v.* Phillips (1909), 26 R. P. C. 389. *As to* (2) **Consd.** Useful Patents Co. *v.* Rylands (1885), 2 R. P. C. 255. *As to* (3) **Reid.** Sugg *v.* Bray (1885), Griffin's Patent Cases (1884–6), 210.

2947. —— —— Independent expert chosen by parties.]—The owners of two patents relating to the construction of incandescent electric lamps brought an action for infringement. Defts. denied infringement, & alleged that the patents were invalid on the ground, (*inter alia*) of insufficiency of specification, want of novelty, & utility:—

Held : one patent was invalid on the grounds that : (*a*) the second claim was too wide ; (*b*) the specification did not describe a lamp which ever became, or could have become commercially successful ; (*c*) the directions contained therein for making the carbon required further experiment ; (*d*) one of the processes described was practically injurious ; (*e*) another of the processes described was, if not injurious, of no practical utility ; (*f*) the third claim was of no practical utility, but the other patent was valid & had been infringed ; an inquiry as to damages & delivering up of lamps infringing such patent was ordered on motion to vary the minutes.

At my suggestion the parties agreed that the experiments should be repeated in the presence of Professor Stokes, whom they chose as an independent expert, who should report the result to the ct. I have the report, which the parties have seen (KAY, J.).—EDISON & SWAN ELECTRIC LIGHT CO. *v.* HOLLAND (1888), 5 R. P. C. 459 ; 4 T. L. R. 686 ; *on appeal* (1889), 41 Ch. D. 28, C. A.

Annotations :—**Refd.** Heap *v.* Hartley (1889), 61 L. T. 538 ; Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424 ; Haskell Golf Ball Co. *v.* Hutchison (No. 2) (1905), 22 R. P. C. 477 ; Jandus Arc Lamp & Electric Co. *v.* Arc Lamp Co. (1905), 22 R. P. C. 277 ; Layland *v.* Boldy (1913), 30 R. P. C. 547 ; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369 ; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95 ; British Thomson-Houston *v.* Charlesworth, Peebles (1924), 41 R. P. C. 241. **Mentd.** Wallace *v.* Tullis Russell (1921), 39 R. P. C. 3.

2948. ——.]—NORTH BRITISH RUBBER CO., LTD. *v.* MACINTOSH & CO., LTD. (1894), 11 R. P. C. 477.

Annotation :—**Refd.** North British Rubber Co. *v.* Gormully & Jeffery Manufacturing Co. (1896), 12 T. L. R. 634.

2949. —— Discretion of court — Appeal.]—SAXBY *v.* GLOUCESTER WAGON CO., [1880] W. N. 28, C. A.

SUB-SECT. 9.—EVIDENCE.

A. In General.

See Patents & Designs Act, 1907 (c. 29), ss. 78, 79 ; &, *generally*, EVIDENCE, Vol. XXII., pp. 19 *et seq.*

2950. Evidence of validity of patent — Decision in previous action—Where facts not materially different.]—NATIONAL OPALITE GLAZED BRICK & TILE CO. *v.* GRAND HOTEL, BIRMINGHAM (1901), 18 R. P. C. 249.

2951. Application to amend specification made before action—Amendment after issue of writ—Amended specification proper one for trial.]—Where leave to amend the specification of a patent has been made to the Comptroller before, & leave to amend granted after, the issue of a writ in an action for infringement, the proper specification to put in evidence & refer to at the trial is the specification as it stands after amendment.—STEPNEY SPARE MOTOR WHEEL CO., LTD. *v.* HALL, [1911] 1 Ch. 514 ; 80 L. J. Ch. 391 ; 104 L. T. 665 ; 27 T. L. R. 283.

2952. Judge's notes for Court of Appeal—Duty of appellant.]—(1) Shorthand notes, taken by clerks of the solrs. in a proceeding, cannot be referred to in any way in the Ct. of Appeal ; the ct. only relies on shorthand notes when taken by an entirely independent person.

(2) When evidence taken orally in the ct. below has to be referred to an appeal, it is the duty of the applt. to apply to one of the judges of the Ct. of Appeal, through his clerk, to apply to the judge below for a copy of his notes to be sent to the Ct. of Appeal ; & if an applt. fails in this duty the appeal will be ordered to stand over at his expense.

(3) Costs on the higher scale should be allowed in patent cases where scientific witnesses are necessarily called.

(4) There should be no difference between the costs in the action of the validity of the patent & the costs upon the question of infringement (COTTON, L.J.).—ELLINGTON *v.* CLARK, BUNNETT & CO. (1888), 38 Ch. D. 332 ; 57 L. J. Ch. 958 ; 58 L. T. 818 ; 36 W. R. 873 ; 5 R. P. C. 319, C. A.

Annotations :—*As to* (3) **Apld.** Dunlop Pneumatic Tyre Co. *v.* Wapshare Tube Co. (1900), 17 R. P. C. 433. **Refd.** Rivington *v.* Garden, [1901] 1 Ch. 561.

2953. Shorthand note by solicitor's clerk—Reference to in Court of Appeal.]—ELLINGTON *v.* CLARK, BUNNETT & CO., No. 2952, *ante.*

2954. Proof of infringement—Whether question for judge or jury.]—(1) The question of infringement peculiarly for the jury, who must say whether any advantage has been taken of the invention of pltf. Or, whether there is such a variation in substance as to constitute a new discovery.

(2) A specious variation in form or ingenious alteration in the mode of adaptation, an infringement of the patent.

(3) The plea that the invention is not a new manufacture known in England, admits the invention to be a manufacture, & puts in issue the novelty.—WALTON *v.* POTTER & HORSFALL (1841), 3 Man. & G. 411 ; 1 Web. Pat. Cas. 585 ; 4 Scott, N. R. 91 ; 11 L. J. C. P. 138 ; 1 Goodeve's Patent Cases, 488 ; 133 E. R. 1203.

Annotations :—*As to* (1) **Consd.** Thorn *v.* Worthing Skating Rink Co. (1876), 6 Ch. D. 415, n. **Refd.** Hill *v.* Evans (1862), 4 De G. F. & J. 288. *As to* (2) **Refd.** Bateman & Moore *v.* Gray (1853), Macr. 93 ; Edison & Swan Electric Light Co. *v.* Woodhouse (1886), Griffin's Patent Cases (1884–6), 90. *Generally*, **Refd.** Betts *v.* Walker (1849), 14 Jur. 647.

2955. —— ——.]—DE LA RUE *v.* DICKENSON, No. 2397, *ante.*

2956. —— ——.]—SEED *v.* HIGGINS, No. 2372, *ante.*

2957. —— Of improvement—Necessity for proof of prior specification.]—If A. in 1818 take out a patent for " improvements in a machine for which L. took out a patent in 1815," it is necessary for A. on the trial of an action for the infringement of his patent to put in L.'s patent & specification ; but it is not material whether a machine made according to the specification of L. would be useful or not if it be shown that a machine constructed according to A.'s specification would be so.—LEWIS *v.* DAVIS (1829), 3 C. & P. 502 ; 1 Web. Pat. Cas. 488 ; 1 Carp. Pat. Cas. 471.

Annotation :—**Consd.** Crane *v.* Price (1842), 1 Web. Pat. Cas. 393.

2958. —— Where plaintiff's patents cover all known methods of manufacture.]—The S. Corpn., Ltd., brought an action for infringement of twenty-three patents, all relating to the manufacture of saccharin, alleging that such patents covered all the known ways of making pure saccharin. Deft. did not deny the validity of the patents, but denied infringement, & alleged that the saccharin sold by him was not pure saccharin, which is of 550 strength, but was saccharin of 330 strength ; that it was made abroad, & that he did not know how it was made :—*Held :* the saccharin sold by deft. was of 550 strength, & the evidence established that pltfs.' patent covered all known ways of making pure saccharin ; the sales by deft. were therefore infringements of those patents or some of them. Judgment was given for pltfs., but the injunction granted was limited

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 9, A., B. (a) & (b), & C.]

to the existence of the patent earliest in date.—SACCHARIN CORPN., LTD. *v.* JACKSON (1903), 20 R. P. C. 611.

Annotation:—**Refd.** British Thomson-Houston Co. *v.* Charlesworth, Peebles (1923), 40 R. P. C. 426.

2959. —— ——.]—The S. Corpn. sued M. & co. for infringement of seven patents. The defence was a denial of infringement:—*Held:* it must be assumed that the art. complained of was made by some process covered by pltfs.' patents, & judgment was given for pltfs. with costs.—SACCHARIN CORPN., LTD. *v.* MACK & CO. (1905), 23 R. P. C. 25.

Annotation:—**Refd.** British Thomson-Houston Co. *v.* Charlesworth, Peebles (1923), 40 R. P. C. 426.

2960. Proof of acquiescence.] — PROCTOR *v.* BENNIS. No. 2472, *ante.*

2961. Presumption against agent—As rival manufacturer.]—WHEATSTONE *v.* WILDE, No. 2786, *ante.*

2962. Presumption of infringement of chemical process—When admission of same chemical composition.]—SHARPE & DOHME INC. *v.* BOOTS PURE DRUG CO., LTD. (1927), 44 R. P. C. 69.

Commission to examine witness abroad.]—*See* EVIDENCE, Vol. XXII., p. 575, No. 6268.

Admissibility.

(a) In General.

See, generally, EVIDENCE, Vol. XXII., pp. 53 *et seq.*

2963. Evidence in rebuttal—After defendant's evidence closed—Particulars of objection exceeded.]—After defts.' evidence was closed, an application was made on behalf of pltfs. that the case might stand over to adduce further rebutting evidence on pltfs.' behalf as to Shaw's heel plate. The ground of this, as I understood, was that defts.' evidence on this point went further than was justified by their particulars of objection. I was most reluctant to yield to the application, but after hearing what other rebutting evidence pltfs. I allowed the case to stand over.—BLAKEY & CO. *v.* LATHAM & CO. (1888), as reported in 6 R. P. C. 29; *on appeal* (1889), 6 R. P. C. 184, C. A.

Annotations:—**Mentd.** Williams *v.* Nye (1890), 7 R. P. C. 62; Savage *v.* Harris (1896), 13 R. P. C. 364.

2964. Expert evidence—For what purposes admitted—Infringement.]—SEED *v.* HIGGINS, No. 2372, *ante.*

2965. —— —— **Equivalents.**]—TICKET PUNCH & REGISTER CO., LTD. *v.* COLLEY'S PATENTS, LTD., No. 2480, *ante.*

2966. —— ——.]—Expert evidence is admissible to explain technical terms, to show the practical working of machinery described or drawn, to point out what is old & what is new in the specification, & to show the particulars in which an alleged invention has been used by an alleged infringer, & the real importance of whatever differences there may be between pltf.'s invention & whatever is done by deft.—BROOKS *v.* STEELE & CURRIE (1896), 14 R. P. C. 46, C. A.

2967. —— ——.]—Pltfs., as the registered legal owners of letters patent granted to one N. for a "process for converting unsaturated fatty acids or their glycerides into saturated compounds," alleged that defts. were infringing their letters patent, & they claimed an injunction & the usual ancillary relief. Defts. denied the validity of the letters patent on the ground that N.'s specification did not sufficiently describe the manner in which the process was to be carried out:—*Held:* the specification was insufficient in this respect & pltfs.' action failed.

It is not competent in any action for witnesses to express their opinion upon any of the issues, whether of law or fact, which the ct. or a jury has to determine. The assistance of expert evidence in patent actions is generally essential. It is required for the purpose of explaining words, or terms of science or art, appearing in the documents which have to be construed by the ct. or to inform the ct. in case the import of a word or phrase differs from its popular meaning (NEVILLE, J.).—JOSEPH CROSFIELD & SONS, LTD. *v.* TECHNO-CHEMICAL LABORATORIES, LTD. (1913), 29 T. L. R. 378; 30 R. P. C. 297.

2968. Acts subsequent to issue of writ—Not admissible.]—Pltf. commenced an action for the infringement of 4 patents for certain mechanism in machines for lasting boots & shoes. One patent was withdrawn during the hearing. Evidence received *de bene esse* with respect to the alleged infringement after issue of the writ:—*Held:* defts. had infringed; the three patents were valid & the evidence as to alleged infringements after the date of the writ was inadmissible.—SHOE MACHINERY CO., LTD. *v.* CUTLAN (1895), 12 R. P. C. 342; *on appeal*, [1896] 1 Ch. 108, C. A.

Annotations:—**Expld. & Apld.** Welsbach Incandescent Gas Light Co. *v.* Dowle & London & Suburban Maintenance Co. (1899), 16 R. P. C. 391. **Mentd.** Poulton *v.* Adjustable Cover & Boiler Block Co., [1908] 2 Ch. 430.

2969. —— ——.]—Pltfs. sold mantles of their manufacture with a limited licence. It was alleged that defts. had infringed by breach of the limited licence. Evidence was offered of acts done after the issue of the writ to strengthen & explain the evidence prior to the date of the writ:—*Held:* the evidence of acts prior to the writ was not sufficient to prove pltfs.' case, &, where an action is for infringement & not to restrain threatened infringement, evidence of acts subsequent to the date of the writ is inadmissible.—WELSBACH INCANDESCENT GAS LIGHT CO., LTD. *v.* DOWLE & LONDON & SUBURBAN MAINTENANCE CO. (1899), 16 R. P. C. 391.

2970. Evidence of inventor.] — BATEMAN *v.* GRAY, No. 2974, *post.*

2971. Evidence of person not mentioned in particulars of breaches—Referred to in interrogatories.]—SYKES *v.* HOWARTH, No. 2286, *ante.*

2972. Specification—Proper notice not given.]—LISTER *v.* LEATHER, No. 2517, *ante.*

2973. Evidence affecting discretion of court.]—MERGENTHALER LINOTYPE CO. *v.* INTERTYPE CO., LTD., No. 3002, *post.*

Exemplification of patent.]—*See* EVIDENCE, Vol. XXII., p. 253, No. 2363.

(b) Defence of Want of Novelty.

2974. Evidence to explain specification—To show new combination of old matters.]—(1) In an action for the infringement of a patent, pleas which deny that pltf. was the true & first inventor, & that the manufacture was new, do not bind pltf. to the description of the invention as given in the specification so as to preclude him from giving evidence to show that the invention does not consist, as might be inferred from the specification, in the use of several new matters but in the new combination of several old matters.

PART XIV. SECT. 2, SUB-SECT. 9.—B. (b).

r. *Evidence of prior user.*] — Particulars of objection on the ground of common public knowledge do not authorise deft. to give evidence of prior user as to anticipation. v. FULHAM (1910), 10 S. R. N. S. W 291; 27 N. S. W. W. N. 66.

(2) The use of equivalent means to effect the same end as that patented is an infringement of the patent.

(3) The man who made the invention may be called to enable you to ascertain what the invention was.—BATEMAN *v.* GRAY (1853), 8 Exch. 906; 1 C. L. R. 512; Macr. 93; 22 L. J. Ex. 290; 155 E. R. 1621.

Annotation:—Generally, **Reld.** Crossley *v.* Potter (1353), Macr. 240; Hancock *v.* Noyes (1854), 9 Exch. 388.

2975. Evidence of prior user—Discovered since closing of evidence.]—In a patent suit which had been set down for hearing, an application made by deft., after notice given to pltf., for leave to produce at the hearing of the cause the evidence as to prior user, stated to be very important, of a new witness discovered since the closing of the evidence, was allowed.—WILSON *v.* GANN (1875), 23 W. R. 546.

2976. Evidence by licencee.] — Pltf. having taken out a patent for improvements in the machinery for clipping horses, deft. offered, if pltf. would give him a licence for the manufacture, to pay the sum of 1*s.* 2*d.* on all horse clippers sold by him, deft., after a certain date, & pltf. accepted the offer. A bill was filed for specific performance of this contract, & a decree was made, declaring that the agreement ought to be specifically performed, ordering a licence to be granted, & directing an account.

On a summons on behalf of pltf. to surcharge deft. on account of certain clippers asserted to have been made according to pltf.'s invention, deft. denied that his clippers came within the limits of the patent, & produced the specification of an American patent as evidence of the construction to be put on the specification of the English patent:—*Held:* a licencee could not in any way dispute the validity of the patent, the evidence was inadmissible, &, further, that the clippers made by deft. were within pltf.'s patent.—ADIE *v.* CLARK (1876), 3 Ch. D. 134; 35 L. T. 349; 24 W. R. 1007, C. A.; *on appeal, sub nom.* CLARK *v.* ADIE (No. 2) (1877), 2 App. Cas. 423, H. L.

*Annotations:—***Reld.** Gosnell *v.* Bishop (1888), 4 T. L. R. 397; Crosthwaite *v.* Steel (1889), 6 R. P. C. 190; Eliot *v.* Bristol Corpn. (1894), 71 L. T. 659; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co. (1919), 36 R. P. C. 95.

See, also, Sub-sect. 3, C.

2977. Evidence outside particulars in defence—Objections not delivered.]—CROPPER *v.* SMITH, No. 2728, *ante.*

2978. —— Prior user.]—On Dec. 16, 1887, a patent was granted to H. for "An apparatus for opening & closing fanlights & skylights." H., in 1892, commenced an action for infringement against A., who, by his defence, alleged that H. was not the true & first inventor, & that his alleged invention was anticipated by the specification of A.'s patent of Dec. 2, 1887. In the course of the trial, evidence was given on behalf of deft. of the user of almost the identical thing claimed by both patentees prior to the date of both patents:—*Held:* upon this evidence both patents were bad; leave should be given to adduce this evidence; deft. ought to have an opportunity of having the objection to pltf.'s patent covered by this evidence raised; if he did not the action would be dismissed without costs, but if he did raise the objection then pltf. must have an opportunity of dealing with it, & all other questions must be reserved.—HILL *v.* ADAMS (1893), 10 R. P. C. 102.

2979. —— Want of subject-matter—Want of novelty alleged in particulars of objections.]—*Semble:* evidence may be given of want of subject-matter, though it is not alleged in the particulars of objections, the objection of want of novelty being sufficient to cover it.—ELECTROLYTIC PLATING APPARATUS CO., LTD. *v.* HOLLAND (1901), 18 R. P. C. 521.

Statements by deceased person accompanying act not in issue.]—*See* EVIDENCE, Vol. XXII., p. 59, No. 329.

C. Onus of Proof and Weight of Evidence.

See, generally, EVIDENCE, Vol. XXII., pp. 35 *et*

2980. Onus of proof—On plaintiff.]—BETTS *v.* WILLMOTT, No. 1588, *ante.*

2981. —— ——.]—SACCHARIN CORPN., LTD. *v.* WILD, No. 2590, *ante.*

2982. —— —— **To show sufficiency of specification.**] — A pltf. must give some evidence of the sufficiency of the specification unless admitted.—TURNER *v.* WINTER (1787), Dav. Pat. Cas. 145; 1 Web. Pat. Cas. 77; 1 Term Rep. 602; 99 E. R. 1274.

*Annotations:—***Reld.** Boulton *v.* Bull (1795), 2 Hy. Bl. 463; Hill *v.* Thompson & Forman (1818), 1 Web. Pat. Cas. 239; Lewis *v.* Marling (1829), 10 B. & C. 22; Derosne *v.* Fairie (1835), 2 Cr. M. & R. 476; Bickford *v.* Skewes (1841), 1 Q. B. 938; Neilson *v.* Harford (1841), 8 M. & W. 806; Brown *v.* Annandale (1842), 8 Cl. & Fin. 437; Walton *v.* Bateman (1842), 1 Web. Pat. Cas. 613; Wegmann *v.* Corcoran (1879), 13 Ch. D. 65; *Re* Alsop's Patent (1907), 24 R. P. C. 733; Hatmaker *v.* Nathan (1917), 35 R. P. C. 61.

2983. —— Shifted to defendant—By primâ facie case.] — In an action for infringement, deft. denied infringement, & in the alternative alleged that the article, the sale of which was complained of, was purchased from one, L., with whom pltfs. had some agreement not to take proceedings:—*Held:* pltfs. had made a *primâ facie* case of infringement by showing that deft. had sold the patented article, & deft. had not discharged the *onus* which lay on him of proving his alternative defence, there being no evidence of the agreement.—BADISCHE ANILIN UND SODA FABRIK *v.* DAWSON (1889), 6 R. P. C. 387.

2984. —— —— ——.]—The action was to restrain infringement of a patent for improvements in rubber tyres & metal rims of wheels for cycles, etc. Defts. at first raised all the usual defences in a patent action, but after the decision in *The Pneumatic Tyre Co.* v. *East London Rubber Co.*, No. 930, *ante*, almost all the issues were struck out, & at the trial the case was practically reduced to a single case of prior user. The judge held that defts.' case was not proved to his satisfaction, & granted an injunction, with solr. & client costs.—PNEUMATIC TYRE CO., LTD. *v.* MARWOOD & CROSS (1897), 14 R. P. C. 240.

2985. —— —— ——.]—A patent was granted for an improvement in welding aluminium. The claim was as follows:—In the autogenous union of aluminium the use of a flux consisting of a mixture of alkali chlorides. A second patent was granted for an improvement in welding or melting objects of aluminium. The claim was for the improvement in the process of welding objects of aluminium described in the specification of the first-mentioned patent, which consists in using as a flux a mixture of alkali chlorides &

PART XIV. SECT. 2, SUB-SECT. 9.—C.

2980 i. *Onus of proof—On plaintiff.*]—There is no presumption in law in favour of the validity of a patent.—*Re* ALLAN & REED (1888), 14 Q. L. R. 126.—**CAN.**

2983 i. —— *Shifted to defendant—By primâ facie case.*] — RUSSELL *v.* CRICHTON (1838), 16 Sh. (Ct. of Sess.) 1155.—**SCOT.**

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 9, C. & D.; sub-sect. 10, A., B. & C. (a).]

of fluorides of the nature described. In an action for infringement of the patents defts. admitted that they had welded the article the welding of which was complained of by pltts., but alleged that they had not any knowledge of the composition of the flux used. Defts. alleged that the patents were invalid on the grounds of want of novelty & subject-matter, insufficiency & want of utility. They alleged that the inventions had been published in a treatise on chemistry by R. & S., & (*inter alia*) in two prior specifications. They also alleged that no mixture of alkali chlorides, whether alone or with the addition of fluorides, could produce a useful autogenous weld, or that if some mixtures of alkali chlorides, or alkali chlorides & fluorides, were useful for welding aluminium, there were other mixtures of either kind that were not useful for the purpose. Pltfs. alleged that the flux used by defts. consisted of a mixture of alkali chlorides with fluorides & sulphates; that the process mentioned by R. & S. was not welding but melting in a crucible; that, in the processes described in the two specifications, the aim was not to weld but to solder; that the directions in pltfs.' specifications had been sufficient to enable a workman, without experience in welding aluminium, to obtain autogenous welds; that welds could be made with fluxes of the kind claimed; & that there were not any mixtures that, as alleged by defts., were not of some use as fluxes:—*Held:* defts. not having attempted to show that the flux used by them was not an infringing flux, infringement of both the patents had been established; none of the defences had been established; & the patents were valid.—AKT. FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM CO., LTD. (1922), 39 R. P. C. 296, H. L.

2986. —— On defendant—Defence that patentee not true & first inventor.]—WARD BROTHERS *v.* HILL & SONS (1903), 20 R. P. C. 189.

2987. Weight of evidence—Question of prior user—Evidence of witnesses ignorant of user—Unavailing against positive evidence.]—R. *v.* ARKWRIGHT (1785), Dav. Pat. Cas. 61; Bull. N. P. 76; 1 Web. Pat. Cas. 64; 1 Carp. Pat. Cas. 53.

Annotations:—**Refd.** Hil *v.* Thompson & Forman (1818), 2 Moore, C. P. 424; Morgan *v.* Seaward (1836), 1 Web. Pat. Cas. 170; Neilson *v.* Harford (1841), 8 M. & W. 806; Hill *v.* Evans (1862), 4 De G. F. & J. 288; Thomas *v.* Welch (1866), L. R. 1 C. P. 192.

2988. —— —— —— ——.]—MANTON *v.* MANTON (1815), Dav. Pat. Cas. 333; 1 Carp. Pat. Cas. 278.

D. Evidence on Appeal.

See, generally, EVIDENCE, Vol. XXII., pp. 617 *et seq.*

2989. Whether fresh evidence admissible—Document not included.]—(1) The general rule is, that no other evidence can be given at a rehearing than might have been given at the hearing. Therefore, where a document is not included in the order of course to prove exhibits *viva voce* at the hearing, or when pltf. has obtained no such order, he cannot obtain an order to prove an exhibit *viva voce* at a rehearing without a special application.

(2) Exhibit not proved at the hearing, upon special application allowed to be proved *viva voce* at the rehearing.—LOVELL *v.* HICKS (1837), 2 Y. & C. Ex. 472; 6 L. J. Ex. Eq. 85; 160 E. R. 482.

2990. ——.]—An action for infringement of two patents was dismissed on the ground that prior user at two places was established. Pltf. appealed, & asked for judgment or for a new trial, on the ground of surprise, improper rejection of evidence, & refusal by the judge to adjourn the hearing. He also moved for leave to adduce further evidence at the hearing of the appeal. The appeal & the motion were dismissed, with costs.—HAGGENMACHER *v.* WATSON, TODD & CO. (1897), 14 R. P. C. 631, C. A.

2991. —— Where admission would raise fresh issue.]—(1) Deft. in an action for infringement of a patent went to trial on a defence of non-infringement simply; he had previously pleaded want of novelty in the patent, but withdrew the plea. Pltf. obtained an injunction & deft. appealed. Deft. subsequently moved for leave to adduce fresh evidence on the hearing of the appeal as to some anticipation of pltf.'s patent which he alleged that he had discovered since the trial:—*Held:* the motion must be refused, because to admit the evidence proposed to be adduced would be to allow the patent to be attacked for want of novelty on the appeal when no issue as to novelty had been raised at the trial.

(2) What would be an infringement of the patent for that instrument? To make or sell an instrument which in some independent substantial part of it was the same, that is, substantially the same as either the whole or some independent substantial part of pltf.'s instrument, as described in his patent (BRETT, M.R.).—HINDE *v.* OSBORNE (1885), Griffin's Patent Cases (1884–1886), 125; 2 R. P. C. 45, C. A.

2992. —— Where adjournment at trial not asked for.]—B. & B. brought an action against S. for infringement of patent. S. set up the invalidity of the patent. At the trial, W. gave evidence for deft. On cross-examination, he deposed as to the manufacture & sale of a particular machine, not mentioned in the particulars of objections, which machine, as described by him, anticipated pltfs.' patent. Pltfs. did not ask for an adjournment, & the judge held the patent invalid on this anticipation. Pltfs. appealed, & applied for leave to adduce fresh evidence on the appeal as to this machine, which they alleged they had discovered since the trial, & had found not to be such a machine as described by W., & not to be an anticipation of their patent:—*Held:* leave to adduce fresh evidence be refused.—BARCROFT & BARCROFT *v.* SMITH (1897), 14 R. P. C. 172.

2993. —— Special circumstances—Or by consent of parties.]—SACCHARIN CORPN., LTD. *v.* WILD, No. 2590, *ante.*

2994. —— Consent of other side—& liberty to other side to rebut.]—FELLOWS *v.* LENCH, LTD. (1916), 34 R. P. C. 45.

Annotation:—**Refd.** Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323.

2995. —— Petition alleging surprise—No application at trial on ground of surprise.]—HATMAKER *v.* NATHAN & CO., LTD. (1919), 36 R. P. C. 231, H. L.

2996. Written statement of expert assessor.]—H. & Sons, Ltd., brought an action against H., Ltd., for infringement of a patent. The patent was upheld by the Ct. of Appeal, & an injunction was awarded against infringement. Defts. then made

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2986 1. —— *On defendant—Defence that patentee not true* A patent carries of novelty, sufficiency & utility.—BITULITHIC & CONTRACTING, LTD. *v.* CANADIAN MINERAL RUBBER CO. & CALGARY (1915), 8 W. W. R. 207; 25 D. L. R. 827.—CAN.

an alteration in their apparatus, which they contended differentiated it from pltfs.' invention as defined by the Ct. of Appeal. Pltfs. then issued a summons for sequestration & committal against defts. & their managing director for breach of the injunction:—*Held:* defts.' altered apparatus was an infringement of pltfs.' patent, & an order for sequestration was made with costs. Defts. appealed, but the Ct. of Appeal dismissed the appeal with costs. At the commencement of the hearing of the summons the judge intimated that he required the assistance of an expert assessor, & B. was appointed such assessor by consent of the parties. B. furnished a written statement of his opinion to the judge, & the judge intimated that this statement ought to come before the Ct. of Appeal, & a copy of it was by arrangement supplied to each party. On the hearing of the appeal, the Ct. of Appeal said that in such a case they could not do justice unless they were able to look at what was said by the assessor to the judge, & therefore the written statement of B. could be read, & it was read accordingly.—HATTERSLEY & SONS, LTD. *v.* HODGSON, LTD. (1905), 22 R. P. C. 229.

SUB-SECT. 10.—RELIEF.

A. In General.

See Patents & Designs Acts, 1907 (c. 29), ss. 32, 32A, 34; 1919 (c. 80), ss. 9, 10, sched.

2997. Ordinary form of relief—Injunction & account.]—LIARDET & ADAMS *v.* JOHNSON (1780), 1 Y. & C. Ch. Cas. 527, n.; 62 E. R. 1000.

2998. Alternative remedies of patentee—Account against manufacturer—Damages against person using.]—PENN *v.* BIBBY, PENN *v.* JACK, PENN *v.* FERNIE, No. 2545, *ante*.

2999. —— Damages or account of profits.]—AMERICAN BRAIDED WIRE CO. *v.* THOMSON, No. 3053, *post*.

—*See* INJUNCTION, Vol. XXVIII., p. 514, Nos. 1190, 1191.

B. Interlocutory Injunction.

See Sub-sect. 4, *ante*.

C. Perpetual Injunction.

(*a*) *In General.*

See Patents & Designs Acts, 1907 (c. 29), ss. 32A, 33, 34; 1919 (c. 80), ss. 9, 10, sched.; & *generally*, INJUNCTION, Vol. XXVIII., pp. 361 *et seq.*

3000. Extent of injunction.]—SACCHARIN CORPN., LTD. *v.* DAWSON, No. 3267, *post*.

3001. ——.]—SACCHARIN CORPN., LTD. *v.* JACKSON, No. 2958, *ante*.

3002. —— Where some claims only infringed—Patents & Designs Act, 1919 (c. 80), s. 9.]—MERGENTHALER LINOTYPE CO. *v.* INTERTYPE CO., LTD. (1926), 42 T. L. R. 682; 43 R. P. C. 239, C. A.

3003. Duration—Duration of letters patent.]—BROWNE *v.* MOORE, No. 2881, *ante*.

3004. —— Alternation of specification after injunction obtained—Injunction not enforceable.]—DUDGEON *v.* THOMSON, No. 2775, *ante*.

3005. Against whom granted—Master of ship using infringing article.]—ADAIR *v.* YOUNG, No. 2298, *ante*.

3006. —— Manufacturer.]—The names of manufacturers should not be inserted in the injunction.—SHOE MACHINERY CO. *v.* CUTLAN (1895), 12 R. P. C. 342; *subsequent proceedings*, [1896] 1 Ch. 108, C. A.

Annotation:—**Mentd.** Welsbach Incandescent Gas Light Co. *v.* Dowle & London & Suburban Maintenance Co. (1899), 16 R. P. C. 391.

3007. —— Foreigner—In respect of transactions in own country.]—BADISCHE ANILIN UND SODA FABRIK *v.* BASLE CHEMICAL WORKS, BINDSCHEDLER, No. 2317, *ante*.

3008. —— Co-patentee claiming entire interest.]—G., who was the inventor of certain devices for improvements in paper manufacturing machines, entered into certain agreements with M., & patents were taken out in the joint names of G. & M. Disputes having arisen between the parties, M. commenced an action against G. claiming damages, for breach of agreement, a declaration as to the rights of the parties, & an injunction to restrain G. from representing that he was the sole person interested in & having the right to deal with the invention and any patents obtained in respect thereof:—*Held:* the rights of the parties as to the patents were those stated in the judgment, & a declaration to that effect was made, & an injunction restraining deft. from misrepresentation was granted.—MARX (ROBERT) (TRADING AS MARX (J.) & CO.) *v.* GALT (1911), 28 R. P. C. 419.

—*See* INJUNCTION, Vol. XXVIII., pp. 436 *et seq.*

3009. Form of injunction.]—DE LA RUE *v.* DICKENSON, No. 2397, *ante*.

3010. Defendant failing to appear—Injunction granted.]—Pltfs., owners of three patents, dated in 1888, 1889, & 1890 respectively, granted a licence to deft. to use the patents of 1888 & 1889. Pltfs. subsequently commenced an action to restrain deft. from infringing the patent of 1890 & for an account of the royalties due under the licence, & of the sales & profits made in infringement of the three patents. Pltfs. now moved for an injunction & for an account of royalties on affidavit of service, deft. not having entered an appearance. The judge granted an injunction & an account of royalties.—PNEUMATIC TYRE CO., LTD. *v.* FERGUSON & NORTH WESTERN CYCLE CO. (1894), 11 R. P. C. 459.

3011. —— ——.]—Where the infringement of letters patent was proved but deft., after delivering a defence, did not appear at the trial to speak to the anticipation by eleven prior specifications referred to in his particulars of objections:—*Held:* although pltfs. were entitled to an injunction restraining infringement & to the costs of the action, an inquiry as to damages & a certificate of validity ought not to be granted.—WEBB LAMP CO., LTD. *v.* ATKINSON (TRADING AS THE HEALTH FILTER CO.) (1902), 19 R. P. C. 599.

3012. Suspension of injunction pending appeal.]—The injunction having been dissolved, pltf. to bring an action to establish his patent right & defts. to keep an account in the meanwhile, a verdict having been obtained for pltf. on the trial

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PART XIV. SECT. 2, SUB-SECT. 10.—A.

2997 1. *Ordinary form of relief—Injunction & account.*]—HUNTINGDON *v.* LUTZ (1863), 13 C. P. 168.—**CAN.**

2999 1. *Alternative remedies of patentee—Damages or account of profits.*]—A pltf. cannot pray for an account of profits & for damages. He must elect between the two remedies.—KINMOND *v.* JACKSON, KINMOND *v.* LAWRIE, 1 C. L. R. 66.—**IND.**

PART XIV. SECT. 2, SUB-SECT. 10.—C. (a).

t. *Jurisdiction to grant.*]—The Ct. of Session has jurisdiction to interdict, at the instance of an English co., the infringement in Scotland of a patent belonging to them by another English co., although no arrestments have been used to found jurisdiction & personal service has not been made on resps.—TONI TYRES, LTD. *v.* PALMER TYRE, LTD. (1905), 7 F. (Ct. of Sess.) 477; 42 Sc. L. R. 352; 12 S. L. T. 707.—**SCOT.**

Sect. 2.—Legal proceedings in respect of ment: Sub-sect. 10, C. (a) & (b) i. & ii.

of the action, on application being made to revive the injunction it was objected that defts. intended to move for a new trial & the matter was ordered to stand over till the result of that application should be known; the parties continuing to keep an account in the interim.—HILL *v.* THOMPSON (1817), 3 Mer. 622; 1 Web. Pat. Cas. 235; 36 E. R. 239, L. C.

Annotations:—**Mentd.** Russell *v.* Barnaley (1834), 1 Web. Pat. Cas. 472; Kay *v.* Marshall (1836), 1 My. & Cr. 373; Curtis *v.* Cutts (1839), 8 L. J. Ch. 184; Crane *v.* Price (1842), 4 Man. & G. 580; Cook *v.* Pearce (1843), 8 Q. B. 1044; Electric Telegraph Co. *v.* Nott (1847), 2 Coop. *temp.* Cott. 41; Newall *v.* Wilson (1852), 2 De G. M. & G. 282; Harwood *v.* G. N. Ry. (1860), 2 B. & S. 194; Bovill *v.* Goodier (1866), 35 Beav. 427; Murray *v.* Clayton (1872), 20 W. R. 649; Clark *v.* Adie (1877), 2 App. Cas. 315; Coles *v.* Baylis & Lewis (1886), 3 R. P. C. 178.

3013. ——.]—CORNISH *v.* KEY (1837), 1 Jur. 235.

3014. ——.]—A., a patentee, had obtained a verdict at law establishing his right to a patent, & that such right had been infringed by C.; & the Ct. of Q. B. had unanimously discharged a rule *nisi* for a new trial obtained by C. C. applied, under C. L. P. Act, 1854 (c. 125), s. 35, for leave to appeal, & leave was granted by the Ct. of Q. B. to appeal upon one point only:—*Held:* notwithstanding the pendency of the appeal, A. was entitled to an injunction against C. to restrain the infringement of the patent, his right having been long enjoyed & established by the verdict of the jury, while an appeal under C. L. P. Act was allowed on grounds of law only, & not on questions of evidence.—LISTER *v.* LEATHER (1857), 29 L. T. O. S. 141; 5 W. R. 550.

3015. ——.]—PENN *v.* BIBBY, PENN *v.* JACK, PENN *v.* FERNIE, No. 2545, *ante*.

3016. ——.]—FLOWER *v.* LLOYD, No. 2906, *ante*.

3017. ——.]—NORTH BRITISH RUBBER CO., LTD. *v.* MACINTOSH & CO., LTD., No. 2948, *ante*.

3018. ——.]—This was an action for infringement of two patents for "an improved method of & means for securing glass plates to walls, ceilings, & the like," & "improved or improvements in connection with fancy or ornamental bricks, tiles, slabs, wallings, ceilings & the like" respectively. The defts. denied infringement & alleged that both the patents were invalid on the ground of (*a*) anticipation by previous specifications, (*b*) prior user, (*c*) want of the subject-matter, & (*d*) want of utility, & that one patent was also invalid as the specification was insufficient:—*Held:* the inventions contained in both patents were novel, useful and good subject-matter, & defts. had infringed the second patent. An injunction with an inquiry as to damages was granted accordingly, but the injunction & inquiry were stayed pending appeal on defts. undertaking to keep an account provided they gave security to the satisfaction of pltfs. for the amount of damages.—NATIONAL OPALITE GLAZED BRICK & TILE SYNDICATE, LTD. *v.* CERALITE SYNDICATE, LTD. (1896), 13 R. P. C. 649.

3019. ——.]—PRESTO GEAR CASE & COMPONENTS CO., LTD. *v.* SIMPLEX GEAR CASE CO., LTD., No. 2413, *ante*.

3020. ——.]—LEEDS FORGE CO., LTD. *v.* DEIGHTON'S PATENT FLUE & TUBE CO., LTD. (1901), 18 R. P. C. 233, C. A.

——.]—*See* INJUNCTION, Vol. XXVIII., p. 517, Nos. 1221–1232.

3021. Injunction granted on plaintiffs' undertaking—Extent of undertaking—Limited by intention of parties.]—The owners of a patent for telephones moved for an interlocutory injunction. Defts. admitted that they were using fifty-two infringing machines, but opposed the injunction on the ground that pltfs. had themselves broken a contract to supply defts. with telephones & were trying to cripple deft.'s business. This pltfs. denied.

An injunction was granted restraining infringement in general terms on pltfs. undertaking to supply defts. with telephones in the place of any the injunction prevented them from using.

Shortly afterwards defts. informed pltfs. that they had discovered they had in use forty-four more telephones to which the injunction would apply, & they asked to be supplied with telephones in the place of these also. Pltfs. contended that the undertaking was not meant to come there, & moved to vary the order, or restrict the undertaking on the ground of misrepresentation:—*Held:* the undertaking should have been limited by what was in the minds of the parties at the time, namely—the fact that there were fifty-two infringing telephones used by defts., & should not be extended to the additional forty-four.—UNITED TELEPHONE CO. *v.* TASKER (1888), 5 R. P. C. 628, C. A.

3022. Defendant consenting to injunction—Whether injunction or perpetual undertaking granted.]—DOVER (H. W.) & DOVER, LTD. *v.* NEW TOWNEND CYCLE CO., LTD. (1903), 21 R. P. C. 135.

3023. —— ——.]—BADISCHE ANILIN UND SODA FABRIK *v.* SPIVEY (1904), 22 R. P. C. 65.

(*b*) *Grounds for Granting or Refusing.*

i. *In General.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 361 *et seq.*

3024. Patent held valid & infringed—Injunction granted.]—This was an action for infringement of a patent for "Improvements in electricity meters, parts of which improvements are also applicable to dynamo electric generators & motors." Defts. denied infringement, & alleged that the invention was not useful, & having regard to the state of common knowledge was not subject-matter, that the amended specification described matters different & larger than those described in the provisional, & was insufficient, & that the invention was not new & had been anticipated by prior publication & prior user:—*Held:* the defence was not made out & the patent was valid & had been infringed. An injunction was granted, with costs on the higher scale, but the allocator to be given for three-fourths of such costs. Three counsel were certified for.—HOOKHAM *v.* JOHNSON (1897), 14 R. P. C. 525.

3025. Admission of infringement—Undertaking not to repeat.]—LOSH *v.* HAGUE, No. 2651, *ante*.

3026. —— ——.]—In an action to restrain the infringement of a patent deft., on being served with the writ, offered to undertake not to infringe, to give the other relief claimed by the writ, & to pay pltf.'s costs. Notwithstanding this offer pltf. delivered a statement of claim & particulars of breaches. Deft. then delivered a defence; & pltf. moved for judgment in the terms of the statement of claim:—*Held:* pltf. ought to have accepted the undertaking offered; &, on defts. giving the undertaking, the ct. declined to grant an injunction, giving to pltf. costs down to the date of the offer & the costs of the day's appearance, & to deft. the other costs subsequent to the offer.—JENKINS *v.* HOPE, [1896] 1 Ch. 278; 65 L. J. Ch. 249; 73 L. T. 705; 44 W. R. 358.

3027. —— ——.] — HUDSON *v.* CHATTERIS ENGINEERING WORKS CO., No. 3280, *post.*

3028. New trial pending—Action to try validity.] —Injunction that the validity of a patent might be tried at law; verdict for the patentee, subject to the opinion of the ct. upon a case; the ct. equally divided; the patentee must bring another action; but the ct. on the possession would not impose any terms upon him, nor dissolve the injunction in the mean time.—BOULTON *v.* BULL (1796), 3 Ves. 140; 30 E. R. 937, L. C.

Annotations:—**Refd.** Harmer *v.* Plane (1807), 14 Ves. 130; Hill *v.* Thompson (1817), 3 Mer. 622; Kay *v.* Marshall (1836), 1 My. & Cr. 373; Brown *v.* Annandale (1842), 8 Cl. & Fin. 437; Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 T. L. R. 294.

3029. —— ——.]—COLLARD *v.* ALLISON, No. 2797, *ante.*

3030. Omission to apply for interlocutory injunction.]—Where a bill is filed by a patentee for an injunction to restrain an alleged infringement of his patent, pltf. is not precluded from asking for an injunction at the hearing, by the fact of his not having applied for it on an interlocutory motion; but the not moving for the injunction imposes on pltf., in such a case, the obligation of making out a clear & unexceptionable title at the hearing; & if he fails in that, & has not previously obtained an injunction, he will not be allowed to use the facts proved in the cause, as evidence of a *primâ facie* case, giving him a right to further time, for the purpose of enabling him to establish more satisfactorily his legal title.

A patentee brought the cause to a hearing without having previously moved for an injunction, & the ct. being of opinion, that on the evidence then produced an injunction would not have been granted on an interlocutory application, refused to retain the bill, to give the patentee an opportunity of establishing his right at law, but dismissed it with costs.

Even if pltfs. should be entitled to an injunction against the co., they will not be entitled to any account. The bill alleges, that defts. have sold & used, it being the fact that they have sold for no profit, & it not appearing that they have used otherwise than by furnishing the burners to their customers (LORD LANGDALE, M.R.).—BACON *v.* SPOTTISWOODE, BACON *v.* JONES (1839), 1 Beav. 382; 3 Jur. 476; 48 E. R. 988; *affd.*, 4 My. & Cr. 433, L. C.

Annotations:—**Consd.** Betts *v.* Clifford (1860), 1 John. & H. 74; Patent Type Founding Co. *v.* Walter (1860), John. 727. **Refd.** Ward *v.* Key (1846), 7 L. T. O. S. 338; Smith *v.* South-Western Ry. (1854), 2 W. R. 310. **Mentd.** Chappell *v.* Purday (1843), 1 L. T. O. S. 384; Cory *v.* Yarmouth & Norwich Ry. (1844), 3 Hare, 593; Ridgway *v.* Roberts (1844), 4 Hare, 106; Gray *v.* Liverpool & Bury Ry. (1846), 4 Ry. & Can. Cas. 235; Beaufort *v.* Morris (1847), 6 Hare, 340; Rodgers *v.* Nowill (1847), 6 Hare, 325; Norton *v.* Nichols (1858), 4 K. & J. 475; Davies *v.* Marshall (No. 1) (1861), 1 Drew. & Sm. 557; Mounsey *v.* Lonsdale, A.-G. *v.* Lonsdale (1870), L. R. 10 Eq. 557.

3031. Delay in application.] — BRIDSON *v.* BENECKE, No. 2822, *ante.*

3032. Threatened infringement sufficient—Actual infringement not necessary.]—FREARSON *v.* LOE, No. 2293, *ante.*

Injunction quia timet.]—*See* INJUNCTION, Vol. XXVIII., pp. 404 *et seq.*

3033. Infringement not made out—Evidence inadmissible—Injunction refused.]—In an action by a patentee claiming damages for an infringement & an injunction, deft. denied the infringement. He also denied the validity of the patent alleging, amongst other things, that it had been anticipated by certain specifications.

The ct. upheld the validity of the patent, but granted no injunction or damages on the ground that the evidence as to the alleged infringement was, under the circumstances, not admissible. In a second action between the same parties in respect of the same patent, deft. again denied the validity of the patent, alleging that it had been anticipated by certain specifications which were not before the ct. in the first action, & which he had discovered since that action:—*Held:* the validity of the patent was *res judicata*, & the judgment in the first action estopped deft. from again denying the validity of the patent.—SHOE MACHINERY CO. *v.* CUTLAN, [1896] 1 Ch. 667; 65 L. J. Ch. 314; 74 L. T. 166; 40 Sol. Jo. 336; 13 R. P. C. 141.

Annotation:—**Refd.** Humphries *v.* Humphries, [1910] 2 K. B. 531.

3034. ——.]—SACCHARIN CORPN., LTD. *v.* QUINCEY, No. 3078, *post.*

3035. One act of infringement sufficient—Presumption of future infringement.] — DUNLOP PNEUMATIC TYRE CO. *v.* NEAL, No. 2626, *ante.*

3036. Breach of agreement—Compromise of prior action.]—R. being the owner of a patent relating to revolving heel pads, & G. having filed a provisional specification relating to the same subject, R. & G. entered into an agreement by way of compromise of an action as follows: that R., admitting G.'s right to manufacture & sell his heel pads in accordance with his provisional specification, would undertake not to interfere with such rights, & would not, further, allege that G.'s heel pads were an infringement of any of R.'s patents or repeat threats to G. or his customers; & that neither party should be at liberty to question the validity of the other's patents for revolving heels or heel pads. R. subsequently brought an action against G. alleging that G. was selling heel pads not protected by the agreement, & claiming a declaration to that effect & an injunction against infringement:—*Held:* deft. was selling certain heel pads not in accordance with his provisional specification as construed by the parties in the agreement. A declaration was made & an injunction was granted accordingly.—ROBERTS *v.* GRAYDON (1904), 21 R. P. C. 194.

Plaintiff refusing defendant's undertaking.]—*See* INJUNCTION, Vol. XXVIII., p. 411, Nos. 363, 364.

ii. *Expiration of Patent.*

3037. Whether ground for refusing injunction.]—The ct. will not interfere by injunction to prevent the violation of an agreement, of which, from the nature of the subject, there could be no decree for a specific performance; as, for instance, to restrain deft. from imparting the secret of an invention which had been the subject of a patent long since expired.—NEWBERY *v.* JAMES (1817), 1 Carp. Pat. Cas. 367; 2 Mer. 446; 35 E. R. 1011, L. C.

Annotations:—**Refd.** Green *v.* Church (1823), 1 L. J. O. S. Ch. 203; Morison *v.* Moat (1851), 20 L. J. Ch. 513; Leather Cloth Co. *v.* American Leather Cloth Co. (1863), 4 De G. J. & Sm. 137; James *v.* James (1872), 20 W. R. 434; Amber Size & Chemical Co. *v.* Menzel, [1913] 2 Ch. 239.

3038. ——.]—Although a patent has expired, the ct. will grant an injunction to restrain the sale of articles manufactured, in fraud of that patent previous to its expiration.—CROSSLEY *v.*

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 10, *C.* (*b*) *ii.*, *&* (*c*), *&* *D.* (*a*) (*b*) *i.*]

DERBY GAS LIGHT CO. (1834), 1 Web. Pat. Cas. 119; 4 L. J. Ch. 25, L. C.

3039. ——.]—A patent was taken out in France, in 1858, by A., who, in 1861, obtained letters patent for his invention in England. The English patent was assigned by A. to C., who, in January, 1865, obtained, in a suit against E. for infringement, a decree by which the validity of the patent was declared, & an injunction was granted to restrain infringement. In Feb. 1866, a judgment of *déchéance* was pronounced by the French tribunal at Paris, declaring the French patent, & all rights under it, determined & void from Feb. 1864, on the ground of non-payment by A. from that time of the annual duties imposed upon patentees by the French law. Upon a motion by C., in Jan. 1867, to commit E. for breach of the injunction awarded by the decree of Jan. 1866:—*Held:* (1) A.'s English patent being identical with his French patent, it was determined in this country, by force of Patent Law Amendment Act, 1852 (c. 83), s. 25, from Feb. 1866, the date of the annulment of the French patent by declaration of the French ct., but no sooner; & although such declaration was in terms retrospective, yet, until actually obtained, the English patent remained in force, & there was no error calling for amendment by bill of review in the decree of this ct., by which its validity declared in Jan. 1866. *Semble:* if the English patent had comprised additional matters not protected by the French patent, the determination of the French patent would only have affected that part of the English patent which was identical, leaving untouched such additional matter; (2) the injunction granted in Jan. 1866, being only co-existent with the patent, expired when the patent was determined, & it was open to E., in answer to the motion to commit, to show that there was no longer any order of the ct. in existence which he could be said to have infringed.—DAW *v.* ELEY (1867), L. R. 3 Eq. 496; 36 L. J. Ch. 482; 15 L. T. 559.

Annotations:—As to (1) **Reld.** Murray *v.* Clayton (1872), 7 Ch. App. 570; *Re* Blake's Patent (1873), L. R. 4 P. C. 535; Pneumatic Tyre Co. *v.* East London Rubber Co. (1896), 75 L. T. 488.

3040. ——.]—The ct. will not entertain a bill for the mere purpose of giving relief in damages for the infringement of a patent when the bill has been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction.—BETTS *v.* GALLAIS (1870), L. R. 10 Eq. 392; 22 L. T. 841; 18 W. R. 945.

3041. ——.]—Pltf. was a gunmaker, who manufactured rifles, purchasing some of the different parts from various makers, & putting them together to form a complete rifle, which after having been viewed & approved by him, was stamped with his name & trade mark on the lockplate as a guarantee that it had been examined & approved by him. He also fitted to the rifles levers manufactured by himself, for which he had taken out a patent, & these levers were also marked with his name. Pltf.'s rifles so marked with his name had a great reputation.

Pltf. supplied rifles so marked & guaranteed by him to the Govt., & when they became unsuitable for Govt. purposes, they were taken to pieces & some of the parts mutilated & sold as old stores. Defts. bought some of these old stores, including levers & lockplates with pltf.'s name & trade mark upon them, & fitted them to old rifle barrels, which had been cut down to the size of carbine barrels, & were not suited to the action which formed part of the rifles as passed & guaranteed by pltf. At this time pltf.'s patent for the levers had expired:—*Held:* defts. might be restrained from making & selling such firearms.—RICHARDS *v.* WILLIAMSON (1874), 30 L. T. 746; 22 W. R. 765.

3042. ——.]—SACCHARIN CORPN., LTD. *v.* QUINCEY, No. 3078, *post.*

3043. ——.]—WELSBACH INCANDESCENT GAS LIGHT CO. *v.* NEW INCANDESCENT (SUNLIGHT PATENT) GAS LIGHTING CO., [1900] 1 Ch. 843; 69 L. J. Ch. 343; 82 L. T. 293; 48 W. R. 362; 16 T. L. R. 205; 44 Sol. Jo. 262; 17 R. P. C. 237.

Annotations:—**Rcld.** Atkins & Applegarth *v.* Castner-Kellner Alkali Co. (1901), 18 R. P. C. 281; Kelvin *v.* Whyte, Thomson (1907), 25 R. P. C. 177.

3044. ——.]—KANE & PATTISON *v.* BOYLE (J.) & CO., No. 3080, *post.*

——.]—*See* INJUNCTION, Vol. XXVIII., p. 418; No. 436.

(*c*) *Breach of Injunction.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 523 *et seq.*

3045. What amounts to breach—Sale of component parts—Where sale of machine restrained.]—*Semble:* an injunction granted to restrain the sale of a complete machine the subject of a patent, will be violated by a sale of the component parts of the machine in such a way that they can easily be put together by any one.—UNITED TELEPHONE CO. *v.* DALE (1884), 25 Ch. D. 778; 53 L. J. Ch. 295; 50 L. T. 85; 32 W. R. 428; Griffin's Patent Cases (1884–1886), 227.

Annotations:—**Consd.** Dunlop Pneumatic Tyre Co. *v.* Moseley, [1904] 1 Ch. 612. **Mentd.** D. *v.* A., [1900] 1 Ch. 484; *Re* Launder, Launder *v.* Richards (1908), 98 L. T. 554.

3046. —— **Repurchase & resale of articles—In respect of which damages paid—Sale of similar articles.**] — Pltfs., owners of several letters patent, obtained by consent an injunction against defts. restraining them from "manufacturing, selling, or exposing for sale 'Victoria Lamps' . . . & from in any other way infringing, etc." Subsequently deft. bought back & resold two "Victoria Lamps," for the sale of which damages had been paid to pltfs., & also sold certain lamps which pltfs. contended were practically "Victoria Lamps," though it was not contended that they infringed any of pltfs.' patents. Pltfs. thereupon moved to commit deft.:—*Held:* the resale of the "Victoria Lamps" was a technical breach of the order, & the sale of the other lamps was a breach for which deft. ought to be committed to prison.—BROCKIE PELL ARC LAMP, LTD. *v.* JOHNSON (1900), 17 R. P. C. 697.

3047. Who liable for breach—Directors of company—Where company restrained.]—The owners of a patent for vulcanised india-rubber springs, granted in 1877, brought an action in 1884 for alleged infringement, & asking for an injunction. Deft. co. at first contested the validity of the patent, but ultimately in 1885, a judgment was taken by agreement between the parties that deft. co. should be restrained from infringing the patent of 1877, with a proviso that nothing in the judgment should prejudice the rights of deft. co. to manufacture vulcanised india rubber springs of which pltfs. had been also owners. In Feb. 1888, pltfs. moved to sequestrate the goods of deft. co. & to commit certain of the directors for breach of the injunction contained in the judgment. Defts. denied infringement, alleging that what they were doing was under the protection of the proviso:—*Held:* the 1866

patent only contemplated the use of india-rubber already vulcanised before being applied to the metal, *i.e. in situ*, was known & used before 1877, & the 1877 patent claimed that process, & the real meaning of the proviso was to protect defts.' rights to make any of the articles described in the patent of 1866, however much they might resemble articles described in the 1877 patent, so long as the former were made in accordance with the specification & drawings of the 1866 patent, consequently, defts. had committed a breach of the injunction, & a sequestration was ordered to issue against deft. co. & committal against the directors: but if defts. within fourteen days, elected to account for profits, & to deliver up all infringing articles, the sequestration & committal not to issue.—SPENCER *v.* ANCOATS VALE RUBBER CO., LTD. (1888), 4 T. L. R. 681; 6 R. P. C. 46, C. A.

3048. —— Agent—Where servants & agents restrained — Proof of agency.] — INCANDESCENT GAS LIGHT CO. *v.* SLUCE, SLUCE & CO. INCANDESCENT GAS LIGHT CO. *v.* RIEMER (1900), 17 R. P. C. 173, C. A.

—— ——.]—*See* INJUNCTION, Vol. XXVIII., pp. 528, 529, Nos. 1362–1370.

Defences to breach.]—*See* INJUNCTION, Vol. XXVIII., p. 525, Nos. 1333, 1334.

Remedies for breach.]—*See* CONTEMPT OF COURT, Vol. XVI., pp. 1 *et seq.*; INJUNCTION, Vol. XXVIII., pp. 526 *et seq.*

D. Damages.

(*a*) *In General.*

3049. Proof of damage—Infringement by user of machine—Defendants alleging impossibility of purchase from plaintiff.]—Judgment was given in an action for infringement of a patent, by which an inquiry as to damages was ordered. The patent was for "Improvements in mechanical musical instruments." The only infringing instrument complained of was an organ purchased by defts. from a third party, which had been fitted with the patented parts; this organ had been used by defts. in their business on sixteen days. Pltfs. claimed £271 10*s.* damages, being the average profit made by pltfs. by transforming an organ & fitting it with the patented parts. The price charged by pltfs. on sale of their organs so fitted was £500. Defts. filed evidence to show that their means would not have allowed them to pay such a price, therefore that they would not have purchased an organ from pltfs., & contended that pltfs. had suffered no pecuniary loss. The master certified that pltfs. had not sustained any damages by reason of the infringement. Pltfs. applied to vary the master's certificate:—*Held:* there was no evidence that pltfs. had suffered any pecuniary loss by reason of defts.' user, & the application was dismissed with costs, including the costs of the inquiry.—GAVIOLI *v.* SHEPHERD (1899), 17 R. P. C. 157.

3050. —— —— —— Inference against defendant.]—Pltfs. were the owners of a patent for "Improvements in machines for inserting metallic fastenings in boots, shoes, & leather work." Deft. purchased & used a machine which in an action for infringement was held to be an infringement, & an inquiry was ordered before the master as to the amount of damages sustained. Defts. contended on the inquiry that under no circumstances would they have acquired pltfs.' machine, & the master found the damages to be one farthing. Pltfs. appealed by summons to vary this finding, & claimed £80 10*s.* damages:—*Held:* it must be inferred against defts. as wrongdoers that they would have taken pltfs.' machine, & the damages were assessed at £40.—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* FUSSELL (A.) & SONS, LTD. (1910), 27 R. P. C. 205.

3051. —— Infringement by manufacture—Infringing articles alleged not to compete with patented article.]—Judgment having been given in chambers for pltfs. in an action for infringement of the Welch Patent relating to bicycle tyres, which judgment included an inquiry as to damages, & the master having certified £163 15*s.* as the damages, deft. applied to vary the certificate on the ground that the tyres made by deft. were fitted to low grade machines, &, although infringements, did not come into competition with pltfs.' tyres, which deft. alleged to be too expensive for fitting to low grade machines. Pltfs. alleged that their tyres were fitted to all grades of machines. There was also a conflict of evidence as to the number of infringing tyres:—*Held:* the damages found by the master did not exceed the proper amount.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* GREEN (1900), 17 R. P. C. 234.

3052. Exemption from liability to damages—Innocent infringers—Patents & Designs Act, 1907 (c. 29), s. 33.]—WILDERMAN *v.* BERK (F. W.) & CO., No. 2285, *ante*.

Alternative to account of profits.]—*See* Subsect. 10, A., *ante*.

Damages provable in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., p. 251, No. 2390.

(*b*) *Loss of Profits as Measure of Damages.*

i. *In General.*

See, generally, DAMAGES, Vol. XVII., pp. 130 *et seq.*

3053. General rule—Limited to natural & direct consequence of plaintiff's acts.]—A patentee had obtained an injunction restraining defts. from infringing his patent, & an inquiry as to damages. The Official Referee found, as facts, that the patentee had from time to time, in consequence of previous reductions by defts., reduced his own prices down to, but never below, defts.' prices for the time being; that he had done so in order to prevent himself from being driven out of the market by defts.; & that, but for defts.' competition & underselling, the patentee would, subject to certain allowances for probable increase of sales in consequence of the reduction in price & the connection & industry of defts., have made the sales which were made by him & also those made by defts. at his own original prices:—*Held:* the patentee was entitled to recover by way of damages, subject to the above allowances, not only the sums found to represent the profits on sales made by defts., calculated at the patentee's original prices, but also the loss caused to the patentee by the reduction in price which he was obliged to make in consequence of defts.' illegal competition.—AMERICAN BRAIDED WIRE CO. *v.* THOMSON (1890), 44 Ch. D. 274; 59 L. J. Ch. 425; 62 L. T. 616; 6 T. L. R. 251; 7 R. P. C. 152, C. A.

Annotations:—**Refd.** Alexander *v.* Henry (1895), 12 R. P. C. 360; Pneumatic Tyre Co. *v.* Puncture Proof Pneumatic Tyre Co. (1898), 15 R. P. C. 405 Leeds Forge Co. *v.*

PART XIV. SECT. 2, SUB-SECT. 10.—D. (a).

a. *Setting aside patent — Whether condition precedent to recovery of damages.*]—In order to recover damages for infringement of letters patent of invention, it is not necessary to have a subsequent patent, under cover of which the infringement has been made, set aside by *sci. fa.*—COLLETTE *v.* LASNIER (1886), 13 S. C. R. 563.—CAN.

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 10, D. (b) i. & ii.

Deightons Patent Flue Co. (1907), 25 R. P. C. 209. **Mentd.** Boyd *v.* Tootal, Broadhurst, Lee Co. (1894), 11 R. P. C. 175.

3054. —— Limited to actual pecuniary loss.]—(1) A person who has in his possession, for the purpose of sale, an article which is an infringement of a patent thereby renders himself liable for infringement, however innocently he may have acquired the article, as, for instance, by an innocent purchase from an infringing manufacturer, notwithstanding that he may not have actually exposed it for sale. Exposing a patented article for sale is a "using & vending" of the invention.

Defts. were innocent purchasers in England, from an infringing manufacturer, of twenty-seven articles protected by letters patent for the United Kingdom only, in the Form D, in Sched. I. to the Patents Act, 1883 (c. 57), conferring upon the patentee the sole privilege to "make, use, exercise & vend" the invention. Eight of these articles they sold in England, & the remaining nineteen they sent to their branch business house in Paris, where they were sold to various foreign purchasers:—*Held:* as, upon the evidence, defts. had purchased the whole twenty-seven for the purpose of sale, that was a "user" of the invention constituting an infringement in respect of the nineteen sent abroad as well as of the eight sold in England, & pltfs. were entitled to damages, in addition to an injunction, to which the defts. had already submitted, in respect of the whole twenty-seven.

(2) The measure to be applied in assessing damages for infringement of a patent is the pecuniary loss actually sustained by the patentee through the infringement, & no more.

Qu.: whether mere transport from place to place of a patented article is an infringement.—BRITISH MOTOR SYNDICATE, LTD. *v.* TAYLOR & SON, LTD., [1901] 1 Ch. 122; 70 L. J. Ch. 21; 83 L. T. 419; 49 W. R. 183; 17 T. L. R. 17; 45 Sol. Jo. 43; 17 R. P. C. 723, C. A.

Annotation:—As to (1) **Refd.** British United Shoe Machinery Co. *v.* Collier (1908), 25 T. L. R. 74.

3055. ——.]—In an action for infringement of a patent it was found that the patent had been infringed & proof was subsequently led as to damages. The Lord Ordinary without stating his reasons assessed the damages at £1,500. Pursuers reclaimed. It was held by the Inner House that while the assessment of damages in such cases was a jury question in the sense that it was a matter for estimation rather than for exact arithmetical calculation, the basis on which such estimation was made should be disclosed by the Lord Ordinary in a reasoned opinion & that if the Ct. of Appeal considered that the amount of damages awarded by him was substantially different from what should have been awarded it was proper for them to vary the award, also that *primâ facie* in cases of infringement a patentee was entitled in name of damages to the amount of the profit he could have made if he had himself effected the sales actually made by the infringers, but that this *primâ facie* aspect might be readily altered by other considerations arising on a purview of the whole circumstances, such as the nature of the trade in question, the area of its exercise & the volume of competition. The ct. recalled the Lord Ordinary's interlocutor & awarded £3,000 damages:—*Held:* the judgment of fact was open to review & the greater number of the machines sold by defenders had been sold on the merits of the pursuers' invention & the amount found by the Inner House was not excessive.—WATSON, LAIDLAW & CO., LTD. *v.* POTT, CASSELS & WILLIAMSON (1914), 31 R. P. C. 104, H. L.

Annotation:—**Refd.** British Thomson Houston Co. *v.* Naamlooze Vennootschap Pope's Metaaldraadlampenfabriek, British Thomson-Houston Co. *v.* Charlesworth, Peebles, British Thomson-Houston Co. *v.* King (1923), 40 R. P. C. 119.

ii. *Number of Infringing Articles Sold or Used.*

3056. Plaintiff deprived of sale of corresponding number.]—BRITISH MOTOR SYNDICATE, LTD. *v.* TAYLOR & SON, LTD., No. 3054, *ante.*

3057. ——.]—The B. T.-H. co., Ltd. commenced an action in respect of infringement of a patent against G., Ltd., H. G. & B. S. G., last two defts. being sued *qua* directors of G., Ltd. Judgment was entered against defts. by consent & (*inter alia*) an inquiry as to damages was ordered. On the inquiry an affidavit was made, & oral evidence was given by H. G., from which it appeared that defts. had had in their possession some one thousand four hundred lamps, the majority of which had been sold, but only sixty three lamps sold were proved to be infringements of pltfs. patent. The master assessed the damages at £500. Defts. applied to vary the master's certificate. It was contended on behalf of pltfs. that, since it had been established that H. G. was an untruthful witness, that he had dealt largely in lamps, some of which were infringements of pltfs.' patent, that he had offered such lamps in gross lots on his own billheads in his own handwriting, & that he had withheld from the ct. information which it was his duty to supply, pltfs. were entitled to more than nominal damages & that it was the duty of the master, acting as a jury, to assess such damages as he considered pltfs. had in fact suffered:—*Held:* to establish by cross-examination that a witness is untruthful does not obviate the necessity of affirmative evidence; pltfs. were entitled to damages only in respect of those lamps which were proved to be infringements; the measure of damage was the loss of profit to the patentee by reason of the patentee having been unable to sell lamps to a number corresponding to that proved to have been sold by the infringer.—BRITISH THOMSON-HOUSTON CO., LTD. *v.* GOODMAN (LEEDS), LTD. (1925), 42 R. P. C. 75.

3058. —— Allowance for sales due to exertions of defendants—Possibility of selling equal quantity of similar articles.]—In an action by pursuers, who were assignees of a patent for the manufacture of horse shoe nails, for damages caused by the infringement of the patent, it appeared that pursuers did not grant licences, but themselves manufactured & sold the nails made by their patented machinery, & it was admitted that a number of boxes of nails manufactured

PART XIV. SECT. 2, SUB-SECT. 10.—D. (b) i.

3054 i. *General rule—Limited to actual pecuniary loss.*]—Actual, & not exemplary damages, will be award for imitating a patented invention.—LAINER *v.* COLLETTE (1882), 5 L. N. 412.—**CAN.**

3055 i. ——.]—The measure of damages for infringement of a patent of invention, by using a patented machine purchased of a manufacturer of the invention, & not the inventor, is not the profit which the purchaser derived from the use of the patent. The true measure is the loss suffered by the patentee.—PINKERTON *v.* COTE (1886), M. L. R. 3 Q. B. 133; 10 L. N. 365.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 10.—D. (b) ii.

3056 i. *Plaintiff deprived of sale of corresponding number.*]—BRITISH INSULATED WIRE CO. *v.* DUBLIN UNITED TRAMWAYS CO., [1900] 1 I. R. 287.—**IR.**

in such a manner as to infringe the patent had been sold by defenders :—*Held :* (1) to the extent by which their trade was injured by defenders' sales pursuers were entitled to substantial damages ; (2) the measure of damage was the amount of profit which they would have made if they had themselves effected such sales, deducting a fair percentage in respect of sales due to the particular exertions of defenders ; (3) the mere possibility that the defenders might have manufactured & sold an equal quantity of similar nails without infringing the patent was no ground for reducing the damages to a nominal sum ; (4) the fact that pursuers had in consequence of the unlawful competition of defenders reduced the price of nails which they had themselves sold did not entitle them to recover additional damages in respect of the reduction in the profits of such sales.—UNITED HORSE-SHOE & NAIL CO., LTD. *v.* STEWART (1888), 13 App. Cas. 401 ; 59 L. T. 561 ; 5 R. P. C. 260, H. L.

Annotations :—As to (2) **Consd.** Boyd *v.* Tootal, Broadhurst, Lee Co. (1894), 11 R. P. C. 175. **Expld.** British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122. **Apld.** Watson, Laidlaw *v.* Pott Cassels & Williamson (1914), 31 R. P. C. 104. **Refd.** Alexander *v.* Heurey (1895), 12 R. P. C. 360 ; Pneumatic Tyre Co. *v.* Puncture Proof Pneumatic Tyre Co. (1898), 15 R. P. C. 405. *As to* (3) **Refd.** Meters *v.* Metropolitan Gas Meters (1911), 104 L. T. 113. *Generally*, **Consd.** American Braided Wire Co. *v.* Thomson (1890), 44 Ch. D. 274. **Refd.** Clement Talbot *v.* Wilson (1907), 97 L. T. 328 ; Spalding *v.* Gamage (1918), 35 R. P. C. 101.

3059. —— —— Probable increase of sales by reduced price.]—AMERICAN BRAIDED WIRE CO. *v.* THOMSON, No. 3053, *ante*.

3060. —— Rate of compensation accepted from other parties.]—Certain machine makers, owners of a patent for improvements in machinery used in, amongst other trades, cotton spinning, brought an action against persons who had used machines which were infringements of the patent ; they had previously brought a successful action against the manufacturers, but the latter had proved unable to pay damages. The patentees had settled with other infringing users on terms which were less favourable to themselves than those which they claimed in the action. It was proved that no machines had been made by pltfs. for cotton spinning till after the purchase of defts.' machines, that there were other machines of a similar kind in the market, & that pltfs. had not given any notice to defts. that the machines purchased by them were infringements :—*Held :* (1) damages for infringement might be recovered from either manufacturers or users of a patented article, or from both, until the full damages had been recovered. (2) the measure of the damages was the amount of profit which pltfs. would have made had defts. purchased their machines from them. (3) the rate at which pltfs. had accepted compensation from non-litigants did not govern the assessment of the amount recoverable by action. (4) defts. having purchased infringing machines could not be heard to say that they might have bought others. (5) pltf.'s rights were not affected by their having given no notice to defts. before their purchase of the infringing machines.

(5) A patent had been supported in the House of Lords & the patentee brought a subsequent action against users of infringing machines for damages. Defts. admitted infringement & the validity of the patent, but contested the amount of the claim for damages, & were ordered to pay more than they had offered but less than pltf. claimed :—*Held :* pltf. was not entitled to solr. & client costs.—BOYD *v.* TOOTAL, BROADHURST, CO., LTD. (1894), 11 R. P. C. 175.

3061. —— Patentee's establishment charges not increased.]—In an action for infringement of letters patent, judgment was given for pltfs., & an inquiry as to damages was ordered. Pltfs. claimed a sum of £86,970 14*s.* 9*d.* as damages, dividing it under three heads—first, reduction of their prices by reason of defts'. competition ; secondly, loss of profit which they would have made had they made & sold the infringing articles ; &, thirdly, further profits which they would have made, by reason of the fact that the infringing flues could have been made without increased establishment charges, thus increasing the profit per flue. The master certified that pltfs. had sustained damage to the amount of £13,950. Each party issued a summons to vary, defts. asking that the damages should be reduced to £5,000. On the hearing of these applications :—*Held :* the certificate could not be supported, the amount of damages certified having been arrived at on mistaken reasons ; the certificate must be discharged.—LEEDS FORGE CO., LTD. *v.* DEIGHTON'S PATENT FLUE CO., LTD. (1907), 25 R. P. C. 209.

3062. —— Sale of article containing infringing parts—Whether loss assessed on profit on parts or on whole article.]—Judgment was given in an action for infringement of two letters patent for an injunction, and an inquiry as to damages. The patents related to a carburetter & to control mechanism of motor cars. Defts. had imported into this country one car containing the patented parts. On the inquiry pltfs. filed evidence that they did not sell or licence the sale of these parts separately, but only sold cars, & they claimed the amount of the profit on a sale by them of a car. Defts. filed evidence that the price of a similar carburetter & control mechanism would not exceed the sum of £10, & paid £20 into ct. The master certified £10 as the amount of pltfs.' damages. Pltfs. applied to vary the certificate : —*Held :* the measure of damages was the loss of profit which pltfs. suffered by not selling the accessories in question, & the amount given by the master more than compensated pltfs. for the loss of profit which they sustained.—CLEMENT TALBOT, LTD. *v.* WILSON (1908), 26 R. P. C. 467, C. A.

Annotation :—**Consd.** Meters *v.* Metropolitan Gas Meters (1911), 104 L. T. 113.

3063. —— —— ——.]—Defts. sold nineteen thousand five hundred prepayment gas meters which contained two parts that constituted infringements of the two letters patent of pltfs. The profit on the infringing parts represented about one forty-fourth of the whole profit on a meter. Under a judgment by consent an inquiry was directed as to what damages, if any, pltfs. had sustained by defts.' infringements. The master certified that the profit lost by pltfs. must be considered to be the profit on the sale of the whole of each meter. He was of opinion that five thousand more meters would have been sold by pltfs. but for defts.' sale of infringing meters ; & he assessed the damages for loss of profit under this head at 13*s.* 4*d.* per meter, £3,333 6*s.* 8*d.*, & for loss of profit on actual sales by pltfs. in consequence of a reduction in prices from defts.' competition at £1,500. The total was therefore £4,833 6*s.* 8*d.* The defts. applied to vary the master's certificate by giving pltfs. only nominal damages ; & pltfs. applied to increase the number of meters they would have sold to ten thousand :—*Held :* the master had rightly certified that the profit on the whole meter was the proper factor to be taken into calculation,

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 10, D. (b) ii., iii. & iv., & (c).]

& had rightly fixed the profit on the five thousand meters at 13*s.* 4*d.* per meter; but that figure ought on the evidence to be reduced to three thousand five hundred, & the damages to £2,333 6*s.* 8*d.*; & the finding that pltfs.' loss on actual sales were £1,500 ought not to be disturbed. —METERS, LTD. *v.* METROPOLITAN GAS METERS, LTD. (1911), 104 L. T. 113; 28 R. P. C. 157.

Annotations:—**Refd.** Wason Laidlaw *v.* Pott Casels & Williamson (1914), 31 R. P. C. 104. **Mentd.** Akt. für Autogene Aluminium Schweissung *v.* London Aluminium Co. (No. 2) (1923), 40 R. P. C. 107.

iii. *Reduction of Price by Illegal Competition.*

3064. Whether considered in assessing damages.] —UNITED HORSE-SHOE & NAIL CO., LTD. *v.* STEWART, No. 3058, *ante*.

3065. ——.] — LEEDS FORGE CO., LTD. *v.* DEIGHTON'S PATENT FLUE CO., LTD., No. 3061, *ante*.

3066. ——.]—METERS, LTD. *v.* METROPOLITAN GAS METERS, LTD., No. 3063, *ante*.

3067. —— Probable increase of sales in consequence of reduction—Connection & industry of defendants.]—AMERICAN BRAIDED WIRE CO. *v.* THOMSON, No. 3053, *ante*.

3068. —— Price reduced by competing tender.]—In an action for infringement of a patent judgment was given by consent for an injunction & for an inquiry as to damages. The patent, No. 6210 of 1896 related to a machine for charging iron furnaces. D. L. & co. requiring a machine asked for tenders from pltfs. & defts. Pltfs.' price for a machine with a double movement made under the above-mentioned patent was £2,750. Defts. were a German firm making machines of the same double movement in Germany. This they were entitled to do, there being no corresponding German patent, & they offered to supply such a machine for £2,250. Owing to this tender of defts. pltfs. were only able to get the order from D. L. & co. by reducing their price from £2,750 to £2,375. Upon the inquiry as to damages the master certified that pltfs. had suffered £250 damages. Defts. applied to have the certificate discharged or varied:—*Held:* as no one but pltfs. could supply this machine, & as the purchasers required it, & as upon the evidence the only ground urged for reducing the price of £2,750 was the competing tender, pltfs. had established that they had suffered at least £250 damages by reason of the conduct of defts.—WELLMAN, SEAVER & HEAD, LTD. *v.* BURSTINGHAUS & CO. LTD. (1911), 28 R. P. C. 326.

iv. *Loss of Royalties.*

3069. Damages assessed on loss of royalties—Plaintiffs manufacturers—Accustomed to grant licences—Infringers charged higher royalties.]—A patentee of an invention applicable to part of a machine, who is himself a manufacturer, has been in the habit of licencing the use of his invention by other manufacturers on payment of a fixed royalty for each machine, having obtained against an infringing manufacturer a decree, amongst other things, for damages, "by reason of the user or vendor" of the invention, is not entitled to claim, by way of damages, any sum beyond the ordinary royalty. Hence he is not entitled to claim, in addition to his ordinary royalty, a manufacturing profit; &, *à fortiori*, not such a manufacturing profit as he would have made if every unlicenced machine had been sent to him to be fitted with the invention. *Secus*, if he had been in the habit of charging infringers with a higher royalty than ordinary licencees. Pltf. having, in another suit, obtained a decree against certain wrongful users, not being manufacturers, of unlicenced machines fitted by deft. with his invention, had in some instances been paid his ordinary royalty by such users: —*Held:* in every such instance, no further royalty was payable by the manufacturer.—PENN *v.* JACK (1867), L. R. 5 Eq. 81; 37 L. J. Ch. 136; 17 L. T. 407; 32 J. P. 164; 16 W. R. 243.

Annotations:—**Consd.** Boyd *v.* Tootal, Broadhurst, Lee (1894), 11 R. P. C. 185. **Dbtd.** British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122. **Consd.** Watson, Laidlow *v.* Pott, Cassels & Williamson (1914), 31 R. P. C. 104; Akt. Für Autogene Aluminium Schweissung *v.* London Aluminium Co. (No. 2) (1923), 40 R. P. C. 107. **Refd.** Clement Talbot *v.* Wilson (1907), 97 L. T. 328; Meters *v.* Metropolitan Gas Meters (1911), 104 L. T. 113.

3070. —— ——.]—Judgment having been recovered for infringement of a patent, an inquiry as to damages was directed. It appeared that pltfs.' usual practice was not to sell, but to let out the patented art. at a rental or royalty:—*Held:* (1) the measure of damages was the profit rental of the article during the entire period from the time when it came into the possession of the infringer until the assessment of the damages or the date of its delivery up; & it was immaterial, for the purposes of assessment, whether the article had or had not been in actual use during any portion of that period; (2) defts. were not entitled to set off against the damages the value of any infringing article delivered up under the judgment of the ct., nor to set off any portion of an agreed sum for damages for infringement recovered by pltfs. in a previous action against the manufacturer from whom defts. bought the article, although the period in respect of the rental payable by defts. as damages commenced at a date antecedent to the commencement of the action against the manufacturer; but, if the damages, recovered by pltfs. from the manufacturer, instead of being an agreed sum, had been a sum representing the full rental or royalty, defts. would have been entitled to a set-off.—UNITED TELEPHONE CO., LTD. *v.* WALKER & OLIVER (1886), 56 L. T. 508; 4 R. P. C. 63.

Annotations:—*As to* (1) **Consd.** British Thomson-Houston Co. *v.* Naamlooze Vennootschap Pope's Metaaldraadlampenfabriek, British Thomson-Houston Co. *v.* Charlesworth Peebles, British Thomson-Houston Co. *v.* King (1923), 40 R. P. C. 119. *Generally*, **Refd.** Boyd *v.* Tootal, Broadhurst, Lee Co. (1894), 11 R. P. C. 175.

3071. —— —— **Defendant supplying low grade article—Assumption that orders would have gone to licencees.]**—An inquiry as to damages having been ordered in a judgment by consent in an action for infringement of a patent relating to bicycle tyres, & the master having made his certificate, defts. moved to reduce the damages found by the master. They contended that the evidence showed that the damages ought not to be assessed on the basis that the orders given to them for tyres would have gone to pltfs., inasmuch as the infringing tyres had been bought for second-grade bicycles, & that pltfs.' tyres would not have been

PART XIV. SECT. 2, SUB-SECT. 10.—D. (b) iv.

b. *Damages assessed on loss of royalties—What must be considered.]*—In cases of infringement damages are not to be assessed solely on the basis of royalty or licence unless there is evidence that in similar circumstances certain defined prices have been charged & paid. It is proper to consider what was charged & paid in other circumstances as one of the factors in assessing damages, but it is improper to treat it as the sole determining factor.—CONSOLIDATED WAFER CO. *v.* INTERNATIONAL CONE CO., [1926] 4 D. L. R. 74; 59 O. L. R. 205.—CAN.

c. —— ——.]—BRITISH THOMSON-HOUSTON CO. *v.* CHARLESWORTH

fitted to such machines, but that pltfs. were only entitled to damages on the basis that the orders would have gone to the licencees of pltfs., from whom pltfs. would have been entitled to royalties: —*Held:* the proper measure of damages was the actual loss caused to pltfs., & the sum awarded correctly represented this loss.—PNEUMATIC TYRE CO., LTD. *v.* PUNCTURE PROOF PNEUMATIC TYRE CO., LTD. (1899), 16 R. P. C. 209.

Annotations:—**Apprvd.** British Motor Syndicate *v.* Taylor, [1901] 1 Ch. 122. **Reld.** Meters *v.* Metropolitan Gas Meters (1911), 104 L. T. 113; Spalding *v.* Gamage (1918), 35 R. P. C. 101; British Thomson-Houston Co. *v.* Naamlooze Vennootschap Pope's Metaaldraadlampenfabriek, British Thomson-Houston Co. *v.* Charlesworth Peebles, British Thomson-Houston Co. *v.* King (1923), 40 R. P. C. 119.

3072. —— Plaintiffs licencors.]—In an action for infringement of a patent an injunction was granted, & an inquiry as to damages directed. The chief clerk, by his certificate, found £1,080 as the amount of the damages. Defts. had sold nine infringing machines. It appeared that the market value of the patented machines during the period of infringement was between £170 & £180, & the cost of manufacture about 50 guineas. The chief clerk took about £120 as the difference between the value & the cost of manufacture, & gave pltfs. nine times that amount, *i.e.* £1,080. Defts. moved to vary the certificate by finding that pltfs. had sustained no damage by defts.' infringement. The judge required further evidence than that before the chief clerk, & such evidence was adduced. It appeared that pltfs. only sold their machines for export, & that at home they issued them under licences:—*Held:* the amount of damages ought to be ascertained by inquiring what amount of profits from licences pltfs. had been deprived of by the acts of defts., & under the circumstances the amount was £650, & the damages ought to be assessed at that sum, & the certificate varied accordingly.—ENGLISH & AMERICAN MACHINERY CO. *v.* UNION BOOT & SHOE MACHINE CO. (1895), 13 R. P. C. 64.

Annotation:—**Reld.** British Thomson-Houston Co. *v.* Naamlooze Vennootschap Pope's Metaaldraadlampenfabriek, British Thomson-Houston Co. *v.* Charlesworth Peebles, British Thomson-Houston Co. *v.* King (1923), 40 R. P. C. 119.

3073. —— —— Prohibited conditions in licence.]—In an action for the infringement of two patents for welding aluminium by the use of certain fluxes it was held that the patents were valid & had been infringed. On the inquiry as to damages it was found by the master that (*a*) the amount of the damages was £716 19*s.* 8*d.*, calculated on a basis of a royalty of 4½ per cent. of the selling price of the articles manufactured by defts.; (*b*) damages ought not to be allowed in respect of goods welded during the existence of licences, not still in force at the date of the commencement of the action, containing conditions prohibited under Patents & Designs Act, 1907 (c. 29), s. 38, & (*c*) damages ought not to be allowed in respect of articles supplied for use by the govt. Pltfs. applied to vary the certificate by substituting £1,506 15*s.* 1*d.* for £716 19*s.* 8*d.*; striking out the paragraph of the certificate relating to (*b*) above; & assessing the damages under head (*c*) at a sum stated. At the hearing of the application the Crown was represented, & it was admitted that the Crown had indemnified defts. in respect of all articles referred to under head (*c*). Pltfs. contended that there was not any reason for adopting the rate of 4½ per cent., & that the damages ought to be based on the royalty payable under a licence that had been granted, & that pltfs. were entitled to damages for infringements during the existence of the licences containing the prohibited conditions:—*Held:* pltfs. were not manufacturers, but only licencors, &, in such a case, it would be proper to award damages on the basis of the royalties provided for by the licence referred to.—AKT. FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM CO., LTD. (NO. 2) (1923), 40 R. P. C. 107.

(*c*) *Inquiry as to Damages.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 521 *et seq.*

3074. Whether granted—Judgment by default.]—WEBB LAMP CO., LTD. *v.* ATKINSON (TRADING AS THE HEALTH FILTER CO.), No. 3011, *ante.*

3075. —— Only one case of infringement.]—TRUE & VARIABLE ELECTRIC LAMP SYNDICATE *v.* BRYANT TRADING SYNDICATE. No. 3187, *post.*

3076. Stay of inquiry pending appeal—On undertaking not to sell.]—A patent having been granted to S. & others for "An improved apparatus for the electrical deposition of metals," the E. co., in whom the patent was vested, brought an action for infringement. Defts.' apparatus was constructed under a subsequent patent. Defts. raised the usual defences, &, among others, anticipation by a specification of Z.:—*Held:* (1) the patent was valid, & Z.'s specification was no anticipation, & defts. had infringed the first claim & probably also the third, & judgment was given for pltfs. for an injunction; (2) defts., although they used, had not sold, any infringing apparatus, & on their undertaking not to sell, pending an appeal, the inquiry as to damages was reserved. —ELECTROLYTIC PLATING APPARATUS CO., LTD. *v.* EVANS & SON (1900), 17 R. P. C. 733.

3077. —— Absence of special reasons—Consent of plaintiff.]—Stay of inquiry as to damages refused. In the absence of special reasons a stay of the inquiry pending an appeal will not be granted unless pltf. consents.—EVANS, TAUNTON (J. & J.), LTD. *v.* HOSKINS & SEWELL, LTD. (1904), 21 R. P. C. 675.

3078. Fact of infringement clear — Several patents—No proof as to which infringed—Inquiry directed.]—(1) In an action by patentees of an article exclusively manufactured abroad, claiming an injunction & damages for the user of the patented article in England, the only evidence of infringement adduced was that of an expert, who deposed that pltfs.' patents related to three separate & distinct modes of producing the article in question; that it was not possible to tell, from an examination of any particular parcel, under which process it had been produced, but that it must have been produced under one or other of these three processes. Deft. called no evidence, & claimed a nonsuit:—*Held:* pltfs. were not

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PEEBLES & CO., [1923] S. C. 599.—SCOT.

3072 i. —— *Plaintiffs licencors.*]—*Held:* pltf. had been in the habit of licensing the use of his invention, the loss of the amount paid for such license was the measure of damages.—SHEEN *v.* JOHNSON (1870), I. L. R. 2 All. 368.—IND.

PART XIV. SECT. 2, SUB-SECT. 10.—D. (*c*).

d. *Whether granted.*] — When the pltf. in an action for infringement of a patent obtains a decree, he is entitled to an inquiry as to damages, if he prefers that to an inquiry as to profits, unless the evidence at the hearing has established that no sensible damage can have been sustained.—WELSBACH LIGHT CO. OF AUSTRALASIA, LTD. *v.* LOCHHEAD (1904), 24 N. Z. L. R. 51.—N.Z.

e. *Limitation of inquiry.*] — *Held:* where the language of the decree is unambiguous, the allegations in the

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 10, D. (c), & E.]

entitled to any injunction, as they had not proved that any particular patent had been infringed, & one of the patents had expired before the hearing.

(2) On the question of damages, the ct. found as a fact that pltfs.' patents covered every possible mode of producing the patented article, & that one of these patents must therefore have been infringed, & that the nature & extent of the wrong done to pltfs. did not depend upon the particular patent infringed. An inquiry was therefore directed, without mentioning any particular patent, whether any & what damages had been sustained by pltfs. by reason of the user by deft. of the patented article.

Semble: it is not always essential to establish the particular alternative under which relief is claimed, provided that the rights of pltf. & the obligations of deft. are identical under each of the alternatives, & that the alternatives exhaust every possible contingency & are mutually exclusive. — SACCHARIN CORPN. LTD. *v.* QUINCEY, [1900] 2 Ch. 246; 69 L. J. Ch. 530; 82 L. T. 792; 64 J. P. 633; 16 T. L. R. 384.

Annotations:—As to (2) **Consd.** Saccharin Corpn. *v.* Dawson (1902), 46 Sol. Jo. 281. **Distd.** Saccharin Corpn. *v.* Wild, [1903] 1 Ch. 410.

3079. Limitation of inquiry—To admitted infringements—Motion for judgment on admissions.]—Where in an action for infringement of a patent, deft. in the defence admitted certain instances of infringement, but denied that he had committed any others, & pltf. thereupon moved for judgment upon the admissions in the pleadings:—*Held:* pltf. was entitled to an inquiry as to damages arising from the admitted infringements only.—UNITED TELEPHONE CO. *v.* DONOHOE (1886), 31 Ch. D. 399; 55 L. J. Ch. 480; 54 L. T. 34; 34 W. R. 326; 2 T. L. R. 331; Griffin's Patent Cases (1884–1886), 227, C. A.

3080. —— To exclude infringements before specification amended.]—The owners of a patent for "Improvements in & appertaining to the manufacture of candy" brought an action for infringement. The invention consisted in making candy, technically known as "hard crack" or "stick" candy, in a vacuum pan. The specification had been amended prior to the action. Deft. did not deny infringement, but contended that the patent was bad because of prior publication, want of subject-matter, misleading & untrue statements in the specification, & insufficiency:—*Held:* the patent was valid. Pltfs. were given damages; but, as the patent had expired before the date of the judgment, an injunction was not granted. A certificate of validity of the patent was granted. Pltfs. moved for an order that the damages be assessed in respect of the use of the invention prior to the amendment of the specification as well as subsequent thereto. The motion was refused with costs.—KANE & PATTISON *v.* BOYLE (J.) & Co. (1901), 18 R. P. C. 325.

3081. —— ——.]—The owners of a patent for "improvements in machines for inserting metallic fastenings in boots, shoes, & leather work," brought an action for infringement in which defts. relied at the trial upon the invalidity of the patent on three grounds: first, that the specification did not sufficiently distinguish between what was old & what was new; secondly, that as to claim 5 of the specification there was no subject-matter, there being merely an aggregation of old parts performing no new function in combination; & thirdly, that claim 12 claimed an invention which would not work & was useless. The last-named objection was founded on a mistake in one of the drawings showing a rod as rigid, & it was objected that, if the rod were rigid, the length of wire cut off would not be accommodated to the varying thickness of the leather used:—*Held:* (1) the combination as a whole was claimed, & there was a new combination producing an old result in a new & more profitable manner, & it was not essential to the validity of the patent to point out the novelty of any element in the combination; (2) there was good subject-matter in claim 5; & although there was a slip in the drawings of the rod, the portion of the machine in which this occurred was not the subject of the patent, & a competent workman would have introduced a known arrangement to correct the error; (3) the patent, which had already expired, was valid; but the specification having been amended, & the ct. not being satisfied that the original claims were framed in good faith & with reasonable skill & knowledge, an inquiry as to damages was granted so as to exclude damages for any infringement anterior to the amendment of the specification.—BRITISH UNITED SHOE MACHINERY CO., LTD. *v.* FUSSELL (A.) & SONS, LTD. (1908), 25 R. P. C. 631, C. A.

Annotations:—**Apld.** Lynch & Wilson *v.* Phillips (1909), 26 R. P. C. 389. **Refd.** Read *v.* Stella Conduit Co. (1916), 33 R. P. C. 191.

Election between enquiry & account of profits.]—*See* Sub-sect. 10, A., *ante*.

Inquiry on discontinuance of action.]—*See* INJUNCTION, Vol. XXVIII., p. 521, No. 1276.

Discovery on inquiry as to damages.]—*See* DISCOVERY, Vol. XVIII., p. 175, No. 1283.

E. Account of Profits.

See, now, Patents & Designs Acts, 1907 (c. 29), s. 34; 1919 (c. 80), s. 10, sched.

3082. Right to account—Proof of profits made—Necessity for.]—BACON *v.* SPOTTISWOODE, BACON *v.* JONES, No. 3030, *ante*.

3083. —— —— ——.]—Where, after verdict in an action for the infringement of a patent, an order for an injunction & for an account to be taken of profits made by deft. is applied for under Patent Law Amendment Act, 1852 (c. 83), s. 42, the ct. will not make an order for an injunction until it be shown that deft., after the verdict, has continued to infringe the patent; & before they will make an order for an account of profits to be taken, a strong case must be established that deft. has made profits by the infringement of the patent.—LISTER *v.* EASTWOOD (1855), 3 C. L. R. 1249.

3084. —— Loss by delay—Though action pending against one of several infringers.]—The right to a decree in equity for an account of the profits made by the manufacture & use of articles in infringement of a patent is incident to the right to an injunction to restrain future infringements; & where no case is made for the injunction the account will not be decreed. The owners of a patent for a peculiar mode of manufacturing iron wheels for railway carriages having discovered that several railway cos. were violating their patent brought an action for damages against one of such cos. only, but did not in any way give

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pleadings shall not be taken into account in the inquiry as to damages. —SMITH *v.* GOLDIE (1885), 11 P. R. 24. —CAN.

... *of proof.*]—On an enquiry whether any & what damage has accrued to the pltf. from the unlawful use by deft. of his patent the *onus* lies on pltf. of proving some special damage such as loss of custom & oth... — HARVEY *v.* MURRAY (1879), L. R. 183.—NFLD.

notice to the other cos. to discontinue their infringements of pltf.'s right. In the action the validity of the patent was disputed, & it was not decided until three years after the patent had expired, when a verdict was given for pltfs. with large damages. Thereupon pltfs. filed a bill for an account of profits, & an injunction against another of the cos. who had infringed their patent, complaining of acts done nine years before :— *Held :* the delay was not excused by the pendency of the action, but was fatal to pltfs.' case.— SMITH *v.* LONDON & SOUTH WESTERN RY. CO. (1854), Kay, 408 ; Macr. 209 ; 2 Eq. Rep. 428 ; 23 L. J. Ch. 562 ; 23 L. T. O. S. 10 ; 2 W. R. 310 ; 69 E. R. 173.

Annotations :—**Refd.** Price's Patent Candle Co. *v.* Bauwen's Patent Co. (1858), 4 K. & J. 727 ; Saxby *v.* Easterbrook (1872), L. R. 7 Exch. 207.

3085. —— Where damages recovered.]—In an action for the infringement of a patent, pltf. obtained a verdict for 40*s.* damages. Afterwards he obtained a rule, absolute in the first instance, ordering deft. to render an account of all the articles which he had before & since the commencement of the action made or sold in breach of pltf.'s patent, & pay to pltf. the moneys received for such articles. A rule *nisi* was obtained, on part of deft., to discharge this rule. By the affidavits it appeared that deft. had made profits by the sale of the pirated articles since the commencement of the action ; but that he had discontinued the manufacture since the verdict & before pltf.'s rule was obtained ; & it appeared that, shortly after the action commenced, pltf.'s attorney had told the other side that pltf. would take only nominal damages, & would, if necessary, file a bill in equity to obtain an account of the profits :—*Held :* (1) the action was still pending, so as to give the ct. jurisdiction under Patent Law Amendment Act, 1852 (c. 83), s. 42 ; (2) there having been a verdict with damages, & there being no continuing piracy such as would give ground for an injunction, no account of the profits before action could be ordered : but, deft. might be considered a trustee for pltf. of those profits which he had made, pending the action, after notice that pltf. would require them ; & an account of those profits might be ordered.— HOLLAND *v.* FOX (1854), 3 E. & B. 977 ; 2 C. L. R. 1576 ; 23 L. J. Q. B. 357 ; 23 L. T. O. S. 230 ; 1 Jur. N. S. 13 ; 2 W. R. 558 ; 118 E. R. 1407.

Annotations :—**Refd.** Patent Type Founding Co. *v.* Lloyd, Same *v.* Walter (1860), 5 H. & N. 192 ; Elwood *v.* Christy (1865), 18 C. B. N. S. 494.

3086. —— After expiry of patent—Where no doubt as to validity.]—F. obtained a patent for umbrella ribs, & enjoyed it uninterruptedly to its conclusion, with the exception of an action for damages by H., another patentee, who recovered £300 & a manufacture & sale of the ribs by D. & D. six months before it expired. F. filed a bill & restrained D. & D., & the cause came to a hearing nine months after the expiration of the patent :—*Held :* the ct. could direct an account, notwithstanding the expiration of the patent ; but it must be a case where there was no doubt as to its validity.—FOX *v.* DELLESTABLE, FOX *v.* JONES (1866), 15 W. R. 194.

Annotation :—**Refd.** Poupard *v.* Fardell (1869), 21 L. T. 696.

3087. —— Infringement of minor details.]—Pltfs. were owners in England of a patent for phonographs granted to E., who remained possessed of an identical patent in America. Deft. purchased two of E.'s machines made abroad, & hearing of litigation concerning the patent, according to his evidence, he altered those two machines, so that in his opinion they were no longer infringements of the patent, by removing the recording point from the diaphragm, but he did not remove certain minor details of the machine which were covered by the patent. He used these machines, so altered, for public exhibition. Pltfs. brought an action for infringement & obtained an interlocutory injunction. The whole patent, including the claims for the minor details, had been held to be valid in an action decided just before the commencement of this action. After the granting of the interlocutory injunction, deft. removed the other infringing details. The action now came on for trial :— *Held :* deft. had infringed by using the minor details ; pltfs. were entitled to an injunction & an account of profits, with costs up to the trial.— EDISON BELL PHONOGRAPH CORPN., LTD. *v.* LONDON PHONOGRAPH CO. (1894), 11 R. P. C. 471.

Alternative to damages.]—*See* Sub-sect. 10, A.,

Dependent on right to injunction.]—*See* INJUNCTION, Vol. XXVIII., p. 514, Nos. 1188, 1189.

3088. Review of master's report.]—CROSLEY *v.* DERBY GAS LIGHT CO. (1838), 3 My. & Cr. 428 ; 1 Web. Pat. Cas. 120, n. ; 3 Jur. 692 ; 40 E. R. 992, L. C.

Annotations :—**Distd.** Bacon *v.* Spottiswoode (1839), 1 Beav. 382. **Refd.** Price's Patent Candle Co. *v.* Bauwen's Patent Candle Co. (1858), 4 K. & J. 727.

3089. Multiplicity of suits in respect of same patent—Prior decision as to validity.]—FOXWELL *v.* WEBSTER, No. 2864, *ante*.

3090. Accounts in Privy Council proceedings—Necessity for filing.]—The Judicial Committee will refuse to enter upon accounts in a patent case if they have not been filed as required by r. 9.—*Re* JOHNSON'S & ATKINSON'S PATENTS (1873), L. R. 5 P. C. 87, P. C.

3091. Action on amended specification—Account since date of amendment.]—WENHAM & CO. *v.* CARPENTER, TODD & CO. (1887), 5 R. P. C. 68.

3092. How profits assessed—Profits made by use of patent—Compared with means defendants would probably have used instead—Not with those used before infringement.]—In an action for infringement of a patent, judgment was given for pltf., & he elected to take an account of profits. On the application of pltf., it was ordered that defts. should give information as to the profits they had made immediately before they commenced to use pltf.'s invention, which was an appliance for turning large ingots. Defts. had been using manual labour previously. After they were restrained from infringing, they used a modification of pltf.'s invention, which was not an infringement. The Chief Clerk found the amount of profits was £250, basing his finding on a comparison with the appliance subsequently used by defts., on the ground that just before pltf.'s invention, their works were in an unfinished state, & that therefore manual labour was not the true test, but he found that if manual labour was to be taken as the test, that the profits were

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PART XIV. SECT. 2, SUB-SECT. 10.—E.

3085 i. *Right to account—Where damages recovered.*]—Every sale of a machine infringing a patent gives the owner of the patent a separate right to recover profits made on the sale of that machine, & he has a right to an account showing details of the sale & cost of each individual machine.—LEPLASTRIER & CO., LTD. *v.* ARMSTRONG-HOLLAND, LTD. (1926), 26 S. R. N. S. W. 585 ; 43 N. S. W. W. N. 195.—**AUS.**

g. —— *Period of limitation.*]—In a suit for an account of profits obtained by the infringement of an

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 10, E., F. & G. (a) & (b).]

£2,000, basing his finding on the books of defts. It was held at the trial that the comparison had been directed to be made by his previous order with what defts. had been doing before they used pltf.'s invention, & that the Chief Clerk had taken, therefore, a wrong basis. The judge discharged the certificate & referred the inquiry to an official referee. Defts. having appealed, pltf. submitted that the test was with manual labour, but that the larger sum of £2,000 found by the Chief Clerk was not large enough, & that defts.' books were not accurate. The Ct. of Appeal laid down, during the argument, that the true test of comparison was with what defts. would probably have used instead of the invention, looking at all the circumstances of the case. The ct. then went into the details to save a further reference back, & the parties consented to leave all matters in difference to the ct. to determine. The Ct. of Appeal by their judgment, after expressing an opinion that an account of profits was extremely difficult to work out, & should rarely be chosen, discharged the order of the judge below & the certificate, & ordered defts. to pay pltf. £3,000 in satisfaction of all demands with all costs.—SIDDELL *v.* VICKERS (1892), 9 R. P. C. 152, C. A.

Annotation:—**Refd.** Ehrlich *v.* Ihlee & Sankey (1888), 4 T. L. R. 337.

3093. —— Rejection of entries in book tendered by defendant.]—The A. co., as owners of certain letters patent, brought an action for royalties against F., & an account was ordered. On taking the account, deft. delivered an account based on the entries in a certain book, but the Registrar treated the book as not reliable, & found deft. liable to pay a balance of £85 7*s.* 10*d.* & based his finding on certain estimated calculations which he made. The Vice-Chancellor of the County Palatine refused to interfere with this finding, & deft. appealed to the Ct. of Appeal:—*Held:* upon the evidence, the finding was right, & the appeal was dismissed, with costs.

I think we cannot say that the Registrar was wrong in arriving at the result that deft. had not accounted for all the hats in respect of which he ought to pay a licence & I am not called upon to criticise too closely the particular figure at which he has arrived (LORD RUSSELL, C.J.).—ALMA VENEER FELT CO., LTD. *v.* FISHER (1896), 14 R. P. C. 159, C. A.

Discovery in account of profits.]—*See* DISCOVERY, Vol. XVIII., pp. 67, 216, Nos. 249, 252, 1634–1636.

F. Delivery up or Destruction of Infringing Articles.

3094. Discretion of court to grant or refuse.]—MERGENTHALER LINOTYPE CO. *v.* INTERTYPE CO., LTD., No. 3002, *ante.*

3095. Purpose of order—To protect patentee—Not to punish infringer.]—MERGENTHALER LINOTYPE CO. *v.* INTERTYPE CO., LTD., No. 3002, *ante.*

3096. Destruction may be ordered—Though property in infringer.]—VAVASSEUR *v.* KRUPP, No. 2556, *ante.*

3098. —— Nature of invention.]—I am not disposed to make any order for the delivery or destruction of the appliances used by the deft. in infringement of pltf.'s patent. This I say, not because of the circumstances of the case, but by reason of the nature of the invention (KEKEWICH, J.).—SIDDELL *v.* VICKERS, SONS & CO., LTD. (1887), as reported in 5 R. P. C. 81; *on appeal* (1888), 39 Ch. D. p. 100, C. A.; *sub nom.* VICKERS, SONS & CO. *v.* SIDDELL (1890), 15 App. Cas. 496, H. L.

Annotations:—**Mentd.** Ehrlich *v.* Ihlee & Sankey (1888), 4 T. L. R. 337; Kelly *v.* Heathman (1890), 45 Ch. D. 256; Longbottom *v.* Shaw (1891), 8 R. P. C. 333; Gadd *v.* Manchester Corpn. (1892), 9 T. L. R. 42; Nuttall *v.* Hargreaves, [1892] 1 Ch. 23; Savage *v.* Harris (1896), 12 T. L. R. 187; Taylor & Scott *v.* Arnand & Northern Press & Engineering Co. (1900), 18 R. P. C. 53; Case *v.* Cressy (1901), 17 R. P. C. 255; Tubes *v.* Perfecta Seamless Steel Tube Co. (1902), 20 R. P. C. 77; Patent Exploitation *v.* Siemens (1904), 21 R. P. C. 541; Auster *v.* Perfecta Motor Equipments (1924), 41 R. P. C. 482; Benton & Stone *v.* Denston (1925), 42 R. P. C. 284; Mellor *v.* Beardmore (1926), 43 R. P. C. 361.

3099. When order may be made—On motion to vary the minutes.]—EDISON & SWAN UNITED ELECTRIC LIGHT CO. *v.* HOILAND, No. 2561, *ante.*

3100. Order may be limited—To infringing parts only.]—EDISON BELL PHONOGRAPH CORPN., LTD. *v.* SMITH & YOUNG (1894), 11 R. P. C. 389; 10 T. L. R. 522, C. A.

Annotations:—**Reid.** Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Gold Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95. **Mentd.** Hatmaker *v.* Nathan (1917), 35 R. P. C. 61.

3101. —— ——.]—MERGENTHALER LINOTYPE CO. *v.* INTERTYPE CO., LTD., No. 3002, *ante.*

3102. Order for delivery up—Not varied to order for destruction—On subsequent motion.]—This was a motion to vary minutes of judgment delivered on June 17, 1911, whereby defts. in the action were ordered, among other things, to make & file within fourteen days after service of the judgment upon them a full & sufficient affidavit, to be made by the secretary or other proper officer, stating what arc lamps or parts of arc lamps were in their possession or power made in infringement of the said letters patent, & within four days from the filing of such affidavit to deliver up to pltfs. the arc lamps or parts of arc lamps that should by such affidavit appear to be in their possession or power by adding to such minutes immediately after the words "deliver up to pltfs." the words or in the presence of pltfs. or their agents destroy or otherwise make unfit for use." The motion was refused.—BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING CO., LTD. *v.* ELECTRICAL CO., LTD. (1911), 55 Sol. Jo. 689; 28 R. P. C. 517.

G. Certificate of Validity.

(a) In General.

See, now, Patents & Designs Acts, 1907 (c. 29), s. 35; 1919 (c. 80), sched.

3103. By whom granted—Supreme court.]—I am clearly of opinion that this is not a case in which solr. & client costs can be recovered under the statute because in my judgment the ct. which decided upon the merits of Bennis's patent was not a "ct. or judge" within Patents, Designs, & Trade Marks Act, 1883 (c. 57). "Ct. or judge" there means clearly a superior ct., & the "judge" must be taken to be a judge of such ct. (DAY, J.).—PROCTOR *v.* SUTTON LODGE CHEMICAL CO. (1888), 5 R. P. C. 184.

limitation, the taking of an account being only a mode of ascertaining the amount of damages, is the same as the period of limitation for an action or damages for the same ground.—[illegible] (1877), I. L. R.

b. *Conditions precedent.*]—In order to found an application for a certi-

3104. Certificate must be put in evidence.]—Patent Law Amendment Act (c. 83), s. 43, enacts that it shall be lawful for the judge before whom an action for infringing letters patent shall be tried, to certify on the record that the validity of the patent came in question; & that "the record, with such certificate, being given in evidence in any suit or action for infringing the said letters patent," shall entitle pltf., on obtaining final judgment, to "his full costs, charges, & expenses, taxed as between attorney & client," unless the judge shall certify that he ought not to have such full costs. An action having been brought by a patentee, substantially, for the recovery of royalties under a due licence, a compromise was entered into before pltf.'s case was closed, & an order of *Nisi Prius* was drawn up, under which deft. was to pay an agreed sum, & a verdict was to be entered for pltf. in the action, for 40*s.* damages, & costs, with all "usual certificates." After the cause was thus disposed of, the presiding judge, upon an *ex p.* application, indorsed on the record a certificate that the record in a certain action wherein B. was pltf. & K. was deft., & the certificate thereon indorsed, was given in evidence at the trial of this action:—*Held:* this certificate was improperly granted, the record & certificate in the former action not having been given in evidence, & it not being under the circumstances a "usual certificate" within the contemplation of the parties.—BOVILL *v.* HADLEY (1864), 17 C. B. N. S. 435; 4 New Rep. 464; 10 L. T. 650; 144 E. R. 176.

3105. Defendant successful in action—Cannot obtain certificate that validity came in question.]—BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN, No. 3177, *post.*

3106. Whether certificate should be pleaded.]—This was a motion for judgment in default of defence in an action for infringement of a patent, a certificate as to the validity of which had been granted in a previous action. The statement of claim did not plead the certificate but asked for solr. & client costs. The proposed minutes provided for an injunction, an inquiry as to damages, & an order for payment of the amount awarded within 14 days after it was ascertained, delivery up of infringing arts., for taxation of costs up to & including the judgment, as between solr. & client, & payment of such taxed costs; the costs of the inquiry as to damages to be reserved & liberty to apply. An order was granted according to the terms of the proposed minutes, with two variations, the costs to include the particulars of breaches which the ct. certified to be reasonable & proper, & all subsequent costs to be reserved instead of only the costs of the inquiry, but expressed the opinion that the certificate of validity ought to have been pleaded.—PNEUMATIC TYRE CO., LTD. *v.* CHISHOLM & CO. (1896), 13 R. P. C. 488.

3107. Limitation of certificate—To one claim of specification.]—A patent was granted for "Improvements in receivers for use in wireless telegraphy"; claim 3 of the specification was as follows:—"A vacuum tube containing a hot filament, a grid formed as a closed cylinder completely surrounding the filament, & a third electrode in the form of a cylinder surrounding the grid substantially as described." In an action for infringement of that patent, & of another patent not material for the purpose of this report, pltfs.' alleged infringement of claim 3. Defts. denied infringement, & alleged that the manufacture & sale complained of had been, in part, by defts. as agents or contractors for His Majesty's Govt. They alleged that the patent was invalid by reason of (*inter alia*) want of novelty, & subject-matter. At the trial, defts. contended that the anode, as well as the grid, must be in the form of a closed cylinder completely surrounding the filament, & that the grid, which was a loose, open-ended cylinder, was not in that form. Pltfs. contended that the word "closed" meant "electrically closed," not "physically" or "geometrically closed." At the trial it was held, that, although the grid must be in the form of a closed cylinder completely surrounding the filament, the anode need not be in that form; that the word "closed" was used, not in the sense contended for by pltfs., but in its ordinary sense; & that, if that was so, defts.' valve contained no such grid as was claimed & was not an infringement; & that claim 3 was valid. A certificate of validity, limited to claim 3, was given:—*Held:* it was impossible to read the word "closed" in the claim except in its ordinary & natural meaning, physically or geometrically closed.

In *Nobel's Explosives Co.* v. *Anderson*, "*Cordite*" *Case*, No. 2441, *ante*, ROMER, L.J., pointed out that infringement must be of the invention claimed, not the invention which the patentee might have claimed if he had been well advised or bolder. It is therefore to the claim that one must direct one's first & chief attention, though of course the claim itself must be read in the light of what has been set out in the body of the specification (LORD DUNEDIN).—MARCONI'S WIRELESS TELEGRAPH CO., LTD. *v.* MULLARD RADIO VALVE CO., LTD. (1924), 41 R. P. C. 323. H. L.

Annotation:—**Mentd.** Brown *v.* Sperry Gyroscope Co. (1924), 42 R. P. C. 111.

3108. Action on threat of legal proceedings.]—CRAMPTON *v.* PATENTS INVESTMENT CO. (1888), 5 R. P. C. 382.

Annotation:—**Mentd.** Kelvin *v.* Whyte, Thomson (1907), 25 R. P. C. 177.

Effect of certificate on costs in subsequent action.]—*See* Sub-sect. 11, E., *post.*

(*b*) *Finality of Certificate.*

3109. Certificate granted — Whether sufficient for subsequent actions.]—(1) When a certificate of validity has been granted in a former action it need not be again granted.

(2) The utility of a patent must be judged by reference to the state of things at the date of the patent; if the invention was then useful, the fact that subsequent improvements have replaced the patented invention & rendered it obsolete & commercially of no value, does not invalidate the patent (LINDLEY, L.J.).—EDISON & SWAN UNITED ELECTRIC LIGHT CO. *v.* HOLLAND (1889), 41 Ch. D. 28; 58 L. J. Ch. 524; 61 L. T. 32; 37 W. R. 699; 5 T. L. R. 294; 6 R. P. C. 243, C. A.

Annotations:—*As to* (2) **Apld.** Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co., [1892] 3 Ch. 424. *Generally*, **Reld.** Heap *v.* Hartley (1889), 61 L. T. 538; Jandus Arc Lamp & Electric Co. *v.* Arc Lamp Co. (1908), 22 R. P. C. 277; Layland *v.* Boldy (1913), 30 R. P. C. 249, 547; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369; Gold Ore Treatment Co. of Western Australia *v.* Golden Horseshoe Estates Co., Golden Horseshoe Estates Co. *v.* Golden Ore Treatment Co. of Western Australia (1919), 36 R. P. C. 95; British Thomson-Houston *v.* Charlesworth Peebles (1924), 41 R. P. C. 241. **Mentd.** Wallace *v.* Tullis Russell (1921), 38 R. P. C. 199.

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ficate, the ct. must be satisfied, (*a*) that in the course of the action the validity of the patent was in *bonâ fide* contention; (*b*) that if a settlement has been arrived at the patent is *primâ facie* a valid patent; & (*c*) that there has been no collusion.—GANE MILKING-MACHINE CO. *v.* MACEWAN & CO. (1915), 34 N. Z. L. R. 908.—N.Z.

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 10, G. (b), (c) & (d) i. & ii.]

3110. —— —— Certificate granted before specification amended.]—In an action for infringement of two patents relating to dyes defts. alleged that the patents were, or had become, invalid because, first, pltfs., the owners of the patents, had no intention to manufacture in this country; secondly, that they had not manufactured in this country, & had used the patents to prevent other persons from doing so; &, thirdly, that they had charged exorbitant prices for the patented articles, much in excess of those charged in other countries. Pltfs. alleged that these grounds of invalidity were bad in law, but that the excise duty on alcohol would prevent profitable manufacture in this country, & that their prices in this country were not exorbitant having regard to the circumstances, including the more complete protection against infringement as compared with other countries, in some of which chemical products cannot be protected by patents:—*Held:* pltfs. had never manufactured or intended to manufacture in this country, & the dyes were sold at a price considerably higher than in countries where they were not protected by patents, & higher than in certain countries where the protection was less complete; but even if exorbitant charges for the patented articles would make the patents invalid, the prices were not proved to be so exorbitant & unreasonable as to invalidate them; as the dyes had been used in this country, the invention had been introduced into this country for the public good, & manufacture in this country is not a condition of the grant of a patent. Judgment was given for pltfs. with costs against such of defts. as had infringed. A certificate having been granted in a previous action as to one patent, that the validity of the patent came into question, although the patent was then held to be, before amendment of the specification, invalid as to one claim on the ground of insufficiency, the ct. refused to go behind the certificate or entertain any question as to the jurisdiction to give such a certificate.—BADISCHE ANILIN UND SODA FABRIK *v.* THOMPSON (W. G.) & CO., LTD. (1904), 21 R. P. C. 473.

Annotation:—**Refd.** Badische Anilin und Soda Fabrik *v.* Chemische Fabrik Vormals Sandoz (1903), 88 L. T. 490.

3111. —— —— ——.]—BROOKS (J. B.) & CO., LTD. *v.* RENDALL UNDERWOOD & CO., LTD., No. 3276, *post.*

3112. —— —— Further grounds raised.]—FLOUR OXIDIZING CO., LTD. *v.* HUTCHINSON (J. & R.), No. 3259, *post.*

(*c*) *On what Issues Granted.*

3113. Want of novelty.]—GILLETT *v.* WILBY, No. 2643, *ante.*

3114. —— Subject-matter.] — Letters patent were granted for an invention of "Improvements in diaphragm horns & like sound-producing instruments." The first claim of the specification was as follows: "Sound-producing apparatus as hereinbefore referred to, comprising the combination of a chamber for the reception of the fluid injected, an open expansion chamber constituted by a bell-shaped mouthpiece of which the smaller end extends axially within the first chamber, a diaphragm constituted by a thin metal plate coaxial with said mouthpiece & held under tension on the smaller open end thereof & serving as an obturator for the fluid under pressure, & means for regulating at will the pressure with which the plate presses against the smaller end of the mouthpiece, substantially as & for the purposes hereinbefore set forth." In an action for infringement of the patent deft., a nominee of the govt. (*inter alia*), denied infringement & alleged that the patent was invalid on the ground of want of novelty & subject-matter:—*Held:* A.'s device was something quite novel, there was no evidence that it had ever been used, & under those circumstances there was no common knowledge which could be treated as conveying further information in addition to that conveyed by A.'s specification, & there was no common knowledge which would have given the patentees the materials for the variant which they made in A.'s device; such variant had resulted in patentable utility & it was not obvious & formed a distinct inventive step; & the patent was valid & had been infringed.

The means by which an object is attained may be perfectly simple & perfectly common, but yet there may be invention, if the patentee has discovered a variant which will render more useful that which has been previously described (WARRINGTON, L.J.).—TESTE *v.* COOMBES (1923), 41 R. P. C. 88, C. A.

3115. —— —— Utility.]—In an action for infringement of two patents by using & subsequently selling an unlicenced patented article deft. pleaded that the patents were invalid, one by reason of anticipation, want of utility, & want of subject-matter, the other by reason of want of utility & want of subject-matter. At the trial the only substantial issue was the alleged anticipation of the first patent:—*Held:* there had been no anticipation of the first patent, & in both patents there was utility & proper subject-matter. The patents were accordingly held valid. An injunction & an inquiry as to damages were granted with a certificate as to the particulars of breaches & a certificate of validity.—DE DION BOUTON (1907), LTD. *v.* MUSKETT (1909), 26 R. P. C. 404.

3116. —— —— ——.]—NESTLE (C.) & CO., LTD. *v.* EUGENE, LTD., No. 2386, *ante.*

3117. —— —— Disconformity—Prior grant.]—The owners of five patents commenced an action for infringement of the same, but subsequently withdrew one, & at the trial offered no evidence on another. Defts. denied infringement, & alleged as to C.'s patent that it was invalid on several grounds, relying especially on a prior grant to W. & on disconformity, &, as to two patents of S., on anticipation & prior grant:—*Held:* these three patents were valid, & had been infringed. Judgment was given for pltfs. on the three patents, certificates of validity being granted as to them.—BIRMINGHAM PNEUMATIC TYRE SYNDICATE, LTD. *v.* RELIANCE TYRE CO. (1902), 19 R. P. C. 298.

3118. Plaintiff failing on issue of infringement—Whether certificate granted.]—MORRIS & BASTERT *v.* YOUNG (1895), 12 R. P. C. 455, H. L.

3119. —— ——.]—In 1892, letters patent were granted to B. for improvements in sewing machines. In 1895, B. commenced an action against defts. for infringement. Defts. denied infringement, & denied the validity of the patent on the grounds (*inter alia*) that the alleged invention was anticipated by several old machines & prior patents, & that there was no invention:—*Held:* the patentee claimed a special arrangement acted upon as mentioned & described, & the specification, being so construed, the invention might be good subject-matter; as all the parts were old, the patentee could not claim to cover mechanical equivalents; & the defts. had not infringed. The appeal was dismissed, with costs, but a certificate that the validity of the patent

had come in question was granted.—BIRCH *v.* HARRAP & CO. (1896), 13 R. P. C. 615, C. A.

3120. —— ——.]—M., the patentee of a new & improved machine for breaking up the surfaces of roads, commenced an action for infringement, in which one deft. denied infringement & the validity of the patent, but at the trial relied principally on infringement, & only alleged that the patent was invalid if it were so widely construed as to include what he did. The third claim of the specification, which was chiefly relied on by pltf., was as follows:—"In a road breaking machine in combination with a pivoted tool holder, carrying tools at either side, a frame in which said tool holder is pivoted arranged to slide vertically in guides substantially as described & illustrated herein." The machine complained of had no pivot, the frame of the tool holder resting loosely on a washer above a nut; the frame was capable of being raised or lowered by means of a screw, & was also capable of being raised or canted by reason of its loose fitting, but that movement was controlled partly by springs & was limited by the outer sides of the machine; subject to these the tool holder was during working free to swing, whereas in pltf.'s machine there was a locking lever to fix the angle of the tools to the ground; there were also differences in the arrangement for vertical adjustment. The second deft. had been added as a deft. by amendment, & at the trial no evidence was given of infringement by him before the date of the writ:—*Held:* the patentee claimed a combination, & claim 3 was a claim for the frame in combination with the pivoted tool holder, & the machine complained of had no pivot or the mechanical equivalent of a pivot; & the arrangement for vertical sliding was different from that described in the specification; & the machine complained of was not an infringement of the patent, & no evidence had been given against the second deft. of any infringement or intention to infringe at the date of the writ. Judgment was given for the defts. with costs, with a certificate that certain of the particulars of objections were reasonable & proper; but a certificate was given to pltf. that the validity of the patent came into question.—MORRISON *v.* ASPLEN (1904), 21 R. P. C. 557.

(*d*) *When Granted.*

i. *In General.*

3121. At time of trial.]—In an action for the infringement of a patent, brought on July 13, pltf., to entitle himself to treble costs, put in evidence the certificate of a judge on a previous trial, under 5 & 6 Will. 4, c. 83, s. 3. He obtained a verdict, damages 1*s.*, but did not request the judge at the second trial to certify under 3 & 4 Vict. c. 24, s. 2, which received the royal assent on July 3, ten days before the trial:—*Held:* this latter Act applied to the present action; pltf. could not have his full costs, or treble costs, without the certificate of the judge who tried the cause; & a judge had no power to grant the certificate after taxation; *qu.:* whether a judge has power to grant a certificate after another cause has been called on.—GILLETT *v.* GREEN (1841), 7 M. & W. 347; 9 Dowl. 219; H. & W. 146; 1 Web. Pat. Cas. 271; 10 L. J. Ex. 124; 5 Jur. 9; 151 E. R. 799.

3122. Patent not declared valid.]—ACETYLENE ILLUMINATING CO. *v.* UNITED ALKALI CO., No. 3432, *post.*

3123. —— **No serious contest as to validity.**]—COOKSLEY *v.* CROWTHORN ENGINEERING CO., LTD. (1921), as reported in 38 R. P. C. 294.

3124. Defendants appearing at trial—But taking no part in proceedings.]—CONSOLIDATED PNEUMATIC TOOL CO., LTD. *v.* CHURCHILL (CHARLES) & CO., LTD. (1905), 22 R. P. C. 367.

ii. *Defendant Consenting to Judgment.*

3125. Whether certificate granted.]—If, in an action for the infringement of a patent, deft. plead not guilty, that the invention was not new, & that the specification is not sufficient; & deft. at the trial consent to a verdict for pltf., without any evidence being given, the judge will not certify, under 5 & 6 Will. 4, c. 83, s. 3, "that the validity of the patent came in question before him."—STOCKER *v.* RODGERS (1843), 1 Car. & Kir. 99, N. P.

3126. ——.]—After the trial of an action for infringement of a patent, in which the validity of the patent was disputed by defts., had lasted several days, the parties agreed to a consent order. The terms of the order were judgment for pltfs. on the validity of the patent, judgment for defts. on the question of infringement, pltf. to pay part of defts.' costs & not to bring actions for infringement against defts. or their customers on the same patent. This order was read to the ct., &, on the application of pltfs., the judge granted a certificate that the validity of their patent had come in question.—DELTA METAL CO., LTD. *v.* MAXIM-NORDENFELT GUNS & AMMUNITION CO., LTD. (1891), 8 R. P. C. 247.

Annotation:—**Folld.** Gerbold *v.* Radnall (1913), 30 R. P. C. 283.

3127. ——.]—ACETYLENE ILLUMINATING CO., LTD. *v.* MIDLAND ACETYLENE (PARENT) SYNDICATE, LTD., No. 3142, *post.*

3128. ——.]—Pltfs., as the owners of three patents for improvements in various parts of the mechanism of motor cars, sued deft. for infringement. Deft. admitted infringement of each of the three patents, but contended they were invalid on various grounds. The case as to each of the patents was treated as a separate action. During the hearing of the action on the third patent deft. withdrew his defence:—*Held:* all the three patents were valid. The usual relief was granted, including a certificate that the validity of each of the patents had come into question.—BRITISH MOTOR TRACTION CO., LTD. *v.* VAUGHAN SHERRIN (1901), 18 R. P. C. 265.

3129. ——.]—A patent was granted to C. in 1894 for improvements in apparatus for transmitting orders, notifications, & the like from one part or station of a navigable vessel to another, & analogous purposes. A second patent was granted to C. & B. in 1898 for "Improvements in or connected with ships' & analogous telegraphic apparatus." At the trial of an action brought for

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PART XIV. SECT. 2, SUB-SECT. 10.—G. (d) i.

k. *Defendants withdrawing from court—After application for adjournment refused.*] — WELSBACH INCANDESCENT GAS LIGHT CO., LTD. *v.* M'GRADY (JOHN) & CO. (1901), 18 R. P. C. 513.—**IR.**

l. *Settlement of action.*]—R. raised an action against the S. P. R. & E. co. for interdict against infringement of a patent. The record was closed & proof ordered, but two days before the date fixed for the proof the action was settled & accordingly no proof was ever taken. By agreement between the parties interdict was granted. R. applied for a certificate that the validity of the patent had come into question. The application was granted.—ROBERTSON *v.* STANDARD PISTON RING & ENGINEERING CO., LTD. (1910), 27 R. P. C. 266.—**SCOT.**

PART XIV. SECT. 2, SUB-SECT. 10.—G. (d) ii.

3125 i. *Whether certificate granted.*]—STEEL RAILWAY JOURNAL BOX CO., LTD. *v.* HURST, NELSON & CO., LTD. (1909), 26 R. P. C. 493.—**SCOT.**

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 10, G. (d) ii. & iii., & H.; sub-sect. 11, A.]

infringement of both patents, defts., before any evidence had been given, submitted to an injunction on the second patent. Evidence as to the validity of the second patent was then given, defts. taking no part therein after all the evidence as to the first patent had been heard, defts. submitted to an injunction, with costs & agreed damages, with regard to that patent, pltfs. agreeing to grant them a licence. A certificate of validity in respect of each of the patents was given.—CHADBURN'S (SHIP) TELEGRAPH CO., LTD. *v.* ROBINSON (1905), 22 R. P. C. 468.

3130. ——.]—An action was brought for infringement of a patent, & in the defence it was alleged that the patent was invalid, grounds of want of novelty, want of subject-matter & want of utility being set out in the particulars of objection. At the trial, counsel for defts. stated, at the opening of the case, that they did not propose to contest the matter further & were willing to submit to an injunction. Thereupon, counsel for pltfs. asked to be allowed to call evidence as to the validity of the patent, as an application would be made for a certificate that the validity of the patent came in question. After argument, evidence was allowed to be given.

An injunction was granted & an order was made for delivery up & costs & a certificate as to validity was granted.—BROWNE *v.* CYKO MANUFACTURING CO., LTD. (1920), 37 R. P. C. 270.

3131. —— **Consent on terms.**]—The owner of a patent having brought an action for infringement, deft. pleaded non-infringement & invalidity, but during the trial he consented to an injunction on certain terms, including the grant to him of a licence on royalty, & judgment was given accordingly. The judge refused to grant a certificate that the validity of the patent came in question.—CLAUGHTEN *v.* FOSTER (1903), 21 R. P. C. 17.

3132. —— ——.]—FERGUSON SUPERHEATERS, LTD. *v.* ASKERN COAL & IRON CO., LTD. (1912), 29 R. P. C. 431.

3133. —— ——.]—In an action for infringement of a patent, in which defts. denied the validity of the patent & delivered particulars of objections, at the close of the evidence of the first witness for pltf. the case was settled & an order taken for an injunction without costs. A certificate that the validity of the patent came into question was, after discussion, granted.—GERHOLD *v.* RADNALL (1913), 30 R. P. C. 283.

3134. —— ——.]—An action was commenced by the owners of two patents in which deft. by his defence & particulars of objections originally alleged the invalidity of both patents, but on Jan. 28, 1919, shortly before the trial of the action, he withdrew that defence as to the earlier of the two patents. The action came on for trial on Mar. 19, 1919, but terms of settlement had already been agreed & embodied in minutes, which provided for an injunction. It was agreed that what pltfs. had complained of as regards the second patent was outside the claim. Pltfs. asked the ct. to grant certificates that the validity of the patents came in question, & asked to be allowed to adduce evidence as to validity:—*Held:* as regards the first patent, the defence of invalidity having been withdrawn, pltfs. ought not to be allowed to adduce evidence which would have been irrelevant & inadmissible if the action had gone on; & as regards the second patent having regard to the agreement, the case was not one for granting a certificate. Certificates asked for refused.—QUASI-ARC CO., LTD. *v.* ANDERSON (1919), 36 R. P. C. 218.

3135. —— ——.]—EMBREY (L.) & EMBREY (H. P.) *v.* BUCKLEY (J. W.), EMBREY (L.) & EMBREY (H. P.) *v.* GREENWOOD & SHARP (1919), 36 R. P. C. 221.

3136. —— ——.]—BLATCHFORD *v.* CORY & GRUNDY, LTD. (1921), 38 R. P. C. 412.

Annotation:—**Folld.** Auster *v.* Beaton (1919), Ltd. (1922), 40 R. P. C. 46.

3137. —— ——.]—AUSTER, LTD. *v.* BEATON (G.) & SON (1919), LTD. (1922), 40 R. P. C. 46.

iii. *Defendant Not Appearing.*

3138. Whether certificate granted.] — WEBB LAMP CO., LTD. *v.* ATKINSON (TRADING AS THE HEALTH FILTER CO.), No. 3011, *ante.*

3139. ——.]—GALL *v.* O'NEILL & BROWN (1909), 27 R. P. C. 18.

3140. —— **Defence denying validity.**]—PERONI *v.* HUDSON, No. 2932, *ante.*

3141. —— ——.]—EDISON BELL PHONOGRAPH CORPN., LTD. *v.* EDISON PHONOGRAPH CO. (1893), 11 R. P. C. 33.

3142. —— ——.]—ACETYLENE ILLUMINATING CO., LTD. *v.* MIDLAND ACETYLENE (PARENT) SYNDICATE, LTD. (1900), 17 R. P. C. 534.

3143. —— ——.]—SACCHARIN CORPN. *v.* SITOS (1899), cited in 17 R. P. C. at p. 536.

3144. —— ——.]—In 1886 a patent was granted to I. for "improvements in illuminant appliances for burners"; & in 1893 a further patent was granted to I. for "an improvement in incandescent gas burners." These two patents became vested in pltf. co., who brought an action against deft. for infringement. The 1886 patent was subsisting at the date of the writ, but had lapsed before judgment. Deft. raised the question of the validity of the 1893 patent in his defence, but did not appear at the trial:—*Held:* deft. had infringed the patent of 1893, & an injunction & a certificate that the validity of the patent had come in question were granted.—WELSBACH INCANDESCENT GAS LIGHT CO., LTD. *v.* KRUMM (1901), 18 R. P. C. 211.

3145. —— —— **Evidence of validity given at trial.**]—The grantee of a patent for improved machinery for making springs for shuttle pegs brought an action against defts., alleging infringement & asking for the usual relief. Deft. delivered a statement of defence, whereby he denied infringement & put in issue the validity of the patent, but did not appear at the trial:—*Held:* pltf. on proving his case was entitled to the relief prayed, & to a certificate that the validity of the patent came in question in the action.—HAYDOCK *v.* BRADBURY (1886), 4 R. P. C. 74.

3146. —— —— ——.]—This action was for infringement of a patent for "improvements in & apparatus for recording & reproducing speech & other sounds." Deft. denied infringement, & by his pleadings alleged the invalidity of the patent on various grounds, but did not appear at the trial. Formal evidence was called to prove the validity of the patent & pltf.'s title. An injunction was granted with an order for delivery up of infringing articles & the usual certificates.—EDISON UNITED PHONOGRAPH CO. & EDISON-BELL PHONOGRAPH CORPN., LTD. *v.* YOUNG (1894), 11 R. P. C. 489.

3147. —— —— ——.]—BROOKS (J. B.) & CO., LTD. *v.* LYCETT, LTD. (1903), 20 R. P. C. 390.

3148. —— —— ——.]—SODASTREAM, LTD. *v.* DAVEY (1907), 24 R. P. C. 763.

3149. —— —— ——.] — JACKSON BOILERS, LTD. *v.* FOURNESS LAMP CO. (1911), 28 R. P. C. 459.

H. Revocation.

See Patents & Designs Act, 1907 (c. 29), s. 32.

3150. Flat of Attorney-General—Necessity for.]—The appeal was allowed, & an order for revocation was made, notwithstanding the fact that the flat of the A.-G. had not been obtained when the counterclaim for revocation was delievered, it being held, that, in the special circumstances of the case, the counterclaim was to be deemed to have been delivered after the flat had been obtained.

I desire to give a caution as to following what may be called the practice said to be followed or established by *Re Dege's Patent*, No. 2140, *ante*, *Re Jameson's Patent*, No. 2141, *ante*, & the like. I think a little more care & attention must be given to obtaining the authorisation by the A.-G. because Patents & Designs Act, 1907 (c. 29), s. 32, must be followed by deft. who is to obtain the relief by revocation (POLLOCK, M.R.).—BRITISH THOMSON-HOUSTON CO., LTD. *v.* BRITISH INSULATED & HELSBY CABLES, LTD., as reported in (1924), 41 R. P. C. 345, C. A.; *affd. sub nom.* BRITISH THOMSON-HOUSTON CO., LTD. *v.* CHARLESWORTH, PEEBLES & CO., BRITISH THOMSON-HOUSTON CO., LTD. *v.* BRITISH INSULATED & HELSBY CABLES, LTD. (1925), 42 R. P. C. 180, H. L.

Annotation:—**Reld.** British Thomson-Houston Co. *v.* Horn (1924), 41 R. P. C. 502.

3151. Stay of order for revocation—Pending appeal to House of Lords.]—BRITISH THOMSON-HOUSTON CO., LTD. *v.* BRITISH INSULATED & HELSBY CABLES, LTD., No. 3150, *ante*.

SUB-SECT. 11.—COSTS.

A. In General.

See R. S. C., Ord. 53A, r. 7; Ord. 65, r. 1.

3152. Motion for injunction—Granted as to part—Plaintiff awarded costs.]—Where a pltf. having applied for an injunction to prevent the infringement of a patent, but has obtained such injunction as to part only of the property sought to be protected, notwithstanding he had proved the whole of his case, he shall not thereby be deprived of his costs.

The question is really this, namely, whether pltf., having proved every part of his case, should be told that he must not have his costs, simply because the injunction had in part failed. Such a course would be grossly contrary to justice. With respect to every part of the case, pltf. is entitled to a decree, with costs, & also a perpetual injunction (SHADWELL, V.-C.).—ONYON *v.* WASHBOURNE (1850), 14 L. T. O. S. 503.

3153. Costs of motion to stay proceedings.]—Where a pltf., who, after the answers had been put in, found that it was unnecessary to proceed with a suit, moved that, on defts. delivering up certain chattels in their possession, all proceedings in the suit be stayed, & that defts. should pay the costs of the suit:—*Held:* such motion must be refused, but the costs should be costs in the cause.—VENTILATION & SANITARY IMPROVEMENT CO. *v.* EDELSTEN (1863), 2 New Rep. 52; 11 W. R. 613.

3154. Costs on question of validity—& on question of infringement—Not differentiated.]—ELLINGTON *v.* CLARK, BUNNETT & CO., No. 2952, *ante*.

3155. Successful appeal—Refund of costs paid—Though no application to refund.]—KAYE *v.* CHUBB & SONS, LTD. (1886), 5 R. P. C. 641, H. L.

Annotation:—**Mentd.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429.

3156. —— Cross-action remitted—Time for application for stay of taxation.]—(1) An action for infringement of a patent & a cross-action under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, for damages for groundless threats of legal proceedings were set down together for trial. At the trial of the first action the judge gave judgment for pltf. & consequently dismissed the cross-action. On appeal:—*Held:* deft. had not infringed, & pltf.'s action dismissed with costs, & the cross-action remitted to the judge below for trial.

(2) Subsequently to the hearing before the Ct. of Appeal pltf. applied that exccution might be stayed until after the hearing of the cross-action, so that if deft. was directed to pay pltf. any costs of that action they might be set off against the costs of the first action, payable by pltf. Deft. had been ordered to give security for the costs of the appeal:—*Held:* deft. had a present right to the payment of a sum of money for costs, of which the court could not deprive him; *semble:* if an application for a stay of taxation of the costs of the first action until after the trial of the cross-action had been made when the Ct. of Appeal gave judgment in the first action, it would have been granted.—AUTOMATIC WEIGHING MACHINE CO. *v.* COMBINED WEIGHING & ADVERTISING MACHINE CO. (1889), 58 L. J. Ch. 647; 61 L. T. 536; 37 W. R. 636, C. A.

3157. Infringement only issue—Party & party costs only allowed.]—If the only issue was infringement or no infringement & the validity of the patent did not come in question, I should not allow solr. & client costs. The costs are for me & on your statement that the validity of the patent did not come in question at all there will be only party & party costs (FARWELL, J.).—EDISON-BELL CONSOLIDATED PHONOGRAPH CO., LTD. *v.* WATERFIELD CLIFFORD & CO. (1902), 19 R. P. C. 329.

Annotation:—**Reld.** British Vacuum Co. *v.* Exton Hotels Co. (1908), 25 R. P. C. 417.

3158. Costs of counterclaim for revocation—Plaintiff submitting to judgment for defendants on claim—Set-off—R. S. C., Ord. 53A, r. 20.]—In two actions for infringement of the same patents defts. petitioned by way of counterclaim for revocation of the patents. The actions were consolidated, & on their coming on for trial pltfs. at once submitted to judgment for defts. with the costs of the actions. Defts. stated that, in the absence of evidence in the actions, they were uable to proceed with the counterclaims. They contended that the counterclaims were in effect part of the defence, & that, on the actions being dismissed with costs, no order ought to be made with regard to the costs of the counterclaims:—*Held:* the case fell within r. 22 [now r. 20], namely, that the actions had not proceeded to trial, & the actions & counterclaims must be dismissed with costs, with a set-off.—BABCOCK & WILCOX, LTD. *v.* WATER TUBE BOILER & ENGINEERING CO., SAME *v.* EDWIN DANKS & CO. (OLDBURY), LTD. (1910), 27 R. P. C. 626.

Annotation:—**Folld.** British Foreign & Colonial Automatic Light Controlling Co. *v.* Metropolitan Gas Meters, [1912] 2 Ch. 82.

3159. Defendant consenting to judgment—Plaintiff entitled to costs of moving in open court.]—

PART XIV. SECT. 2, SUB-SECT. 11.—A.

m. *Costs of motion for costs.]*—KNICKERBOCKER CO. *v.* RATZ (1894), 16 P. R. 30.—**CAN.**

n. *Costs of motion to quash appeal.]*—DRESCHEL *v.* AUER INCANDESCENT LIGHT MANUFACTURING CO. (1898), 28 S. C. R. 268.—**CAN.**

Sect. 2.—*Legal proceedings in respect of infringement: Sub-sect.* 11, *A. & B.* (*a*), (*b*), (*c*) & (*d*).]

Where pltf. in an action for the infringement of his registered design, or trade mark, or patent, is proceeding to obtain a judgment restraining the infringement, it is desirable that some publicity should be given to the order; & although deft. has consented to the order, pltf. is entitled to the costs of moving in open ct. & not merely to such costs as would have been incurred by applying by summons in chambers.—SMITH (J. T.) & JONES (J. E.), LTD. *v.* SERVICE, REEVE & CO., [1914] 2 Ch. 576; 83 L. J. Ch. 876; 111 L. T. 669; 30 T. L. R. 599; 58 Sol. Jo. 687.

Annotation:—**Mentd.** Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762.

3160. Costs payable by innocent infringer.]—WHITEHEAD & POOLE, LTD. *v.* FARMER (SIR JAMES) & SONS, LTD., No. 2627, *ante*.

3161. Promise by one party not to enforce costs — Not evidence of reciprocal bargain.]—ELBORNE *v.* COOMBES (1924), 41 R. P. C. 308.

Costs of interlocutory injunction.]—*See* Part XIV., Sect. 2, sub-sect. 4, F., *ante*.

B. Apportionment of Costs.

(*a*) *In General.*

3162. Both parties partly successful—Costs apportioned.]—(1) Where deft. in an action for the infringement of a patent, succeeds on a plea which goes to the whole action, he will be entitled to the general costs of the cause, deducting the costs of the objections on which pltf. has succeeded & of the issues found for him.

(2) The certificate given by a judge under 5 & 6 Will. 4, c. 83, s. 5, should be as to the determination of each objection of which notice has been given, & not as to the issues.—LOSH *v.* HAGUE (1839), 5 M. & W. 387; 7 Dowl. 495; 8 L. J. Ex. 251; 3 Jur. 409; 151 E. R. 164.

3163. ——.]—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* NEW IXION TYRE & CYCLE CO., LTD. (1898), 15 R. P. C. 389.

3164. ——.]—Letters patent were granted to pltf. in 1901 for "An invention for improvements in or relating to route or destination & like indicators for tramcars, road & other vehicles; applicable also for advertising purposes." Pltf. while retaining his rights to be the sole manufacturer of these indicators, which were to be known as the "Panorama Destination Indicators," appointed deft. his sole agent in respect of their sale. Pltf. in the action alleged that deft. had broken the agency agreement by devising, causing to be manufactured, & selling another destination indicator, & also by selling other indicators as "Panorama Destination Indicators" & passing them off as being pltf.'s indicators & that deft. had infringed the patent. Deft. denied the infringement, & alleged that the patent was invalid on the grounds of want of novelty, subject-matter & utility. He denied the passing-off, but admitted selling indicators not of pltf.'s manufacture, pleading in justification that pltf. had previously broken the agency agreement by appointing other persons to be agents for the manufacture & sale of the patented indicators. He counterclaimed for damages for such breach:—*Held:* (1) the patent was invalid for want of novelty; the question of infringement need not therefore be considered; there had been no passing-off, but there had been a breach of the agreement by deft., as to which an inquiry as to damages was ordered; (2) as to costs, deft. was entitled to have three-fourths, & pltf. to have one-fourth with a set-off; pltf., therefore, was ordered to pay half the costs of the action.—GAWTHORPE *v.* MASON (1906), 23 R. P. C. 401.

3165. ——.]—BRITISH THOMSON-HOUSTON CO., LTD. *v.* HORN (1925), 42 R. P. C. 326, C. A.

3166. On appeal.]—MOORE *v.* BENNETT, No. 2946, *ante*.

3167. ——.]—HALE *v.* COOMBES (1925), 42 R. P. C. 328, H. L.

Annotation:—**Refd.** Tucker *v.* Wandsworth Electrical Manufacturing Co. (1925), 42 R. P. C. 531.

3168. Form of order.]—SIMMONDS *v.* HITCHMAN (1885), 2 R. P. C. 117, n.

3169. Procedure of taxing master—Costs of objections—Where part only certified.]—HASKELL GOLF BALL CO. *v.* HUTCHINSON & MAIN, No. 3402, *post*.

(*b*) *Plaintiff Unsuccessful except as to Issue of Validity.*

3170. Plaintiff awarded costs of issue of validity—Defendant awarded general costs of action.]—PARKES *v.* STEVENS, [1869] W. N. 269.

Annotation:—**Refd.** Hill *v.* Hibbit (1872), 41 L. J. Ch. 703.

3171. ——.] — AUTOMATIC WEIGHING MACHINE CO. *v.* KNIGHT, No. 2446, *ante*.

3172. ——.]—SUNLIGHT INCANDESCENT GAS LAMP CO., LTD. *v.* INCANDESCENT GAS LIGHT CO., LTD. (1897), 14 R. P. C. 757.

3173. ——.]—The action was dismissed & deft. was awarded the general costs of the action, except in so far as they had been increased by the issue of validity & pltf. was awarded the costs of that issue with a set-off. The counterclaim for revocation of the patent was dismissed with costs & a certificate of validity as to claims was granted.—GODFREY *v.* HANCOCK & CO. (ENGINEERS), LTD. (1925), 42 R. P. C. 407.

3174. ——.]—The judgment was varied, & the general costs of the action & of the issue of infringement were given to deft., & the costs of the issue of validity were given to pltfs., with a set-off. Pltfs. & deft. appealed to the House of Lords:—*Held:* the patent was valid.—ARMSTRONG (SIR W. G.) WHITWORTH & CO., LTD. *v.* HARDCASTLE (1925), 42 R. P. C. 543, H. L.

Annotations:—**Mentd.** Metropolitan Vickers Electrical Co. *v.* British Thomson-Houston Co. (1925), 43 R. P. C. 76; Mergenthaler Linotype Co. *v.* Intertype Co. (1926), 42 T. L. R. 682.

3175. ——.]—**Costs to date of abandonment of plea.**]—PYRENE CO., LTD. *v.* WEBB LAMP CO., LTD., No. 2630, *ante*.

(*c*) *Plaintiff Unsuccessful except as to Issue of Infringement.*

3176. Plaintiff awarded costs of issue of infringement—Defendant awarded general costs of action.]—POOLEY *v.* POINTON (1885), Griffin's Patent Cases (1884–1886), 199.

3177. ——.]—(1) A patentee failed in establishing the validity of his patent, but succeeded on the issue of infringement:—*Held:* pltf. must pay the general costs of the action, but deft. must pay the costs occasioned by the issue of infringement, the one set of costs to be set off against the other.

(2) A certificate under Patent, Designs & Trade Marks Act, 1852 (c. 83), s. 43, that the validity of a patent came in question in the action cannot be obtained by deft. in an action for infringement.—BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN (1885), 29 Ch. D. 366; 53 L. T. 750; Griffin's Patent Cases (1884–1886), 34; 2 R. P. C. 73, C. A.; *revsd.* on other grounds (1887), 12 App. Cas. 710, H. L.

Annotations:—*As to* (1) **Consd.** Haslam Foundry & Engineering Co. *v.* Hall (1887), 4 T. L. R. 154. *As to* (2) **Refd.** Cole *v.* Saqui & Lawrence (1888), 40 Ch. D. 132. *Generally,*

Mentd. Easterbrook *v.* G. W. Ry. (1885), 2 R. P. C. 201; Kurtz *v.* Spence (1887), 58 L. T. 438; Edison & Swan United Electric Light Co. *v.* Holland (1889), 5 T. L. R. 294; Vickers *v.* Siddell (1890), 7 R. P. C. 292; Lane Fox *v.* Kensington & Knightsbridge Electric Lighting Co. [1892] 3 Ch. 424; *Re* Martindale, [1894] 3 Ch. 193; Atkins & Applegarth *v.* Castner-Kellner Alkali Co. (1901), 18 R. P. C. 281; Scott *v.* Scott, [1913] A. C. 417; Osram Lamp Works *v.* Pope's Electric Lamp Co. (1917), 34 R. P. C. 369.

3178. —— ——.]—(1) Where deft. in an action for infringing a patent denied by his pleading the fact of infringement, which issue was decided against him, but judgment was given in his favour on the ground that a similar article to that of pltfs.' had been made & used before the date of pltfs.' patent:—*Held:* deft. was not entitled to the costs of the issue of infringement.

(2) Where deft. to an action for infringement of a patent relies upon common knowledge, as distinguished from anticipation, this defence should be pleaded distinctly.—PHILLIPS *v.* IVEL CYCLE CO. (1890), 62 L. T. 392; 7 R. P. C. 77.

3179. —— ——.]—CASSEL GOLD EXTRACTING CO., LTD. *v.* CYANIDE GOLD RECOVERY SYNDICATE, No. 1022, *ante*.

3180. —— ——.]—BINNINGTON *v.* HILL (1891), 8 R. P. C. 326.

3181. —— ——.]—KANE *v.* GUEST & CO. (1899), 16 R. P. C. 433.

3182. —— **Though unsuccessful in claim for passing off.**]—Where an action was brought for infringement of a patent & for passing off the goods of defts. as & for those of pltfs. & pltfs. succeeded as to the patent & failed as to the passing off, the costs were ordered to be treated on the footing of these being two separate causes of action & to follow the event in each.—HILL *v.* THOMAS & SONS (1906), 23 R. P. C. 375; *revsd.* on other grounds (1907), 24 R. P. C. 415, C. A.

(d) Actions on More than One Patent.

3183. Each party successful in respect of different patent—Costs apportioned.]—The costs of the action must be paid by defts.. except so far as such costs have been increased & occasioned by the claim, as to patent of 1878, in the sixth paragraph of the statement of claim. So far as the costs of the action have been increased by that claim, defts. are entitled to be paid by pltfs., for they have not pursued their claim (BACON, V.-C.).—HOCKING *v.* FRASER (1885), Griffin's Patent Cases (1884–1886), 129; 3 R. P. C. 3.

3184. —— ——.]—CONSOLIDATED PNEUMATIC TOOL CO., LTD. *v.* CLARK, SAME *v.* ARMSTRONG (SIR W. G.) WHITWORTH & CO., LTD., SAME *v.* INGERSOLL SERGEANT DRILL CO. (1907), 24 R. P. C. 593, C. A.; *revsd.* on other grounds, INGERSOLL SERGEANT DRILL CO. *v.* CONSOLIDATED PNEUMATIC TOOL CO., LTD., ARMSTRONG (SIR W. G.) WHITWORTH & CO., LTD. *v.* SAME, CLARK *v.* SAME, 25 R. P. C. 61, H. L.

Annotations:—**Refd.** British United Shoe Machinery Co. *v.* Collier (1908), 25 T. L. R. 74; Hale *v.* Coombes (1924), 41 R. P. C. 112.

3185. —— ——.]—Action for the infringement of three patents. Appeal as regards the first patent was dismissed with costs; but as regards second & third patents, it was allowed with costs, the costs to be taxed as if there were separate actions.—BROOKS *v.* LAMPLUGH (1897), 15 R. P. C. 33, C. A.; *on appeal* (1898), 16 R. P. C. 41, H. L.

3186. —— ——.]—L. co. brought an action for infringement of two patents & for passing off deft.'s lamps as pltfs.' Before the trial pltfs. abandoned their case on the second patent. At the trial the jury answered the questions put to them, in favour of pltfs. as regards infringement & in favour of defts. as regards passing off. The learned judge granted an injunction & refused to stay execution pending an appeal; but the Ct. of Appeal granted a stay upon defts. undertaking to pay £1,000 into ct. within a fortnight as security. A question arose as to the form of the order giving defts. costs in respect of the abandoned patent, & it was held they were entitled to the costs thrown away by reason of the claims against them for alleged infringement of such patent.—LUCAS (JOSEPH), LTD. & LUCAS *v.* MILLER & CO., LTD. (1900), 17 R. P. C. 165.

3187. —— ——.]—The owners of two patents for variable electric lamps brought an action for infringement of both of them. The particulars of objections alleged both inventions to lack subject-matter & to have been anticipated by prior specifications. It became clear at the trial that one of the inventions had been anticipated by one of the specifications cited, & pltfs. mainly relied on the patent for the other invention. Infringement was not contested. An objection was alleged against the second patent, viz. that, as the lamp was stated in the provisional specification to be specially applicable to lamps in common use, & it was clear that as shown in the drawings, it could not be used in lamp holders in which the plungers were placed at a certain angle to the bayonet joints, which holders were commonly used at the date of the patent, & that the invention lacked utility. A further objection was to a subordinate claim on the ground that it involved no invention as a claim in gross:—*Held:* the first patent was invalid for want of novelty; &, as to the second patent, the particular arrangement of the contact pieces shown in the drawings was a mere error which any workman could correct, & the contrivance was novel, useful, & involved invention; & the second claim was not a claim in gross but merely subsidiary; an injunction was granted as regards the second patent, but no inquiry as to damages, only one lamp having been sold. The costs were given to pltfs. except so far as increased by the claim in respect to the first patent, which costs they were ordered to pay.—TRUE & VARIABLE ELECTRIC LAMP SYNDICATE *v.* BRYANT TRADING SYNDICATE (1908), 25 R. P. C. 461.

3188. —— ——.]—I think the proper order is, that pltfs. shall have the costs of the action except in so far as they have been increased by the addition of the second patent, & defts. are to have their costs in so far as they have been so increased, & there will be a set-off (PARKER, J.).—CROSTHWAITE FIRE BAR SYNDICATE, LTD. *v.* SENIOR (1909), 26 R. P. C. 713.

3189. —— ——.]—OSRAM LAMP WORKS, LTD. *v.* "Z" ELECTRIC LAMP MANUFACTURING CO., LTD. (1912), 29 R. P C. 401.

3190. ——.]—Defts. were given costs of & occasioned by the claim for infringement of the patent in respect of which notice of discontinuance had been given, with a set-off.—TURNER *v.* BOWMAN (1924), 42 R. P. C. 29.

3191. One patent abandoned—Right of defendant to costs.]—In an action for infringement of two patents for producing artificial musk, one of which was abandoned at the trial, it was proved that defts.' produced the same result as pltfs.' process described in the specification of the patent relied on by them at the trial, & by a process which was substantially the same, although some of the steps were different, & some of the intermediate products different:—*Held:* deft. had infringed, & an injunction was granted, with costs, except that deft. was held entitled to the costs so far as the

Sect. 2.—Legal proceedings in respect of infringement: Sub-sect. 11, *B.* (*d*), *& C.* (*a*), (*b*) *&* (*c*) *i.*]

abandoned patent was concerned. A certificate of the validity of their other patent was given to pltfs., & a certificate was given to deft. that his particulars of objections to the abandoned patent were reasonable & proper.—FABRIQUES DE PRODUITS CHIMIQUES DE THANN, ETC. *v.* CASPERS (1897), 15 R. P. C. 94.

C. Certificate of Reasonableness of Particulars of Objections.

(*a*) *In General.*

See R. S. C., Ord. 53A, r. 20.

3192. Requisites of certificate—Should relate to determination of objections—Not issues.]—LOSH *v.* HAGUE, No. 3162, *ante*.

3193. Jurisdiction of Court of Appeal to grant.]—The Ct. of Appeal in reversing the decision of the ct. below in favour of a patent, has jurisdiction to grant deft. under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 29 (6), a certificate that his particulars of objections to the patent were proven, or were reasonable & proper, so as to entitle him to be allowed on taxation costs in respect of such particulars.—COLE *v.* SAQUI & LAWRENCE (1888), 40 Ch. D. 132; 58 L. J. Ch. 237; 59 L. T. 877; 37 W. R. 109; 5 T. L. R. 84, C. A.

Annotation:—**Consd.** Shoe Machinery Co. *v.* Cutlan, [1896] 1 Ch. 108.

3194. Whether costs allowed in absence of certificate—Discretion of court.]—In an action in the Ct. of the County Palatine to restrain infringement of a patent defts. delivered particulars of objection. At the trial the judge held the patent invalid for an objection appearing on the face of it, & dismissed the action with costs, stating his opinion that defts. ought to have the costs of the witnesses brought up to support their particulars of objection, though they had not been called, as pltfs. virtually had been nonsuited. On taxation the registrar disallowed these costs, but the Vice-Chancellor held that they must be allowed. Pltfs. appealed:—*Held:* neither Chancery Amendment Act, 1858 (c. 27), nor 25 & 26 Vict. c. 42, made it obligatory on a Ct. of Equity to follow the rule as to costs of particulars of objections laid down by the Patent Law Amendment Act, 1852 (c. 83), s. 43, & that the rule which applied to cts. having no discretion as to costs ought not to be followed by analogy by a ct. which has discretion as to costs; the Vice-Chancellor had therefore power to give these costs, & they must be allowed.—PARNELL *v.* MORT, LIDDELL & CO. (1885), 29 Ch. D. 325; 53 L. T. 186; 33 W. R. 481; Griffin's Patent Cases (1884–1886), 182, C. A.

3195. ——.]—MIDDLETON *v.* BRADLEY, No. 3234, *post*.

3196. ——.]—WILCOX & GIBBS *v.* JANES, No. 3238, *post*.

3196a. —— **Certificate not applied for by defendant.**]—HONIBALL *v.* BLOOMER, No. 3208, *post*.

3197. Procedure on taxation—Where certificate not granted.]—Where, at the trial of a patent action in which deft. has delivered particulars of objections pursuant to Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 29 (2), pltf.'s case breaks down at the opening on the sole ground that his specification shows that the alleged invention is not a proper subject for a patent, so that it becomes unnecessary to go into deft.'s case at all, & the ct. consequently gives judgment for deft. with costs, deft. is not entitled, on taxation, to the costs of his particulars of objections, since the ct. will not in such a case go into the particulars merely for the purpose of certifying for those costs under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 29 (6). But, *semble*, when the case has been decided upon the result of deft.'s cross-examination of pltf.'s witnesses, & not merely on the question of the validity of the specification itself, it may be proper for the ct. to look into the particulars with a view to certifying for the costs of them.—LONGBOTTOM *v.* SHAW (1889), 43 Ch. D. 46; 58 L. J. Ch. 734; 61 L. T. 325; 37 W. R. 792; 5 T. L. R. 704; 6 R. P. C. 510.

Annotation:—**Folld.** Mandleberg *v.* Morley (1895), 64 L. J. Ch. 245.

3198. —— ——.]—Where a patent action, in which deft. has pleaded no infringement & also invalidity of pltf.'s patent, is dismissed with costs on the ground of no infringement alone, the ct. not deciding the question of invalidity at all, & no certificate is given under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 29 (6), that deft.'s particulars of objections to the validity of the patent were "reasonable & proper," so that on taxation his costs of the particulars are disallowed on the ground of the absence of such a certificate; pltf. is not entitled, under R. S. C., 1883, Ord. 65, r. 27 (20), (21), to set off, as against the costs payable by him, costs incurred by him in consequence of deft.'s particulars, whether deft. may at the trial have called evidence in support of them or not. It is a condition precedent to a party being allowed under R. S. C., Ord. 65, r. 27 (20), the costs occasioned to him by improper proceedings of the other party that there must have been a disallowance of the costs of the other party either by the ct. or by the taxing master under that sub-rule on the ground that the proceedings were "improper, vexatious or unnecessary"; & disallowance of deft.'s costs of particulars on the mere ground of the absence of the statutory certificate is insufficient to entitle pltf. to the costs occasioned to him by them, & the taxing master cannot enter into the question whether the particulars were improper, as deft.'s costs relating to them being disallowed for want of a certificate, are not before him for taxation.—GARRARD *v.* EDGE (1890), 44 Ch. D. 224; 59 L. J. Ch. 379; 62 L. T. 510; 38 W. R. 455; 6 T. L. R. 253, C. A.

3199. —— ——.]—An action for infringement of a patent was discontinued by pltfs. after defence & particulars of objections had been delivered. On the taxation of defts.' costs pltfs. objected (*inter alia*) that certain items related to the particulars of objections, & that, as these had not been certified, such items ought not to be allowed. Among the principal items objected to were charges for perusing a report by defts.' patent agent, perusing specifications, & a payment to the patent agent & a fee to counsel for perusing papers. The taxing master reduced certain of these items & allowed part of the charges for perusing specifications as instructions for defence & in answer to the objections he stated that he had allowed such charges as were reasonable & proper to be allowed to defts. as instructions for their defence & not as particulars of objections. Pltfs. applied to review the taxation:—*Held:* the taxing master had acted on a right principle, & the summons must be dismissed with costs.—PIGGOTT & CO., LTD. *v.* HANLEY CORPN. (1906), 23 R. P. C. 639.

3200. —— **Where certificate limited.**]—In an action for infringement of a patent defts. denied infringement, & alleged want of subject-matter & of novelty by reason of a large number of alleged anticipations. At the trial the judge dismissed the action with costs on the ground of want of novelty

in respect of two anticipations only :—*Held :* the taxing master, in taxing the costs, must not disallow costs incurred with respect to issues on which the judge found that defts. had failed, or tax the costs as if the action had been confined to proving the two objections on which defts. succeeded, but must tax the whole of defts.' costs, disallowing only the costs of those objections in respect of which no certificate was given pursuant to Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 29 (6). —HASKELL GOLF BALL CO. *v.* HUTCHISON & MAIN, [1906] 1 Ch. 518 ; 75 L. J. Ch. 270 ; 94 L. T. 731 ; 54 W. R. 330 ; 50 Sol. Jo. 257 ; 23 R. P. C. 125.

3201. —— ——.]—An action for infringement of a patent was, on appeal by defts., dismissed by the Ct. of Appeal with costs, the patent being held invalid, & a certificate was given as to four out of the six anticipations alleged in the particulars of objections. On the taxation of the costs pltfs. objected, in effect, that the master, in allowing a reduced lump sum for instructions for brief, had not disallowed costs relating to alleged anticipations in respect of which no certificate had been given, & secondly that he had allowed costs relating to experiments which were not relevant to any of the alleged anticipations certified. Defts. objected to the disallowance by the master of the costs of three counsel at the trial. On summonses by pltfs. & defts. respectively to review the taxation : —*Held :* the answer of the taxing master showed that he had taken into account in allowing a sum for instructions for brief none of the alleged anticipations except those which were certified by the Ct. of Appeal, & the objection to the costs of the experiments also failed ; & on defts.' summons the decision of the taxing master should not be interfered with. Both summonses were dismissed, with costs, but an application for set-off on the ground that defts. were in liquidation was refused.—MERCEDES DAIMLER MOTOR CO., LTD. *v.* F. I. A. T. MOTOR CAB CO., LTD. (1913), 31 R. P. C. 8.

3202. —— **Action discontinued—Subsequent action against same defendants not yet heard—Stay of taxation.**]—An action was brought for infringement of patents, but on a defence being delivered founded on the existence of certain contracts entered into by pltfs. contrary to Patents & Designs Act, 1907 (c. 29), notice of discontinuance was given by pltfs. under R. S. C., Ord. 26, r. 1, with a view to bringing a fresh action, which was shortly afterwards brought against same defts. for infringement of the same patents. Pltfs. before the defence in the second action had been delivered applied for a stay of proceedings in the taxation of costs in the discontinued action on the grounds that the taxing master would not be able to exercise his discretion in considering the reasonableness of the particulars of objections unless pltfs. disclosed their case which would be the same in both actions, & also that if the second action came to trial the ct. would have to decide in it as to the reasonableness of the same objections : —*Held :* no ground was shown for granting a stay of taxation.—AKT. FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM CO., LTD. (1918), 36 R. P. C. 29.

(*b*) *Application for Certificate.*

3203. What must be shown—Not sufficient that particulars not unreasonable.]—GERM MILLING CO., LTD. *v.* ROBINSON, No. 2890, *ante*.

3204. When application should be made—At trial—Subsequent application allowed without costs.] —R. brought an action against M. for infringing his patent. M. denied the alleged infringement, & put in issue the validity of the patent on the grounds stated in his particulars of objections. The judge at the trial on Nov. 12, 1885, held that the patent was invalid, & dismisesd the action with costs. Deft. did not apply at the trial for a certificate under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 29 (6), that he had proved his particulars of objections, but on Mar. 29, 1886, he moved for such a certificate :—*Held :* deft. was entitled to apply within a reasonable time after trial for the certificate, & as he had applied within a reasonable time it should be given, but as he might have asked for it at the trial he was not entitled to the costs of the motion, & if pltf. had not opposed the motion he would have been entitled to his costs, but having opposed no costs would be given to him.—ROWCLIFFE *v.* MORRIS (1886), 3 R. P. C. 145.

3205. —— —— ——.]—In 1893, letters patent were granted to D. for "improvements in interceptors & the like." In 1898 an action was commenced against defts. for infringement. Defts. denied the validity of the patent on the ground of want of subject-matter :—*Held :* the letters patent were invalid on that ground, & the action was dismissed.

Application was subsequently made by defts. for costs of particulars of objections. Costs of objections were allowed but no costs were given of the application.—DUCKETT (JAMES) & SON, LTD. & DUCKETT *v.* SANKEY & SON (1899), 16 R. P. C. 357.

(*c*) *Action Proceeding to Trial.*

i. *When Certificate Granted.*

See R. S. C., Ord. 53A, r. 20.

3206. When particulars gone into.]—The action was accordingly dismissed with costs, but the judge refused to give a certificate as to particulars of objections as they had not been gone into.—NEWSUM *v.* MANN (1890), 7 R. P. C. 307.

3207. ——.]—The costs of all particulars of objections put in evidence were allowed.—CROSTHWAITE *v.* MOORWOOD, SONS & CO. (1894), 11 R. P. C. 555.

3208. —— **Procedure in case of nonsuit.**]—Pltf., in an action for infringing letters patent, was nonsuited after proof of the first out of twelve particulars of objections delivered by defts., who did not apply to the judge for a certificate under Patent Law Amendment Act, 1852 (c. 83), s. 43, to be allowed costs in respect of the particulars :—*Held :* defts. were thereby not entitled to be allowed such costs.

In the case of a nonsuit, the judge must give his opinion on hearing proof of the particulars, without the intervention of a jury ; & in order to obtain the certificate, the cause must be gone through by the judge alone, without the jury (PARKE, B.).—HONIBALL *v.* BLOOMER (1854), 10 Exch. 538 ; 3 C. L. R. 167 ; 24 L. J. Ex. 11 ; 24 L. T. O. S. 134 ; 156 E. R. 552 ; *sub nom.* HONEYBALL *v.* BLOOMER, 1 Jur. N. S. 188 ; *sub nom.* HONEYBALL *v.* PLUMER, 3 W. R. 71.

Annotations :—**Distd.** Batley *v.* Kynock (1875), L. R. 20 Eq. 632. **Dbtd.** Parnell *v.* Mort, Liddell (1885), 29 Ch. D. 325. **Refd.** Greaves *v.* Eastern Counties Ry. (1859), 5 Jur. N. S. 733.

3209. —— **Admissions on cross-examination.**]—The patentee of an invention for improvements in balancing weights for windows, etc., brought an action for infringement. Defts. denied infringement & put in issue the validity of the patent on the grounds (*inter alia*) of (*a*) want of subject-matter ; (*b*) anticipation ; (*c*) prior publication.

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At the trial the ct., without calling for evidence from defts.:—*Held:* (1) there had been no infringement; (2) there was no subject-matter, &, upon the admissions in cross-examination of pltf.'s witnesses, granted a certificate that deft.'s particulars of objections as to want of subject-matter & as to anticipation & prior publication were reasonable & proper.—HEYES *v.* HALLMARK (1891), 9 R. P. C. 25.

3210. —— Whether court will inquire into reasonableness.]—LONGBOTTOM *v.* SHAW, No. 3197, *ante*.

3211. —— ——.]—Where an action for the infringement of a patent is disposed of without any evidence being given, & there is nothing before the ct. to enable it to determine whether deft.'s particulars of objections were reasonable & proper, it will not inquire into the facts of the case merely for the purpose of determining whether deft. ought to be allowed the costs of his particulars. Where, however, pltf.'s evidence has been given, & it appears from that that the objections were reasonable & proper, the ct. will give a certificate to that effect.—MANDLEBERG *v.* MORLEY (1895), 64 L. J. Ch. 245; 72 L. T. 106; 43 W. R. 266; 39 Sol. Jo. 201; 13 R. 322; 12 R. P. C. 35.

Annotations:—**Folld.** Acetylene Illuminating Co. *v.* United Alkali Co. (1902), 50 W. R. 361; American Steel & Wire Co. *v.* Glover (1902), 50 W. R. 284.

3212. —— ——.]—When in an action for infringement of a patent pltfs. offer no evidence & the action is dismissed with costs, the ct. will not hear evidence that defts.' particulars of objections were reasonable & proper, & will not grant a certificate under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 29 (6), to that effect.—AMERICAN STEEL & WIRE CO. *v.* GLOVER & CO., LTD. (1902), 50 W. R. 284; 46 Sol. Jo. 231; 19 R. P. C. 111.

3213. —— Certificate refused—Plaintiff not appearing at trial.]—Pltf. in an action for infringement of a patent obtained an interlocutory injunction against deft., but did not appear at the trial:—*Held:* there must be judgment for deft. with costs, & an inquiry as to damages sustained by deft. by reason of the interlocutory injunction, but no certificate could be given as to the reasonableness of the particulars of objections.—MAY *v.* YUILL & CO. (1910), 27 R. P. C. 525.

Annotation:—**N.F.** British, Foreign & Colonial Automatic Light Controlling Co. *v.* Metropolitan Gas Meters, [1912] 2 Ch. 82.

3214. —— —— Patent abandoned at trial.]—Two letters patent were granted respectively for "improvements in or relating to apparatus for stripping carding engines." The first claim of the first patent was as follows: "in a carding engine stripping apparatus of the type described the combination with a doffer nozzle rigidly mounted upon a carriage that is capable of angular displacement upon it supporting tube, of means—separate from the carriage—adapted to support or guide the nozzle as it traverses across the doffer." The first claim of the second patent was as follows: "in a vacuum card stripping apparatus the combination with a carriage & means for traversing the same across the carding surfaces of the machine, of a main cylinder nozzle & a doffer nozzle mounted upon the carriage & both connected to the suction producing means whereby the doffer & main cylinder may be stripped simultaneously, substantially as described." In an action for infringement of both patents defts. denied infringement & alleged that both patents were invalid (*inter alia*) for want of novelty & subject-matter; & defts. counter-claimed for revocation of both patents. At the trial pltfs. abandoned their claim in respect of the second patent & submitted to an order for revocation:—*Held:* as to the first patent, there was no infringement & the patent was invalid for want of novelty & subject-matter & the patent must be revoked. A certificate on certain particulars of objections was granted in respect of the patent relied upon by pltfs. at the trial, but was refused in the case of the patent abandoned by pltfs.—TEXTILE PATENTS, LTD. *v.* WEINBRENNER (1925), 42 R. P. C. 515.

3215. By court of appeal—Appellants succeeding on non-infringement.]—When applts. succeeded on non-infringement, the Ct. of Appeal refused to certify as to the particulars of objections.—PILKINGTON (PETER), LTD. *v.* MASSEY (1904), 21 R. P. C. 697, C. A.

ii. *For What Particulars Certificate Granted.*

See R. S. C., Ord. 53A, r. 20.

3216. Whether certificate limited to objections proved.]—GERM MILLING CO., LTD. *v.* ROBINSON, No. 2890, *ante*.

3217. ——.]—On application by defts. for a certificate that their particulars were proved reasonable, a limited certificate was granted, not extending to objections which it was for them to prove, & which they had not proved.—ALBO-CARBON LIGHT CO. *v.* KIDD (1887), 4 R. P. C. 535.

Annotation:—**Distd.** Mandleberg *v.* Morley (1895), 64 L. J. Ch. 245.

3218. ——.]—The grantee of a patent for an apparatus for stretching & holding strips of leather for covering metallic rollers brought an action alleging infringement & asking for an injunction. Deft. denied infringement, & alleged that the patent was invalid on the ground that it was not the subject of a patent, & had been anticipated:—*Held:* no infringement of the stretching process had been proved, & that the holding process was not subject-matter, & the action must be dismissed with costs on the higher scale, but deft. was not entitled to the costs of the objections not proved by him.—ODDY *v.* SMITH (1888), 5 R. P. C. 503.

3219. ——.]—G. brought an action for infringement of a patent for improvements in metallic boxes or receptacles for holding alimentary & other substances. By his defence, deft. alleged that the patent was invalid on a number of different grounds, including anticipation.

At the trial pltf.'s first witness, in cross-examination, was unable to distinguish the alleged invention from a previous specification, & the action was dismissed on the ground of that prior publication. Deft. was allowed the cost of all particulars of objections involved in that decision.—GRIFFIN *v.* FEAVER (1889), 6 R. P. C. 396.

3220. ——.]—NETTLEFOLDS *v.* REYNOLDS, No. 2723, *ante*.

3221. ——.]—A certificate as to some of the particulars of objections was given, but the costs of an alleged prior user that had not been proved were given to pltfs.—BONNARD *v.* LONDON GENERAL OMNIBUS CO., LTD. (1920), 38 R. P. C. 1, H. L.

Annotation:—**Reld.** Bowen *v.* Pearson (1924), 42 R. P. C. 101.

3222. ——.]—A certificate as to the particulars of objections with an exception was given, & the costs of an application for leave to deliver a reply that pltfs. had not delivered were made costs in the cause. A certificate that the validity of the patent had come in question was refused.—HAMER *v.* HAWORTH (1921), 38 R. P. C.

3223. ——.]—SHAW *v.* BURNET & CO. (1924), 41 R. P. C. 432.

3224. —— Objections not put to plaintiff on cross-examination.]—The owner of a patent for improvements in combined manhole covers & ventilators for sewers brought an action for alleged infringement. Deft. put in issue the validity of the patent on the ground, amongst other things, of anticipation by prior user. At the close of the examination of pltf., who was called as first witness, deft.'s counsel undertook to prove user of articles admitted to be similar in all essential points to the patented article. A witness was accordingly examined on behalf of deft. who had superintended the manufacture of such articles for some years prior to the date of the patent, & the judge dismissed the action, with costs on the lower scale, & gave deft. a certificate that certain of the particulars of objections were reasonable & proper, which did not extend to alleged anticipations, which were not put to pltf. on cross-examination. —BADHAM *v.* BIRD (1888), 5 R. P. C. 238.

3225. —— Validity not decided—Objections relating to validity allowed.]—JARDINE *v.* KING, MENDHAM & CO., No. 2478, *ante*.

3226. —— Objection failing—Particulars necessary for purpose of trial.]—CASTNER KELLNER ALKALI CO. *v.* COMMERCIAL DEVELOPMENT CORPN., No. 3227, *post*.

3227. —— Objections to novelty—Patent held novel but bad for disconformity—Particulars assisting court on question of conformity allowed.]

(1) Particulars of an objection to a patent for want of novelty delivered by a deft. enumerated specifications of prior patents. Pltfs.' patent was held novel, but bad for disconformity. The ct. certified that the particulars of such of the specifications as had been of assistance in deciding the question of nonconformity were reasonable & proper, without regard to the general costs of the case.

(2) The cost of transcripts of shorthand notes of evidence for the purpose of appeal allowed.—CASTNER KELLNER ALKALI CO. *v.* COMMERCIAL DEVELOPMENT CORPN., [1899] 1 Ch. 803; 68 L. J. Ch. 402; 80 L. T. 476; 47 W. R. 534; 43 Sol. Jo. 436, C. A.; *on appeal* (1900), 17 R. P. C. 593, H. L.

Annotations :—As to (2) **Reld.** Osmond *v.* Mutual Cycle & Manufacturing Supply Co. (1899), 68 L. J. Q. B. 1027. *Generally*, **Reld.** Kelvin *v.* Whyte, Thomson (1907), 25 R. P. C. 177.

3228. —— Objections merely matters of evidence.]—ACETYLENE ILLUMINATING CO. *v.* UNITED ALKALI CO., No. 3432, *post*.

3229. —— Action dismissed on ground of no invention—Particulars as to subject-matter, vagueness & novelty allowed.] — Pltfs. sued for infringement of a patent for an invention for wire mattresses, which, according to pltfs.' expert witness, consisted in the combination of several parts, with a practical continuity from side to side of the framework, over which the wire fabric was stretched; the device of gaining strength by overlapping being admitted to be an old idea. In dismissing the action on the ground that no invention was proved, the ct. granted a certificate as to the particulars of objections delivered by deft. with respect to (*a*) subject-matter, (*b*) vagueness, & (*c*) novelty.—SIDDALL & HILTON, LTD. *v.* WOOD (1903), 21 R. P. C. 230.

3230. —— Action confined to one claim of specification.]—BRITISH OXYGEN CO., LTD. *v.* MAINE LIGHTING CO. (1924), 41 R. P. C. 176.

Annotation :—**Reld.** Harris *v.* Brandreth (1925), 42 R. P. C. 471.

3231. —— Objections unnecessary or not material.]—BOWEN *v.* PEARSON (E. J.) & SONS, LTD. (1924), 42 R. P. C. 101.

3232. Particulars of speculative inquiry—Not allowed.]—The costs of preparing for trial before notice of trial will in no case be allowed between party & party.

In an action for infringing a patent deft. got time to plead, taking short notice of trial, with liberty to pltf. to set down the cause at once. Pleas were delivered, & pltf. had a special jury nominated; but issue was not joined, & no notice of trial was given; pltf. then discontinued :—*Held :* deft. was not entitled to his costs of preparing for trial. *Semble :* in preparing particulars of objections to a patent, the costs of inquiring as to the use by others of inventions similar to pltf.'s should not be allowed, as they are the costs of a speculative inquiry.—CURTIS *v.* PLATT (1864), 16 C. B. N. S. 465; 4 New Rep. 152; 33 L. J. C. P. 255; 10 L. T. 383; 10 Jur. N. S. 823; 143 E. R. 1209.

(*d*) *Action Not Proceeding to Trial.*

See R. S. C., Ord. 53A, r. 20.

3233. Whether certificate granted — Action abandoned.]—In an action for the infringement of a patent, defts. delivered, with their pleas, particulars of objections, pursuant to Patent Law Amendment Act, 1852 (c. 83), s. 41. Pltf. having abandoned his action before trial :—*Held* (1) defts. were entitled to the costs of the particulars; for sect. 43, which provides that pltf. or deft. shall not be allowed the costs of any particular "unless certified by the judge before whom the trial was had to have been proved," does not apply, so as to limit the ordinary right to such costs under Statute of Gloucester, except when the cause comes on for trial; (2) the cause not having been tried, defts., under 6 Geo. 4, c. 50, s. 34, were not entitled to the costs of a special jury applied for by them.—GREAVES *v.* EASTERN COUNTIES RY. CO. (1859), 1 E. & E. 961; 28 L. J. Q. B. 290; 33 L. T. O. S. 162; 5 Jur. N. S. 733; 7 W. R. 453; 120 E. R. 1171.

Annotation :—As to (1) **Distd.** Middleton *v.* Bradley, [1895] 2 Ch. 716.

3234. —— ——.]—Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 29 (6), is not confined to a case where the action is brought on for trial. Consequently, if, after deft. has delivered his statement of defence & particulars of objections, pltf. abandons the action without bringing it on for trial, deft. will not be allowed any costs of his particulars without a certificate of the ct. or a judge that they were reasonable & proper.—MIDDLETON *v.* BRADLEY, [1895] 2 Ch. 716; 64 L. J. Ch. 888; 73 L. T. 81; 43 W. R. 684; 39 Sol. Jo. 725; 13 R. 737.

Annotation :—**Consd.** Wilcox & Gibbs *v.* Janes, [1897] 2 Ch. 71.

3235. —— Action discontinued.]—This was an action for infringement of several patents. Defts. denied infringement, & the validity of the patents. The pleadings were closed in Aug. 1894. No notice of trial was given. Interrogatories were administered by pltfs. in Jan. 1895. In Feb., pltfs. applied by summons for an order that the action be discontinued, with taxed costs to be paid by pltfs. An order was so made in chambers that the action should be discontinued, pltfs. to pay defts.' taxed costs including costs of preparation for trial as the taxing master should think reasonable & also the costs of particulars of objections as if same had been certified. Pltfs. now moved to vary this order by striking out the direction as to costs of preparation for trial & of the particulars.

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The judge declined to vary his order stating that as pltfs. asked for leave to discontinue the judge had a discretion to impose terms.—BOAKE ROBERTS & CO. *v.* STEVENSON & HOWELL (1895), 12 R. P. C. 228.

Annotation :—**Reld.** Middleton *v.* Bradley (1895), 13 R. 737.

3236. —— ——.]—In two actions for infringement of letters patent, which had been set down for trial, pltfs. applied for leave to discontinue. Defts. asked that the cts. should impose as a term of such leave, that pltfs. should pay the costs of the particulars of objections as if the same had been certified to be reasonable & proper. Under R. S. C., Ord. 53A, r. 22, if such an action does not proceed to trial the costs of the issues raised by the particulars of objection are to be in the discretion of the taxing master :—*Held :* whether or not the rule compelled the ct. to leave the costs in question to the taxing master, it was the proper course, & accordingly the term asked for by defts. was refused.—BIBBY & BARON, LTD. *v.* STRACHAN & HENSHAW, LTD., BIBBY & BARON, LTD. *v.* DUERDEN (1911), 28 R. P. C. 305 ; 55 Sol. Jo. 235.

3237. —— —— **Terms of leave to discontinue.**]—Pltfs. in a patent action applied, after the pleadings had been closed, for leave to discontinue on paying the costs of defts. Defts. asked that leave should only be given on the terms of (*a*) pltfs. paying costs as between solr. & client ; (*b*) also paying the costs of the particulars of objection, as if certified ; & (*c*) not bringing any action against any person whomsoever in respect of the same alleged infringement. The judge granted the leave on terms (*a*) & (*b*) & on the terms of pltfs. undertaking not to bring any other action against defts. in respect of the infringement alleged in the pleadings ; in the event of pltfs. not accepting these terms the application was ordered to be dismissed with costs.—CHAMBERLAIN & HOOKHAM, LTD. *v.* HUDDERSFIELD CORPN. (1901), 18 R. P. C. 454.

3238. —— —— **Evidence as to nature of patent necessary.**]—Where pltf. in an action for infringement of a patent gives notice of discontinuance before the pleadings are closed, & there is no evidence before the ct. as to the nature of the patent, the ct. cannot inquire into the facts of the case merely for the purpose of determining whether deft. ought to be given a certificate that his particulars of objection were reasonable & proper, so that he may be entitled to the costs of them on taxation.—WILCOX & GIBBS *v.* JANES, [1897] 2 Ch. 71 ; 66 L. J. Ch. 525 ; 45 W. R. 474 ; 41 Sol. Jo. 469 ; 14 R. P. C. 523.

Annotation :—**Consd.** Cooper Patent Anchor Ry. Joint Co. *v.* British Electric Equipment Co. (1906), 95 L. T. 177.

3239. —— —— ——.]—ASHWORTH *v.* HORSFALL & BICKHAM (1903), 21 R. P. C. 47.

3240. —— —— ——.]—The owners of a patent commenced an action for infringement of it, but discontinued after defence. Defts. applied for a certificate that their particulars of objections were reasonable & proper. A previous action for infringement of the same patent against other defts. had been dismissed, & a certificate had been granted in that action as to some of the particulars of objection. Defts. in this action asked at the hearing of this application for a certificate only as to such particulars of objections as were similar to those certified in the previous action :—*Held :* a certificate that particulars of objections were reasonable & proper could not be granted.—NEW INVERTED INCANDESCENT GAS LAMP CO., LTD. *v.* GENERAL INCANDESCENT CO., LTD. (1905), 22 R. P. C. 614.

Annotation :—**Apld.** Cooper Patent Anchor Ry. Joint Co. *v.* British Electric Equipment Co. (1906), 95 L. T. 177

3241. —— —— ——.]—Where pltfs. in an action for the infringement of their alleged letters patent gave notice, after delivery of defts.' particulars of objections, of discontinuance of the action in consequence of another action against other defts. for infringement of the same alleged letters patent having been decided against them, the ct., having no materials before it to enable it to exercise its discretion as to granting a certificate under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 29 (6), that the particulars of objections were reasonable & proper, so that defts. might be entitled to the costs of them on taxation, declined to grant such certificate.—COOPER PATENT ANCHOR RAIL JOINT CO., LTD. *v.* BRITISH ELECTRIC EQUIPMENT CO., LTD. (1906), 95 L. T. 177 ; 23 R. P. C. 606, C. A.

3242. —— **No evidence offered at trial.**]—AMERICAN STEEL & WIRE CO. *v.* GLOVER & CO., LTD., No. 3212, *ante*.

3243. —— **Action dismissed for want of prosecution—Reasonableness certified on affidavit evidence.**]—Pltf. in a patent action having failed to give notice of trial, defts. applied by motion that the action might stand dismissed for want of prosecution with costs to be paid by pltf. & that the particulars of objections delivered by defts. with their defence might be certified to have been reasonable & proper. The ct. dismissed the action with costs unless pltf. should give notice of trial within ten days, &, being satisfied by affidavits which were filed in support of the motion that the particulars of objections were reasonable & proper, granted a certificate to that effect.—BATES *v.* HORSFALL & SLADING (1905), 22 R. P. C. 519.

3244. Discretion of taxing master to allow costs—Where action discontinued.]—This was a patent suit in which pltfs., after the briefs were delivered but before the hearing, took the common order dismissing their bill with costs :—*Held :* (1) on taxation of the costs & notwithstanding the judge had not certified what particulars had been proved, that defts. were entitled to allowances in respect of drawing & settling by counsel particulars of breaches. (2) They were entitled to an allowance in respect of the charges of scientific witnesses, & such allowance was not limited by the rules of taxation at common law, & also they were entitled to an allowance in respect of the cost of a model ; but the ct. followed the taxing master's decision as to amount.—BATLEY *v.* KYNOCK (1875), L. R. 20 Eq. 632 ; 44 L. J. Ch. 565 ; 33 L. T. 45 ; Goodeve's Patent Cases, 36.

Annotations :—*As to* (2) **Distd.** Middleton *v.* Bradley, [1895] 2 Ch. 716. **Reld.** Mackley *v.* Chillingworth (1877), 2 C. P. D. 273 ; Turnbull *v.* Janson (1878), 3 C. P. D. 264. *Generally*, **Reld.** Tilghman's Sand Blast Co. *v.* Wright (1884), Griffin's Patent Cases (1884-1886), 216.

3245. —— ——.]—BIBBY & BARON, LTD. *v.* STRACHAN & HENSHAW, LTD., BIBBY & BARON, LTD. *v.* DUERDEN, No. 3236, *ante*.

3246. —— **Where actions abandoned at trial.**]—An action was brought by pltfs. for the infringement of three patents. At the trial pltfs. elected not to proceed with the action, so far as it related to two of the patents. The action was tried on the third patent & was dismissed with costs :—*Held :* the action did not " proceed to trial " on the two abandoned patents within R. S. C., Ord. 53A, r. 22, & the costs of defts.' particulars of objections to those patents were in the discretion of the taxing master.—BRITISH, FOREIGN & COLONIAL AUTOMATIC LIGHT CONTROLLING CO., LTD. *v.*

METROPOLITAN GAS METERS, LTD., [1912] 2 Ch. 82; 81 L. J. Ch. 520; 106 L. T. 834; *subsequent proceedings, sub nom.* METROPOLITAN GAS METERS, LTD. *v.* BRITISH, FOREIGN & COLONIAL AUTOMATIC LIGHT CONTROLLING CO., LTD., [1913] 1 Ch. 150.

D. Certificate of Reasonableness of Particulars of Breaches.

See R. S. C., Ord. 53A, r. 20.

3247. Plaintiff unsuccessful in action—Whether certificate granted.]—GERM MILLING CO., LTD. *v.* ROBINSON, No. 2890, *ante*.

3248. —— ——.]—KANE *v.* GUEST & CO., No. 3181, *ante*.

3249. Application for certificate—What must be shown—Not sufficient that particulars not unreasonable.]—GERM MILLING CO., LTD. *v.* ROBINSON, No. 2890, *ante*.

3250. Defendant no. appearing—Jurisdiction of court to grant certificate—Patents & Designs Act, 1883 (c. 57), s. 29.]—PNEUMATIC TYRE CO. *v.* PARR (J.) & CO., [1896] W. N. 88.

3251. —— —— —— **Particulars examined by court.**]—BROOKS *v.* HALL (1903), 21 R. P. C. 29.

3252. —— —— —— ——.]—SACCHARIN CORPN., LTD. *v.* SKIDMORE (1903), 21 R. P. C. 31.

3253. —— —— —— ——.]—SACCHARIN CORPN., LTD. *v.* HAY (1905), 22 R. P. C. 212.

E. Effect of Certificate of Validity.

See Patents & Designs Acts, 1907 (c. 29), s. 35; 1919 (c. 80), sched.

3254. Solicitor & client costs—In subsequent action.]—*Semble:* where the right has been established at law & the judge certifies that fact, the costs will be ordered to be taxed between solr. & client.—BETTS *v.* DE VITRE (NO. 2) (1864), as reported in 11 L. T. 533; 11 Jur. N. S. 9.

Annotation:—**Refd.** Penn *v.* Bibby, Penn *v.* Jack, Penn *v.* Fernie (1866), L. R. 3 Eq. 308.

3255. —— ——.]—BOVILL *v.* HADLEY, No. 3104, *ante*.

3256. —— ——.]—UNITED TELEPHONE CO. *v.* FAULKNER (1886), 3 R. P. C. 282, n.

3257. —— ——.]—UNITED TELEPHONE CO. *v.* FLEMING (2) (1886), 3 R. P. C. 282.

3258. —— ——.]—Pltfs. in the action were the owners of a patent claiming a combination for telephonic purposes of a diaphragm or tympan with electric tension regulators operating in a closed circuit. Deft.'s instrument, which was alleged to be an infringement, consisted of a disc of carbonised leather behind a mouthpiece & a ball of carbonised wood suspended by means of a flexible metallic conductor so as to rest lightly by gravity against the disc. Deft. denied the alleged infringement & contended that his instrument did not contain either of the elements of pltfs.' combination, & did not operate in a closed circuit:—*Held:* (1) deft.'s disc was a diaphragm within the meaning of the specification; (2) deft.'s disc & ball were tension regulators covered by the specification; (3) deft.'s instrument did operate in a closed circuit; (4) pltfs. were entitled to an injunction in the usual form, including, as they were holders of a judge's certificate that the validity of the patent had already come in question, costs as between solr. & client.—UNITED TELEPHONE CO. *v.* ST. GEORGE (1886), 3 R. P. C. 321; Griffin's Patent Cases (1884–1886), 230.

3259. —— ——.]—Costs were given on the higher scale, &, a certificate of validity having been given in a previous action for infringement, the judge refused to direct that the costs should not be as between solr. & client in this action.

It is the duty of the ct. not to upset a patent on merely theoretical objections. If there is a statement which may be substantially true, but which is doubted on scientific theory by scientific witnesses, the ct. ought to be very careful to be satisfied that the objection made is a real objection & not merely the opinion of a scientific man, but it is incumbent on the patentee to adduce evidence sufficient to satisfy the ct. that there were good grounds for granting him his monopoly. If the patentee claims certain results from his invention, & in fact the invention does not produce those results or even if it fails to produce any one of those results out of many, then the Crown has been deceived & the grant is void. But it is necessary to distinguish between the results which the patentee claims from his invention, & the purposes to which, in his opinion, it may be applied. If he says that an invention producing certain definite results may be applied for certain purposes & it then turns out that it cannot be applied for those purposes, that does not affect the validity of the patent (WARRINGTON, J.).—FLOUR OXIDIZING CO., LTD. *v.* HUTCHINSON (J. & R.) (1909), 26 R. P. C. 597.

3260. —— ——.]—MARCONI *v.* HELSBY WIRELESS TELEGRAPH CO., No. 2475, *ante*.

3261. —— ——.]—BRITISH THOMSON-HOUSTON CO., LTD. *v.* CORONA LAMP WORKS, LTD. (1921), as reported in 39 R. P. C. 49, H. L.

Annotations:—**Montd.** Act. für Anilin Fabrikation in Berlin *v.* Levinstein (1921), 38 R. P. C. 277; British Thomson-Houston Co. *v.* B. T. T. Electric Lamp & Accessories Co. (1922), 39 R. P. C. 167.

3262. —— —— **Party & party costs in suit in which validity granted.**]—PENN *v.* BIBBY, PENN *v.* JACK, PENN *v.* FERNIE, No. 2545, *ante*.

3263. —— —— **Where validity not disputed.**]—(1) Where in a suit for infringement of a patent the ct. had jurisdiction to grant an injunction at the time the bill was filed, but the patent expired before the hearing:—*Held:* the ct. had jurisdiction at the hearing to grant an inquiry as to damages.

(2) Full costs granted under Patents, Designs & Trade Marks Act, 1852 (c. 83), s. 43, to the patentee, though defts. did not contest the validity of the patent.—DAVENPORT *v.* RYLANDS (1865), L. R. 1 Eq. 302; 35 L. J. Ch. 204; 14 L. T. 53; 12 Jur. N. S. 71; 14 W. R. 243.

Annotations:—*As to* (1) **Consd.** Betts *v.* Gallais (1870), L. R. 10 Eq. 392; Fritz *v.* Hobson (1880), 14 Ch. D. 542. **Refd.** Frame Manufacturing Co. *v.* Morton (1922), 40 R. P. C. 33. *As to* (2) **Distd.** Penn *v.* Bibby, Penn *v.* Jack, Penn *v.* Fernie (1866), L. R. 3 Eq. 308. *Generally,* **Mentd.** Leeds Industrial Co-op. Soc. *v.* Slack (1924), 40 T. L. R. 745.

3264. —— —— ——.]—An action was brought for an alleged infringement of two patents, claiming an injunction & damages. Deft. did not dispute the validity of the patents, but denied the infringement. Deft., however, paid a sum of money into ct. in the alternative. At the hearing deft. did not oppose the claim for an injunction, & the usual inquiry as to damages was directed to be made. Pltfs. proved the certificate as to the validity of the patents having been questioned in previous actions under Patent Law Amendment Act, 1852 (c. 83), s. 43, & Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 31, & asked for costs as between solr. & client. Deft. applied to the judge to certify that pltfs. ought not to have costs as between solr. & client, on the ground that the validity of pltfs.' patent had not been disputed, & their claim to relief not seriously contested by deft.:—*Held:* pltfs. were entitled to costs of the action as between solr. & client, those of the reference as to damages being reserved; & the fact that deft. had not disputed the validity of the patent, & had by paying money into ct. so far

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admitted his liability, afforded no ground for granting him a certificate depriving pltfs. of costs as between solr. & client.—UNITED TELEPHONE CO., LTD. *v.* PATTERSON (1888), 60 L. T. 315; 6 R. P. C. 140.

3265. —— —— ——.]—FABRIQUES DE PRODUITS CHIMIQUES DE THANN & DE MULHOUSE *v.* LAFITTE (1899), 16 R. P. C. 61.

3266. —— —— ——.]—WELSBACH INCANDESCENT GAS LIGHT CO. *v.* DAYLIGHT INCANDESCENT MANTLE CO., LTD. (1899), 16 R. P. C. 344; *on appeal*, 17 R. P. C. 141, C. A.

Annotation:—**Mentd.** British Thomson-Houston Co. *v.* Sterling Accessories, Same *v.* Crowther & Osborn, [1924] 2 Ch. 33.

3267. —— —— ——.]—In an action brought for an injunction to restrain the infringement of five patents, which covered all known methods of making pure saccharin, pltfs. were unable to prove which of the patents had been infringed. The evidence showed that the infringing articles complained of consisted of pure saccharin; that pure saccharin could not be produced by the use of the processes described in an expired patent for saccharin upon which deft. relied; & that one of the patents sued upon must have been infringed:—*Held:* an injunction & inquiry as to damages should be granted, but that the injunction should be limited to the period covered by the oldest of the five unexpired patents. Pltfs. were awarded the costs of both actions; but although they held a certificate of validity of one of the patents, the judge, as the only issue in the actions was infringement, certified for party & party costs.—SACCHARIN CORPN., LTD. *v.* DAWSON (1902), 46 Sol. Jo. 281; 19 R. P. C. 169.

Annotations:—**Consd.** British Vacuum Co. *v.* Exton Hotels Co. (1908), 25 R. P. C. 617. **Mentd.** Saccharin Corpn. *v.* Wild, [1903] 1 Ch. 410; British Thomson-Houston Co. *v.* Charlesworth, Peebles (1923), 40 R. P. C. 426.

3268. —— —— ——.]—Where a certificate as to validity of a patent had been granted in an action for infringement, the ct., having in a subsequent action in which validity was not denied, found infringement, refused to direct that pltfs. should not have solr. & client costs.

I will state that pltfs. offered to accept £60 by way of damages &, defts. not accepting that, I order an inquiry (WARRINGTON, J.).—BRITISH VACUUM CO., LTD. *v.* EXTON HOTELS CO., LTD. (1908), 25 R. P. C. 617.

3269. —— —— **Defendants consenting to settle & pay party & party costs.**]—In an action for infringement of a patent, the validity of which had been certified to have come in question in a previous action, pltfs. moved for an interlocutory injunction; defts. consented to settle the action & to pay pltfs.' costs as between party & party:—*Held:* defts. must pay costs as between solr. & client.—UNITED TELEPHONE CO. *v.* TOWNSHEND & MERCER (1885), 3 R. P. C. 10.

3270. —— —— **Not in action commenced before certificate granted.**] — AUTOMATIC WEIGHING MACHINE CO. *v.* INTERNATIONAL HYGIENIC SOCIETY (1889), 6 R. P. C. 475.

Corpn. *v.* Anglo-Continental Sacc

Co. *v.* Exton Hotels Co. (1908), 25 R. P. C. 617.

3271. —— —— ——.]—SACCHARIN CORPN., LTD. ANGLO-CONTINENTAL CHEMICAL WORKS, No. 2315, *ante*.

3272. —— —— **Faulty specification causing ...ment litigation.**]—(1) If the invention is such there is nothing new in it unless you have regard to the whole combination & all its parts as arranged, then nothing would seem to be an infringement which does not comprise the whole combination & all its parts as described, or the mechanical equivalents of such described parts respectively. But the invention may be such that you find novelty without having regard to the whole combination & all its parts as described; that is to say, you may find that there is an essence or substance of invention underlying or pervading the particular combination & arrangement described in the letters patent, so that the combination & arrangement may be regarded as a specific instance of the kind of invention underlying or pervading the patented combination. In the former case, as I said, there is in my opinion no infringement unless the alleged piratical machine takes the whole combination & all its parts or their respective mechanical equivalents. But in the latter case there will be or may be an infringement, though in the details there may be material parts or steps which are neither the parts of the patented machine as described nor the mechanical equivalents of such respective parts (VAUGHAN WILLIAMS, J.).

(2) As to the costs between solr. & client I think there is no sort of ground for it. The fact of the matter is, that although this case has been tried before, the necessity for this frequent litigation arises very much from the unhappy & lax manner in which the letters patent have been framed (VAUGHAN WILLIAMS, J.).—AUTOMATIC WEIGHING MACHINE CO. *v.* NATIONAL EXHIBITIONS ASSOCN., LTD. (1891), 8 R. P. C. 345; *on appeal*, 9 R. P. C. 41, C. A.

Annotations:—*As to* (1) **Expld.** Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. (1924), 41 R. P. C. 323. **Reid.** Automatic Weighing Machine Co. *v.* Fearly (1893), 10 T. L. R. 22; Ticket Punch Register Co. *v.* Colley's Patent (1895), 12 R. P. C. 1.

3273. —— —— **Where extent of patent questioned.**]—The owners of a patent granted in 1890 to Welch for "Improvements in rubber tyres & metal rims or felloes of wheels for cycles & other light vehicles," the validity of which had been certified, having brought an action for infringement, deft. by his defence (*inter alia*) denied infringement, & alleged that the patent only applied to the wires used in the manufacture of the tyres, & that such wires, when once purchased, could be used again. The specification had been construed by the House of Lords, & at the trial deft. relied mainly on non-infringement:—*Held:* deft. had infringed; judgment was given for pltfs., &, as deft. had raised questions as to the extent of the patent, pltfs. were not deprived of solr. & client costs.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* WILSON (1900), 17 R. P. C. 332.

3274. —— —— **Validity & infringement denied —Set-off.**]—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* WAPSHARE TUBE CO., LTD., No. 3286, *post*.

3275. —— —— —— **Party & party costs on counterclaim.**]—In an action for infringement of the patent a certificate of validity had been granted. A subsequent action for infringement was brought & pltfs. claimed costs as between solr. & client. Defts. denied infringement & validity & made a counterclaim for revocation of the patent. An injunction & an inquiry as to damages were granted with solr. & client costs of the action. The counterclaim was dismissed with party & party costs.—BRITISH VACUUM CLEANER CO., LTD. *v.* LONDON & SOUTH-WESTERN RY. CO. (1910), 27 R. P. C. 649; *on appeal*, 28 R. P. C. 77, C. A.; (1912), 29 R. P. C. 309, H. L.

3276. —— —— **Certificate granted prior to amendment of specification—Subsequent action on**

(J. B.) & CO., LTD. *v.* KENDALL, UNDERWOOD & CO., LTD. (1906), 24 R. P. C. 27.

3277. —— Necessity for express direction.]—In a suit for the infringement of a patent, where the ct. considers pltf. entitled to full costs as between solr. & client, the decree or order should contain an express direction that the costs be so taxed, notwithstanding Patent Law Amendment Act, 1852 (c. 83), s. 43, provides that he shall have such full costs unless the judge shall certify that he ought not to have them.—LISTER *v.* LEATHER (1858), 4 K. & J. 425; 70 E. R. 177.

Annotations:—**Expld.** Penn *v.* Bibby, Penn *v.* Jack, Penn *v.* Fernie (1866), L. R. 3 Eq. 308. **Reld.** North Metropolitan Tram. Co. *v.* L. C. C., [1898] 2 Ch. 145. **Mentd.** Printing & Numerical Registering Co. *v.* Sampson (1875), 32 L. T. 354.

3278. To what costs certificate extends—Costs of postponement.]—The P. co., as owners of a patent granted to W., the validity of which was established in a previous action, brought an action for infringement against the L. co. On the action coming on for trial, R. appeared as agent of the L. co. for the purpose of conducting their defence. The judge ruled that he was unable to do so, & the trial was postponed to enable the L. co. to instruct counsel. On the action coming on again for trial, the only defence relied upon was non-infringement, all other defences having been withdrawn:—*Held:* the L. co. had infringed, & judgment was given for pltfs., with solr. & client costs, such costs to include the costs occasioned by the postponement of the trial.—PNEUMATIC TYRE CO., LTD. *v.* WEST LONDON RUBBER & TYRE CO., LTD. (1898), 15 R. P. C. 129.

F. Undertaking or Arrangement Offered.

3279. Offer to withdraw appeal—Subject to variation of order appealed from—In conformity with decision favourable to appellant—Effect of refusal.]—Applts. gave notice to resp. that a decision favourable to their contention on one point of the pending appeal having been given in another case by a ct. of final appeal, they were prepared to withdraw from the remaining points of their appeal & pay resp.'s costs up to the date of their doing so, on condition that resp. would consent to a variation in the order appealed from, in conformity with the decision favourable to applts.' one contention which had been so given during the pendency of the appeal. Applts. added that in the event of resp. rendering it necessary to proceed with the appeal in spite of such decision they should, if successful, ask for the costs of the appeal. Resp. declined to consent to such variation:—*Held:* he must pay the costs of the appeal from the date of his refusal to accede to applts.' proposal.—DE VITRE *v.* BETTS (1873), L. R. 6 H. L. 319; 42 L. J. Ch. 841; 21 W. R. 705, H. L.; *varying* S. C. *sub nom.* BETTS *v.* DE VITRE (1868), 3 Ch. App. 441, L. C.

Annotations:—**Reld.** Watson *v.* Holliday (1882), 20 Ch. D. 780; Gill *v.* Coutts & Cutler (1895), 13 R. P. C. 136; British Thomson-Houston Co. *v.* Sterling Accessories, Same *v.* Crowther & Osborn, [1924] 2 Ch. 33. **Mentd.** Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487.

3280. Defendant offering to submit & pay damages—Effect of refusal.]—H. wrote to the C. co., complaining of infringement of his patent, & a correspondence ensued. The C. co. admitted certain infringements in 1893 & 1895, stating that they had acted without knowledge of the patent. H. offered to accept a prompt payment of £150 on the co. undertaking to publish an apology. The co. sent a cheque for £150, but declined to make an apology. The cheque was returned by pltf.'s solrs., & an action for infringement was commenced. Defts. paid £150 into ct., which pltf. accepted in satisfaction of his claim for damages. The action came on upon motion for judgment:—*Held:* (1) pltf. was not entitled to an injunction, as he had not proved that defts. intended to commit any further infringement; (2) no costs ought to be given down to the time when pltf. accepted the £150 in satisfaction of damages, & pltf. must pay defts.' costs subsequent to that date.—HUDSON *v.* CHATTERIS ENGINEERING WORKS CO. (1898), 15 R. P. C. 438.

3281. —— ——.]—The owner of a patent brought an action for infringement, & defts. by letter offered an undertaking not to infringe, delivery up, & a sum for damages & costs down to the date of the letter. Pltf. accepted this offer, but desired an order of the ct., & defts. offered to submit to an order giving effect to the terms. They refused to consent to pay the costs of obtaining it, but were willing to leave the matter to the ct. Pltf. thereupon brought the matter before the ct. on a motion for an injunction. At the hearing the only question was as to the costs of an order to give effect to the agreed terms:—*Held:* pltf. had shown himself unreasonable, & the motion was wholly unnecessary, as it was only necessary to have mentioned the matter to the ct., & defts. were entitled under the circumstances to their costs since the date of the letter, with a set-off.—GILL *v.* PHILIPS (GEORGE) & SON, LTD. (1911), 29 R. P. C. 397.

——.]—*See* INJUNCTION, Vol. XXVIII., pp. 545, 546, 547, Nos. 1526, 1527, 1534, 1541.

G. Costs on Higher Scale.

3282. Grounds for allowing—Costs of appeal—Costs allowed on higher scale in court below.]—CONSOLIDATED PNEUMATIC TOOL CO., LTD. *v.* CLARK, SAME *v.* ARMSTRONG (SIR W. G.), WHITWORTH & CO., LTD., SAME *v.* INGERSOLL SERGEANT DRILL CO., No. 3184, *ante*.

3283. —— —— ——.]—GADD & MASON *v.* MANCHESTER CORPN. (1892), 67 L. T. 569; 9 R. P. C. 516; 9 T. L. R. 42, C. A.

Annotations:—**Reld.** Pirrie *v.* York Street Flax Spinning Co. (1894), 11 R. P. C. 429; Cassel Gold Extracting Co. *v.* Cyanide Gold Recovery Syndicate (1895), 11 T. L. R. 345; Shrewsbury & Talbot S. T. Cab. Co. *v.* Sterckx (1895), 12 T. L. R. 122; Savage *v.* Harris (1896), 12 T. L. R. 187; Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre & Automatic Valve Co. (1898), 16 R. P. C. 50; Taylor & Scott *v.* Annand & Northern Press & Engineering Co. (1899), 16 R. P. C. 547; Layland *v.* Boldy (1913), 29 T. L. R. 651; Norton *v.* Barker (1913), 30 R. P. C. 229. 741; *Re* Mertens' Patent (1914), 31 R. P. C. 373.

3284. —— Questions of unusual difficulty.]—GADD & MASON *v.* MANCHESTER CORPN., No. 3283, *ante*.

3285. —— —— Making scientific witnesses necessary.]—ELLINGTON *v.* CLARK, BUNNETT & CO., No. 2952, *ante*.

3286. —— —— ——.]—The action was dismissed with costs except so far as they were increased by the issue of invalidity, the costs of which deft. was ordered to pay. Costs on the higher scale & of three counsel were allowed & on the issue of invalidity pltfs. obtained costs as between solr. & client, a certificate of validity having been obtained in a previous action on the patent, a set-off of costs was ordered.

The questions I have had to consider have been very complicated questions of mechanics on which very skilled persons have had very great difficulty in arriving at a conclusion. I think that the case is one in which, upon special grounds, the costs ought to be allowed on the higher scale & costs of

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three counsel (BUCKLEY, J.).—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* WAPSHARE TUBE CO., LTD. (1900), 17 R. P. C. 433.

3287. —— —— ——.]—FLOUR OXIDIZING CO., LTD. *v.* HUTCHINSON (J. & R.), No. 3259, *ante*.

H. Costs on Discontinuance.

3288. Action dropped by tacit agreement—Subsequent motion to discontinue—Each party to bear own costs.]—Where an action set down in the list for trial has been dropped by tacit agreement between the parties without any special or express stipulation, & without any provision in the event, which happened in this case, of the agreement for the settlement of their differences subsequently going off:—*Held:* (1) on deft.'s motion, the action should be restored to the list, it was a *lis pendens* & could be restored; (2) on pltfs.' motion for leave to discontinue, owing to the tacit agreement pltfs. were entitled to discontinue it, if they chose to do so, each party to bear their own costs.—BROOKS (J. B.) & CO., LTD. *v.* LYCETT (1902), 19 R. P. C. 166.

3289. Notice of discontinuance bad—Action dismissed with costs.]—VICKERS, SONS & MAXIM, LTD. *v.* COVENTRY ORDNANCE WORKS, LTD. (1908), 25 R. P. C. 207.

Costs of motion for injunction & inquiry as to damages.]—*See* INJUNCTION, Vol. XXVIII., p. 521, No. 1276.

Costs of particulars of objections on discontinuance.]—*See* Sub-sect. 11, C. (*d*), *ante*.

I. Security for Costs.

3290. Appeal—Must be given within three months—Or reasonable time—Extenuating circumstances.]—The ct. laid it down as a general rule that when security for the costs of an appeal is ordered to be given, & three months or what the ct. considers a reasonable time has elapsed without such security being given, an order will be made for the dismissal of the appeal, unless there are extenuating circumstances, in which case the ct. will take such circumstances into consideration, & will, if it grants further time, fix that time itself. In the present case, a reasonable time having elapsed, & no extenuating circumstances having been shown, the appeal would be dismissed (*per* CUR.).—WASHBURN & MOEN MANUFACTURING CO. *v.* PATTERSON (1885), 29 Ch. D. 48; 54 L. J. Ch. 643; 52 L. T. 705; 33 W. R. 403; 1 T. L. R. 278; Griffin's Patent Cases (1884–1886), 240, C. A.

—— **Defendants becoming bankrupt pending appeal.**]—*See* BANKRUPTCY, Vol. V., p. 1006, No. 8206.

3291. Against whom ordered—Plaintiff company in infringement action—Patent substratum of company.]—In an action by a limited co. for infringement of letters patent defts., after delivery of defence, applied for security for costs of the action:—*Held:* the patents were the *substratum* of the co., & under the circumstances of the case security ought to be given either in £100 cash to be brought into ct., or to the satisfaction of the master upon that part of the assets of the co. which consisted of buildings & machinery.—DIAMOND STEEL MANUFACTURING CO. *v.* HARRISON BROTHERS (1910), 27 R. P. C. 451.

3292. —— **Not against respondent resident abroad—In petition for revocation.**]—Resp. appearing to a petition for the revocation of letters patent presented under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 36, is not in the position of pltf. & ought not to be ordered to give security for the costs of the petition though resident abroad.—*Re* MILLER'S PATENT (1894), 63 L. J. Ch. 324; 70 L. T. 270; 11 R. P. C. 55.

Annotation:—**Apld.** Maatschappij voor Fondsenbezit *v.* Shell Transport & Trading Co., [1923] 2 K. B. 166.

J. Particular Items of Costs.

3293. Interrogatories & inspection of machine—Not included in general costs—Unless so ordered.]—In an action for infringing a patent, pltf. obtained judge's orders to interrogate a servant of deft., & to inspect a wheel, which was alleged to be an infringement of the patent. These orders gave no direction as to costs. Pltf. became entitled to the general costs of the cause & the master allowed him all the costs of the inspection & examination upon interrogatories:—*Held:* upon a review of the master's taxation pltf. was not entitled to those costs.—SMITH *v.* GREAT WESTERN RY. CO. (1856), 6 E. & B. 405; 25 L. J. Q. B. 279; 27 L. T. O. S. 122; 2 Jur. N. S. 668; 119 E. R. 916; *sub nom.* SMITH *v.* LONDON & GREAT WESTERN RY. CO., Macr. 228.

Annotation:—**Refd.** Nolan *v.* Copeman (1873), 42 L. J. Q. B. 44.

3294. Costs of special jury—Action discontinued.]—GREAVES *v.* EASTERN COUNTIES RY. CO., No. 3233, *ante*.

3295. Costs of third counsel—Discretion of taxing master.]—The case of *Betts* v. *Menzies* (1857), 3 Jur. N. S. 885, as I well remember, was imported into the argument as a substantive part of pltf.'s case. The evidence & the judge's notes in that case were proved & read. After that, it cannot be said to be unreasonable that a gentleman of the common law bar, who had been engaged in that case, should be retained to explain to the ct. what had occurred upon the trial of which evidence had been given in the cause. Therefore quite irrespectively of the weight & importance of the cause I think there are special circumstances to justify the taxing master's decision, which I am not disposed to vary (PAGE-WOOD, V.-C.).—BETTS *v.* CLIFFORD (1860), 1 John. & H. 74; 3 L. T. 36; 70 E. R. 667.

Annotations:—**Refd.** Mounsey *v.* Lonsdale, A.-G. *v.* Lonsdale (1870), 6 Ch. App. 141. **Mentd.** Davies *v.* Marshall (No. 1) (1861), 1 Drew. & Sm. 557; Gale *v.* Abbott (1862), 6 L. T. 852.

3296. ——.]—BRADFORD DYERS' ASSOCN., LTD. *v.* BURY, BRADFORD DYERS' ASSOCN., LTD. *v.* WILLIAMS (1901), 19 R. P. C. 125.

3297. ——.] — WILSON *v.* WILSON BROTHERS BOBBIN CO., LTD. (1911), 28 R. P. C. 741.

3298. Costs of preparing for trial—Before notice of trial—Not allowed between party & party.]—CURTIS *v.* PLATT, No. 3232, *ante*.

3299. Costs of expert witnesses.]—BATLEY *v.* KYNOCK, No. 3244, *ante*.

3300. —— **Fees for experiments.**]—LEONHARDT & CO. *v.* KALLÉ & CO., No. 2513, *ante*.

3301. —— **Assisting counsel—Not allowed unless specially ordered.**]—CONSOLIDATED PNEUMATIC TOOL CO. *v.* INGERSOLL SERGEANT DRILL CO. (1908), 25 R. P. C. 574.

3302. Costs of preparing model.]—BATLEY *v.* KYNOCK, No. 3244, *ante*.

3303. ——.] — WILSON *v.* WILSON BROTHERS BOBBIN CO., LTD., No. 3297, *ante*.

3304. Costs of preparing particulars of objection—Action discontinued.]—GREAVES *v.* EASTERN COUNTIES RY. CO., No. 3233, *ante*.

3305. Costs of settling particulars of breaches—Allowed to defendants—Although particulars not certified.]—BATLEY *v.* KYNOCK, No. 3244, *ante*.

3306. Costs of shorthand notes—Solicitor & client costs.]—Where on the trial of a patent action it was agreed in open ct. between counsel for the parties with the sanction of the judge that a shorthand writer's note of the evidence to be taken on behalf of the parties jointly should be used as the record of the evidence for the purposes of the trial:—*Held:* the solr. of a party to the action was entitled to charge his client with money disbursed as his share of the cost of taking the shorthand note.—OSMOND *v.* MUTUAL CYCLE & MANUFACTURING SUPPLY CO., [1899] 2 Q. B. 488; 68 L. J. Q. B. 1027; 81 L. T. 254; 48 W. R. 125, C. A.

Annotations:—**Consd.** East London Ry. *v.* Thames Conservators (1904), 48 Sol. Jo. 492. **Distd.** Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393. **Apld.** *Re* Roney, [1914] 2 K. B. 529. **Consd.** Seal *v.* Turner, [1915] 3 K. B. 194.

3307. —— Copies necessary for court—Allowed as between party & party.]—CASTNER KELLNER ALKALI CO. *v.* COMMERCIAL DEVELOPMENT CORPN., No. 3227, *ante*.

3308. Costs of preliminary inspection of machinery.]—ASHWORTH *v.* ENGLISH CARD CLOTHING CO., LTD. (No. 1), No. 2880, *ante*.

3309. Interest on costs—Where repayment ordered on appeal.]—Action for an infringement of a patent was dismissed with costs, & pltf. paid defts.' costs with interest to date. Upon pltf. successfully appealing to the Ct. of Appeal, deft. repaid the amount so received with interest to date. The House of Lords restored the original order, & pltf. repaid the original amount of costs & interest, but refused to satisfy defts.' claim for interest at 4 per cent. on the amount from the date of the repayment after the Ct. of Appeal decision to the date of the return after the House of Lords decision:—*Held:* defts. were entitled to this further sum in respect of interest.—ASHWORTH *v.* ENGLISH CARD CLOTHING CO., LTD. (No. 2), [1904] 1 Ch. 704; 73 L. J. Ch. 282; 90 L. T. 263; 21 R. P. C. 355.

3310. Costs of application to deliver reply—Reply not delivered—Costs in cause.]—HAMER *v.* HAWORTH, No. 3222, *ante*.

Costs of interlocutory injunction where motion ordered to stand over.]—*See* INJUNCTION, Vol. XXVIII., p. 549, No. 1565.

Part XV.—Legal Proceedings.

SECT. 1.—IN GENERAL.

3311. Discretion of court—Declaratory judgment that patent invalid ab initio.]—NORTH EASTERN MARINE ENGINEERING CO. *v.* LEEDS FORGE CO., No. 2211, *ante*.

3312. —— Application for leave to discontinue—Granted on terms.]—A patentee brought an action for an infringement of his patent. After he had delivered his reply, he discovered that he would probably lose his action unless he should first have corrected his specification. He therefore applied for leave to discontinue the action:—*Held:* inasmuch as the patentee could not, with any leave the ct. could give him, sue on a specification corrected during the action, it would not be fair, or in accordance with the intention of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 19, to allow him to discontinue on such terms that he would be in a position to bring a subsequent action on the same footing as if in the previous action he had obtained leave to correct the specification. Leave to discontinue would be granted only on the terms that he should not bring any other action against the alleged infringer in respect of any infringement alleged in the particulars of breaches.—ROBERTSON *v.* PURDEY, [1906] 2 Ch. 615; 75 L. J. Ch. 685; 95 L. T. 330; 23 R. P. C. 79.

3313. Allegation that patent obtained in defraud of plaintiffs' right—Claim for injunction & damages—Statutory remedy for revocation not pursued.]—A patent having been granted to B., an action was commenced by T. C. against B. for a declaration that deft. had obtained the patent fraudulently & in fraud of pltfs.' rights, or, in the alternative, a declaration that the patent was bad on the ground of disconformity between the provisional & complete specifications; & for an injunction restraining deft. from dealing with the patent; & an inquiry as to damages. At the trial, deft. took a preliminary objection that the relief claimed was inappropriate, the statutory remedy being revocation of the patent:—*Held:* if the ct. were to make the declaration claimed, it could not give any consequential relief, & where that was so, it was not the practice of the ct. to make declarations; the injunction claimed could not be granted, because the appropriate remedy, if

PART XV. SECT. 1.

o. *Jurisdiction — Of foreign court —Validity.*]—The grant of letters patent is an exercise of the Sovereign power of the State, & therefore, as in the case of title to land, the validity of the grant is not examinable in the cts. of another State, except in cases where the question of that validity arises merely incidentally in an action otherwise cognisable by the cts. of that other State.—POTTER *v.* BROKEN HILL PROPRIETARY CO., LTD. (1906), 3 C. L. R. 479.—**AUS.**

p. —— *Of Supreme Court — To entertain appeal.*]—There can be no appeal to the Supreme Ct. of Canada in an action in respect to a patent of invention where the validity of the patent is not in question & it does not appear that the matter in controversy exceeds $1,000, the amount limited by 60 & 61 Vic. c. 34 (D), providing for appeals from the Province of Ontario.—MCLAUGHLIN *v.* LAKE ERIE & DETROIT RIVER RY. CO. (1903), Cout. 297.—**CAN.**

q. —— —— ——.]—VICTOR SPORTING GOODS CO. *v.* HAROLD A. WILSON CO. (1904), Cout. 330.—**CAN.**

r. —— *Of Exchequer Court — In patent actions generally.*]—The Exchequer Ct. has no jurisdiction at common law in actions respecting patents for invention, & where any relief is sought in respect of such matters the jurisdiction of the ct. to grant the same must be found in some statute. The ct. cannot entertain proceedings to obtain a declaration of the respective rights of parties *inter se* arising under assignments of a patent for invention; nor for a declaration that such assignments are invalid, & that the registration thereof should be vacated.—FELT GAS COMPRESSING CO. *v.* FELT (1913), 14 Exch. C. R. 311; 14 D. L. R. 395.—**CAN.**

t. —— —— ——.]—The Exchequer Ct. has jurisdiction to determine conflicting applications for patents notwithstanding the pending of a similar proceeding before the Comr. of Patents, by way of arbn., under Patent Act, 1906, s. 20; where jurisdiction is assumed the other proceedings will be stayed.—HUTCHINS CAR ROOFING CO. *v.* BURNETT (Ont.) (1916), 16 Exch. C. R. 391.—**CAN.**

a. —— —— *To grant leave to appeal.*]—Unless an order upon a demurrer be a decision upon the issues raised therein, leave to appeal to the Supreme Ct. of Canada cannot be granted under Exchequer Ct. Act, ss. 51, 52, as amended by 2 Edw. 7, c. 8.—TORONTO TYPE FOUNDRY CO. *v.* MERGENTHALER LINOTYPE CO. (1905), 36 S. C. R. 593.—**CAN.**

b. —— *Of sheriff's court.*]—GILL *v.* CUTLER (1895), 23 R. (Ct. of Sess.) 371; 33 Sc. L. R. 218; 3 S. L. T. 205.—**SCOT.**

c. *Venue.*]—In an action for the

it could be given, would be revocation ; & as there was no allegation of common law fraud, damages could not be given.—TRACTION CORPN., LTD. *v.* BENNETT (1908), 25 R. P. C. 819.

3314. Unpatented secret ideas—Alleged communication in breach of agreement—Particulars of ideas.]—Confidential information relating to the manufacture of coal gas was alleged by H. to have been communicated by him to the works committee of a municipal corpn. It was also alleged that by an agreement in writing the committee had undertaken not to disclose the information without H.'s authority, & not to use it until an agreement had been made with regard to it, & that a licence to use certain letters patent relating to the manufacture of coal gas had been granted by H. to the corpn. An action was commenced by H. against the corpn. for royalties under the licence for damages for breach of the agreement, & for an injunction to restrain defts. from using the information or ideas communicated to them by pltf., except at a gasworks specified in the agreement. Defts. made an application for particulars of the ideas referred to in the statement of claim : —*Held :* pltf. must give particulars of such of the ideas as were the subject of letters patent, & also particulars, subject to proper safeguards as to matters that were secret, of any other ideas alleged by pltf. to be secret, with liberty to apply. —HELPS *v.* OLDHAM CORPN. (1923), 40 R. P. C. 68.

SECT. 2.—IN RESPECT OF INFRINGEMENT.

See Part XIV., Sect. 2, *ante*.

SECT. 3.—IN RESPECT OF THREAT OF LEGAL PROCEEDINGS.

SUB-SECT. 1.—IN GENERAL.

3315. Necessity for existing patent.]—Upon its true construction, the Patents & Designs Act, 1907 (c. 29), s. 36, as amended by Patents & Designs Act, 1919 (c. 80), s. 20, presupposes the existence of a patent, in respect of whose infringement legal proceedings are threatened ; so that a threat by a person who has applied for a patent & whose complete specification has been accepted, but to whom a patent has not at the time of making the threat been granted, & is ultimately refused, is not a threat within the meaning of that section in respect of which a remedy is provided.—ELLIS & SONS *v.* POGSON, [1923] 2 Ch. 496 ; 93 L. J. Ch. 16 ; 129 L. T. 524 ; 67 Sol. Jo. 657 ; 40 R. P. C. 179, C. A.

See Patents & Designs Acts, 1907 (c. 29), s. 36 ; 1919 (c. 80), sched.

3316. Whether plaintiff may raise question of validity.]—CHALLENDER *v.* ROYLE, No. 2273, *ante*.

3317. —— Amendment of pleadings—After lapse of time.]—In an action under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, to restrain a patentee from issuing threats, pltfs in their statement of claim alleged that defts.' patent was invalid. The judge ordered this allegation to be struck out, being of opinion that the validity of defts.' patent could not be tried in such an action. After nearly a year, the time for appealing against that order having long expired, pltfs. applied to the judge to whom the action had been transferred, for liberty to amend the statement of claim by inserting an allegation that defts.' patent was invalid. The judge refused the application, & pltfs. appealed :—*Held :* liberty to amend ought to be given but upon special terms, in order that defts. might not suffer any loss by pltfs. not having taken the proper course of appealing in due time from the order of the judge.—KURTZ *v.* SPENCE (1887), 36 Ch. D. 770 ; 58 L. T. 320 ; 36 W. R. 438 ; 3 T. L. R. 827, C. A.

Annotations :—**Refd.** Challender *v.* Royle (1887), 57 L. T. 734 ; Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435.

3318. Right to particulars — Of objections — Plaintiff alleging defendants' patents to be invalid.] —Pltfs. brought an action to restrain defts., who were holders of various patents for electric accumulators, from threatening pltfs.' customers with legal proceedings for infringement, & by their statement of claim alleged that defts.' patents were invalid. No specific statement had been made by defts. which patents they alleged to be infringed. Defts., who had not delivered a defence, applied for particulars of objections. The judge ordered pltfs. to deliver particulars of objections within a limited time after defts. had given to pltfs. a list of the patents on which the defts. intended to rely. Defts. appealed, asking for an unconditional order on pltfs. to deliver objections :—*Held :* the order under appeal was right, but defts. ought also to state that they relied on no other patents than those in the list, & pltfs. ought to undertake, when the list had been delivered, to amend their statement of claim so as to define the patents the validity of which they disputed.—UNION ELECTRICAL POWER & LIGHT CO. *v.* ELECTRICAL STORAGE CO. (1888), 38 Ch. D. 325 ; 59 L. T. 427 ; 36 W. R. 913 ; 5 R. P. C. 329, C. A.

3319. —— Of threats—Names of customers.]—In an action to restrain threats :—*Held :* defts. were entitled to particulars of the threats complained of, but not to the names of customers whom pltfs. had in consequence thereof promised

infringement of a patent, pltf. laid the venue in H., while deft. was a resident of T. :—*Held :* regarding the language of Patent Act, 1872, s. 24, the venue should be laid in the county where deft. resided : & an order was made to change the place of trial to T.—GOLDSMITH *v.* WALTON (1881), 9 P. R. 10.—**CAN.**

d. ——.]—The venue in an action to restrain the infringement of a patent, must be laid at the place of sittings of the ct. in which the action is brought, nearest to the place of residence or business of deft.—AITCHESON *v.* MANN (1883), 9 P. R. 473.—**CAN.**

e. ——.]—In an action for damages for infringement of a patent, the writ need not be issued out of the registry nearest the place of residence or business of defts., but Patent Act, s. 30, is complied with if the venue is laid at the place of such registry.—SHORT *v.* FEDERATION BRAND SALMON CANNING CO. (1898), 6 B. C. R. 385.—**CAN.**

f. *Jury.*]—An action for the infringement of a patent should not ordinarily be tried by a jury.—VERMILYEA *v.* GUTHRIE (1882), 9 P. R. 267.—**CAN.**

g. *Security for costs.*]—Pltfs. & deft. each applied for a patent of invention in the Patent Office, & the Comr. having declared there was conflict, pltfs. brought action before this ct. to have the matter of this conflict decided & to have it declared who was the first inventor :—*Held :* as in such an action each party is seeking affirmative relief & as such each party is as much pltf. as the other, deft. becoming quasi pltf., if he resides out of the jurisdiction may be ordered to give security for pltf.'s costs.—ROWE *v.* THOMAS, [1925] Exch. C. R. 117.—**CAN.**

h. *Action on contract—Invalidity of patent as defence—Claim for revocation.*]—TODD & HIGGINBOTHAM *v.* O'REGAN (1859), 21 Dunl. (Ct. of Sess.) 1320 ; 31 Sc. Jur. 725.—**SCOT.**

to indemnify.—LAW *v.* ASHWORTH (1890), 7 R. P. C. 86.

3320. —— —— Names of agents making threats.]—In an action to restrain threats of legal proceedings for infringement of a patent, pltfs. alleged that they complained of threats made by defts.' agents on certain specified dates to certain persons named. On an application by defts. for particulars:—*Held:* pltfs. must give the names of the agents of defts. by whom they alleged the threats to have been made.—DOWSON, TAYLOR & CO., LTD. *v.* DROSOPHORE CO., LTD. (1894), 11 R. P. C. 536.

3321. —— Of infringement—Defendant not alleging infringement—Refusing to admit non-infringement.]—DOWSON, TAYLOR & CO., LTD. *v.* DROSOPHORE CO., LTD. (1894), 11 R. P. C. 653.

3322. Service out of the jurisdiction.]—OVERTON & CO. *v.* BURN, LOWE & SONS (1896), 74 L. T. 776; 40 Sol. Jo. 620, C. A.

SUB-SECT. 2.—WHO MAY SUE.

See Patents & Designs Acts, 1907 (c. 29), s. 36; 1919 (c. 80), sched.

3323. Person aggrieved.]—KENSINGTON & KNIGHTSBRIDGE ELECTRIC LIGHTING CO. *v.* LANE FOX ELECTRICAL CO., No. 3399, *post.*

3324. Former licencee of patent.]—AXMANN *v.* LUND, No. 3353, *post.*

3325. Applicant for patent—Holding provisional protection.]—BURT *v.* MORGAN & CO., LTD. (1887), 3 T. L. R. 666.

Annotation:—**Refd.** Challender *v.* Royle (1887), 36 Ch. D. 425.

3326. Manufacturer whose customers are threatened.]—A. & co., B., & H. were all three rival manufacturers of blue & B. had in 1884 taken out a patent for a particular method of wrapping up his blue. In Aug. 1890, H. began using similar wrappers, & in Feb. 1890, B. brought an action against him for having passed off his goods as those of B., in which action B., in Nov. 1890, recovered £500 damages. About that time A. & co. began using wrappers something like B.'s. Between Aug. & Nov. 1890, B. sent out in his boxes of blue the following circular signed by his solrs.: Notice to grocers & others—Information of extensive violation of Mr. B.'s patent rights has been received, all parties are warned not to infringe these rights. This circular was received by some of A. & co.'s customers, though not by A. & co. themselves. In Dec. 1890, B. brought an action against A. & co. for fraudulently passing off their goods as his, & on Jan. 31, 1891, he amended his statement of claim by inserting a statement of his patent, & a claim for infringement. Meanwhile on June 16, 1891, A. & co. brought this action under Patents, Designs, & Trade Marks Act of 1883 (c. 57), s. 32, to restrain B. from threatening their customers, amongst other things, by the circular. In June, 1891, B.'s patent was revoked by consent upon a petition presented by A. & co., & B. discontinued that part of his action:—*Held:* (1) B. had not prosecuted his action with due diligence; (2) A. & co. were persons aggrieved within the meaning of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32; (3) the circular was not a mere general warning within the principle of *Challender* v. *Royle*, No. 2273, *ante*, but was a threat within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32; & (4) A. & co. were entitled to an inquiry as to damages.

I think upon the true construction of this sect., the sect. might apply to an intended infringement provided that you could show that the intended infringement, if carried out, would be an actual infringement (LINDLEY, L.J.).—JOHNSON *v.* EDGE, [1892] 2 Ch. 1; 61 L. J. Ch. 262; 66 L. T. 44; 40 W. R. 437; 8 T. L. R. 289; 36 Sol. Jo. 230; 9 R. P. C. 142, C. A.

Annotation:—*As to* (3) **Apld.** Craig *v.* Dowding (1907), 97 L. T. 683.

3327. ——.]—A co. owned a patent for gas buoy lanterns that had expired, and also owned patents for improvements which were still running, & had for some years supplied B. with gas buoy lanterns made under the patents. B. having given D. an order for gas buoy lanterns, which were founded to some extent on the expired patent, the managing director of the co. wrote B.: I am much surprised at this. I am afraid that this matter will lead to a great deal of difficulty & unpleasantness, & you must not be surprised if my co. applies for an injunction against D. to restrain him from selling his gas buoy lanterns:—*Held:* under the circumstances the letter was a threat within the meaning of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, & D. was accordingly entitled to an injunction against the co. in the terms of the sect. . . . It is quite true that the letter . . . does not specify in terms the patents which belonged at that time to the co., or refer to any patent in particular . . . but I think the natural effect on any ordinary person . . . receiving that letter would be that the threat referred to of proceedings concerned the rights of the co. as patentees (ROMER, J.).—DOUGLASS *v.* PINTSCH'S PATENT LIGHTING CO., [1897] 1 Ch. 176; 65 L. J. Ch. 919; 75 L. T. 332; 45 W. R. 108; 13 T. L. R. 5.

Annotations:—**Distd.** Beven & Alexander *v.* Welsbach Incandescent Gas Light Co. (1902), 20 R. P. C. 69; Diamond Coal Cutting Co. *v.* Mining Appliances Co. (1915), 85 L. J. Ch. 232.

3328. ——.]—Deft., the registered proprietor of a patent, threatened certain customers of pltfs., & they in consequence repudiated a contract with pltfs., who commenced an action to restrain the threats. Subsequently to the commencement of this action deft. amended his specification & pleaded infringement. It was contended for the defence that the ct. could not look at the unamended specification to decide whether the threats were justifiable or not. It was also contended that, inasmuch as pltfs. had a binding contract with their customers, which they could have enforced but did not enforce, they were not aggrieved persons within the meaning of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32:—*Held:* pltfs. were aggrieved persons within the meaning of the sect. & deft.'s patent as amended was invalid, & pltfs. were entitled to an injunction and an inquiry as to damages. No decision was given on the point as to whether it was necessary to consider the specification as if it had been amended at the date of the threats.—HOFFNUNG & CO. *v.* SALSBURY (1899), 16 R. P. C. 375.

3329. Patentee in negotiation for assignment of patent.]—Pltf. had invented certain improvements in quick release mechanism for the draught attachment of road vehicles & such like, intended for use on tarring machines, in respect of which he had applied for patent rights, & had lodged provisional cognate specifications. A complete specification was left in Aug. 1920, & was accepted in May, 1921, & a patent was granted. Defts. were the owners of a patent in respect of an invention for a similar purpose. In July, 1920, pltf. was in negotiation with a co. for the sale or licence of the patent rights when acquired, & at

Sect. 3.—*In respect of threat of legal proceedings: Sub-sects.* 4 & 5, *A., B. & C.*]

Act, 1883 (c. 57), s. 32, include threats by private letter, to the person charged with infringement, the words " or otherwise " not being restricted, on the *ejusdem generis* principle, to " or other means such as circulars or advertisements."

The solrs. to defts., a co., sent a letter to pltfs., another co., alleging an infringement of patents claimed by defts., & stating that unless pltfs. forthwith discontinued the infringement legal proceedings would be taken. Defts. not having followed up the letter by legal proceedings, pltfs. brought an action for an injunction, under Patents, Designs, & Trade Marks Act, 1883 (c 57), s. 32, to restrain them from making or continuing threats of legal proceedings. Defts. in their statement of defence alleged that pltfs. had infringed the patents, but afterwards, by amendment, struck out the allegation:—*Held:* that pltfs. were entitled to a perpetual injunction with costs.

(2) On receipt of the letters containing the threats pltfs. delayed the erection of certain new machinery, & incurred expense in employing engineers to enquire into the question of alleged infringement:—*Held:* the losses & expenses were not recoverable as damages under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32.—DRIFFIELD & EAST RIDING PURE LINSEED CAKE CO. *v.* WATERLOO MILLS CAKE & WAREHOUSING CO. (1886). 31 Ch. D. 638; 55 L. J. Ch. 391; 54 L. T. 210; 34 W. R. 360; 2 T. L. R. 314; Griffin's Patent Cases (1884–1886), 80; 3 R. P. C. 46.

Annotations:—As to (1) **Consd.** Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435; Skinner *v.* Skew, [1893] 1 Ch. 413. *Generally,* **Refd.** Challender *v.* Royle (1887), 36 Ch. D. 428, n.

3343. —— ——.]—A " threat " within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, may be contained in letters written *bonâ fide* in answer to inquiries about a patent. Such a letter cannot be considered as a privileged communication. The words " or otherwise " in the sect. are not to be classed as *ejusdem generis* with " circulars or advertisements "; they are extended by the words which precede them, & not confined by them.

In an action to restrain threats of legal proceedings under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 35, no defence can be based on the ground that what deft. did was done *bonâ fide*, or that it was done on a privileged occasion.—SKINNER & CO. *v.* SHEW & CO., [1893] 1 Ch. 413; 62 L. J. Ch. 196; 41 W. R. 217; 9 T. L. R. 84; 37 Sol. Jo. 65; 2 R. 179; *sub nom.* SKINNER & CO. *v.* PERRY, 10 R. P. C. 1, C. A.

Annotation:—**Consd.** Beven & Alexander *v.* Welsbach Incandescent Gas Light Co. (1902), 20 R. P. C. 69.

3344. Words spoken " without prejudice."]—KURTZ & CO. *v.* SPENCE & SONS, No. 3335, *ante.*

3345. Threats by private letter.]—Deft., who was the owner of a patent, wrote a letter to a firm who had brought certain articles from pltf., in which she said: " the article being sold & advertised by you is regarded as an infringement. We therefore request you to cease advertising & selling the article in question." Pltf. brought an action for an injunction to restrain the continuance of the threats, & deft. then brought an action for infringement, which action was discontinued:—*Held:* as the letter constituted a threat of legal proceedings within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, pltf. was entitled to bring an action for an injunction to restrain the continuance of the threats, unless deft. with due diligence commenced & prosecuted an action for infringement; but as deft had *bonâ fide* commenced an action for infringement, in which the validity of the patent could have been tried, the proviso in sect. 32 of the Act applied, & pltf.'s action for an injunction was not maintainable; whether the action for infringement could or could not have succeeded was not a relevant issue.—CRAIG *v.* DOWDING (1908), 98 L. T. 231; 24 T. L. R. 248, C. A.

3346. —— **Solicitor's letter.**] — DRIFFIELD & EAST RIDING PURE LINSEED CAKE CO. *v.* WATERLOO MILLS CAKE & WAREHOUSING CO., No. 3342, *ante.*

3347. —— ——.]—COMBINED WEIGHING & ADVERTISING CO. *v.* AUTOMATIC WEIGHING MACHINE CO., No. 3379, *post.*

3348. —— ——.]—D. took out a patent in 1885 for an improved bottle for aerated liquids, & in Aug. 1886, granted an exclusive licence to use parts of the invention called the trigger opener to F., who was to pay royalties, & not at any time to dispute the validity of D.'s patent. In Nov. 1888, F. obtained a licence from B. & E., the owners of a patent of the year 1887 for improvements relating to means for facilitating the opening of internally stoppered bottles for aerated & other liquids. In 1888 D. discovered that F. was making trigger openers which D. alleged were made in accordance with his patent, but for which F. refused to pay royalties, claiming a right to make them under the patent of B. & E. D.'s solr., after some correspondence in Dec. 1888, wrote to F.'s solrs. that B. & E.'s specification was clearly an infringement of D.'s patent, & in the action against F. claims would be made in respect of this patent. B. & E., who were assisting F., & employing the same solrs., by their solrs., in Mar. 1889, required D. to withdraw such threats, or to commence an action to make them good. In Apr. 1888, D. commenced an action against F., alleging that F. was making trigger openers differing only colourably from D.'s patented article, & refused to pay royalties, on the ground that the trigger openers were covered by B. & E.'s patents. D. further alleged that the trigger openers of B. & E. did not differ materially from his own, & claimed a declaration that the trigger openers made by F. were within D.'s patent, & that F. was liable to pay royalties, an injunction to restrain F. from making trigger openers under B. & E.'s patent, or only colourably differing from D.'s articles, & an account of royalties. F. denied that the trigger openers made by him were an infringement of D.'s patent. B. & E. were desirous of being made parties to this action to dispute the validity of D.'s patent, but as D. refused to joint them, in Aug. 1889, they commenced an action against D., alleging that D. had threatened F. by the said letter, that he had continued the threats & commenced an action against F., in which he refused to join B. & E. as parties, that F. had infringed no legal right of D., because his manufacture was not an infringement, & because D.'s patent was invalid, & that they, pltfs., had suffered damage by reason of the said threats, & they claimed an injunction to restrain D. from threatening them or their licencees. Thereupon D. took out a summons to stay all proceedings in this last action, & F. applied to stay all proceedings in the first action till the second action was tried:—*Held:* there was no ground for staying the action by D. against F., & that F.'s summons must be dismissed; though the letter to F.'s solrs. gave a cause of action under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, to any person aggrieved thereby, yet D.'s action was an action for infringement within the proviso to that sect.; it was not necessary that the action for infringe-

ment should be brought after the action for threats, or that it must be an action in which the validity of the patent could be tried; D.'s action was brought with due diligence, & consequently B. & E. had no cause of action.—BARRETT *v.* DAY, DAY *v.* FOSTER (1890), 43 Ch. D. 435; 59 L. J. Ch. 464; 62 L. T. 597; 38 W. R. 362; 7 R. P. C. 54.
Annotation:—**Apprvd.** Skinner *v.* Shew, [1893] 1 Ch. 413.

3349. —— Not referring in terms to patent.]—DOUGLASS *v.* PINTSCH'S PATENT LIGHTING CO., No. 3327, *ante*.

3350. —— Letter written "without prejudice."]—KURTZ & CO. *v.* SPENCE & SONS, No. 3335, *ante*.

3351. —— Written bonâ fide in answer to inquiries.]—SKINNER & CO. *v.* SHEW & CO., No. 3343, *ante*.

SUB-SECT. 5.—RIGHT TO INJUNCTION.

A. In General.

3352. Discretion of court.]—EDLIN *v.* PNEUMATIC TYRE CO., No. 3381, *post*.

3353. —— Undertaking by defendant to commence action.]—The ct. will restrain a patentee from issuing circulars threatening legal proceedings against infringers unless he will undertake to commence proceedings to assert the validity of his patent; & the fact that the party seeking the aid of the ct. was formerly a licencee of the patent under the patentee, & had himself concurred in issuing similar circulars, does not prevent the ct. interfering after the expiration of the licence.—AXMANN *v.* LUND (1874), L. R. 18 Eq. 330; 43 L. J. Ch. 655; 31 L. T. 119; 22 W. R. 789.
Annotations:—**Consd.** Halsey *v.* Brotherhood (1880), 15 Ch. D. 514; Challender *v.* Royle (1887), 36 Ch. D. 425.

3354. Form of order—Interim injunction.]—The undertaking in damages usually inserted in an order granting an *interim* injunction should not be inserted in an *interim* order in a patent action restraining one of the parties from publishing threats of legal proceedings for infringement of his alleged patent.—FENNER *v.* WILSON, [1893] 2 Ch. 656; 62 L. J. Ch. 984; 68 L. T. 748; 42 W. R. 57; 3 R. 629; 10 R. P. C. 283.
Annotation:—**Reid.** Haskell Golf Ball Co. *v.* Hutchison & Main (1904), 21 R. P. C. 497.

3355. —— ——.]—WRIGHTSON *v.* TAYLOR, MADDOX & CO. (1907), 24 R. P. C. 347.

3356. Where only one threat—Defendants admitting non-infringement—Injunction in default of undertaking.]—The L. co., being owners of a patent, wrote to B. & co. a threatening letter in respect of certain glass vessels, which they were in fact making for W. W. brought an action to restrain the L. co. from threatening. The L. co., after being allowed by arrangement to inspect B. & co.'s works, admitted that what they were doing was no infringement of the patent:—*Held:* pltf. was entitled to an injunction, or an undertaking by defts. not to threaten in respect of the glass vessels specified in the letter, & defts. must pay the costs of the action.—WEBB *v.* LEVINSTEIN & CO., LTD. (1898), 15 R. P. C. 78.

3357. Breach of injunction—What amounts to—Issue of circulars as agent—Containing threats by principal.]—An order restraining deft., his servants & agents, from threatening pltfs., or any of their customers with "any legal proceedings or liability" in respect of the manufacture, sale, or purchase of a certain patented article is not disobeyed by the circulation by deft. of a pamphlet with his name thereon as agent for a third person, containing a notice signed by the third person, & stating that he was the exclusive maker of the article, & it was his intention to prosecute all infringers of his patents.—ELLAM *v.* MARTYN (H. F.) & CO. (1898), 68 L. J. Ch. 123; 79 L. T. 510; 47 W. R. 212; 15 T. L. R. 107; 43 Sol. Jo. 112; 16 R. P. C. 28.

3358. —— —— Action for infringement.]—An action against a co. to restrain threats was terminated by an order embodying an undertaking not to threaten. Subsequently pltfs. in the action moved for sequestration against the co. & to attach certain directors for alleged breaches of the undertaking contained in the order. The breaches complained of were (*a*) an action commenced by the co.; (*b*) certain letters written on its behalf in answer to inquiries:—*Held:* the undertaking had not been broken, & the motion was dismissed with costs.—BEVEN & ALEXANDER *v.* WELSBACH INCANDESCENT GAS LIGHT CO., LTD. (1902), 20 R. P. C. 69.

3359. —— —— Letters written in answer to inquiry.]—BEVEN & ALEXANDER *v.* WELSBACH INCANDESCENT GAS LIGHT CO., LTD., No. 3358, *ante*.

Necessity for strict proof.]—*See* INJUNCTION, Vol. XXVIII., p. 525, No. 1331.

B. Necessity for Non-Infringement by Plaintiff.

3360. Whether necessary.]—On motion under the Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, to restrain the publication of advertisements warning the public that the invention claimed by appct. is an infringement of patent rights claimed by the advertisers, & that all necessary proceedings will be taken to protect such rights should any attempt be made to manufacture or supply the invention claimed by appct., appct. as a condition precedent to obtaining an injunction, must show that there has been no infringement on his part, & if in opposition to the motion a case of alleged infringement is raised by resps.' affidavits, an injunction will not be granted, although resps. decline to take legal proceedings in respect of such alleged infringement against appct.—BARNEY *v.* UNITED TELEPHONE CO. (1885), 28 Ch. D. 394; 52 L. T. 573; 33 W. R. 576; Griffin's Patent Cases (1884–86), 48; 2 R. P. C. 173.
Annotation:—**Dbtd.** Challender *v.* Royle (1887), 36 Ch. D. 428, n.

3361. ——.]—CHALLENDER *v.* ROYLE, No. 2273, *ante*.

3362. —— Balance of convenience considered.]—In a motion by pltf. under Patents, Designs, & Trade Marks Act, 1883, for an *interim* injunction to restrain deft. from issuing threats of legal proceedings for an alleged infringement of deft.'s patent, it is not necessary for pltf. to prove that he has not infringed deft.'s patent, but the question is one of the balance of convenience & inconvenience, & the ct. will decide according to its opinion whether more harm will be done by granting or refusing an injunction.—WALKER *v.* CLARKE (1887), 56 L. J. Ch. 239; 56 L. T. 111; 35 W. R. 245; 3 T. L. R. 297; 4 R. P. C. 111.
Annotation:—**Apld.** Challender *v.* Royle (1887), 36 Ch. D. 428, n.

C. Motive of Defendant.

3363. Whether plaintiff must prove malice or mala fides.]—Pltfs. were the makers of "Rainbow Water Raisers or Elevators," & they commenced an action for an injunction to restrain defts. from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of defts. Pltfs. subsequently gave notice of a motion to restrain the issue of this

Sect. 3.—*In respect of threat of legal proceedings: Sub-sect.* 5, *C. & D.* (*a*) & (*b*).]

circular until the trial of the action. Defts. then commenced a cross-action claiming an injunction to restrain pltfs. from infringing their patents:—*Held:* as there was no evidence of *mala fides* on the part of defts., they ought not to be restrained from issuing the circular until their action had been disposed of, but they must undertake to prosecute their action without delay.—HOUSEHOLD & ROSHER *v.* FAIRBURN & HALL (1884), 51 L. T. 498; 1 R. P. C. 109.

3364. ——.]—A patentee issued a circular calling attention to his patent for folding screens, & intimating his intention to take legal proceedings against infringers thereof. B., a maker of folding screens in Germany, commenced an action to restrain the issue of this circular to his customers or persons who might become his customers, whereupon the patentee commenced an action against B. & his agent in England, N. On the first action coming on for trial:—*Held:* at the time the circular was issued deft. had a right to advertise himself as patentee, & there was no evidence of malice on his part, & the action must be dismissed, without costs.—SHARP *v.* BRAUER, BRAUER *v.* SHARP (1886), 3 R. P. C. 193; Griffin's Patent Cases (1884–1886), 205.

3365. ——.]—On Nov. 9 & 10, 1893, G., a patentee, threatened L. & a customer of L. with legal proceedings. L.'s solr. remonstrated, & challenged G. to bring an action for infringement. On Nov. 18, G. published an advertisement in a trade journal cautioning against infringement. On Nov. 23, L. commenced an action against G. to restrain the threats, & gave notice of motion. On Dec. 4, G. commenced an action for infringement of his patent against L. On Dec. 17, the motion in L.'s action was ordered to stand to the trial of the infringement action which G. undertook to prosecute with due diligence. Statement of claim was delivered by G. on Jan. 24, 1894. Defence & particulars of objections were delivered on Mar. 22. Further & better particulars were applied for in May, & an order made that further particulars be given. L., in June, applied for time to deliver the further particulars. At the same time G., who was late in delivering his reply, asked L. to grant extension of time to June 19. On that day G. discontinued the infringement action. L. then renewed his motion for an injunction to restrain the threats. L. contended (*a*) that G. had not prosecuted his action with due diligence; (*b*) that the effect of his threats was still continuing, & as he refused to recall his previous threats, he was, in fact, still making threats: & (*c*) that G. had made his threats *malâ fide ab initio*, & this was shown by his discontinuance:—*Held:* the right of action given by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, to restrain threats was taken away by G.'s action, though discontinued; such action was prosecuted with due diligence; there was nothing to show that G. made his threats *malâ fide*, or was intending to continue them, & the action was dismissed with costs.—ENGLISH & AMERICAN MACHINERY CO., LTD. *v.* GARE MACHINE CO., LTD. (1894), 11 R. P. C. 627.

3366. ——.]—DREDGE *v.* PARNELL, PARNELL *v.* DREDGE (1896), 13 R. P. C. 392.

3367. ——.]—The I. co. & the S. co. being competing cos. in the manufacture of incandescent mantles, the S. co. brought an action for infringement of a patent. The action was approaching trial, when the S. co.'s solrs. issued a circular giving notice of the action & stating that they were advised that the I. co.'s mantles were infringements, & warning purchasers that they exposed themselves to like actions, &, in the event of the S. co. succeeding, that the purchasers would be liable to pay damages & costs & to have their mantles destroyed by order of the ct. The I. co. thereupon commenced an action to restrain the issue of the circular, & moved for an interlocutory injunction against the S. co., their solrs., & other agents. An *ex p.* injunction was granted, & the motion was now heard on evidence. The I. co. contended that the circular was issued *malâ fide* on the following grounds:—(*a*) that it stated more than the S. co.'s legal rights; (*b*) that the patent was an old one, & that the I. co. had been carrying on the same process for nine years to the knowledge of the patentees, & that the S. co. did not, *bonâ fide*, believe in their case:—*Held:* the circular was perfectly accurate if read carefully, but that ignorant persons might misread it; as it was strictly correct, no evidence of malice could be drawn from it; the circumstances explained the delay in bringing the infringement action; there was no evidence that the S. co. knew of any infringement; & there was no evidence of *mala fides*.—INCANDESCENT GAS LIGHT CO., LTD. *v.* SUNLIGHT INCANDESCENT GAS LAMP CO., (1897),

3368. ——.]—A counterclaim in a passing off action which alleges threats barely, & claims an injunction to restrain such threats, but shows no malice or bad faith on the part of pltf. who is maintaining the action which he has brought, can be struck out under R. S. C., Ord. 25, r. 4, as disclosing no reasonable cause of action under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, or otherwise. Leave to amend the counterclaim by alleging malice was refused.—RIPLEY *v.* ARTHUR & CO. (1900), 18 R. P. C. 82; 45 Sol. Jo. 165.

3369. —— **Threat by licencees of patent.**]—INCANDESCENT GAS LIGHT CO., LTD. *v.* NEW INCANDESCENT (SUNLIGHT PATENT) GAS LIGHTING CO., LTD., No. 3331, *ante*.

3370. —— **Patents & Designs Act, 1907 (c. 24), s. 36.**]—CRAIG *v.* DOWDING, No. 3345, *ante*.

3371. Bona fides of defendant—Whether valid defence.]—HALSEY *v.* BROTHERHOOD, No. 2809, *ante*.

3372. —— ——.]—SKINNER & CO. *v.* SHEW & CO., No. 3343, *ante*.

3373. —— ——.]—TEMLER *v.* STEVENSON (H.) & SONS, TEMLER *v.* ACT. FUR CARTONNAGEN INDUSTRIE, No. 3330, *ante*.

3374. —— ——.]—(1) The H. co. were the owners of two patents for hair curlers. In 1894, P. & co. placed upon the market a hair curler which the H. co. alleged was an infringement of their patent rights. On May 10, 1894, the H. co. commenced an action against P. & Co. for infringement, but discontinued this action on June 18, 1895, on account of their having discovered that an amendment of the specification of one of their patents, which they thought had been made, had not been, in fact, completed, &, therefore, such patent was invalid. Thereupon P. & co. commenced an action against the H. co. for an injunction to restrain them from threatening, to which the H. co. raised, by way of defence, the action which they had commenced & discontinued as aforesaid. The threats action came on for trial before the judge & a special jury. The jury found that the threats of the H. co. to take proceedings against P. & co. were made in

good faith, & that their action against P. & co. was commenced & prosecuted with due diligence.

(2) A question was then argued before the judge as to whether the H. co.'s action was an illegal one under the Statute of Monopolies. The judge held that it was not, & gave judgment for the H. co., with costs.—PECK & CO. *v.* HINDES, LTD. (1898), 67 L. J. Q. B. 272; 14 T. L. R. 164; 15 R. P. C. 113.

D. Commencement of Infringement Action as Bar to Right.

(a) In General.

See Patents & Designs Acts, 1907 (c. 29), s. 36; 1919 (c. 80), sched.

3375. Loss of right to injunction.]—BERLINER *v.* EDISON BELL CONSOLIDATED PHONOGRAPH CO., LTD. (1899), 16 R. P. C. 336.

3376. —— Action commenced by owner of patent — No injunction against licencees.] BARNETT & FOSTER *v.* BARRETT'S SCREW STOPPER BOTTLING CO., LTD. (1884), 1 R. P. C. 9; Griffin's Patent Cases (1884–1886), 47.

3377. —— —— ——.]—INCANDESCENT GAS LIGHT CO., LTD. *v.* NEW INCANDESCENT (SUNLIGHT PATENT) GAS LIGHTING CO., LTD., No. 3331, *ante*.

3378. —— Action commenced with due diligence.]—CHALLENDER *v.* ROYLE, No. 2273, *ante*.

3379. —— ——.]—(1) A solr.'s letter saying that proceedings will be instituted is a threat within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32. The action for infringement pointed at by the sect. is an action by the patentee against the person whom he has threatened, not against any other person who may be infringing.

(2) Where there is an action to restrain threats deft. is not bound to assert his rights by defence or counterclaim, but is entitled to bring a separate action for the alleged infringement of his patent. But if he does so, arrangements ought to be made so that the proceedings in one action should be stayed to abide the result of the trial in the other.

(3) A. commenced an action under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, against B. to restrain threats. B. within ten days brought a cross-action against A. for infringing his patent. After pleadings had been delivered & notice of trial given in both actions, A. offered to stay his action for threats until B.'s action was concluded; but B. refused, & forced A. to proceed, & both actions came on together for trial. B.'s action having been dismissed with costs:—*Held:* on the true construction of the section, A.'s right of action was taken away by B. having within a reasonable time commenced & prosecuted with due diligence his cross-action for infringement; & A.'s action must be dismissed, but, under the circumstances, without costs.—COMBINED WEIGHING & ADVERTISING CO. *v.* AUTOMATIC WEIGHING MACHINE CO. (1889), 42 Ch. D. 665; 58 L. J. Ch. 709; 61 L. T. 474; 38 W. R. 233.

Annotations:—As to (1) **Apld.** Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435. *As to* (3) **Apprvd.** Skinner *v.* Shew, [1893] 1 Ch. 413.

3380. —— ——.]—MACKIE *v.* SOLVO LAUNDRY SUPPLY CO., LTD. (1892), 9 R. P. C. 465.

3381. —— ——.]—EDLIN *v.* PNEUMATIC TYRE CO. (1893), 37 Sol. Jo. 455.

3382. —— —— Whether action may succeed or fail immaterial.]—CRAIG *v.* DOWDING, No. 3345, *ante*.

—— —— What amounts to diligence.]—*See* Sub-sect. 5, D. (*c*), *post*.

When diligence runs.]—*See* Sub-sect. 5, D. (*c*), *post*.

3383. —— Action dismissed.] — COMBINED WEIGHING & ADVERTISING CO. *v.* AUTOMATIC WEIGHING MACHINE CO., No. 3379, *ante*.

3384. —— ——.]—METROPOLITAN GAS METERS, LTD. *v.* BRITISH, FOREIGN & COLONIAL AUTOMATIC LIGHT CONTROLLING CO., LTD., No. 3389, *post*.

3385. Refusal to bring action for infringement—Injunction granted restraining threats.]—ROLLINS *v.* HINKS, No. 2764, *ante*.

3386. —— ——.]—WILLOUGHBY *v.* TAYLOR, No. 3337, *ante*.

3387. Stay of proceedings in respect of threats—Pending trial of infringement.]—COMBINED WEIGHING & ADVERTISING CO. *v.* AUTOMATIC WEIGHING MACHINE CO., No. 3379, *ante*.

3388. —— Infringement action before proceedings for threats—Vexatious action.] —(1) An action to restrain threats in respect of an alleged infringement of a patent ought not, having regard to Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, to be commenced after an action to restrain the alleged infringement has been instituted & is being prosecuted with due diligence; & if it is so commenced, all proceedings in it may be stayed as being vexatious.

(2) An action by a patentee against a licencee brought *bonâ fide* for royalties in respect of articles manufactured, as the patentee alleges, but the licencee denies, in accordance with the patent, & for an injunction to restrain the licencee from manufacturing the articles, except subject to the terms of the licence, is an action to restrain the infringement of the patent within Patents, Designs. & Trade Marks Act, 1883 (c. 57), s. 32, notwithstanding that the validity of the patent cannot be contested by the licencee.—BARRETT *v.* DAY, DAY *v.* FOSTER (1890), 43 Ch. D. 435; 59 L. J. Ch. 464; 62 L. T. 597; 38 W. R. 362; 7 R. P. C. 54.

Annotation:—As to (1) **Apld.** Skinner *v.* Shew, [1893] 1 Ch. 413.

3389. —— At instance of plaintiff—Subsequent dismissal without costs.]—In Feb. 1911, pltfs. ascertained that defts. were issuing threats with reference to the alleged infringement of their patent. On Feb. 14, 1911, they wrote to defts. with reference to the threats. On Mar. 31, 1911, they issued their writ in the present action, & on Apr. 13, 1911, gave notice of motion for an injunction to restrain the issue of the threats. On Apr. 21, 1911, defts. issued their writ against the pltfs. for an infringement of their patent. On Apr. 25, 1911, the motion in the threats action came on for hearing, and by consent the action was stayed pending the result of the action for infringement, the costs being reserved, with liberty to apply. On Dec. 14, 1911, judgment was given in the infringement action dismissing the action, & that judgment was subsequently affirmed by the Ct. of Appeal. On an application by first pltfs. that their action might be dismissed, but without costs:—*Held:* pltfs. had adopted a proper course with a view of saving expense by staying their action pending the decision of the infringement action & not putting defts. to the expense of proving that they had complied with the proviso to Patents & Designs Act, 1907 (c. 29), s. 36, & they were therefore entitled to have their action dismissed without costs.—METROPOLITAN GAS METERS, LTD. *v.* BRITISH, FOREIGN & COLONIAL AUTOMATIC LIGHT CONTROLLING CO., LTD., [1913] 1 Ch. 150; 82 L. J. Ch. 74; 108 L. T. 151; 57 Sol. Jo. 129.

(b) What Amounts to Action.

See Patents & Designs Acts, 1907 (c. 29), s. 36, & 1919 (c. 80), sched.

t. 3.—*In respect of threat of legal proceedings: Sub-sect.* 5, *D.* (*b*) *&* (*c*).]

3390. Action against other than plaintiff—Any :son threatened.]—CHALLENDER *v.* ROYLE, No. 73, *ante.*

3391. —— —— For infringement to which 'eats relate.]—COMBINED WEIGHING & ADVERTIS-G CO. *v.* AUTOMATIC WEIGHING MACHINE CO.,). 3379, *ante.*

3392. —— —— Customer of plaintiff—Under-king to bring subsequent action against plaintiff.] Defts. being the owners of a patent for "an provement in eyelets," wrote by their solicitors B. & R., customers of pltfs., complaining of the le by B. & R. of eyelets alleged to be infringe-ents of the patent & threatening proceedings; & R. thereupon wrote saying that they had scontinued the sale. The solrs. of defts. also rote a similar letter to P., another of pltfs.' stomers, & an action for infringement was bsequently commenced by defts. against him, which he consented to a perpetual injunction. ltfs., who manufactured the articles complained abroad, had only an agent in this country. hey commenced an action against defts. to restrain reats, & moved for an interlocutory injunction. he judge granted an injunction. Defts. appealed. he appeal was settled on the terms that defts. ould bring an infringement action against pltfs.' gent, pltfs. undertaking to give security for costs, the injunction being dissolved with liberty to pply to restore it if the action were not prosecuted ith due diligence.—ENGELS *v.* HUBERT UN-HANGEABLE EYELET SYNDICATE, LTD. (1902), 9 R. P. C. 201, C. A.

3393. —— Against licencee—For royalties & estraint of manufacture.]—BARRETT *v.* DAY, DAY . FOSTER, No. 3388, *ante.*

3394. —— Users of infringing articles—No ction against makers.]—"Z" ELECTRIC LAMP MANUFACTURING CO., LTD. *v.* OSRAM LAMP WORKS, LTD. (1911), 28 R. P. C. 479.

3395. Action on one patent—Validity of four patents in issue.]—DOWSON, TAYLOR & CO., LTD. *v.* DROSOPHORE CO., LTD., No. 3321, *ante.*

3396. Action commenced & discontinued.]—PECK & CO. *v.* HINDES, LTD., No. 3374, *ante.*

3397. Counterclaim in action for threats.]—The E. co. were owners of a patent for improvements in the construction of chains for velocipedes, mainly consisting of making rivets by a particular process. In 1898 they published in various newspapers a letter alleging in effect that the A. co. was infringing their patent, & that they intended to take steps against this infringement. After some correspondence, the A. co. commenced an action against the E. co. for an injunction & £2,500 damages, raising a case under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, & also alleging that the letter was a libel on them in their trade or business. Defts. delivered a defence & counterclaim, the counterclaim being for an injunction & other relief in respect of infringement of said patent. The action was tried before a judge & a special jury, &, in answer to the questions put to them by the judge, the jury found (*a*) pltfs., the A. co., were not infringing defts.' patent; (*b*) defts. did not begin an action to enforce their claim with due diligence; (*c*) defts.' threats were made with a view to injure pltfs.; (*d*) pltfs. were entitled to £500 damages for the threats & £5 for the libel.—APPLEBY'S (ALFRED) TWIN ROLLER CHAIN, LTD. *v.* EADIE CHAIN, LTD. (1899), 16 R. P. C. 318.

3398. Action in which infringement may be tried—At some stage of proceedings.]—In Apr. 1903, defts., the owners of a patent, issued circulars warning persons dealing in, or using any of pltfs.' "saddles with four, six or more wires made in infringement" of the patent. They also subsequently made certain threats in respect of specific saddles of a pattern known as "L 5," "L 14" & "L 16." In May, 1903, defts. commenced an action against pltfs. for infringement of the patent, but the particulars of breaches did not mention these saddles; "L 5" & "L 14" had not been sold prior to the commencement of the infringement action, & defts. alleged that they did not then know of "L 16." In Nov. 1903, pltfs. commenced this action to restrain defts. from issuing threats in respect of "L 5," "L 14," & "L 16," & for damages. They based their action both on Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, & on a common law right, alleging *mala fides* on the part of defts. Defts. contended that their action against pltfs. was an action for infringement within the proviso to Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, & was a defence under that sect., & they denied *mala fides*. At the trial, pltfs. submitted that the issue whether the three saddles mentioned were infringements of the patent should be decided in the threats action, & contended that this question could not be decided in the pending action for infringement. The action for infringement had, at the date of the trial of this action, been stayed:—*Held:* the infringement action was an action for the infringement of the patent within the proviso to Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 32, & it constituted a defence to the threats action so far as founded on that sect., there was no evidence of *mala fides* in defts.' conduct, & under the circumstances it was unnecessary to decide the issue of infringement, which could be decided at some stage of the infringement action.—LYCETT SADDLE & MOTOR ACCESSORIES CO., LTD. *v.* BROOKS (J. B.) & CO., LTD. (1904), 21 R. P. C. 656.

3399. Action pending.]—A patentee agreed in writing, in July, 1890, to assign his patent to the L. co. In Nov. 1890, the patentee commenced an action against the K. co. for alleged infringement. In Feb. 1891, pending the patentee's action, the L. co. sent letters & circulars threatening customers of the K. co. with liability for an alleged infringement. The K. co. then commenced an action under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, [as persons aggrieved] against the L. co. for an injunction to restrain such threats:—*Held:* the fact of the patentee's action being pending did not entitle the L. co. to the benefit of the proviso that the sect. shall not apply if the person making such threats with due diligence commences & prosecutes an action for infringement of his patent; & the K. co. were entitled to an interlocutory injunction against the co.—KENSINGTON & KNIGHTSBRIDGE ELECTRIC LIGHTING CO. *v.* LANE FOX ELECTRICAL CO., [1891] 2 Ch. 573; 64 L. T. 770; 39 W. R. 650; 7 T. L. R. 471; *subsequent proceedings, sub nom.* LANE FOX *v.* KENSINGTON & KNIGHTSBRIDGE ELECTRIC LIGHTING CO., [1892] 3 Ch. 424, C. A.

3400. Action commenced before threats issued.]—Pltfs. brought an action against defts. for infringement of their patent. Pltfs. then published a circular to the effect that their patent was being infringed, & that they were bringing a large number of actions against specfied alleged infringers, including the action against defts. Defts. delivered a defence & counterclaim. The

defence was, that the goods complained of as infringements of the patent were manufactures & sold under a licence granted by pltfs. to predecessors of the defts. By their counterclaim they claimed an injunction to restrain pltfs. from publishing, or representing by circulars, etc., that defts. were not authorised to make & sell such goods. Pltfs. contended that, though they had given a licence to certain persons to use their patent, there were no rights under the circumstances to assign to defts. without pltfs.' consent, a consent that had never been granted. Upon motion for an interlocutory injunction:—*Held:* the case was not within Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, because of the proviso at the end of that sect., in this case an action having been *bonâ fide* brought even before the circular was issued; there was no analogy between this case & where a tenant sued his landlord, for in this case the question between the parties was whether defts. were licencees at all; & although the publication of the circular complained of might greatly damage defts., they had no equity to restrain the plaintiffs from stating that they were taking proceedings.—DUNLOP PNEUMATIC TYRE CO., LTD. *v.* NEW SEDDON PNEUMATIC TYRE & SELF-CLOSING TUBE CO., LTD. (1897), 76 L. T. 405; 13 T. L. R. 246, C. A.

(*c*) *Due Diligence.*

See Patents & Designs Acts, 1907 (c. 29), s. 36; 1919 (c. 80), sched.

3401. From when diligence runs—Time of threat—Not discovery of infringement.]—CHALLENDER *v.* ROYLE, No. 2273, *ante*.

3402. —— —— ——.]—On Apr. 19, 1904, the owners of letters patent commenced an action for infringement of the patent, in which they delivered their statement of claim on May 20, 1904. On June 8, they issued advertisements containing threats, which were circulated among the customers of defts. & referred specifically to their goods. Defts. moved in the action to restrain pltfs. from representing by advertisements or otherwise that defts.' goods were infringements of pltfs.' patent, & they relied on Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, alleging that pltfs. had known of the sale of defts.' goods for eighteen months; they also alleged that the advertisements were a contempt of ct. At the date of the hearing of the motion, on June 23, defts. had not put in their defence. Pltfs. had brought actions against other persons, who had submitted:—*Held:* "due diligence" in sect. 32 means after the threat & not after the acts complained of as infringements, & no want of due diligence on the part of pltfs. was proved.—HASKELL GOLF BALL CO. *v.* HUTCHINSON & MAIN (1904), 20 T. L. R. 606; 21 R. P. C. 497.

3403. Application of due diligence—To prosecution as well as commencement.]—HOUSEHOLD & ROSHER *v.* FAIRBURN & HALL (1885), Griffin's Patent Cases (1884–1886), 131.

3404. —— ——.]—In Dec. 1896, I. commenced an action against B. for infringement of a patent, which action was discontinued in Apr. 1898; in May, 1898, I. commenced a second action against B. for infringement of the same & of another patent, & in Feb. 1899, this action was dismissed on application by B., I. not having given notice of trial. In Apr. 1899, B. commenced an action against I. & others claiming damages for threats & in respect of other matters, & alleged threats prior to the commencement of the first patent action as well as during its pendency & also threats in a circular issued by defts. on June 1, 1898, after the commencement of the second patent action. Defts. pleaded (*inter alia*) that the patent actions were *bonâ fide*, & had been commenced & prosecuted with due diligence. The jury found at the trial (*a*) that the threats were made *bonâ fide*; (*b*) that the first action was brought honestly & *bona fides*; (*c*) that it was not prosecuted with due diligence, & they gave £80 damages; & (*d*) in answer to the question whether the second action was brought honestly & *bonâ fide* & prosecuted with due diligence, they found in the negative, & gave £135 damages, as well as giving further findings on other issues. Judgment was given for pltf. for £80 & costs, to be taxed, on that issue, & further consideration of the other matters was adjourned. On the further argument defts. contended that there was no evidence of any threats to support the verdict for £135; that the circular of June 1, 1898, was a legitimate answer to a circular issued by pltf., & also that it was a mere general warning; & that the jury had not found that it was a threat:—*Held:* there was some evidence of threats to go to the jury.—BISHOP *v.* INMAN (1900), 17 R. P. C. 749.

3405. —— ——.]—VOELKER INCANDESCENT MANTLE, LTD. *v.* WELSBACH INCANDESCENT GAS LIGHT CO., LTD. (1901), 18 R. P. C. 494.

3406. What amounts to "due diligence" Action commenced with due diligence—Subsequently discontinued.]—COLLEY *v.* HART, No. 3411, *post*.

3407. —— —— ——.]—ENGLISH & AMERICAN MACHINERY CO., LTD. *v.* GARE MACHINE CO., LTD., No. 3365, *ante*.

3408. —— —— ——.]—TEMLER *v.* STEVENSON (H.) & SONS, TEMLER *v.* ACT. FUR CARTONNAGEN INDUSTRIE, No. 3330, *ante*.

3409. —— —— ——.]—PECK & CO. *v.* HINDES, LTD., No. 3374, *ante*.

3410. —— —— ——.]—CRAIG *v.* DOWDING, No. 3345, *ante*.

3411. —— **Defendant awaiting delivery of statement of claim—To raise infringement on counterclaim in proceedings for threats.**]—(1) In order that an action by the owner of a patent for the infringement of his patent should be "prosecuted with due diligence" within the meaning of Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 32, so as to exclude the operation of the former part of that sect., it is not necessary that the infringement action should be prosecuted up to judgment. Pltf. will not lose the protection of the proviso by reason of his discontinuing the action before trial upon discovering that he has no cause of action. *Semble*, *primâ facie*, if a threats action under sect. 32 is commenced against the owner of a patent by an alleged infringer, deft. will not be wanting in "due diligence" if he waits a reasonable time for the delivery of the statement of claim, in order that he may, if possible, raise the question of infringement by means of a counterclaim in the threats action, instead of incurring the expense of an independent action for infringement. (2) A threats action under sect. 32 was commenced against the owner of a patent by an alleged infringer on Sept. 22, 1888. The threats were contained in a trade circular which had been circulated on Sept. 15. On Dec. 6, deft. in the threats action commenced an action against pltf. for infringement of the patent. On Feb. 8, 1889, a statement of claim was delivered in the threats action, & on Mar. 9 the statement of defence was delivered. On May 13 a statement of claim was delivered in the infringement action, the time for its delivery having been several times extended by consent.

[. 3.—*In respect of threat of legal proceedings: Sub-sect.* 5, *D.* (*c*); *sub-sect.* 6. *Part XVI.*]

Nov. 6 the patentee discovered, by means of report of an expert made under an order for pection in the threats action, that there had n no infringement of the patent, & on Nov. 7 gave notice of discontinuance of the infringent action, & paid deft.'s costs of it. At the l of the threats action:—*Held:* the infringent action had been commenced & prosecuted h "due diligence," &, consequently, the proviso sect. 32 applied, & pltf. in the threats action had cause of action under that section.—COLLEY *v.* RT (1890), 44 Ch. D. 179; 59 L. J. Ch. 308; 62 T. 424; 38 W. R. 501; 6 T. L. R. 212; 7 P. C. 101.

notations:—*As to* (1) **Apld.** Craig *v.* Dowding (1908), 98 . T. 231. *Generally*, **Refd.** Johnston *v.* Edge (1891), 36 ol. Jo. 110.

3412. —— Negotiations carried on continuously.] EDLIN *v.* PNEUMATIC TYRE CO., No. 3381, *ante*.

3413. —— Second action for infringement—lor action dismissed for want of prosecution.]—e J. co. commenced an action against W. & S. infringement of patent, & also actions against ir of their customers, which were to abide the sult of the principal action. The action against . & S. was dismissed on account of the default the J. co. The J. co. then, on July 26, 1900, ued a threatening circular. On July 31, W. & S. mmenced an action to restrain the J. co. from reatening, & on the same day gave notice of otion for an interlocutory injunction, which came for hearing on Aug. 8. In the meantime the co. issued & served a writ in an infringement tion against a customer of W. & S.:—*Held:* ere being no evidence that the last-mentioned tion was not being prosecuted with due diligence, order would be made on the motion, except at the costs be reserved.—WAITE & SAVILLE. TD. *v.* JOHNSON DIE PRESS CO., LTD. (1900), 18 P. C. 1.

SUB-SECT. 6.—DAMAGES.

See, generally, DAMAGES, Vol. XVII., pp. 78 *et q.*

3414. When given—Notice issued bonâ fide.]—ALSEY *v.* BROTHERHOOD, No. 2809, *ante*.

3415. When assessed—At trial—Not on reference.]—In an action to restrain the issue of threats y a patentee an injunction was granted & an nquiry ordered as to damages caused to pltf. In is statement of claim pltf. complained of threats ommencing in May, 1886, & no evidence was iven of any other threats at the trial. On the nquiry before the Chief Clerk, evidence was admitted of threats of earlier date. Shorthand notes f all the proceedings before the Chief Clerk were aken. The Chief Clerk substantially attributed o defts.' threats the whole of the falling off which e found to have taken place in pltf.'s trade, hough the pltf. had been obliged to take liquidaion proceedings about that time. He admitted vidence of the communication of defts.' threats o third persons, & found £1,348 as damages. Defts. moved to vary this report on the ground hat the evidence was improperly admitted, & that here was no evidence of threats prior to the hreats complained of in the pleadings:—*Held:* the Chief Clerk had improperly admitted hearsay evidence, & there was no evidence that the earlier threats had been authorised by defts., defts. were liable for the actual damages caused by the threats made by them, & not for damages resulting from mere rumours or threats unauthorised by them, the Chief Clerk was wrong in attributing the whole loss in trade of pltf. to defts.' threats, as it was clear that part of it must be attributed to the liquidation proceedings, the judge had taken a fair view, which was all that was possible, in the circumstances of the case. The question of damages should have been decided by the judge at the trial & not referred.—UNGAR *v.* SUGG (1892), 9 R. P. C. 114, C. A.

3416. Inquiry as to damages.]—JOHNSON *v.* EDGE, No. 3326, *ante*.

3417. —— Whether limited to threats pleaded.]—UNGAR *v.* SUGG, No. 3415, *ante*.

3418. —— What evidence admissible—Hearsay evidence.]—UNGAR *v.* SUGG, No. 3415, *ante*.

3419. —— —— Letter terminating negotiations for contract—In consequence of threats.]—Pltfs. having, in July, 1892, obtained an injunction against deft. in respect of threats with regard to cameras made & sold by pltfs., an inquiry as to damages was directed. Deft. brought his action for infringement, but discontinued it in May, 1893, & pltfs. then proceeded with their inquiry. The Chief Clerk found that through deft.'s threats pltfs. had lost a contract which was in negotiation between themselves & a co., under which pltfs. were to supply the co. exclusively with cameras for three seasons beginning in Mar. 1892, 1893, & 1894 respectively, the co. to guarantee orders up to a certain amount, & to have the option to continue sole licencees after that time. The Chief Clerk assessed the damages in respect of the loss of the contract at the profit on the minimum amount of orders for the years 1892 & 1893:—*Held:* the valuable part of the season of 1893 had expired when deft. discontinued his action for infringement, giving no damages in respect of the year 1894, when the market was open to pltfs. Part of the evidence before the Chief Clerk consisted of the correspondence & evidence on which the judgment at the trial had been obtained, & in particular of a letter from the solrs. of the co. to pltfs. referring to the correspondence, & saying, "Under these circumstances it is absolutely impossible for our clients to continue any negotiations for an agreement."—SKINNER & CO. *v.* SHEW & CO., [1894] 2 Ch. 581; *sub nom.* SKINNER & CO. *v.* PERRY, 63 L. J. Ch. 826; 71 L. T. 110; 11 R. P. C. 406; 8 R. 455.

Annotation:—**Consd.** Horne *v.* Johnston (1921), 38 R. P. C. 366.

3420. Measure of damages—Actual loss caused by threats made—Not loss resulting from mere rumours—Or authorised threats.]—UNGAR *v.* SUGG, No. 3415, *ante*.

3421. —— Not loss due to delayed erection of machinery—Nor expenses of inquiry into alleged infringement.]—DRIFFIELD & EAST RIDING PURE LINSEED CAKE CO. *v.* WATERLOO MILLS CAKE & WAREHOUSING CO., No. 3342, *ante*.

3422. —— Loss of contract—Assessed on loss of profit on minimum orders.]—SKINNER & CO. *v.* SHEW & CO., No. 3419, *ante*.

Ascertainment difficult.]—*See* DAMAGES, Vol. XVII., p. 93, No. 100.

k. *When given.*]—GILLESPIE *v.* YOUNG (1867), 5 Macph. (Ct. of Sess.) (H. L.) 106; 39 Sc. Jur. 567.—SCOT.

Part XVI.—International and Colonial Arrangements.

Patents & Designs Acts, 1907 (c. 29), s. 91; 1914 (c. 18), s. 1; 1919 (c. 80), sched.; Patent Rules, 1920, rr. 15–18.

3423. To whom patent granted under International Convention—Person who has made foreign application.]—Application under the International Convention refused by Comptroller-General. The A.-G. confirmed the Comptroller's decision. A patent under the International Convention can only be granted to the person who has made the foreign application.—*Re* SHALLENBERGER'S APPLICATION (1889), 6 R. P. C. 550.

3424. —— ——.]—Application under the International Convention refused by the Comptroller-General. The A.-G. confirmed the Comptroller's decision. A patent under the International Convention can only be granted to the person who has made the foreign application:—*Semble:* a corpn. can apply under sect. 103.—*Re* CAREZ'S APPLICATION (1889), 6 R. P. C. 552.

3425. —— ——.]—On July 5, 1912, an application for a patent was made by L. & B., &, under Patents & Designs Act, 1907 (c. 29), s. 91, the date claimed for the application was Mar. 30, 1912, on which date a patent for the same invention had been applied for in Germany by L. alone. It appeared that, under a deed of June 3, 1912, B. became in the view of the German Patent Office a co-patentee with L., & the German application was dealt with on that footing. The Chief Examiner refused to accept the application unless amended so as to make L. the sole appct. Appcts. appealed to the Law Officer:—*Held:* L., & L. alone, was the person entitled to make the application in this country, & the decision of the Chief Examiner was upheld.—*Re* LENTZ & BERNER'S APPLICATION (1913), 31 R. P. C. 71.

3426. —— **Assignee of foreign inventor.**]—"Assignee" under Patents & Designs Act, 1907 (c. 29), s. 91, as amended by the Patents & Designs Act, 1914 (c. 18), means assignee of the benefit of the invention in this country or of the right to apply for a patent in this country. If appct. in the foreign state has assigned, the assignee should make the application in this country under the Convention. The Comptroller-General is entitled to ask an appct. whether he has assigned his rights in this country.—*Re* EISLER'S APPLICATION (1916), 34 R. P. C. 89.

3427. —— **Foreign applicant not beneficial owner—What conditions may be imposed.**]—*Re* WOHL'S APPLICATION (1924), 42 R. P. C. 45.

3428. —— **Foreign applicants without equitable interest—Necessity for assignment of legal interest.**]—NOTES OF OFFICIAL RULINGS, 1926 (B) (1926), 43 R. P. C. App. ii.

3429. How foreign corporation may apply.]—*Re* CAREZ'S APPLICATION, No. 3424, *ante*.

3430. ——.]—A foreign corpn. applied for a patent on form A., declaring that they were the true & first inventors of the invention. The Comptroller required the application to be amended. The Law Officer, on appeal, confirmed the Comptroller's decision. Form A. in the schedule to the Patent Rules is not applicable to the case of corpn., but is intended for personal appcts. who are true & first inventors. Form A. is intended for the use where there has been a communication from abroad, whether the communicator is a corpn. or private individual.—*Re* SOCIÉTÉ ANONYME DU GENERATEUR DU TEMPLE'S APPLICATION (1895), 13 R. P. C. 54.

3431. Date of English patent—Conclusive—No application to ante-date—Effect of publication during period for application.]—The protection against the consequences of the prior publication in this country of an invention patented in a foreign country, with which her Majesty has made international arrangements under the Convention of 1883, applies only in cases where the patentee has obtained the limited rights given by Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 103, as amended by 48 & 49 Vict. c. 63, s. 6. Consequently a patentee who has obtained a patent in this country for the full period of fourteen years cannot rely upon the statutory protection to relieve him from the effect of a publication in this country, prior to the date of his patent, of a description of the same invention as already patented in France.—BRITISH TANNING CO. *v.* GROTH (1891), 60 L. J. Ch. 235; 64 L. T. 21; 7 T. L. R. 205; 8 R. P. C. 113.

Annotation:—**Reld.** Acetylene Illuminating Co. *v.* United Alkali Co., [1902] 1 Ch. 494.

3432. —— **Procedure by foreign patentee—Period for election as to date.**]—(1) When a patentee has applied under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 103, for protection for any invention in any foreign state with which the British Govt. has made an arrangement & afterwards makes an application in this country for his patent, he has two alternatives: he may either take a patent to run from the date of his prior application to the foreign state, or he may take a patent to run from the date of his English application, but in either alternative the date of his application in this country for the patent to which he is entitled under the sect. if he asks for it must be within seven months from the date of his foreign application: in other words, he must elect from what date his patent is to run within seven months from the date of his foreign application.

(2) In respect of the fourth patent defts. had delivered particulars of objection, including (*a*) a reference to certain inventions which showed that the patent was void for want of novelty; (*b*) a specification & particulars referring to certain electric furnaces previously invented by other persons. The patent made no claim to an electric furnace as part of the invention, but claimed for a process in which electric furnaces were used:—*Held:* it was a matter for proof & not for particulars of objection to show what the furnaces

PART XVI.

1. *Colonial registration of British or foreign patents.*]—The grantee of an English patent applied on Feb. 2 for letters of registration for the invention for which he held the English patent. The letters were granted on Mar 2. Between Feb. 2 & Mar. 2 newspapers arrived in the Colony containing a notice of the English patent & a description of the invention:—*Held:* this did not invalidate the letters of the registration.—BRUSH ELECTRICAL ENGINEERING CO. *v.* KINGSBURY (1891), 12 N. S. W. Eq. 211; 8 N. S. W. W. N. 57.—**AUS.**

m. ——.]—Under West Australian Patent Act, 1888, s. 49, holders of patents obtained in Great Britain or any other country are enabled to obtain letters of registration in the Colony without the formalities & delay necessary on an application for a patent, but subject to all the incidents & conditions to which letters patent would be subject:—*Held:* prior publication, or even prior user of an invention in the Colony after the date

were, & defts. were not entitled to a certificate under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 29, as to the particulars of objection.

(3) Pltfs. asked that, notwithstanding the fourth patent had been declared invalid, the ct. should give them a certificate, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 31, that the validity of the patent had come in question :—*Held :* the certificate under the sect. could only be granted where the patent had been declared valid.—ACETYLENE ILLUMINATING CO. *v.* UNITED ALKALI CO., [1902] 1 Ch. 494 ; 71 L. J. Ch. 301 ; 50 W. R. 361 ; 19 R. P. C. 213 ; *affd.*, 72 L. J. Ch. 214, C. A. ; (1904), 22 R. P. C. 145, H. L.

Annotation :—**Refd.** British Thomson-Houston Co. *v.* Charlesworth Peebles (1923), 40 R. P C. 426.

3433. —— Opposed by prior British patentee—Conditions for protection of prior patentee.]—An application for a patent was made by a citizen of the United States on July 6, 1920, claiming under sect. 91 of the Patents & Designs Acts, 1907 & 1919, the date Oct. 29, 1913. The claim was made under Patents, Designs, & Trade Marks (Temporary) Rules, 1914, r. 3 (*a*), which were in force when the application in the United Kingdom was made. The claim for this prior date under the Temporary Rules was opposed by a co. on the ground that it was not a case in which the earlier date could or ought to be allowed under the powers given to the Comptroller by the Temporary Rules. The co. had a direct interest in the question as to what date should be allowed the application & the patent when sealed, inasmuch as they had a British patent dated Dec. 9, 1918, in respect of similar subject-matter which would undoubtedly be affected by the grant of the earlier date on the application :—*Held :* in view of the understanding with the United States of America, appct. should be allowed the benefits given by Patents, Designs, & Trade Marks (Temporary) Rules, 1914, r. 3 (*a*), but, in the exercise of the Comptroller's discretion, specific conditions for the protection of persons *bonâ fide* in possession of the invention prior to the date of application in the United Kingdom should be imposed.—*Re* ARMSTRONG'S APPLICATION (1922), 39 R. P. C. 146.

Part XVII.—Patent Agents.

See Patents & Designs Act, 1919 (c. 80), s. 18, & Register of Patent Agents Rules, 1908, rr. 3–27 of 1919.

3434. Registration of patent agents—Effect of laying rules before Parliament—Statutory provision.]—The Board of Trade made certain rules known as the Register of Patent Agents Rules, 1889, which were laid before Parliament & no objection was taken to them within the forty days specified by Patents, Designs, & Trade Marks Act, 1883 (c. 57). They provided (*inter alia*) for the mode by which a patent agent practising before Patents, Designs, & Trade Marks Act, 1888 (c. 50), should be entered in the register ; & also for the payment of an entrance fee, & an annual fee by all patent agents continuing on the register, & for erasure from the register of the name of any person whose annual fee was not paid :—*Held :* (1) the rule having been laid before both Houses of Parliament for forty days without being annulled were " of the same effect as if they were contained in Patents, Designs, & Trade Marks Act, 1883 (c. 57), & as long as they remained in force it was not competent to question their authority ; (2) the right mode of procedure against an unregistered patent agent was by way of summary proceeding for the penalty.—PATENT AGENTS INSTITUTE *v.* LOCKWOOD, [1894] A. C. 347 ; 63 L. J. P. C. 75 ; 71 L. T. 205 ; 10 T. L. R. 527 ; 6 R. 219, H. L.

Annotations :—*As to* (1) **Refd.** *Re* London & General Bank (1894), 38 Sol. Jo. 682 ; Baker *v.* Williams, [1898] 1 Q. B. 23 ; Starey *v.* Graham, [1899] 1 Q. B. 406 ; Stephens *v.* Chown, Stephens *v.* Clark, [1901] 1 Ch. 894 ; Devonport Corpn. *v.* Tozer, [1902] 2 Ch. 182 ; Brightman *v.* Tate (1919), 35 T. L. R. 209 ; Barwick *v.* S. E. & C. Ry., [1920] 2 K. B. 387 ; Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616 ; R. *v.* Electricity Comrs., *Ex p.* London Electricity Joint Committee Co. (1920), Ltd., [1924] 1 K. B. 171.

3435. —— Payment of fee—By person practising before 1888.]—(1) The Register of Patent Agents Rules, 1889, are valid & in force ; & therefore a patent agent who has been *bonâ fide* in practice prior to the passing of the Patents, Designs, & Trade Marks Act, 1888 (c. 50), & who is consequently entitled under sect. 1 (3) of that Act to be registered as a patent agent, must pay before registration the fee prescribed by those rules.

(2) The right which a person had prior to the passing of the Patents, Designs, & Trade Marks Act, 1888 (c. 50), to practise as a patent agent & describe himself as such, is not a " right acquired " which is saved from the operation of the Act by sect. 27.—STAREY *v.* GRAHAM, [1899] 1 Q. B. 406 ; 68 L. J. Q. B. 257 ; 80 L. T. 185 ; 47 W. R. 392 ; 15 T. L. R. 163 ; 43 Sol. Jo. 223 ; 16 R. P. C. 106.

Annotation :—*Generally,* **Mentd.** R. *v.* Tristram (1899), 47 W. R. 639.

3436. Duty of agent—To know law relating to patents.]—A patent agent is bound to know the law with regard to the practice of obtaining patents, & should watch the decisions of the cts. with some care.

Deft., a patent agent, nearly a year after the decision of the Lord Chancellor in *Ex p. Bates & Redgate*, No. 772, *ante*, obtained provisional protection for an invention of pltfs., his principals, & then allowed five months to elapse before taking final steps to have the patent sealed, in consequence of which delay a second inventor succeeded in obtaining a patent for the same invention, although provisionally specified at a later date, & the A.-G. refused to seal pltfs.' patent :—*Held :* there was evidence of negligence to go to the jury.—LEE *v.* WALKER (1872), L. R. 7 C. P. 121 ; 41 L. J. C. P. 91 ; 26 L. T. 70.

Annotation :—**Refd.** *Ex p.* Bailey (1872), 8 Ch. App. 60.

of its patent, affects the letters of registration.—AUSTRALIAN GOLD RECOVERY CO., LTD. *v.* LAKE VIEW CONSOLS, [1901] A. C. 142, P. C.—**AUS.**

n. *Delay in filing application—Effect of Order in Council excluding war period.*]—*Re* LOCOMOTIVE STOKER CORPN. LETTERS PATENT (1920), 20 Exch. C. R. 191.—**CAN.**

o. —— *Application for foreign patent.*]—RUSSELL *v.* PATENTS COMR., [1925] 4 D. L. R. 796 ; [1925] Exch. C. R. 15.—**CAN.**

p. *Effect of Treaty of Peace (Germany) Order, 1920.*]—CANADIAN WESTINGHOUSE CO., LTD. *v.* GRANT (W. W.), LTD., [1926] Exch. C. R. 164.—**CAN.**

3437. Negligence of agent—Delay in obtaining complete protection.]—LEE *v.* WALKER, No. 3436, *ante*.

3438. What amounts to description as patent agent—Signing specification as "agent for applicant."]—A complete specification was lodged & signed F. F., 85, G. Street, agent for appct. F. F. who was not registered as a patent agent, was prosecuted for unlawfully & knowingly describing himself as a patent agent. The magistrate dismissed the summons, but stated a case for the ct. :—*Held :* F. F. had not described himself as a patent agent, & the case was dismissed with costs.—GRAHAM *v.* FANTA (1892), 9 R. P. C. 164.

Annotation :—**Reld.** Graham *v.* Tanner (1912), 82 L. J. K. B. 119.

3439. —— Description as "patent expert."]—GRAHAM *v.* ELI, GRAHAM *v.* HUGHES, GRAHAM *v.* BARLOW (1898), 14 T. L. R. 370 ; 15 R. P. C. 259.

Annotation :—**Apld.** Hans *v.* Graham, [1914] 3 K. B. 400.

3440. —— Description as "experts & engineers"—In circular describing patent agents' work.]—The Patents & Designs Act, 1907 (c. 29), s. 84 (1), provides that a person shall not be entitled to describe himself as a patent agent, unless he is registered as a patent agent.

Resp., who was not a registered patent agent, issued a circular in which his firm were described as "experts & engineers," & in which it was stated in effect that the firm were prepared to do the class of work which is usually done by patent agents, but the circular did not in terms state that the firm were patent agents :—*Held :* resp. had not described himself as a patent agent.—GRAHAM *v.* TANNER, [1913] 1 K. B. 17 ; 82 L. J. K. B. 119 ; 107 L. T. 681 ; 77 J. P. 35 ; 29 T. L. R. 24 ; 23 Cox, C. C. 217 ; 29 R. P. C. 683.

Annotation :—**Folld.** Hans *v.* Graham (1914), 83 L. J. K. B. 1255.

3441. —— Calling office "patent office."]—GRAHAM *v.* ELI, GRAHAM *v.* HUGHES, GRAHAM *v.* BARLOW, No. 3439, *ante*.

3442. —— Calling office "patent agency."]—The Patents & Designs Act, 1907 (c. 29), s. 84 (1), provides that a person shall not be entitled to describe himself as a patent agent unless he is registered as patent agent.

Applt., who was not a registered patent agent, occupied premises on which were affixed the words "Patent Agency" & "Patents, Designs, & Trade Marks" :—*Held :* applt. had not described himself as a patent agent.—HANS *v.* GRAHAM, [1914] 3 K. B. 400 ; 83 L. J. K. B. 1255 ; 111 L. T. 551 ; 78 J. P. 455 ; 24 Cox, C. C. 381.

3443. Professional misconduct of agent—Powers of council of Chartered Institute to hear complaint.]—A person who has a judicial duty to perform is disqualified if he has a bias which renders him otherwise than an impartial judge, or if he has so conducted himself in relation to the matters to be investigated as to create in the mind of a reasonable man a suspicion that he may have such a bias. The mere fact that the Council of the Chartered Institute of Patent Agents have unsuccessfully applied to the Board of Trade under rule 8 of their charter with reference to a complaint by a third party against a member of the Institute does not preclude them from proceeding to rehear the matter on the same complaint under rule 32. But if the Council have taken a substantial share in the proceedings before the Board of Trade by preferring & supporting the charges before the Board, they are disqualified from afterwards adjudicating upon the same charges.—LAW *v.* CHARTERED INSTITUTE OF PATENT AGENTS, [1919] 2 Ch. 276 ; 88 L. J. Ch. 319 ; 121 L. T. 50 ; 35 T. L. R. 385 ; 63 Sol. Jo. 447 ; 36 R. P. C. 163.

Restrictive covenant not to practise.] — *See* TRADE & TRADE UNIONS.

Part XVIII.—Offences.

See Patents & Designs Act, 1907 (c. 29), ss. 89, 90.

3444. Imitation of mark of patentee—Proof of offence required—Defence of want of novelty unavailable.]—In an action for a penalty under 5 & 6 Will. 4, c. 83, s. 7, for putting on an article made according to a patent the words, "K. & G. Patent Elastic," without the licence of the patentee, it is no defence "that the invention was not a new manufacture." But it is necessary to prove that such words did imitate, & were so put on by deft. "with a view of imitating" the mark of the patentee.—MYERS *v.* BAKER (1858), 3 H. & N. 802 ; 28 L. J. Ex. 90 ; 32 L. T. O. S. 133 ; 7 W. R. 66 ; 157 E. R. 691.

3445. Use of name after expiration of patent—No infringement.]—In 1862 a patent for improvements in filters was taken out by S. C. in the name of himself & of his son G. C., aged seventeen. After the death of S. C. in the same year, the business was carried on by G. C., who made & sold filters under the title, & marked with a label as "S. C.'s Improved Patent Gold Medal Self-cleaning Rapid Water Filters." The patent of 1862 was allowed to lapse in 1865. In 1867 G. C., who had then attained twenty-one, altered his label to "G. C.'s Improved Patent Gold Medal Self-cleaning Rapid Water Filters," above which was a medallion containing the royal arms, surmounted by the words "By Her Majesty's Royal Letters Patent." Defts., who had been in G. C.'s employ, set up in business in the same town in 1876 as makers & sellers of filters, which were similar in appearance to those of G. C., & inscribed with "S. C.'s Patent Prize Medal Self-cleaning Rapid Water Filters, Improved & Manufactured

PART XVII.

3437 i. *Negligence of agent—Delay in obtaining complete protection.*]—In an action of damages against patent agents, pursuer averred that defenders had charge of two patents held by him, & that they had allowed them to lapse by failing to give him notice that certain payments were necessary to keep them in force. Defenders pleaded that there was no loss, as the patents were invalid by reason of anticipation by prior patents specified :—*Held :* the defence was irrelevant.—TURNBULL & CO., LTD. *v.* CRUIKSHANK & FAIRWEATHER (1905), 7 F. (Ct. of Sess.) 791 ; 42 Sc. L. R. 743 ; 13 S. L. T. 347.—SCOT.

Right of Chartered Institute of Patent Agents—To prosecute person—Wrongfully describing himself — As patent agent.]—LOCKWOOD *v.* CHARTERED INSTITUTE OF PATENT AGENTS (1912), 30 R. P. C. 108.—SCOT.

PART XVIII.

r. *Article manufactured & sold in Canada—Patent taken out in America.*]—It is not illegal to manufacture & sell an article in this country which has been patented in the United States, & put upon it a statement that it is so patented, as a recommendation of it,

by W. & co." :—*Held :* (1) the label used by pltf. was not a trade-mark, but only a description of the article as made according to S. C.'s patent, which was common to all the public ; (2) there was nothing in defts.' label calculated to mislead the public by a fraudulent imitation of pltf.'s label ; (3) pltf.'s label, coupled with the medallion of the royal arms, constituted a false representation that the patent was still subsisting, & disentitled pltf. to relief by injunction.—CHEAVIN *v.* WALKER (1877), 5 Ch. D. 850 ; 46 L. J. Ch. 686 ; 37 L. T. 300, C. A.

Annotations :—As to (1) **Consd.** *Re* Palmer's Trade Mk. (1883), 24 Ch. D. 504. **Apld.** Reddaway *v.* Banham, [1895] 1 Q. B. 286. **Refd.** Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54. *As to* (3) **Distd.** Gridley *v.* Swinborne (1888), 52 J. P. 791.

3446. —— ——.]—Where the inventor of a new substance has given to it a name, &, having taken out a patent for his invention, has during the continuance of the patent, alone made & sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent.—LINOLEUM MANUFACTURING CO. *v.* NAIRN (1878), 7 Ch. D. 834 ; 47 L. J. Ch. 430 ; 38 L. T. 448 ; 26 W. R. 463.

Annotations :—**Consd.** *Re* Ralph's Trade Mk., Ralph *v.* Taylor (1883), 25 Ch. D. 194. **Apld.** *Re* Formalin Hygienic Co.'s Appln. (1900), 17 R. P. C. 486. **Distd.** *Re* Chesebrough's Trade Mk. "Vaseline," [1902] 2 Ch. 1. **Refd.** Orr Ewing *v.* Johnston (1879), 40 L. T. 307 ; *Re* Palmer's Trade Mk. (1883), 24 Ch. D. 504 ; Blair *v.* Stock (1884), 52 L. T. 123 ; Leonard & Ellis *v.* Wells, *Re* Leonard & Ellis's Trade Mk. (1884), 53 L. J. Ch. 233 ; Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. 449 ; Powell *v.* Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54 ; *Re* Gestetner's Trade Mk., [1908] 1 Ch. 513 ; Brock "Crystal Palace" Fireworks *v.* Pain (1911), 105 L. T. 976 ; Edge *v.* Niccolls, [1911] 1 Ch. 5 ; Horlick's Malted Milk Co. *v.* Summerskill (1916), 34 R. P. C. 63. **Mentd.** *Re* Apollinaris Co.'s Trade Mks., [1891] 2 Ch. 186.

3447. —— **Whether "false trade description."**]—S., the original patentee, without fraud, sells, in packets, "S.'s patent refined isinglass," a well known article, which is really only gelatine :—*Held :* he ought not to be convicted, under Merchandise Marks Act, 1887 (c. 28), s. 2, of a "false trade description" merely because the description is not in the present strict sense of the words an accurate indication of the material in the packet.—GRIDLEY *v.* SWINBORNE (1888), 52 J. P. 791 ; 5 T. L. R. 71, D. C.

Annotations :—**Refd.** Starey *v.* Chilworth Gunpowder Co. (1889), 6 T. L. R. 95 ; R. *v.* Butcher (1908), 24 T. L. R. 797.

3448. Use of word "patent"—After application but before grant.]—C. applied for a patent for electric bells, & subsequently, but before the patent had been granted, sold several electric bells stamped with the word "patent." Thirteen summonses were applied for against him in respect of the sale of such bells by the Patents Investment co. One of such summonses was issued, & on its coming before the magistrate the other twelve were withdrawn :—*Held :* the full penalty of £5 ought to be imposed, with £1 3*s.* costs.—R. *v.* CRAMPTON (1886), 3 R. P. C. 367.

3449. —— —— **Onus on defendant to justify.**]—Deft. was selling a lamp as a patented article when no patent had been granted for it, although a provisional specification had been filed. On a summons taken out against him under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 105 :—*Held :* the burden was on deft. to prove the patent under which he justified his use of the term "patent," that he was not entitled to use the term because a provisional specification had been filed, & not having justified his use of the term a fine must be imposed under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 105.—R. *v.* WALLIS (1886), 3 R. P. C. 1.

3450. False description of article as patented—After complete specification accepted but before grant.]—R. *v.* TOWNSEND (1896), 13 R. P. C. 265.

3451. False description of article as patented.]—E., Ltd., represented by advertisement that a stencil duplicator known as the M. D. was patented. E., Ltd., having been prosecuted by R., Ltd., on the ground that they had falsely represented the M. D. to be patented, relied on a patent granted to N. It was found by the magistrate as a fact that the main characteristic of N.'s invention was a perforated zinc or other metal plate with its edges turned down so as to prevent the underside of the plate coming into contact with the surface on which it rested ; that the plate with turned down edges was the only invention in N.'s patent ; that the apparatus covered by N.'s patent had proved unsatisfactory owing to a tendency of the metal plate to sag in the middle, & that the remedy therefor would be to put longitudinal strips or struts down the middle of the plate, which would constitute a mechanical equivalent of the M. D. except that the latter had also a tray ; that all the elements in N.'s patent except the turned down edges were present in the M. D. The magistrate was of opinion that N.'s patent could not be held to apply to the M. D. & accordingly convicted E., Ltd. On an appeal by way of case stated, it was contended on behalf of E., Ltd., that one integer in a combination patent had been changed by the substitution of a mechanical equivalent ; that the question which the magistrate should have asked himself was whether the article described as patented was within the claim of the specification ; that the magistrate had construed the specification in the light of prior art, whereas he was only entitled to consider the claim as it stood ; that the words "falsely represents" only applied to a statement as to an existing fact, & that where there was a question of mixed law & fact, *viz.* of construction, there could be no offence within Patents & Designs Act, 1907 (c. 29), s. 89 :—*Held :* Patents & Designs Act, 1907 (c. 29), s. 89, was expressed in perfectly clear terms without ambiguity or possibility of variations of meaning ; the magistrate had addressed himself to the question whether the M. D. was a patented article, he had not misdirected himself on any question of law.—ESCO, LTD. *v.* ROLO, LTD. (1923), 40 R. P. C. 471, D. C.

False description as patent agent.]—*See* Part XVII., *ante*.

so long as there is no infringement of a valid existing patent in this country.—KIDDER *v.* SMART. KIDDER *v.* SMART MANUFACTURING CO. (1885), 8 O. R. 362.—**CAN.**

t. *Penalty of forfeiture — When* —— There is no express provision in the statute imposing the penalty of forfeiture for importing into Canada the various parts of the invention in respect of which the patent was granted, much less for importing one of its parts. The words of the statute are "the invention for which the patent is granted," & they ought not to be extended beyond their plain meaning. In administering the statute, the minister can only apply the penalty to the offence which the statute forbids. He cannot apply it to an attempt to evade the statute.—ROYAL ELECTRIC CO. OF CANADA *v.* EDISON ELECTRIC LIGHT CO. (1889), 2 Exch. C. R. 576.—**CAN.**

PAUPERS.

See BURIAL AND CREMATION; POOR LAW.

PAVEMENT.

See HIGHWAYS, STREETS, AND BRIDGES; STREET AND AERIAL TRAFFIC.

PAVING EXPENSES.

See HIGHWAYS, STREETS, AND BRIDGES.

END OF VOL. XXXVI.

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